185 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company v. Colonial Pipeline Company	Docket Nos. OR18-7-002
BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc. v. Colonial Pipeline Company	OR18-12-002
TransMontaigne Product Services LLC v. Colonial Pipeline Company	OR18-17-002
Southwest Airlines Co. and United Aviation Fuels Corporation v. Colonial Pipeline Company	OR19-1-001
Phillips 66 Company v. Colonial Pipeline Company	OR19-4-001
American Airlines, Inc. v. Colonial Pipeline Company	OR19-16-001
Metroplex Energy, Inc. v. Colonial Pipeline Company	OR19-20-000
Gunvor USA LLC v. Colonial Pipeline Company	OR19-27-000
Pilot Travel Centers, LLC v. Colonial Pipeline Company	OR19-36-000
Sheetz, Inc. v. Colonial Pipeline Company	OR20-7-000
Apex Oil Company, Inc. and FutureFuel Chemical Company v. Colonial Pipeline Company	OR20-9-000 (consolidated)

OPINION NO. 585

ORDER ON INITIAL DECISION [PART I]

(Issued November 16, 2023)

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ORDER ON INITIAL DECISION

(Issued November 16, 2023)

1. This order addresses briefs on and opposing exceptions to a partial initial decision issued on December 1, 2021 (Initial Decision) related to complaints that challenged Colonial Pipeline Company's (Colonial) product loss allocation (PLA) charges and methodology and its market-based rate authority in origin markets from Texas to Alabama.[1]

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[1] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 177 FERC ¶ 63,017 (2021) (Initial Decision). Issues related to Colonial's challenged cost-based transportation rates

2. As discussed below, we affirm in part and reverse in part the Initial Decision. We reverse the Initial Decision and hold that Colonial's tariff gives Colonial authority to assess a PLA charge. We affirm the Initial Decision and hold that aspects of Colonial's PLA mechanism are not just and reasonable. In addition, we reverse the Initial Decision's selection of a fixed percentage-of-value replacement PLA mechanism and direct Colonial to implement a single cents-per-barrel PLA charge with a tracker that is updated and reconciled annually using a true-up mechanism. We also reverse the Initial Decision and hold that reparations are not warranted regarding the PLA issues in this case.

3. We also affirm the Initial Decision's determination that Colonial should retain market-based rate authority for the Gulf Coast origin market. However, we reverse the Initial Decision's holding that Colonial's market-based rate authority should be revoked for the Alabama origin market.[2]

I. Background

A. Parties

4. Colonial is an interstate refined products pipeline with a mainline system running from Houston, Texas, through Louisiana, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey and with local spurs including Tennessee and the New York Harbor. Colonial's Line 1 is used to ship grades of motor gasoline, and Line 2 is used to ship diesel, kerosene, jet fuel and fuel oil (both to Greensboro, SC) with Lines 3 and 4 shipping a mix of products north to Baltimore/Washington and Pennsylvania/New Jersey delivery points.[3]

5. The complainants in this proceeding (Complainants) are shippers on Colonial taking transportation service under Colonial's FERC tariff nos. 98 and 99, representing

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are addressed in an April 27, 2022 Supplemental Initial Decision, *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 179 FERC ¶ 63,008 (2022). We address the Supplemental Initial Decision in a concurrent order. *See Epsilon Trading, LLC v. Colonial Pipeline Co.*, Opinion No. 586, 185 FERC ¶ 61,126 (2023).

[2] The record developed in this proceeding contains nonpublic information. The discussion in this order includes citations to nonpublic information, only to the extent necessary to identify where relevant nonpublic information may be found in the record. This order does not release any nonpublic information.

[3] *See* Initial Decision, 177 FERC ¶ 63,017 at PP 45-46.

refineries, marketers and traders, wholesale and retail distributors, and consumers of various grades of refined petroleum.[4]

B. Procedural History

6. From November 22, 2017 through March 9, 2020, Complainants filed a series of complaints against Colonial under the ICA. Complainants alleged that Colonial violated the ICA and Commission regulations by failing to state its PLA charges in its tariff, and that Colonial's mechanism for deriving and adjusting the PLA charges is unjust and unreasonable.[5] In addition, Complainants challenged the lawfulness of Colonial's transportation rates, including Colonial's previously approved market-based rate authority.[6]

7. The Commission consolidated the complaint proceedings and established a hearing to investigate issues related to: (1) Colonial's PLA charges; (2) Colonial's

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[4] *Id.* PP 18-38. Complainants filed exceptions in three groups: (A) Citgo Petroleum Corp. (Citgo), filing alone; (B) Joint Complainants, comprising American Airlines, Inc., BP Products North America, Inc., Chevron Products Co., Epsilon Trading, LLC, Metroplex Energy, Inc., Phillips 66 Co., Southwest Airlines Co., Trafigura Trading LLC, TCPU Inc., United Aviation Fuels Corp., and Valero Marketing and Supply Co.; and (C) Joint Shippers, comprising Apex Oil Co. Inc., FutureFuel Chemical Co., Gunvor USA LLC, Pilot Travel Centers LLC, Sheetz, Inc., and Saratoga RP East LLC (formerly TransMontaigne Product Services, LLC). On January 9, 2023, NGL Energy Partners LP notified the Commission that its complaint had been partially satisfied and is partially withdrawn with respect to its status as the real party in interest through September 30, 2019 for any remedy due TransMontaigne. Thereafter, Pilot is the real party in interest for TransMontaigne as a result of an acquisition. Joint Notice of Partial Dismissal of Complaint, Docket No. OR18-7-000, et al. (filed Jan. 9, 2023). Citgo withdrew its complaint on July 18, 2023, thereby terminating the docket on its complaint (OR18-21-000). Citgo, Withdrawal of Complaint, Docket No. OR18-7-002, et al. (filed July 18, 2023) (citing 18 C.F.R. § 385.216 (2022); Energy Policy Act of 1992, Pub. L. No. 102-486, § 1802(d)(2), 106 Stat. 2776 (1992) (codified at 42 U.S.C. § 712 note)). Nonetheless, this order discusses Citgo's exceptions to the Initial Decision to the extent a remaining participant adopted them. Furthermore, we consider the testimony and exhibits sponsored by Citgo's witnesses because this evidence remains part of the record of these consolidated proceedings, notwithstanding the termination of the docket on Citgo's complaint.

[5] Initial Decision, 177 FERC ¶ 63,017 at PP 578, 589.

[6] *Id.* P 120.

transportation rates set pursuant to its market-based rate authority; and (3) Colonial's indexed transportation rates.[7]

8. From September 15 through December 18, 2020, more than 25 participants participated in a 58-day virtual hearing that featured 25 witnesses and produced over a thousand exhibits and thousands of pages of testimony. Participants filed initial briefs on January 29, 2021, and reply briefs on March 1, 2021.

9. On December 1, 2021, the Presiding Administrative Law Judge (ALJ) rendered a partial initial decision, recommending that the Commission: (1) uphold Colonial's market-based rate authority in the Gulf Coast market; (2) revoke Colonial's market-based rate authority in the Alabama origin market for its Moundville; Alabama origin; and (3) find that Colonial's existing PLA mechanism is contrary to the ICA.[8] The ALJ reserved issues related to Complainants' cost-of-service challenge to Colonial's indexed transportation rates for a later partial initial decision.[9]

10. On January 27, 2022, participants submitted briefs on exceptions, and on March 3, 2022, participants submitted briefs opposing exceptions.

II. <u>Product Loss Allocation</u>

11. Regarding PLA, we affirm the Initial Decision in part. First, we reverse the Initial Decision and hold that Colonial's tariff gives Colonial authority to assess a PLA charge. Second, we affirm the Initial Decision and hold that aspects of Colonial's current PLA mechanism are not just and reasonable. Third, we reverse the Initial Decision's selection of a 0.19% fixed percentage-of-value charge as Colonial's new PLA mechanism. We

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[7] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Hearing Order), *reh'g denied*, 169 FERC ¶ 61,035 (2019) (Rehearing Order), *consolidated with: Sw. Airlines Co. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,094 (2019); *Am. Airlines, Inc. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,214 (2019); *Metroplex Energy, Inc. v. Colonial Pipeline Co.*, 167 FERC ¶ 61,165 (2019); *Gunvor USA LLC v. Colonial Pipeline Co.*, 168 FERC ¶ 61,080 (2019); *Pilot Travel Ctrs., LLC v. Colonial Pipeline Co.*, 169 FERC ¶ 61,098 (2019); *Sheetz, Inc. v. Colonial Pipeline Co.*, 171 FERC ¶ 61,162 (2020).

[8] Issues raised by Complainants with respect to Colonial's market-based rate authority in destination markets and origin markets east of Alabama were addressed by stipulation. Initial Decision, 177 FERC ¶ 63,017 at P 132; *Epsilon Trading, LLC v. Colonial Pipeline Co.*, Docket No. OR18-7-002 (July 25, 2019) (ALJ order accepting stipulation).

[9] Initial Decision, 177 FERC ¶ 63,017 at P 4.

instead direct Colonial to implement on compliance as its new PLA mechanism a single cents-per-barrel charge with a tracker that is updated and reconciled annually using a true-up mechanism. Finally, we reverse the Initial Decision and hold that reparations are not warranted under the circumstances.

A. Background on the PLA Mechanism

12. Colonial incurs net costs arising from normal system operations associated with product loss,[10] compatible interface which downgrades product,[11] and incompatible interface which creates transmix[12] (PLA costs). Colonial recovers these net costs via PLA charges that differ for long-haul and short-haul shipments, and Colonial maintains a PLA account that reflects the accumulated difference between these net PLA costs and its recoveries from the PLA charges.[13] Colonial states that it manages the PLA account to a zero balance over time.[14]

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[10] Product loss can result from metering inaccuracy and evaporation during transport. *Id.* P 567.

[11] When an oil pipeline ships different products back-to-back, compatible or incompatible interface develops at the point where two products commingle. The interface of compatible products leads to product downgrades at the delivery point (e.g., the interface of premium and regular gasoline is treated as regular gasoline). The shipper that transported the lower-quality product will receive more product than it originally shipped while the shipper that tendered the higher-value product will receive less than its original shipment. Colonial collects the value of the downgraded product from the shipper that receives additional product and compensates the shipper that receives less product. The value that Colonial collects when it delivers extra, lower-value product to one shipper is less than the value that Colonial must pay the shipper receiving less of a higher-value product, resulting in a net loss. Ex. CPC-00111 (Brock) at 7:9-8:10.

[12] When Colonial ships incompatible products back-to-back, the incompatible interface creates transmix, a mixture that requires reprocessing because it has no other use. Colonial batches and sells the transmix that results from incompatible interface to third-party processors and compensates shippers for each barrel lost through the generation of transmix at the prevailing price for the lost product. Due to the price difference between the product lost and the value of the transmix, which is inherently less valuable, Colonial incurs a net loss. *Id.* at 8:17-9:6.

[13] *Id.* at 6:15-8; *see also* Ex. JC-0067 at 4-5.

[14] Ex. CPC-00111 (Brock) at 11:2-3.

B. Colonial's Tariff Establishes that a PLA Charge Will Be Assessed

1. Initial Decision

13. The Initial Decision determined that Colonial uses its PLA mechanism to recover charges for a Commission-jurisdictional transportation service.[15] The Initial Decision then found that Colonial's PLA charges are not on file in its tariff, in violation of the ICA and Commission regulations.[16] The Initial Decision noted that while all details of the rate calculation need not be in Colonial's tariff, the tariff must indicate the exact rate or charge affecting the value of transportation service.[17]

2. Positions of the Participants

14. Colonial states that the Initial Decision erred in holding that Colonial must include its PLA charges in its tariff.[18] Colonial argues that the PLA charges are not for transportation in the same sense as transportation rates.[19] Thus, Colonial claims that the requirement that transportation rates be set forth in the tariff is inapplicable.[20]

15. Complainants and Trial Staff agree with the Initial Decision's finding that Colonial violated the ICA and Commission regulations by not including its PLA charges in its tariff.[21] Likewise, they reject Colonial's claim that the PLA charges are not transportation rates.[22]

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[15] Initial Decision, 177 FERC ¶ 63,017 at P 617; *see also id.* P 615.

[16] *Id.* PP 627, 654.

[17] *Id.* PP 628-629 (citing 49 U.S.C. app. § 6(1) (1988)).

[18] Colonial Br. on Exceptions at 82.

[19] *Id.* at 82-83.

[20] *Id.* at 83.

[21] *See* Joint Complainants Br. Opposing Exceptions at 76; Joint Shippers Br. Opposing Exceptions at 60; Trial Staff Br. Opposing Exceptions at 92.

[22] Joint Complainants Br. Opposing Exceptions at 75-77; Joint Shippers Br. Opposing Exceptions at 58 n.99; Trial Staff Br. Opposing Exceptions at 93-94.

3. **Commission Determination**

16. As an initial matter, we find the PLA charges to be jurisdictional. We agree with the Initial Decision that product loss and degradation due to interface are an ordinary consequence of Colonial's jurisdictional oil transportation service that results in charges to shippers.[23] A PLA charge is assessed on each barrel shipped in interstate service on Colonial's system and thereby increases the cost of jurisdictional oil transportation service.[24] Moreover, the management of product loss and interface results in costs and revenues to Colonial, and Colonial uses its PLA mechanism to recover its net costs from its shippers.[25] Consistent with the foregoing, we affirm the Initial Decision's finding that Colonial uses its PLA mechanism to recover costs from a jurisdictional transportation service.[26]

17. However, we reverse the Initial Decision and find that Item 75 in Colonial's tariff gives Colonial authority to assess a PLA charge. Item 75(c) states,

> A product loss allocation charge ("PLA Charge") based on origin and delivery shall be assessed on each delivered barrel. Carrier administers the PLA Charge to recover, but not over-recover, any loss amounts incurred by the carrier that are not otherwise mitigated by the activities described throughout this section. The PLA Charge shall be routinely evaluated to determine if it needs to be adjusted, upward or downward, to ensure the carrier's ultimate collections reflect its actual experience. Any PLA Charge change, upward or downward,

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[23] *See* Initial Decision, 177 FERC ¶ 63,017 at PP 571, 615; Ex. CPC-00111 (Brock) at 8:11-16 (product loss is "inherent in the operation of any pipeline system").

[24] Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)) ("A product loss allocation charge . . . based on origin and delivery shall be assessed on each delivered barrel.").

[25] Ex. CPC-00111 (Brock) at 6:16-9:14, 10:3-11(describing the accounting process for the PLA account). While the purpose of the PLA charges may be to keep Colonial and its shippers whole, this does not change the fact that the PLA charges are jurisdictional charges that must be included in the tariff, contrary to Colonial's assertion. *See* Colonial Br. on Exceptions at 83.

[26] Initial Decision, 177 FERC ¶ 63,017 at PP 615, 617.

> will be communicated to shippers through a bulletin issued 30 days prior to the change going into effect.[27]

This provision provides that Colonial will assess a PLA charge. Item 75(c) also establishes that Colonial will track its PLA costs and collections and adjust the PLA charge to true up any over- or under-recoveries and ensure that Colonial recovers its actual PLA costs only. Thus, we find that Colonial acted in accordance with its tariff when Colonial assessed and administered the PLA charge and we reverse the Initial Decision's finding that Colonial's tariff did not authorize the PLA charge merely because the exact PLA charge was not expressly stated.[28]

C. Aspects of Colonial's PLA Mechanism Are Not Just and Reasonable

1. Initial Decision

18. The Initial Decision found that Colonial's existing PLA mechanism is unjust and unreasonable.[29] Specifically, the Initial Decision found that Colonial does not maintain discernible records of how it determines and calculates the PLA charges.[30] The Initial Decision also found that Colonial failed to provide sufficient evidence justifying when, how, or why Colonial changes the PLA charges or its collection method or to whom it applies.[31] The Initial Decision further found that the PLA account over- and under-recovers and is reconciled at Colonial's discretion without sufficient notice or transparency.[32] The Initial Decision stated that this conflicts with the purpose of filed rates and regulatory policies, which are to discourage intergenerational rate inequity among shippers, because shippers may pay higher or lower rates based on whether the account has a deficit or surplus.[33] In addition, the Initial Decision found that Colonial

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[27] Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0).

[28] Contrary to the Dissent's view, we do not believe that Colonial violated the filed-rate doctrine because Item 75 authorized Colonial to assess a PLA charge, as discussed above.

[29] Initial Decision, 177 FERC ¶ 63,017 at PP 622, 638.

[30] *Id.* P 630.

[31] *Id.* P 627.

[32] *Id.* P 631.

[33] *Id.*

failed to justify its practice of applying disparate charges for short- and long-haul shipments.[34]

2. Positions of the Participants

19. Colonial argues that the Initial Decision erred by finding that Colonial's existing PLA mechanism is unjust and unreasonable.[35] Colonial states that its PLA mechanism is supported by record evidence, including evidence showing that (1) the PLA mechanism is similar to a conventional tracker and true-up mechanism and (2) the PLA account is maintained such that it benefits shippers over time, does not profit Colonial, and is ultimately cost neutral.[36] Colonial also suggests that the Commission approved its treatment of PLA costs following a 2015 audit in which no adverse findings or recommendations were made on that topic.[37]

20. Colonial claims there is record evidence justifying the inputs to the PLA charges and when, how, and why Colonial adjusts the charges, including by reference to Item 75 of Colonial's tariff, Section 2.9.2 of its shipper manual, and Colonial's FERC Form 6 notes or quarterly Form 6-Q filing.[38] Further, Colonial states it gives shippers at least 30 days' advance notice of changes to the PLA charges using its electronic bulletin board system.[39]

21. In addition, Colonial contends that it adequately supported its practice of imposing different PLA charges for short- and long-haul shipments.[40] Colonial asserts that the configuration of Colonial's system supports a different charge for short-haul movements

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[34] *Id.* PP 632-634.

[35] Colonial Br. on Exceptions at 4, 77-87.

[36] *Id.* at 78-79.

[37] *See id.* at 98 n.63; Ex. CPC-00111 (Brock) at 35:3-5; Ex. CPC-00030 (2015 FERC Audit Report).

[38] Colonial states that, since 2016, it has reported the PLA account balance in its annual Form 6 or quarterly Form 6-Q filing. Colonial Br. on Exceptions at 80 (citing Exs. JC-00074, CPC-00355, CPC-00356).

[39] *Id.* at 84.

[40] *Id.*

because they "contribute less to Colonial's product loss experience."[41] Colonial further asserts that "losses due to transmix are very unlikely to occur" on those movements.[42]

22. Complainants and Trial Staff agree with the Initial Decision's determination that Colonial's existing PLA mechanism is not just and reasonable.[43] They also agree with the Initial Decision that there is insufficient evidence justifying Colonial's PLA mechanism.[44] Complainants share the Initial Decision's observation that the generational impacts of long periods of under- and over-recovery render the PLA mechanism unjust and unreasonable.[45] Joint Complainants and Trial Staff also support the Initial Decision's finding that Colonial failed to justify assessing different PLA charges for short- and long-haul shipments.[46]

3. **Commission Determination**

23. We find that Colonial's PLA mechanism is unjust and unreasonable because it: (1) gives Colonial sole discretion over how and when Colonial adjusts the PLA charges; (2) allows Colonial to manage the PLA account with insufficient transparency or accountability to Colonial's shippers and the Commission; and (3) assigns different charges for short- and long-haul movements without sufficient justification.[47]

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[41] *Id.* at 85 (quoting Ex. CPC-00111 (Brock) at 19).

[42] *Id.* at 86.

[43] Joint Complainants Br. Opposing Exceptions at 70; Joint Shippers Br. Opposing Exceptions at 6, 59; Trial Staff Br. Opposing Exceptions at 92.

[44] *See* Joint Complainants Br. Opposing Exceptions at 73-74; Joint Shippers Br. Opposing Exceptions at 61-62; Trial Staff Br. Opposing Exceptions at 94-95.

[45] Joint Complainants Br. Opposing Exceptions at 78; Joint Shippers Br. Opposing Exceptions at 61 (citing Initial Decision, 177 FERC ¶ 63,017 at P 631).

[46] *See* Joint Complainants Br. Opposing Exceptions at 79-80; Trial Staff Br. Opposing Exceptions at 95-96.

[47] We acknowledge Colonial's argument that the Initial Decision erred in placing the burden on Colonial to prove that its PLA mechanism is just and reasonable. *See* Colonial Br. on Exceptions at 73-77; *see also* Initial Decision, 177 FERC ¶ 63,017 at PP 616-617. Nonetheless, even if Complainants and Trial Staff had the burden to show that the PLA mechanism is not just and reasonable, we find that they have met such burden based on the evidence in the record, as explained below.

24. First, we find that Colonial's current PLA mechanism gives Colonial sole discretion over when to adjust the PLA charges, including over what period to return any PLA account surplus. Colonial's tariff provides that "[t]he PLA Charge shall be routinely evaluated to determine if it needs to be adjusted, upward or downward, to ensure the [pipeline's] ultimate collections reflect its actual experience."[48] Colonial's shipper manual does little to clarify this.[49] Based on the record, Colonial did not follow any discernable or predictable pattern in its decisions regarding when to adjust the PLA charges. The changes were not made at a consistent time interval, such as annually or quarterly,[50] and the changes did not coincide with the PLA account balance reaching any threshold level of over- or under-recovery.[51] Further, Colonial's sole discretion over

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[48] Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)).

[49] *See* Ex. CPC-00112 at 42 (Colonial Shipper Manual § 2.9.5) ("The [PLA] charge is designed to balance the [PLA] account . . . [and] will be adjusted from time to time based on the performance of the [PLA] account . . . ."). Further, although significant aspects of Colonial's PLA mechanism are contained in Section 2.9 of its shipper manual, the shipper manual is neither referenced in Item 75 of Colonial's tariff nor filed with the Commission for review. The Commission has found that, under the ICA, if details about a policy are provided in a document other than the tariff, then the tariff must incorporate that document by reference to its title and effective date. *Tricon Energy Ltd. v. Colonial Pipeline Co.*, 171 FERC ¶ 61,078, at PP 28-31 (2020); *Amoco Pipeline Co.*, 82 FERC ¶ 61,108, at 61,386 (1998); *see also Enter. TE Prods. Pipeline Co. LLC*, 131 FERC ¶ 61,134, at P 11 (2010) ("The Commission cannot approve as just and reasonable tariff language referencing policies it has not actually seen."). Accordingly, Colonial's tariff should be modified prospectively to incorporate the shipper manual by reference. *See supra* note 204.

[50] Ex. CPC-00111 (Brock) at 19:11 (Table 4) (indicating changes in the short-haul PLA charge in September 2016 and December 2018, and changes in the long-haul PLA charge in June 2016, September 2016, January 2017, and December 2018).

[51] While Colonial states that it "determines a [PLA] rate that will bring the account to within a +/– $10 million balance within the next 12 months," *id.* at 18:7-9, the record indicates that Colonial often misses this goal, *see id.* at 11 (Table 1) (depicting the PLA account balance from January 2001 through May 2019); Ex. JC-0067 at 4-5 (listing running PLA account balance monthly from January 2015 through December 2018).

when to adjust the PLA charges coupled with long periods of significant over- or under-recovery raises concerns of intergenerational rate inequity.[52]

25. Second, we find there is insufficient evidence regarding how Colonial calculates the PLA charges. Colonial asserts that it "developed a model to forecast the performance of the [PLA] Account's balance based on historical actual performance and other factors like futures pricing."[53] This model is not in the record.[54] It is a black box. Colonial does not disclose the model's inputs, show how it makes projections using the model, or provide support for any past projections used to adjust the PLA charges. Colonial only provides a high-level summary of its considerations in making these projections.[55] Further, Colonial does not explain how the projections from this model relate to the actual changes to the PLA charges. Instead, Colonial explains that internal presentations recommending adjustment to the PLA charges are periodically provided to its

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[52] *See BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,215, at P 18 n.16 (2008) ("Intergenerational equity is the fair distribution of the costs and benefits of a long-lived project when those costs and benefits are borne by different generations' project users."); *Boston Edison Co*., 34 FERC ¶ 63,023, at 65,076 (1986) (noting that a nuclear power plant's decommissioning cost estimates should ensure that such costs "are spread equitably over today's and tomorrow's consumers").

[53] Ex. JC-0076 at 2 (Colonial response to data request JC-CPC-1.32(d)); Ex. CPC-00111 (Brock) at 28:18-20 (stating that Colonial "uses a forecast of future performance when setting the PLA [charges]").

[54] *See* Ex. JC-0076 at 2 (Colonial response to data request JC-CPC-1.32(d)(i) that references but does not include "PLA Account Model[s]" from July 2016, December 2016, and October 2018); Joint Index of Exhibits, Docket No. OR18-7-002, et al. (filed Jan. 11, 2021) (containing no reference to PLA account models).

[55] Colonial states that it forecasts "volume downgrades (including transmix and surplus volumes)" by "consider[ing]" historical averages, although "[e]xceptions from the historical averages may be used if loss experience is expected to materially differ during the forecast period from the historical averages due to operational or equipment changes." Ex. JC-0076 at 2 (Colonial response to data request JC-CPC-1.32(d)). Colonial also states that it "uses NYMEX futures pricing for an estimate of the forecasted direction of product pricing" for "RBOB Regular Gasoline (F Grade) and ULSD (62 Grade)," and that for "Colonial's other product grades, forecasted pricing is derived by applying historical differential patterns to RBOB Regular Gasoline (F Grade) and ULSD (62 Grade) NYMEX futures." *Id*. *See also id.* at 3, 8, 11-13, 15-18 (Colonial response to data request JC-CPC-1.32(d)) (PLA fee presentations to Colonial's management from 2016 and 2018).

management, and sometimes the recommended changes "differ from the actual change approved and implemented by Management."[56] Likewise, when Colonial changes its PLA charges, it does not share with shippers how the model supports the new PLA charge level[57] or disclose sufficient historical data.[58] This lack of transparency makes it difficult for Colonial's shippers to assess and, if appropriate, challenge changes to the PLA charges.[59] Colonial's failure to make a tariff filing before changing the PLA charges also removes the Commission's ability to evaluate such changes.

26. Third, the record does not support a finding that Colonial's use of separate PLA charges for short- and long-haul movements is just and reasonable.[60] Although Colonial identifies factors that indicate short-haul movements contribute less to net PLA costs as a general matter, Colonial fails to quantify the difference or justify its approach for

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[56] *Id.* at 3 (Colonial response to data request JC-CPC-1.32(d)(iv)).

[57] Colonial simply notifies shippers of a PLA fee change through a bulletin. Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)); *see also* Ex. CPC-00111 (Brock) at 16:4-5.

[58] Colonial only gives shippers a snapshot of the aggregate PLA account balance in its annual Form 6 and quarterly 6Q filings. Colonial Br. on Exceptions at 80 (citing Exs. JC-00074, CPC-00355-00356). Colonial does not report to its shippers the system-wide gains/losses, net transmix disposition proceeds, or PLA charge proceeds.

[59] The Initial Decision found that "the record contains virtually no substantive information that would justify any individual line item costs and collections for product loss, or compatible interface, incompatible interface, or transmix disposition, from any shipper in either the base or the test year." Initial Decision, 177 FERC ¶ 63,017 at P 627. However, there is no evidence in the record calling into question the accuracy of the cost and collection data that Colonial maintains and uses to determine the PLA charges. In fact, Joint Complainants used this data to form the basis of their recommended fixed percentage-of-value charge. *See* Ex. JC-0065 (Tolleth) at 26-27. Moreover, Complainants' objections relate more to transparency than to accuracy. *E.g.*, Joint Complainants Br. Opposing Exceptions at 75 ("Colonial's tariff, Colonial's shipper manual, and settlement statements are devoid of any substantive information detailing the PLA-related costs and revenue items in any manner sufficient to justify the PLA charge(s) being levied on shippers.").

[60] This finding is without prejudice to Colonial proposing different PLA charges for short- and long-haul movements in a future proceeding. If Colonial makes such a proposal, then Colonial will have the burden to demonstrate that its proposed PLA charges are just and reasonable.

allocating costs between short- and long-haul movements.[61] Colonial merely cites studies that it admits were destroyed before this case began[62] and states that it "generally attempts to move the two fees in a proportional manner."[63]

27. In addition, we reject Colonial's suggestion that the Commission reviewed and approved its treatment of PLA costs following a 2015 audit.[64] An audit report could not constitute a Commission determination on Colonial's PLA methodology, much less an approval, because it is not binding Commission precedent.[65] Moreover, "what is decided

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[61] Colonial explains that short-haul movements "are defined as deliveries south of and inclusive of Collins, MS, and originations north of and inclusive of Woodbury, NJ," and that long-haul movements are deliveries north "of Collins exclusive of the short haul deliveries in the Northeast." Ex. CPC-00111 (Brock) at 18:15-17. Colonial asserts a "belief" that "short haul movements contribute less to Colonial's product loss experience" based on how Colonial's system is configured. *Id.* at 19:3-4. Specifically, Colonial claims that short-haul movements do not occur on multi-product lines, which are "*a* source of transmix," and do not transport through tankage, which is "*a* source of evaporative losses." *Id.* at 19:4-9 (emphases added). Colonial also references a bottleneck on its system at Collins "that prevents some barrels from passing through," and demonstrates that short-haul shipments accounted for just 8.5% of all movements in 2018. Colonial Br. on Exceptions at 85; *see also* Ex. CPC-00442 (long and short-haul PLA workpaper example).

[62] Ex. CPC-00111 (Brock) at 20:9-11; *see also* Ex. S-00051 at 1 (Colonial Data Response to TPSL-CPC-3.11) (explaining that an earlier analysis of "Northeast Short-Haul Movements" showed that "the loss experience for such movements was significantly below average"); Tr. 6732:12-15 (Brose) (counsel confirming the destruction was completed "in accordance with Colonial's routine document retention policy before this case began").

[63] Ex. S-00051 at 1 (Colonial Data Response to TPSL-CPC-3.11).

[64] *See* Colonial Br. on Exceptions at 98 n.63; Ex. CPC-00111 (Brock) at 35:3-5.

[65] *Procs. for Disposition of Contested Audit Matters*, Order No. 675, 114 FERC ¶ 61,178, at P 32 (2006) ("An uncontested audit report is similar to a stipulation and consent agreement to the extent that the audited person consents to the contents of the audit report. By contrast, a Commission order to resolve a contested matter does have precedential effect."), *order on reh'g*, Order No. 675-A, 115 FERC ¶ 61,189, at P 16 (2006) (denying clarification). Colonial did not contest the 2015 audit report. Ex. CPC-00030 at 1 (2015 FERC Audit Report).

for accounting purposes is not necessarily binding for ratemaking purposes."[66] Further, as the Initial Decision noted, the Commission's Office of Enforcement audit of Colonial's accounting practices did not reach any conclusion regarding Colonial's PLA practices.[67] Indeed, the audit report stated that "any instance of non-compliance not addressed herein or that may occur in the future may also be subject to investigation and appropriate remedies."[68]

D. A Cents-per-Barrel Charge with a Tracker and Annual True-Up Is a Just and Reasonable PLA Mechanism

28. The participants propose alternative replacement methods for Colonial's PLA mechanism. These replacement methods differ in two respects. First, Trial Staff supports a cents-per-barrel charge, consistent with Colonial's present mechanism, whereas Joint Complainants support a percentage-of-value charge. Second, Trial Staff proposes a tracker whereas Joint Complainants propose a fixed charge.

29. Trial Staff proposes that Colonial make an annual tariff filing that establishes a cents-per-barrel PLA charge for the upcoming period and includes a true-up for prior period over- and under-recoveries.[69] Trial Staff also proposes that Colonial base its PLA charge on either historical data or future projections "or a combination of both."[70]

30. Joint Complainants propose that Colonial's tariff state a fixed percentage PLA charge assessed on the commodity value of tendered shipments.[71] For example, if the fixed percentage-of-value charge is 0.19% and a shipper tenders for shipment 1,000 barrels worth $100 per barrel, then the shipper would be invoiced $190 on its monthly settlement statement. According to Joint Complainants, with an appropriate percentage in place, such mechanism should "cause the net impact" of system gains,

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[66] *Ga. Power Co.*, 33 FERC ¶ 63,074, at 65,286 (1985); *see also Panhandle E. Pipe Line Co.*, Opinion No. 885, 181 FERC ¶ 61,211, at P 41 (2022) (an audit report is not indicative of what the Commission will find appropriate in a rate proceeding).

[67] Initial Decision, 177 FERC ¶ 63,017 at P 623.

[68] Ex. CPC-00030 at 2 (2015 FERC Audit Report).

[69] Ex. S-00022 (McComb) 80:1-81:6; Trial Staff Br. on Exceptions at 38 (supporting "a per-delivered barrel charge").

[70] Ex. S-00022 (McComb) at 80:19-81:1 (describing this as a modification to Joint Shippers' proposal).

[71] Ex. JC-0065 (Tolleth) at 21:9-14, 23:13-17.

losses, and transmix disposition "to be neutral on average" while allowing, but not guaranteeing, Colonial full recovery of its PLA costs.[72]

31. Joint Shippers generally support Joint Complainants but also state they do not oppose Trial Staff's proposal.[73] Colonial, for its part, supports its current mechanism but does not oppose Trial Staff's proposal.[74] Both Colonial and Joint Shippers agree with Trial Staff that Trial Staff's proposal is a refinement of Colonial's existing PLA mechanism.[75]

1. Initial Decision

32. The Initial Decision rejected the proposed cents-per-barrel charge with a tracker. Instead, the Initial Decision recommended that the Commission direct Colonial to assess a fixed percentage-of-value charge of 0.19%, based on test period data.[76] The Initial Decision stated that the Commission does not favor tracker mechanisms.[77] The Initial Decision also found no evidence that a tracker and true-up mechanism like that commonly used for lost-and-unaccounted-for natural gas is used by any liquid pipeline[78] while three other refined products pipelines use a fixed allowance.[79] Moreover, the Initial Decision found that a cents-per-barrel charge with a tracker would impose an

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[72] *Id.* at 21:14-19. Mr. Tolleth proposes that Colonial assess a fixed percentage-of-value charge in the range of 0.18% to 0.15% on each transported barrel, *id.* at 22:5-6, which is less than the annual values Mr. Tolleth calculated for 2015-2018 (ranging from 0.296% to 0.192%) or the test period (0.189%), *id.* at 27 (Figure 2).

[73] Joint Shippers Br. Opposing Exceptions at 58 n.98; *see also* Ex. TMG-0001 (Palazzari) at 109:15-111:10.

[74] Colonial Br. Opposing Exceptions at 98.

[75] Trial Staff Br. on Exceptions at 38; *see also* Ex. TMG-0076 (Palazzari) at 164:1-7 (asserting that a critical improvement is that the modified tracker-and-true-up proposal enables shipper review and Commission oversight); Ex. CPC-00111 (Brock) at 28:18-21 (stating "[t]his is exactly what Colonial does now, with two exceptions," including that "the rate occasionally has been adjusted more frequently than annually").

[76] Initial Decision, 177 FERC ¶ 63,017 at PP 644, 646.

[77] *Id.* P 644 (citing *Midwestern Gas Transmission Co.*, 57 FERC ¶ 61,073 (1991)).

[78] *Id.* P 643.

[79] *Id.* P 642.

excessive "level of annual regulatory oversight"[80] while a fixed percentage-of-value charge would provide predictability and incentivize reduced product losses.[81]

2. Positions of the Participants

33. Colonial and Trial Staff challenge the Initial Decision's recommendation that the Commission require the use of a fixed percentage-of-value charge.[82] Trial Staff argues that the Initial Decision erred in rejecting its proposed cents-per-barrel charge with a tracker,[83] and Colonial and Joint Shippers do not oppose Trial Staff's proposal.[84]

34. Colonial and Trial Staff challenge the Initial Decision's reliance on the fact that other refined products pipelines use a fixed percentage-of-value charge.[85] Colonial asserts that there is no industry-standard PLA cost recovery mechanism[86] and that, in any case, the cost recovery mechanism and percentage recommended by the Initial Decision differ from those used by other refined products pipelines.[87] Trial Staff similarly argues there is no one-size-fits-all method.[88]

35. Colonial further asserts that a fixed percentage-of-value charge may not track the primary driver of costs related to the PLA account: the highly variable differences between the price of various refined products.[89] Trial Staff argues that a cents-per-barrel

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[80] *Id.* P 644 & n.1219.

[81] *Id.* PP 641, 649.

[82] Colonial Br. on Exceptions at 4, 88; Trial Staff Br. on Exceptions at 32.

[83] Trial Staff Br. on Exceptions at 4.

[84] Colonial states that if the Commission holds that its existing PLA practices are not just and reasonable, then it does not oppose implementing Trial Staff's proposal. Colonial Br. Opposing Exceptions at 98. Joint Shippers state that they would not oppose Trial Staff's proposal if the Commission declines to adopt a fixed charge. Joint Shippers Br. Opposing Exceptions at 58 n.98.

[85] Colonial Br. on Exceptions at 94-95; Trial Staff Br. on Exceptions at 32-33.

[86] Colonial Br. on Exceptions at 87-88.

[87] *Id.* at 94-95.

[88] Trial Staff Br. on Exceptions at 33.

[89] Colonial Br. on Exceptions at 90-91.

charge with a tracker is suitable because Colonial's PLA costs are volatile and difficult to project.[90]

36. Colonial claims that it has little control over the factors that influence PLA costs, and thus that it was speculative for the Initial Decision to conclude that a fixed charge would incentivize Colonial to reduce them.[91] Colonial argues that a fixed charge could create perverse incentives for Colonial to change its pricing policies or reduce transportation options since a fixed charge may cause Colonial to under-recover its PLA costs.[92]

37. Colonial asserts that it has much of the administrative infrastructure in place to implement Trial Staff's proposed tracker and true-up mechanism.[93] Colonial also states that such a mechanism would avoid the punitive and confiscatory potential of the fixed charge that Joint Complainants propose.[94] Further, Trial Staff asserts that such a mechanism is more efficient here, as a tracker and true-up is a modified version of Colonial's current approach.[95] Trial Staff also argues that a tracker is more appropriate because large swings in the PLA costs risk more future filings by Colonial and its customers.[96]

38. In addition, Colonial and Trial Staff challenge the Initial Decision's recommendation to set the fixed percentage-of-value charge at 0.19% using base and test period data.[97] Colonial asserts that its PLA costs can vary significantly[98] and that the test year is anomalous and unrepresentative.[99] Similarly, Trial Staff argues that the record does not demonstrate that a fixed percentage-of-value charge based on the value of

[90] Trial Staff Br. on Exceptions at 35.

[91] Colonial Br. on Exceptions at 89.

[92] *Id.* at 91 & n.58.

[93] Colonial Br. Opposing Exceptions at 98.

[94] *Id.*

[95] Trial Staff Br. on Exceptions at 37.

[96] *Id.* at 37-38.

[97] Colonial Br. on Exceptions at 4, 91; Trial Staff Br. on Exceptions at 26-28.

[98] Colonial Br. on Exceptions at 92.

[99] *Id.* at 93-94.

barrels that Colonial received during the test period would reasonably align with Colonial's future PLA costs because that method does not sufficiently account for changes in commodity price differentials.[100]

39. Joint Complainants and Joint Shippers support the Initial Decision's recommendation for a fixed percentage-of-value charge.[101] Joint Complainants assert that a fixed PLA charge is consistent with industry practice.[102] Joint Complainants also argue that a tracker and true-up is not permissible for regular and recurring operating costs that arise on an industry-wide basis, as is the case with Colonial's PLA costs.[103] Joint Complainants argue that costs and revenues can vary over time in any aspect of pipeline operations, and Colonial or its shippers may make a filing to attempt to correct any unreasonable imbalance.[104] Joint Complainants dismiss as unrealistic Trial Staff's claim that the volatility of product price differentials, and thus PLA costs, will spur more rate filings, given the experience of other products pipelines with a fixed allowance.[105]

40. Moreover, Joint Complainants assert that neither Colonial nor Trial Staff provided an analysis in response to Joint Complainants' witness Mr. Tolleth's calculations of an appropriate fixed percentage-of-value PLA charge.[106] Joint Shippers also challenge Colonial's arguments that the test period is anomalous and unrepresentative of Colonial's normal operations with respect to product loss and transmix.[107] Joint Shippers claim that because the record shows a declining product loss trend on Colonial's system, the 0.19% percentage-of-value charge may actually overstate future product loss on Colonial's system.[108] Joint Shippers assert that the Commission prefers to design rates based on test

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[100] Trial Staff Br. on Exceptions at 27-32.

[101] Joint Complainants Br. Opposing Exceptions at 81-84, 87; Joint Shippers Br. Opposing Exceptions at 63-64.

[102] Joint Complainants Br. Opposing Exceptions at 89; *see also id.* at 91.

[103] *Id.* at 71-73, 87.

[104] *Id.* at 90 & n.342.

[105] *Id.* at 90.

[106] *Id.* at 84-85.

[107] Joint Shippers Br. Opposing Exceptions at 64-65.

[108] *Id.* at 65.

period costs and volumes and that this methodology assumes that actual costs may vary from the test period amounts.[109]

3. Commission Determination

41. We reverse the Initial Decision and require Colonial to implement a PLA mechanism based upon: (1) a cents-per-barrel charge and (2) a tracker with an annual true-up that is filed with the Commission. We discuss these two aspects of the PLA mechanism separately below.[110] Consistent with our instruction below, we direct Colonial to make a compliance filing with tariff sheets that state the cents-per-barrel PLA charge and describe in detail the tracker and true-up mechanism. We note that a variety of PLA mechanisms may be just and reasonable in the context of refined products pipelines, including a fixed percentage-of-value charge. The Commission evaluates such mechanisms on a case-by-case basis. The PLA mechanism that we approve here is based on the record developed in this case.

a. A Cents-per-Barrel Charge Is Superior to a Percentage-of-Value Charge

42. We adopt a cents-per-barrel PLA charge because it directly incorporates the costs that must be recovered through the PLA mechanism and thus accounts for the primary driver of net PLA costs: product price differentials.[111] As explained above, Colonial incurs net costs due to product loss or when product is downgraded due to interface.[112] A

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[109] *Id.* at 64.

[110] We note that the Initial Decision did not address the merits of a cents-per-barrel charge compared to a percentage-of-value charge. Rather, it focused on the difference between a tracker with an annual true-up and a fixed charge. *See* Initial Decision, 177 FERC ¶ 63,017 at PP 641-650.

[111] Trial Staff explains that it is the difference in price between products—rather than the price of individual products—that drives net PLA costs because "[a] pipeline may lose 1,000 barrels of product each year, but there will be significant value differences if the net value of the lost commodity is $10 per barrel in one year and $50 per barrel in another year." Trial Staff Br. on Exceptions at 29-30; *see also* Ex. CPC-00111 at 8-9.

[112] Net PLA costs are composed of: (1) product loss due to evaporation and measurement losses, *see* Ex. CPC-00111 (Brock) at 9:4-9; (2) compatible interface losses when higher value product is degraded into lower value product; and (3) incompatible interface losses, incurred when there is interface between incompatible products, generating transmix. *See supra* P 12.

cents-per-barrel charge directly accounts for these net costs because the charge is derived by dividing those net costs by total barrels shipped.[113]

43. By contrast, given the specifics of this case, we find that a percentage-of-value charge is likely to lead to a PLA charge that is misaligned with the costs that the PLA charge is meant to recover.[114] The percentage-of-value charge that Mr. Tolleth proposes is based upon the total value of the product received by Colonial from the shipper, not Colonial's actual or expected PLA costs.[115] Moreover, the record does not support a connection between Colonial's net PLA costs and the total value of the product it receives from shippers.[116] At times, the total value of all product received by Colonial may be relatively high while the PLA costs, driven by the price differential between higher-value products and lower-value products, are relatively small.[117] In this scenario, the pipeline's collections under a percentage-of-value charge would be relatively high

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[113] For example, if a pipeline has net PLA costs of $180,000 (e.g., $20,000 from product loss, $60,000 from compatible interface, and $100,000 from incompatible interface/transmix) and the pipeline has shipments of 100,000 barrels, the resulting cents-per-barrel PLA charge would be $180,000/100,000 barrels, or $1.80 per barrel.

[114] *See* Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)) ("[Colonial] administers the PLA Charge to recover, but not over-recover, any loss amounts incurred by the [pipeline] that are not otherwise mitigated by the activities described throughout this section.").

[115] Ex. JC-0065 (Tolleth) at 23:12-17 (explaining that applying the percentage-of-value charge, "shippers would pay a small portion of the commodity value of their tendered shipments"); *see also id.* at 26:1-8 & 27 (Figure 2) (calculating the percentage-of-value charge itself by dividing "net product loss costs" by "the value of received barrels" for a given period, which "represents the implied fraction of received barrels").

[116] In fact, Mr. Tolleth's four-year study of Colonial's annual throughput and net PLA costs shows that these values can move independently. For example, in 2015 and 2018 Colonial had roughly the same volume of annual receipts but the value of those barrels was about 20% *greater* in 2018 while the net PLA costs were about 20% *less* in 2018 than in 2015. *See* Ex. JC-0082 at 1 (Figure 2).

[117] For example, ultra-low sulfur diesel (ULSD) and No. 2 oil may commingle to create compatible interface when they are shipped sequentially. Colonial witness Mr. Brock compared the change in ULSD prices to the price differential between ULSD and No. 2 oil. For 11 of the 24 months in the base and test period, the price differentials moved in opposite directions. Ex. CPC-00111 (Brock) at 13:14-14:1.

although the pipeline's PLA costs are relatively low.[118] Accordingly, using a percentage-of-value charge could lead to significant divergence between Colonial's recoveries and the PLA costs it incurs, leading by extension to significant over- or under-recovery.[119]

b. A Tracker and True-Up Mechanism Is Superior to a Fixed PLA Charge

44. Based upon the record, we find that a tracker and true-up mechanism is superior to a fixed charge in this case. This finding is based primarily upon the significant volatility in Colonial's PLA costs. As discussed above, product price differentials drive net PLA costs. Product price differentials can vary dramatically,[120] prompting significant annual fluctuations in Colonial's PLA costs.[121] These fluctuations are also reflected in the

[118] Consider the downgrading of product due to compatible interface for a pipeline over two periods. In Period 1, the value per barrel of Products A and B were $100 and $90. In Period 2, the value per barrel of Products A and B increased to $150 and $140. In both periods, the downgrading of Product A into Product B caused the same $10 loss per barrel. However, under a percentage-of-value charge, shippers would pay a PLA charge that is approximately 50% higher in Period 2 because the values of the individual Products A and B are higher.

[119] Extending the example in the prior footnote, assume that in both Period 1 and 2 (i) the pipeline shipped 50,000 barrels of Product A and 50,000 barrels of Product B, (ii) 200 barrels of Product A were downgraded at the interface into Product B, and (iii) the pipeline recovered PLA costs using a 0.02% percentage-of-value charge. For Period 1, this would imply a PLA cost of $2,000, i.e., ($100/bbl – $90/bbl) * 200 bbls, a total PLA charge of $1,900, i.e., [($100 * 50,000 bbls) * 0.02%] + [($90 * 50,000 bbls) * 0.02%], and an under-recovery of $100. For Period 2, this would imply the same PLA cost of $2,000, i.e., ($150/bbl – $140/bbl) * 200 bbls, but a total PLA charge of $2,755, i.e., [($150 * 50,000 bbls) * 0.02%] + [($140 * 50,000 bbls) * 0.02%], and an over-recovery of $755, or approximately 38%. By contrast, under a cents-per-barrel charge of $0.20 per barrel, the pipeline would have charged the same amount in both periods and would have just recovered its net PLA costs.

[120] For example, the average differential between premium and regular gasoline was approximately $22 per barrel in the summer of 2015 but approximately seven dollars per barrel in the summer of 2016. Ex. CPC-00111 (Brock) at 19:16-20:3.

[121] For example, Colonial's per-barrel net PLA costs decreased by approximately 37% from 2015 to 2016 and increased by approximately 11% from 2017 to 2018. *See* Ex. JC-0065 at 27 (Figure 2) (dividing net PLA costs in column 3 by annual receipts (bbls) in column 1).

variable size of Colonial's PLA account balance over time.[122] A tracker with an annual true-up protects shippers by avoiding large over-recoveries while also allowing Colonial to recover its PLA costs. A tracker is also consistent with Colonial's existing tariff provision that provides Colonial may "recover, but not over-recover, any loss amounts" that it incurs "that are not otherwise mitigated."[123]

45. We are not persuaded by the arguments against a tracker mechanism in favor of a fixed charge. We find that a fixed charge based on data from 2015-2018 is unlikely to reflect current or future circumstances.[124] Given the volatility of the factors driving Colonial's net PLA costs, a calculation based on the four-year period studied here, let alone the one-year test period, is unlikely to yield a representative fixed charge.[125] Setting a PLA that is too high would allow Colonial to over-recover. Setting a fixed charge too low, in addition to denying Colonial the right to recover its costs, could create

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[122] *See* Ex. JC-0074 at 5 (reporting a "net receivable (i.e., net product loss)" of approximately $22 million at the end of 2015 and a "net liability (i.e., net product gain)" of approximately $28 million at the end of 2016 on Colonial's FERC Form No. 6); Ex. CPC-00111(Brock) at 11 (Table 1) (depicting variation in the PLA account balance from January 2001 through May 2019).

[123] Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)).

[124] *See El Paso Nat. Gas Co.*, 112 FERC ¶ 61,150, at P 73 (2005) ("The Commission has . . . found it appropriate to consider data outside of the test period if the post-test-period data show that the projections based on the test-period data will be seriously in error."); *ARCO Pipe Line Co.*, 52 FERC ¶ 61,055, at 61,245 (1990) (finding that, with respect to PLA expense, "the test year data is anomalous and should not be used in light of [more recent data] which indicates a reversal in any downward trend").

[125] *See, e.g.*, *ANR Pipeline Co.*, 110 FERC ¶ 61,069, at PP 7-8, 19 (2005) (finding a tracker appropriate for "cost items that are subject to significant changes from year to year and are thus particularly difficult to project," such as lost-and-unaccounted for gas). Moreover, Joint Complainants are incorrect that the methodology used to develop a percentage-of-value charge "implicitly accounts for product price differentials" such that a fixed charge would be appropriate here. JC-00154 (Tolleth) at 29:9-13. On the contrary, Mr. Tolleth's fixed charge calculations varied significantly over the 2015-2018 period and the Initial Decision's selection of a charge above Mr. Tolleth's recommendation does not obviate the risk that a fixed PLA charge will not align with future costs.

perverse incentives for Colonial to reduce its losses by, for example, decreasing the products shipped on its system (which would reduce interface).[126]

46. We are also unconvinced that a tracker and true-up mechanism undermines Colonial's incentives to limit net PLA costs. Although Colonial has used a PLA mechanism akin to a tracker and true-up for decades, nothing in the record suggests that Colonial has been imprudent in its management of product loss and transmix.[127] Additional measures to limit interface could actually disrupt and delay transportation service.[128] Moreover, Colonial has limited ability to affect transmix proceeds. Because Colonial only has sufficient tank capacity to store 10 days' worth of transmix, it has minimal opportunity to time its disposition of transmix to maximize gains.[129] Further, Colonial has a small number of buyers for transmix and each buyer is region-specific.[130] There is no evidence in the record that Colonial has been imprudent in negotiating the

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[126] *See* Ex. CPC-00111 (Brock) at 27:12-14; *id.* at 25:18-26:2 ("A fixed percentage . . . methodology creates an economic incentive for the pipeline to take risk related to product quality . . . or otherwise profit from what is essentially the downgrading of shippers product."). By comparison, even if we were to accept a relatively low cents-per-barrel PLA charge in this proceeding, Colonial must reassess the appropriate charge in its annual true-up filing per our directive below. The Commission has allowed pipelines to make such adjustments in tracker and true-up filings without a general cost-of-service rate case. *See, e.g.*, *Columbia Gas Transmission, LLC*, 142 FERC ¶ 61,238, at PP 1-2 (2013) (accepting annual tariff filing adjusting retainage factors related to lost-and-unaccounted-for gas).

[127] In fact, the record shows that PLA costs decreased over the four-year period that Mr. Tolleth studied. Ex. JC-0082 at 1-2 (Figures 2&3); Ex. JC-0065 (Tolleth) at 28:5-13 (describing a "downward trend in the proportion of received barrel value necessary to fully compensate for Colonial's contemporaneously incurred product loss costs"). We recognize, however, that any decline in PLA costs may be fleeting and attributable to external forces.

[128] For instance, delaying batches so that dissimilar batches are further apart reduces the total volume that Colonial can transport.

[129] Ex. JC-0070 at 1-2.

[130] *Id.* at 2 (explaining that "[t]ransmix is typically generated at the end of pipeline segments," and "Colonial has contracted with several transmix processors to ratably purchase the transmix . . . at specified locations along the pipeline").

fees from its five transmix processors.[131] Thus, Colonial's ability to affect net PLA costs is likely marginal compared to the market forces that drive product price differentials and thus PLA costs.

47. We are also unpersuaded that a fixed charge is an appropriate methodology for Colonial merely because some other refined products pipelines use it. The Commission has not prescribed a standard PLA methodology, and the record shows that refined products pipelines use various methods to recoup costs associated with product loss and transmix.[132] Although some other refined products pipelines use a fixed PLA charge, we find the proposed tracker and true-up mechanism more appropriate for Colonial's system based on the record here. We also note that the Commission has previously approved tracker and true-up mechanisms in the oil pipeline industry.[133] The fact that tracker and true-up mechanisms are less common in the oil pipeline industry is not a reason to reject that approach here.[134]

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[131] *Id.* at 2; *see also* Ex. CPC-00111 (Brock) at 34:15-18 (stating that Colonial "goes through a competitive bidding process whenever a contract expires").

[132] These methods include requiring a percentage tender deduction on received barrels—which reduces the volume that the pipeline must deliver—and charging shippers a cents-per-barrel fee or a percentage of received volumes. *See* Ex. JC-0080 (excerpts from the tariffs of Plantation Pipe Line Company (Plantation), Explorer Pipeline Company (Explorer), and Magellan Pipeline Company, L.P. (Magellan)); Ex. JC-00167 at 7-10 (excerpts from Buckeye Pipe Line Company, L.P.'s (Buckeye) tariff and shipper manual). The Commission has also approved the recovery of net PLA costs through a pipeline's base rates. *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121, at PP 63-66 (2011).

[133] *See, e.g.*, *Enbridge Energy, Ltd. P'ship*, 175 FERC ¶ 61,266, at PP 1-2 (2021) (approving recovery of shipper-requested-project costs "through an incremental surcharge . . . via an annual true-up mechanism"); *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at P 30 (2008) (approving a variable rate component to recover non-capital costs under a flow-through mechanism with a true-up mechanism); *Enbridge Pipelines (S. Lights) LLC*, 121 FERC ¶ 61,310 at PP 42, 45 (approving an annual true-up between estimated and actual transportation revenues and costs).

[134] *See Colonial Pipeline Co.*, 119 FERC ¶ 61,183, at P 23 (2007) ("The Commission has neither considered nor treated its rate methodologies as limiting its ratemaking approach or constraining it from exploring and adopting other rate approaches that are more fitting in particular circumstances to ensure that a just and reasonable rate results.").

48. Furthermore, we disagree with the Initial Decision that a tracker would be a "complete switch" from the status quo or would unduly burden Colonial.[135] Colonial states that a cost tracker and true-up mechanism is akin to its existing practice of 20-plus years and that it would not be administratively burdensome to implement.[136] Indeed, we find that imposing a fixed charge would represent a greater departure from Colonial's longstanding PLA practices.[137]

49. We also reject the assertion of Joint Complainants that a true-up in Colonial's PLA mechanism constitutes retroactive ratemaking because it allows over-recovery in one period to compensate for past under-recoveries.[138] Colonial's present tariff provides notice that prior-period over- and under-collections will be returned to or recovered from shippers through changes in the PLA charge,[139] and that practice will continue in any future tracker mechanism. In such instances there is no retroactive ratemaking.[140]

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[135] Initial Decision, 177 FERC ¶ 63,017 at P 644.

[136] Colonial Br. Opposing Exceptions at 98; Tr. 4230:15-21 (Brock) (explaining that "the only difference" between the proposed tracker and true-up mechanism "is the filing of the tariff," and "[t]he mechanics of the account . . . are basically the same as what we [i.e., Colonial] do today. The tracking -- the tracking of costs, the tracking of inflows and outflows of dollars. That sounds very similar to what we're doing today, which is the biggest piece of this whole endeavor"); Ex. CPC-00111 (Brock) at 11, 18, 21 (indicating that Colonial has used its current PLA mechanism since at least 2001).

[137] The D.C. Circuit recently upheld the Commission's selection of a cost allocation methodology based, in part, on its longstanding use by the entity at issue. *Entergy Ark., LLC v. FERC*, 40 F.4th 689, 701-02 (D.C. Cir. 2022) (crediting the Commission's observation that the chosen methodology "is one that MISO had been using . . . since their inception in 2007 and is regarded by MISO as one of its most reliable measures of the net economic impact of a project").

[138] Joint Complainants Br. Opposing Exceptions at 78.

[139] Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c) ("[Colonial] administers the PLA Charge to recover, but not over-recover, any loss amounts incurred by the [pipeline] that are not otherwise mitigated by the activities described throughout this section. The PLA Charge shall be routinely evaluated to determine if it needs to be adjusted, upward or downward, to ensure the [pipeline's] ultimate collections reflect its actual experience.").

[140] *TransColorado Gas Transmission Co.*, 112 FERC ¶ 61,135, at P 11 (2005) (in a case involving true-ups of gas quantities, holding "there is no violation of the filed rate doctrine or the rule against retroactive rate making because the shippers are on notice that

50. We also find that an annual true-up filing will not unduly burden Commission resources. As several participants note, the Commission routinely processes tracker and true-up filings for lost and unaccounted-for gas in the natural gas pipeline industry.[141] Colonial's annual PLA true-up filings should be similarly routine because, as discussed below, we are directing Colonial to report its actual experience and base any changes in the PLA charge on that experience. Imposing a stated, fixed charge could risk as many or more future filings to adjust the charge by Colonial or its customers given the large cost swings discussed above.[142]

51. Finally, we are unpersuaded that adopting a tracker and true-up mechanism here is inconsistent with Commission policy regarding trackers and the Commission's base and test period regulations. As discussed above, the record shows that Colonial's PLA costs are volatile, difficult to project, and significant. The Commission may permit trackers in these circumstances.[143] Moreover, we are not concerned that using a tracker here "could

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the pipeline is entitled to recover these costs"); *see also La. Public Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (same as to refunds).

[141] *See* Trial Staff Br. on Exceptions at 33; Ex. TMG-0001 (Palazzari) at 110:16-17.

[142] For example, the record shows that Colonial adjusted its PLA charges five times in less than five years. *See* Ex. CPC-00111 (Brock) at 19:11 (Table 4) (showing four adjustments in PLA fees from November 2015 to November 2019); Ex. CPC-00112 at 42 (July 2019 Colonial Shipper Manual § 2.9.5) (stating the short- and long-haul PLA charges as 5.0 cents and 18.0 cents per delivered barrel, respectively); Ex. CPC-00354 at 34 (July 2020 Colonial Shipper Manual § 2.9.5) (stating the short- and long-haul PLA charges as 5.5 cents and 20.0 cents per delivered barrel, respectively). If Colonial had a fixed PLA charge stated in its tariff, as the Initial Decision recommends going forward, this would have resulted in Colonial updating its tariff at least annually.

[143] *Fuel Retention Pracs. of Nat. Gas Cos.*, 120 FERC ¶ 61,255, at P 21 (2007) ("While the Commission's general policy is that rates should be based on projections of future costs based on test period experience, the Commission permits certain costs that are volatile and thus particularly difficult to project, to be tracked."); *ANR Pipeline*, 110 FERC ¶ 61,069 at P 19 (noting that a tracker may be appropriate for "cost items that are subject to significant changes from year to year and are thus particularly difficult to project"); *see also, e.g.*, *SFPP, L.P.*, Opinion No. 522, 140 FERC ¶ 61,220, at PP 80-81 (2012) (increasing a litigation surcharge's value to include SFPP's actual costs, based on earlier findings that "the protracted litigation . . . creates unique circumstances rendering it very difficult to determine a representative level for SFPP's future regulatory litigation expenses").

result in over compensation due to tracking only one element of the cost of service while not taking into account offsetting decreases in other costs."[144] A PLA tracker accounts for discrete, related costs and revenues that are reflected on PLA-specific invoices.[145] Products pipelines commonly address PLA costs through a charge or assessment that exists outside of base rates.[146] Further, all participants support a surcharge for PLA costs in this case and no participant advocates incorporating PLA costs into Colonial's base rates.[147] A tracker and true-up mechanism also has significant participant support.[148] Given the foregoing, we find that a tracker and true-up mechanism is appropriate here.

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[144] *Midwestern Gas*, 57 FERC at 61,268 n.3; *see also El Paso*, 112 FERC ¶ 61,150 at P 74.

[145] *See* Ex. CPC-00114 (Colonial Sample Settlement Statement).

[146] *See* Ex. JC-0065 (Tolleth) at 24:9-24 (describing the mechanisms that three other interstate refined products pipelines use to recover PLA costs outside of base rates); Ex. JC-0080 (excerpts from the tariffs of Plantation, Explorer, and Magellan).

[147] Joint Complainants Br. Opposing Exceptions at 89 n.340; Trial Staff Br. on Exceptions at 34. However, Joint Complainants conflate a standard for approving surcharges with the Commission's policy regarding tracker mechanisms. Because there is no disagreement as to whether a PLA surcharge is appropriate, the standard that Joint Complainants cite is not pertinent here. *Compare* Joint Complainants Br. Opposing Exceptions at 71 (stating that "the specific test" for "approval of reconciling surcharges or tracker mechanisms for liquid pipelines" is that stated in *Chevron Pipe Line Co.*, 165 FERC ¶ 61,069, at P 8 (2018)) *with Chevron*, 165 FERC ¶ 61,069 at P 8 ("The Commission has deemed surcharges appropriate when the costs at issue are: (1) necessitated by factors beyond the pipeline's control; (2) extraordinary and non-recurring; and (3) not industry-wide.").

[148] Colonial Br. Opposing Exceptions at 98 ("[I]f the Commission . . . finds that Colonial's existing PLA and transmix practices are unjust and unreasonable, Colonial generally would not oppose Trial Staff's recommendation to implement a modified tracking and true-up mechanism in place of the current procedures."); Joint Shippers Br. Opposing Exceptions at 58 n.98 ("At the hearing, Joint Shippers proposed a tracker and true-up as an alternative to a fixed fee for prospective use. Thus, Joint Shippers do not oppose such a mechanism for prospective use if the Commission rejects the fixed fee."); Trial Staff Br. on Exceptions at 4, 38 (advocating "a per-barrel charge included in Colonial's tariff that is subject to an annual true-up filing").

E. Colonial Need Not Charge Intrastate Volumes for the PLA

1. Initial Decision

52. The Initial Decision found that Colonial failed to justify its practice of not assessing a PLA charge for intrastate deliveries to Baton Rouge and Cedar Bayou.[149]

2. Positions of Participants

53. Colonial contends that it justified not assessing a PLA charge for intrastate deliveries to Baton Rouge or Cedar Bayou.[150] Colonial states that the record shows that Baton Rouge and Cedar Bayou deliveries are intrastate, and thus beyond the Commission's jurisdiction, and that Colonial assesses charges for any related PLA costs under the relevant state tariffs.[151]

54. Joint Complainants, Joint Shippers, and Trial Staff agree with the Initial Decision that Colonial failed to justify not assessing a PLA charge for intrastate deliveries to Baton Rouge and Cedar Bayou.[152] Joint Shippers and Trial Staff assert that by excluding these intrastate movements from the design of its interstate PLA charge, Colonial may be improperly shifting intrastate PLA costs to its interstate shippers.[153]

3. Commission Determination

55. Based on the record, we find that it is reasonable for Colonial not to assess a PLA charge on intrastate deliveries to Cedar Bayou and Baton Rouge and to exclude those movements from its calculation of the PLA charge. Colonial has shown that it tracks and addresses any costs associated with product loss and interface for intrastate deliveries to Cedar Bayou and Baton Rouge under the associated state tariffs.[154] Colonial also

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[149] Initial Decision, 177 FERC ¶ 63,017 at PP 632-634.

[150] Colonial Br. on Exceptions at 84.

[151] *Id.* at 85-87; *see also* Colonial Br. Opposing Exceptions at 97.

[152] Joint Complainants Br. Opposing Exceptions at 71; Joint Shippers Br. Opposing Exceptions at 63; Trial Staff Br. Opposing Exceptions at 97-98.

[153] Joint Shippers Br. Opposing Exceptions at 63; Joint Shippers Br. on Exceptions at 93; Trial Staff Br. Opposing Exceptions at 97-98.

[154] Ex. CPC-00446 at 10 (Colonial LAPSC Tariff No. 1, for movements in Louisiana, Item 75, eff. Apr. 11, 2006) (providing that any "losses resulting from shrinkage, evaporation, other physical product loss and interface mixture in any calendar

presented evidence that the shipper at Baton Rouge "is responsible for providing the line fill for the movement from the Baton Rouge Tank Farm to the Baton Rouge Dock and subsequently is responsible for all product downgrades that occur to its volumes during" that movement.[155] Moreover, there is no evidence in the record that Colonial is shifting PLA costs from intrastate movements to its interstate shippers when calculating the PLA charge.

F. Reparations Are Not Warranted Under the Circumstances

56. The Commission has discretion as to the level of reparations to award, if any.[156] The ICA generally "allows reparations for up to two years prior to the date of the filing of a complaint if the rates paid in those two years exceed the just and reasonable rate established in the complaint proceeding."[157] The Commission may award reparations to compensate complaining shippers for any payments above a reasonable charge.[158]

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month, will be allocated on a monthly accrual basis among the shippers based on estimates of actual losses"); Ex. CPC-00448 at 12 (Colonial TRRC-2.1.0, for deliveries from Houston, TX to Cedar Bayou, TX, Item 75, eff. July 1, 2018) ("[Colonial] shall account to each shipper for all petroleum products received. Losses resulting from shrinkage, evaporation, and interface mixture will be settled financially with each shipper based on [the pipeline's] meter measurements and [its] monthly settlement pricing.").

[155] Ex. CPC-00166 (Brock) at 11:20-12:3.

[156] *Chevron Prods. Co. v. SFPP, L.P.*, 127 FERC ¶ 63,024, at P 501 (2009); *SFPP, L.P.*, Opinion No. 435, 86 FERC P 61,022, at 61,112 (2000) ("Reparations have traditionally been considered an equitable remedy, and whether they are granted is a matter of Commission's discretion."); *see also SFPP, L.P. v. FERC*, 592 F.3d 189, 195 (D.C. Cir. 2010) (rejecting argument that "FERC erroneously denied that it had equitable discretion to fashion a remedy" because "FERC acknowledged an award of reparations is an equitable remedy and that it was not compelled to award reparations.").

[157] *BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1306 (D.C. Cir. 2004) (citing 49 U.S.C. app. § 16(3)(b)).

[158] 49 U.S.C. app. § 8 ("In case any common carrier subject to the provisions of this chapter shall do . . . any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable . . . for the full amount of *damages sustained in consequence* of any such violation . . . .") (emphasis added); *Parsons v. Chicago & Nw. Ry. Co.*, 167 U.S. 447, 460 (1897) ("[B]efore any party can recover under the [ICA], he

1. Initial Decision

57. The Initial Decision held that Complainants should be awarded reparations regarding the PLA mechanism based on the difference between (a) the actual assessments on the complaining shippers' settlement statements from exactly two years before the filing of each shipper's complaint to the present and (b) the assessment calculated using the replacement methodology that the Initial Decision recommended.[159]

2. Positions of Participants

58. Colonial states that the Initial Decision improperly found that Complainants are entitled to reparations. Colonial asserts that reparations are inequitable because Colonial retained no net revenue, and thus no windfall, from its PLA charge collections.[160] Colonial further asserts that, because there are no excess PLA charges to return, reparations would only serve to penalize Colonial.[161]

59. Joint Shippers contend that the Initial Decision erred by not ordering Colonial to refund *all* PLA and transmix allocation charges collected over the period eligible for reparations, arguing that because the charges were not legally filed in Colonial's tariff, the charges were collected unlawfully. Joint Shippers argue that this relief is necessary to deter pipelines from charging unfiled rates, particularly here where Colonial was on notice from prior complaints that it may be violating this requirement.[162] Joint Shippers state that the Initial Decision should have also required Colonial to refund the time value of the charges it collected and retained unlawfully, with interest.[163] Joint Shippers further assert that the Initial Decision should have required Colonial to refund the time value of the transmix allocation charges that it collected each month and refunded the next month,[164] because Colonial earned a return on the money it retained during the

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must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.").

[159] Initial Decision, 177 FERC ¶ 63,017 at P 654.

[160] Colonial Br. on Exceptions at 96-98.

[161] *Id.* at 98-99.

[162] Joint Shippers Br. on Exceptions at 89-91.

[163] *Id.* at 91-93 (citing 18 C.F.R. § 340.1(c)).

[164] Colonial assigns all system volumes to a shipper, including unsold transmix. Colonial charges each shipper a portion of the value of any unsold transmix, less associated transportation costs, each month (transmix allocation) and issues a credit for

one-month lag.[165] Joint Shippers also claim that the Initial Decision erred to the extent its reparations calculation allows netting of monthly over-collections with under-collections in other months.[166]

60. Colonial and Trial Staff oppose Joint Shippers' proposal to refund all PLA charges that Colonial collected for the period in question. Trial Staff asserts that a pipeline is entitled to the reasonable value for a service even if the rate charged was unfiled.[167] Trial Staff also argues that the Commission lacks authority to award additional reparations to incentivize pipeline action.[168] Colonial states that reparations is an equitable remedy and argues that refunds are meant to be restitutionary rather than punitive.[169] Colonial also rejects, as contrary to Commission precedent, Joint Shippers' suggestion that a full refund is justified because Colonial was on notice that its PLA charges may be unlawful.[170] Colonial states that shippers are not entitled to the time value of all PLA and transmix charges collected. Colonial argues that time-value refunds are not required where a pipeline only collected its out-of-pocket costs from shippers, as Colonial asserts it did here.[171] Colonial also argues that if the Commission accepts Joint Shippers' position on this issue, that logic could be applied to require shippers to pay Colonial interest for every month in which the PLA account was in arrears.[172]

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the prior month's transmix allocation. These charges and credits offset each other over time. Ex. CPC-00113 at 14 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Items 75(a)-(b)); Ex. CPC-00112 at 41 (Colonial Shipper Manual § 2.9.4); *see also* Joint Shippers Br. on Exceptions at 92-93.

[165] Joint Shippers Br. on Exceptions at 92-93.

[166] *Id.* at 10, 90 n.165 (citing *BP W. Coast*, 374 F.3d at 1307-08).

[167] Trial Staff Br. Opposing Exceptions at 98 (citing *SFPP, L.P.*, 122 FERC ¶ 61,126, at P 16 (2008), *aff'd sub nom. SFPP*, 592 F.3d 189).

[168] *Id.* at 99.

[169] Colonial Br. Opposing Exceptions at 90-91.

[170] *Id.* at 94-95.

[171] *Id.* at 95-96.

[172] *Id.* at 96-97.

61. Joint Complainants support the Initial Decision concerning reparations.[173] Joint Complainants state that the Commission presumes reparations are due when a complainant is made to pay an unreasonable rate.[174] Joint Complainants contend reparations are equitable here because Colonial violated a core tenet of the ICA by not filing its PLA charges. Joint Complainants also argue that Colonial will benefit from a windfall if it is allowed to retain revenue from unreasonable and unfiled rates.[175]

62. Joint Complainants assert that Colonial's PLA fees and transmix disposition proceeds are revenue that Colonial collected and used for its benefit, especially during periods of sustained over-recovery.[176] Joint Complainants state that reparations should be calculated on a monthly basis, with interest,[177] and that Commission precedent prohibits netting monthly over- and under-charges in calculating reparations.[178]

3. <u>Commission Determination</u>

63. We find that reparations are not warranted here. As discussed below, we conclude that the shippers did not suffer any damages from the PLA charges because Colonial's PLA mechanism operates as a tracker such that Colonial recovers no more than its actual PLA costs; therefore, we find the denial of reparations to be an equitable result.

64. The record contains credible evidence that Colonial administers the PLA account so that Colonial has recovered no more than its actual costs, consistent with Item 75 of Colonial's tariff, even if the balance is not zero in any given month or year.[179] Figures reported by Colonial and compiled by Complainants show that from 2015 through 2018 the running PLA account balance went from being under-funded to over-funded and back

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[173] Joint Complainants Br. Opposing Exceptions at 4.

[174] *Id.* at 92.

[175] *Id.* at 92-94.

[176] *See id.* at 97.

[177] *Id.* at 99.

[178] *Id.* at 95 (citing *BP W. Coast*, 374 F.3d at 1307-08).

[179] *See* Ex. CPC-00111 (Brock) at 11:2-8; *id.* at 21:13-15 ("between January 2001 and December 2018 the [PLA] account has incurred $1.8 billion in costs and was under-collected by $6.7 million, or 0.4%").

to being under-funded.[180] Colonial's tariff specifies that the PLA charge was designed to authorize Colonial to pass through to shippers its PLA costs without profiting,[181] and, consistent with its tariff, Colonial adjusted its PLA charges to correct either a surplus or a deficit in the running PLA account balance.[182] Moreover, we are unpersuaded to account for the time-value of money for those temporary periods when the PLA account had a surplus or deficit, as Complainants urge.[183] Because the PLA account had a positive or negative running balance at regular intervals over two decades,[184] both Colonial and its shippers have benefitted from the time-value of money at times.[185] To the extent that any excess amounts are currently in the PLA account, the annual true-up mechanism directed below will ensure that these are promptly returned to shippers through a lower PLA charge.[186]

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[180] *See* Ex. JC-0154 (Tolleth) at 10:21-11:12; Ex. JC-0077 at 5-6 (listing in columns 6 and 7 the running PLA account balance based on information that Colonial reported); Ex. JC-0067 at 4-5 (listing product loss allocation activity and balances with PLA charge changes from January 2015 through December 2018, as provided in Colonial's response to JC-CPC-1.32(b)-(e)).

[181] *See* Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)) ("[Colonial] administers the PLA Charge to recover, but not over-recover, any loss amounts incurred by the [pipeline] that are not otherwise mitigated by the activities described throughout this section.").

[182] For example, Colonial decreased its long-haul PLA charge from $0.25/bbl to $0.21/bbl in June 2016, Ex. CPC-00111 (Brock) at 19:11 (Table 4), soon after the PLA balance shifted from a year-plus deficit to a surplus, *see* Ex. JC-0067 at 4-5.

[183] *See* Joint Complainants Br. Opposing Exceptions at 97; Joint Shippers Br. on Exceptions at 91-93.

[184] Ex. CPC-00111 (Brock) at 11:9 (Table 1); *id.* at 11:3-8 (stating that "between January 2001 and October 2019 the account has been in a loss position 60% of the time" and that Colonial has borne "the majority of any carrying costs" as a result).

[185] To the extent that shippers cite to cases involving awarding refunds to utilities subject to regulation under the Federal Power Act based on the time-value of money, the Commission has not previously extended this policy to oil pipeline reparations. Moreover, Colonial has recovered only its variable costs. The Commission generally does not order time-value refunds where doing so would deny a utility its variable expenses. *E.g.*, *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999).

[186] This also addresses Joint Complainants' and Joint Shippers' concern that, even if Complainants received reparations, Colonial would still benefit from any excessive

65. Our decision to deny reparations is further supported by the shortcomings of the reparation remedies proposed in the record by the Initial Decision and Complainants. The Initial Decision recommended that Colonial calculate reparations as the difference between the "actual assessments on the complaining shippers' Settlement Statements" during the statutory period and "the assessment calculated pursuant to the method deemed just and reasonable."[187] Such a calculation is not appropriate here given how Colonial has managed the PLA account over the course of decades. The rate that Colonial charged depended not only on actual or projected net PLA costs from two years before each complaint was filed to present, but also on the cumulative PLA account balance from prior periods. That is to say, the rate covers both current PLA costs and prior period imbalances in Colonial's PLA account.[188] Although in any given month or year Colonial's costs and charges were not perfectly aligned, the PLA account has a balance that is managed to zero over time.[189] Thus, the value of reparations, if any, would differ dramatically based on the time period selected. Consequently, we do not find it reasonable to calculate reparations by reference to only the two years before each complaint was filed.

66. We also find it unreasonable to focus only on months in which Colonial over-collected its PLA costs and ignore those in which it under-collected such costs, as proposed by Complainants.[190] This approach would fail to properly compensate Colonial for its PLA costs, as Colonial would under-recover the PLA costs arising from the jurisdictional service it provided to shippers. It is undisputed that Colonial billed its PLA charges, as required by Item 75(c) of its tariff, with the goal of balancing the PLA

PLA charges collected from non-complainants. Joint Complainants Br. Opposing Exceptions at 98; Joint Shippers Br. Opposing Exceptions at 68.

[187] Initial Decision, 177 FERC ¶ 63,017 at P 654.

[188] Ex. CPC-00111 (Brock) at 18:5-9 ("In setting the PLA level Colonial reviews the current balance in the account then layers in an expectation of the account activity over the next 12 or so months. Colonial then determines a rate that will bring the account to within a +/– $10 million balance within the next 12 months based on the assumptions contained within the model."); *id.* at 20:16-21 (explaining that the +/– $10 million tolerance "would allow a buffer of 2-3 months if the account experienced a sustained positive or negative charge before Colonial could react and adjust the rate"); *id.* at 22:21-23:1 ("The PLA is adjusted on a periodic basis to recover or give back any deficit or surplus that was collected in a prior period.").

[189] *Id.* at 11:2-3.

[190] *See* Ex. JC-0065 (Tolleth) at 33:10-18; Joint Complainants Br. Opposing Exceptions at 99; Joint Shippers Br. on Exceptions at 90 n.165.

account over the course of years.[191] The record also shows that, using its tracker and true-up mechanism, Colonial has returned over-collections to shippers over time and drawn the PLA account balance to zero by adjusting the PLA charges.[192] Thus, requiring Colonial to return any over-collections in a given month without considering that those sums were previously returned to shippers by Colonial's tracker mechanism would require Colonial to return the same funds twice to shippers and result in a net loss to Colonial.[193] We are not persuaded by Complainants' assertions that Commission precedent prohibits netting monthly over- and under-charges in calculating reparations.[194] *BP West Coast* did not involve a similar tracker and true-up mechanism, and therefore is inapposite.[195] Moreover, nothing in that case suggests that netting is precluded where "a multi-year rate method," like Colonial's PLA mechanism, is employed.[196]

67. We also reject Joint Shippers' contention that Colonial must return to Complainants as reparations all fees that it collected because its PLA charges were unfiled.[197] As discussed above, we find that Item 75 of the Colonial tariff authorized Colonial to assess a PLA charge.[198] Moreover, no party claims that Colonial failed to

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[191] Moreover, Complainants' approach is not required by the prohibition against retroactive ratemaking because Colonial's existing tariff provides notice that prior-period over- and under-collections will be returned to or recovered from shippers through changes in the PLA charge. *See supra* P 49.

[192] *See supra* P 64 & notes 183-184.

[193] For instance, if Colonial over-recovered by $200,000 in one period (Period 1) and then under-recovered by $200,000 in the following period (Period 2), these offset each other in the PLA account such that the balance is zero. In contrast, requiring Colonial to return the $200,000 from Period 1 without considering the under-recovery in Period 2 would result in Colonial returning the same value twice and cause Colonial to under-recover its overall costs.

[194] Joint Complainants Br. Opposing Exceptions at 95 (citing *BP W. Coast*, 374 F.3d at 1307-08); Joint Shippers Br. on Exceptions at 10, 90 n.165 (same).

[195] *BP W. Coast*, 374 F.3d at 1307-08 (upholding as reasonable "in the[] circumstances" the Commission's decision not to allow netting of reparations given that "a multi-year rate method was not employed").

[196] *Id.*

[197] Joint Shippers Br. on Exceptions at 89.

[198] *See supra* Part II.B.3.

provide the services for which it charged PLA fees or demonstrates that Colonial recovered more than its PLA costs. Thus, Complainants have not suffered damages equal to all PLA fees they paid Colonial.[199]

G. Implementation of Approved PLA Mechanism

68. Consistent with the discussion above, we direct Colonial to modify its tariff to state the cents-per-barrel PLA charge. The cents-per-barrel PLA charge should be calculated consistent with the directives in this order, and Colonial must assess the same PLA charge for long-haul and short-haul movements consistent with the discussion above.

69. We further direct Colonial to revise its tariff to describe the methodology it will use to derive the cents-per-barrel PLA charge and related tracker mechanism.[200] Under this methodology, the PLA charge must be updated annually based upon an estimate of the upcoming year's PLA costs and include a tracker for resolving prior period under- and over-recoveries that have accumulated in the PLA account.[201]

70. When making the annual filing, Colonial must fully explain and provide detailed support (including workpapers and any models) showing the basis for the updated PLA

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[199] 49 U.S.C. app. § 8 ("[a] common carrier shall be liable . . . the full amount of damages sustained in consequence of any . . . violation" of the ICA).

[200] If Colonial chooses to incorporate the tracker and true-up mechanism in its tariff by referencing a separate document (such as a shipper manual), any future changes to the relevant portions of the underlying document must be noticed by refiling the tariff to correct the title and effective date of the change in the mechanism and/or associated policies and the revised underlying document must be filed with the Commission. *Tricon Energy*, 171 FERC ¶ 61,078 at P 29; *Enter.*, 131 FERC ¶ 61,134 at P 11 (pipelines must file their policies and "any subsequent revisions" with the Commission "so that the Commission and shippers can review them before the policies and any changes to them are placed in effect").

[201] Although Colonial may propose limited exceptions in order to avoid inequitable results or imposing a significant burden on shippers, the new PLA charge should be set at a level that is projected to cause the PLA account to eliminate positive or negative balances by the end of the annual cycle. As an example of a limited exception, Colonial could propose for the Commission's review something like an out-of-cycle fuel filing in the natural-gas pipeline context. *See, e.g.*, *Kinder Morgan La. Pipeline LLC*, 179 FERC ¶ 61,077 (2022).

charge that is stated in its tariff,[202] including the true-up.[203] Colonial should provide monthly net costs underlying its PLA charge, including those related to (a) product losses, (b) compatible interface, and (c) incompatible interface.[204]

III. Market-Based Rate Authority

71. An oil pipeline may obtain market-based rate authority following a determination that it lacks significant market power.[205] The Commission requires an oil pipeline seeking this authority to file an application with the Commission. The application must: (1) identify the relevant product market; (2) describe the relevant geographic markets at the pipeline's origin and destination; (3) identify the competitive alternatives for shippers, including existing competition and potential competition constraining the pipeline's ability to exercise market power; (4) describe any other factors that bear on the issue of whether the carrier lacks significant market power in the relevant markets; and (5) compute the market concentration[206] and other market power measures.[207] The Commission uses this information to determine whether the oil pipeline lacks significant

[202] These projections should include the PLA costs for the prior year and an explanation for why these projections may differ from the prior year's costs.

[203] The record shows that Colonial already maintains the necessary cost data. *See* Ex. JC-0082 at 6-9 (presenting PLA Account activity by month from 2015 through 2018, as provided by Colonial in response to data request JC-CPC-1.32b-e).

[204] As a part of describing the net costs related to incompatible interface, Colonial should include transmix proceeds consistent with the data provided in the record. *See id.*

[205] 18 C.F.R. pt. 348; *Mkt.-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007 (cross-referenced at 69 FERC ¶ 61,103), *order on reh'g*, Order No. 572-A, 69 FERC ¶ 61,412 (1994), *aff'd sub nom. Assoc. of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996)). *See also* 18 C.F.R. 342.4(b) (allowing pipelines with an approved application to make rate changes using their market-based rate authority).

[206] The standard expression of market concentration is the Herfindahl-Hirschman Index (HHI). HHI expresses market concentration by summing the squares of the individual market shares of all sellers in the market. For example, if each of four sellers has a 25% share of the market, the HHI for the market would be (25 * 25 * 4) or 2,500. Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,185.

[207] 18 C.F.R. § 348.1(c).

market power in the relevant markets.[208] The Commission's market power determination is a fact-specific, case-by-case inquiry.[209]

72. When investigating a complaint challenging a pipeline's existing market-based rate authority, the Commission generally applies the same framework to determine whether the pipeline continues to lack significant market power and should retain its authority. However, the complainant has the burden of proof.[210]

73. As discussed below, we affirm the Initial Decision's determination that Colonial should retain market-based rate authority for the Gulf Coast origin market. However, we reverse the Initial Decision's determination that Colonial's market-based rate authority should be revoked for the Alabama origin market.[211]

A. Gulf Coast Origin Market

1. Burden of Proof and Changed Circumstances

a. Initial Decision

74. The Initial Decision applied the analysis described in *Guttman*, in which a complainant, after having established a *prima facie* case sufficient to justify a hearing, must bear the burden of proof at hearing to demonstrate that the pipeline has the ability to exercise market power.[212]

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[208] In *Guttman*, the Commission defined market power as the ability to profitably sustain a small but significant and non-transitory increase in price above a competitive level for a significant period of time, under the "SSNIP" test. *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, Opinion No. 558, 161 FERC ¶ 61,180, at P 93 n.240 (2017), *order on reh'g*, Opinion No. 558-A, 164 FERC ¶ 61,025 (2018) (Guttman Rehearing).

[209] *See*, *e.g.*, Guttman Rehearing, Opinion No. 558-A, 164 FERC ¶ 61,025 at PP 13, 22, 63 (citing *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 241).

[210] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180.

[211] We note that no participant raises exception to the Initial Decision's determination that the appropriate product market for both the Gulf Coast and Alabama origin markets is the transportation of all pipelinable refined petroleum products. Initial Decision, 177 FERC ¶ 63,017 at PP 170-177.

[212] *Id.* PP 151-55 (citing *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 87; Guttman Rehearing, Opinion No. 558-A, 164 FERC ¶ 61,025 at P 12).

b. Positions of the Participants

75. Colonial agrees with the Initial Decision's holding that Complainants bear the burden of proof regarding revocation of Colonial's market-based rates. However, Colonial argues that the Initial Decision errs in holding that, once the case is set for hearing, "no additional evidentiary showing of material changed circumstances will be required."[213] Colonial claims that because the Complainants failed to demonstrate changed circumstances compared to those relied upon when Colonial was granted market-based rate authority the challenges to its market-based rate authority should have been dismissed. Colonial claims that the Hearing Order[214] "expressly reserves the changed circumstances issue for further investigation, setting for hearing 'the issue of whether, as a result of changes in market circumstances, Colonial possesses significant market power in its relevant markets.'"[215]

76. In contrast, Complainants and Trial Staff argue that the Initial Decision correctly applied *Guttman* when finding there was no additional, separate burden to demonstrate changed circumstances at hearing.[216] They argue that the Hearing Order found Complainants had made a *prima facie* showing of changed circumstances in the markets,[217] and the hearing properly focused on examining whether Colonial possesses market power through "the examination of market definitions, HHIs and market

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[213] Colonial Br. on Exceptions at 10-11 (quoting Initial Decision, 177 FERC ¶ 63,017 at P 153).

[214] Hearing Order, 164 FERC ¶ 61,202.

[215] Colonial Br. on Exceptions at 12 (quoting Hearing Order, 164 FERC ¶ 61,202 at P 50).

[216] Joint Shippers Br. Opposing Exceptions at 51-52; Joint Complainants Br. Opposing Exceptions at 11-14; Trial Staff Br. Opposing Exceptions at 11-12.

[217] Joint Shippers Br. Opposing Exceptions at 52-53 (citing Hearing Order, 164 FERC ¶ 61,202 at P 18 (describing changed circumstances in the markets)); Trial Staff Br. Opposing Exceptions at 12-13.

shares."[218] Complainants also argue that if there were an additional burden to show changed circumstances, they have met such burden, citing to evidence in the record.[219]

c. Commission Determination

77. We disagree with Colonial. In *Guttman*, the Commission squarely addressed and rejected the argument that participants challenging a pipeline's market-based ratemaking authority at the hearing stage bore "an additional heightened evidentiary burden to demonstrate materially changed circumstances relative to the time [when] the Commission originally approved [the pipeline's] market-based rates."[220] The Commission emphasized that a complaint challenging a pipeline's market-based rate authority should present "reasonable grounds for asserting that there have been substantial changes in competitive circumstances in the markets relative to the time of the prior proceeding that granted the pipeline's market-based rate authority, taking into account the time that has elapsed."[221] However, the Commission found, once the complaint presented reasonable grounds for asserting that substantial changes in competitive circumstances warrant a hearing, "no additional evidentiary showing of material changed circumstances" is required, separate from the complainant's burden of proof to show that the pipeline's market-based rate authority should be revoked.[222] The Commission reasoned that "if the Complainants meet their burden in the hearing proceeding to show that [the pipeline] can exercise market power in the relevant markets, it can be assumed that circumstances in the market structure and competitive circumstances have changed since the Commission approved market-based rates."[223] Therefore, Colonial is incorrect that Complainants bore an additional, separate burden at hearing to demonstrate material changed circumstances.

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[218] Trial Staff Br. Opposing Exceptions at 13 (quoting Hearing Order, 164 FERC ¶ 61,202 at P 57).

[219] *See* Joint Complainants Br. Opposing Exceptions at 18 (discussing testimony comparing pipeline options available in 2000 with current options).

[220] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 87-88, *aff'd* Guttman Rehearing, Opinion No. 558-A, 164 FERC ¶ 61,025 at PP 8, 11-12.

[221] *Guttman,* Opinion No. 558, 161 FERC ¶ 61,180 at P 87, *aff'd* Guttman Rehearing, Opinion No. 558-A, 164 FERC ¶ 61,025 at P 11.

[222] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 87.

[223] *Id.* P 90 (quoting *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 155 FERC ¶ 63,008, at P 141 (2016) (initial decision) (internal quotation marks omitted)).

78. Despite Colonial's claims that challenges to its market-based rate authority should have been dismissed for failure to demonstrate changed circumstances,[224] Colonial did not seek rehearing of the Commission's establishment of a hearing. Now, the hearing has been completed and an extensive record developed. We emphasize that the record and the market-power findings reflect extensive testimony, market data, and other support, including netback analyses and extensive consideration of competitive alternatives to Colonial. This evidence is substantial and material to the issue of whether Complainants have met the burden of proof to show that Colonial now has the ability to exercise market power in the Gulf Coast origin market.

2. Geographic Markets

79. The Commission has held that the "relevant geographic market is the area in which a shipper may rationally look for transportation service."[225] A geographic origin market includes all of the alternatives available to shippers to transport or otherwise dispose of their particular products.[226] Geographic markets are determined in each proceeding based on its specific facts.[227]

a. Initial Decision

80. The Initial Decision identified a single 90-county Gulf Coast origin market in Texas, Louisiana, Mississippi, and Alabama.[228] A map of this market is included as Appendix A.

81. In adopting the 90-county Gulf Coast market, the Initial Decision relied upon the detailed price test provided by Trial Staff witness Mr. Ruckert. Mr. Ruckert started his analysis with the narrowest candidate market proposed in the record, consisting of three

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[224] Colonial Br. on Exceptions at 11 n.3.

[225] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 183; *MPLX Ozark Pipe Line LLC*, Opinion No. 578, 180 FERC ¶ 61,053, at P 19 (2022).

[226] *Saddlehorn Pipeline Co.*, 181 FERC ¶ 61,021, at P 12 (2022) (citing *Buckeye Linden Pipe Line Co.*, 160 FERC ¶ 61,021, at P 15 (2017); *W. Shore Pipe Line Co.*, 100 FERC ¶ 61,001, at P 6 n.8 (2002)).

[227] *Id.* (citing *Enterprise Prods. Partners L.P.*, 146 FERC ¶ 61,115, at P 35 (2014) (*Seaway I*); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188); *MPLX*, Opinion No. 578, 180 FERC ¶ 61,053 at P 19; *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 183.

[228] Initial Decision, 177 FERC ¶ 63,017 at P 209.

contiguous candidate markets (West Gulf Coast, Central Gulf Coast, and East Gulf Coast)[229] proposed by Complainants' witness Dr. Arthur. For each refinery in those markets, Mr. Ruckert estimated the netback value for alternatives for the refinery to clear product.[230] Mr. Ruckert calculated the netback by determining (a) the product price at a destination that could be reached from the refinery, (b) the cost of transporting the product to those destinations by pipeline, waterborne shipments, trucking, or some combination thereof,[231] and (c) the netback that results from subtracting the transportation costs from the product price.[232] The netback identifies which transportation option is the most profitable, under the assumptions of the analysis, from a particular refinery origin point. Mr. Ruckert proceeded to rank his netbacks from highest to lowest. A simplified example of Mr. Ruckert's netback calculations is shown below:

Table 1: Simplified Netback Calculations
(cents per gallon, except rank)

A	B	C	D	E	F	G	H	I
Alternative	Destination	Value at Destination	Truck	Pipeline	Water	Transp. Cost (D+E+F)	Netback (C - G)	Rank (Best = 1)
Within the Candidate Market								
Colonial	City A	189.00	0.00	4.00	0.00	4.00	185.00	2
Colonial	City B	188.00	0.00	4.20	0.00	4.20	183.80	3
Pipeline 1	City C	190.00	0.00	3.00	0.00	3.00	187.00	1
Outside the Candidate Market								
Pipeline 2	City D	185.00	0.60	1.00	0.00	1.60	183.40	4
Pipeline 3	City E	185.00	0.85	5.15	0.00	6.00	179.00	6
Waterborne	City F	184.00	1.00	0.00	1.20	2.20	181.80	5

Source: This is a modified version of Table 2 provided by Mr. Ruckert in Exhibit S-00106 at 29.

[229] Ex. S-00106 at 76. The West Gulf Coast Market includes the Houston to Hebert, Tex. Area; the Central Gulf Coast Market includes the Lake Charles to Krotz Springs, La. area and the East Gulf Coast includes the Baton Rouge, La. to Pascagoula, Miss. area. A map of the three separate markets is shown in Appendix A. Based upon data submitted in the proceeding, Mr. Ruckert included in these areas counties where the center of population was within 75 miles of a refinery that currently uses Colonial. Ex. S-00106 at 65-66.

[230] This could include transporting product outside the market or local consumption within the market.

[231] For example, a refinery may use trucking to reach the pipeline origin. The transportation costs are the sum of the (a) trucking costs and (b) the pipeline's rate.

[232] Ex. S-00106 at 87.

82. Next, Mr. Ruckert identified the competitively priced alternatives by applying a SSNIP[233] to the lowest netback on Colonial for each refinery.[234] In the simplified example, applying a 15% SSNIP increases the transportation rate from the hypothetical refinery to City B from 4.20 cents per gallon to 4.83 cents per gallon:

Table 2: Simplified Netback Calculations with SSNIP
(cents per gallon, except rank)

A	B	C	D	E	F	G	H	I
Alternative	Destination	Value at Destination	Truck	Pipeline	Water	Transp. Cost (D+E+F)	Netback (C - G)	Rank (Best = 1)
Within the Candidate Market								
Colonial	City A	189.00	0.00	4.00	0.00	4.00	185.00	2
Colonial	City B	188.00	0.00	4.83	0.00	4.83*	183.17	4 (was 3)
Pipeline 1	City C	190.00	0.00	3.00	0.00	3.00	187.00	1
Added to the Candidate Market								
Pipeline 2	City D	185.00	0.60	1.00	0.00	1.60	183.40	3 (was 4)
Outside the Candidate Market								
Pipeline 3	City E	185.00	0.85	5.15	0.00	6.00	179.00	6
Waterborne	City F	184.00	1.00	0.00	1.20	2.20	181.80	5

* Transportation cost on Colonial to City B increased from $4.20 to $4.83 by a 15% SSNIP.
Source: This is a modified version of Table 3 provided by Mr. Ruckert in Exhibit S-00106 at 31.

As a result of the SSNIP in this simplified example, Pipeline 2 now has a higher netback (183.40 cents per gallon) than Colonial's route to City B (183.17 cents per gallon). Even if it is currently unused and outside the original candidate market, Pipeline 2 is now competitively priced such that shippers could shift some portion of their transportation of refined petroleum products to Pipeline 2 in response to a SSNIP by Colonial.[235] Under Mr. Ruckert's methodology, this would support expanding the candidate market to include the applicable origin on Pipeline 2.

83. For each of the 25 refineries in the three Gulf Coast markets proposed by Dr. Arthur, Mr. Ruckert used this process to evaluate both (a) potential competitive alternatives to Colonial within each market (discussed below in competitive alternatives) and (b) potential alternatives outside the refinery's market (*e.g.*, whether it would be economical for a refinery in the West Gulf Coast market to access pipelines in the Central

[233] *See supra* note 209.

[234] Ex. S-00106 at 117.

[235] *Id.* at 31.

Gulf Coast market).[236] For each refinery, Mr. Ruckert evaluated 121 unique combinations of transportation paths.[237] For each refinery, Mr. Ruckert calculated multiple netbacks that were outside the original candidate market containing the refinery.

84. Through this process, Mr. Ruckert combined the three narrower candidate markets proposed by Dr. Arthur into the single, 90-county Gulf Coast market. Mr. Ruckert explained that refineries had several competitive alternatives located outside of the refinery's particular geographic market.[238] In particular, shippers at refineries in the East Gulf Coast market and the Central Gulf Coast market can respond to a SSNIP on Colonial by barging to pipelines in the West Gulf Coast market.[239] Mr. Ruckert also explained that refineries in the West Gulf Coast market could avoid a SSNIP by Colonial by using local barging to access a pipeline (Plantation)[240] in the Central Gulf Coast market.[241]

85. In order to test the rigor of his results, Mr. Ruckert adjusted his detailed price test to include more stringent assumptions:

- Mr. Ruckert conducted a second iteration of his analysis relying on Dr. Arthur's proposed competitive price proxy. Dr. Arthur's proxy was less than 80% of Colonial's current rates making it less likely that an alternative would be competitive in response to a SSNIP by Colonial.[242]

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[236] *Id.* at 78-83, 89-91.

[237] *Id.* at 91.

[238] *E.g.*, *id.* at 139.

[239] This includes barging to pipelines such as Enterprise TE Products Pipeline Company (TEPPCO) and Magellan in Houston. *Id.* at 140 (citing Ex. S-00111 at 47-72, 76-78).

[240] Products (SE) Pipe Line was known as Plantation Pipe Line Company at the time of the Complaints. We refer to the pipeline *infra* as Plantation consistent with the Initial Decision and the record.

[241] Ex. S-00106 at 140 (citing Ex. S-0011 at 4-39); *see also* Ex. S-00111 at 1 (showing that Plantation was a good competitive alternative for every one of the 12 West Gulf Coast refineries).

[242] Ex. S-00106 at 120.

- Mr. Ruckert conducted a sensitivity analysis for trucking and waterborne transportation that frequently serve as intermediate transportation options between refineries and pipelines: (a) increasing all waterborne transportation by 25%; (b) increasing truck unloading fees (which are relevant for trucking costs between refineries and pipelines) from $0.50 per barrel to $0.75 per barrel.[243]

- Mr. Ruckert performed different iterations of his analysis using a SSNIP of 10% and 20% as well as the Commission's preferred 15%.[244]

Even imposing these more conservative assumptions, Mr. Ruckert's analysis supported the conclusion that the 90-county Gulf Coast market was appropriate for the evaluation of Colonial's market-based rate authority.[245]

86. Persuaded by Mr. Ruckert's analysis (as supplemented by Trial Staff witness Dr. Norman), the Initial Decision adopted Trial Staff's proposed 90-county Gulf Coast market.[246] The Initial Decision rejected the three separate smaller Gulf Coast markets proposed by Dr. Arthur because Mr. Ruckert's analysis showed that those markets should be expanded. Although the Initial Decision relied upon Trial Staff's analysis for defining the geographic market, Colonial witness Ms. Carey's separate analysis provided substantially similar results.[247]

b. Positions of the Participants

i. Complainants

87. Complainants claim that the Initial Decision erred by adopting Trial Staff's 90-county Gulf Coast market, rather than Dr. Arthur's proposal for three smaller geographic origin markets within the Gulf Coast region: (1) the West Gulf Coast, including refineries in the Houston to Hebert, Texas, region; (2) the Central Gulf Coast, including refineries at Lake Charles and Krotz Springs, Louisiana; and (3) the East Gulf Coast, consisting of the refineries in the Baton Rouge, Louisiana, to Pascagoula,

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[243] *Id.* at 132-133.

[244] *Id.* at 135.

[245] *Id.* at 134, 136.

[246] Initial Decision, 177 FERC ¶ 63,017 at P 209.

[247] *See* Ex. CPC-00135.

Mississippi, area.[248] Complainants urge the Commission to adopt Dr. Arthur's analysis in his hypothetical monopolist test. Dr. Arthur explains how he performed the hypothetical monopolist test with each of his three proposed markets:

> [I]f a hypothetical monopolist over all means of transportation of refined products from the refineries producing refined products where volumes flow into Colonial's [origin points within the proposed market], including pipelines, rail, waterborne, and trucking methods, increased the transportation rate above a competitive level, would (or could) producers of refined products at those refineries substitute transportation movements away from the hypothetical monopolist to another location? In the absence of any alternative for transporting refined products away from those refineries in the candidate origin market, the refineries necessarily would have to accept the hypothetical monopolist's rate increase or idle capacity.[249]

On the basis that refineries "would accept a lower netback rather than idle capacity," Dr. Arthur concludes that the hypothetical monopolist would "profitably sustain a rate increase above a competitive level" and no further expansion of the proposed markets is appropriate. Although Dr. Arthur performed a detailed netback analysis for identifying competitive alternatives as discussed below, Dr. Arthur did not support Complainants' proposed geographic market definition with such an analysis as part of his hypothetical monopolist test.

88. Complainants also advance several criticisms of Trial Staff's analysis. Complainants argue that Trial Staff's analysis improperly assumes that shippers can access remote pipelines within the 90-county Gulf Coast market using trucking and barging as intermediate transportation: Complainants allege there is no evidence that shippers actually use trucking or barging to reach other pipelines.[250] Additionally, Complainants challenge Trial Staff's use of pricing data from the Oil Price Information Service (OPIS), claiming that Argus price data is more representative of prices for

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[248] Joint Shippers Br. on Exceptions at 77; Joint Complainants Br. on Exceptions at 9, 18, 21-24.

[249] Ex. JC-0083 at 30; Joint Complainants Br. on Exceptions at 22 (citing Ex. JC-0083 at 30).

[250] Joint Shippers Br. on Exceptions at 77; Joint Complainants Br. on Exceptions 12-16, 26-33.

unfinished products shipped on Colonial.[251] Furthermore, Complainants argue that Trial Staff's analysis understated the netbacks for transportation on Colonial because Trial Staff failed to take into account that shippers can elect to transport different products to maximize revenues from cycle to cycle.[252] Moreover, Joint Shippers criticize Trial Staff's netback analysis for demonstrating that shippers could bear a SSNIP for a one-year period, while they claim the test calls for a two-year analysis.[253]

89. Next, Joint Shippers and Joint Complainants claim that the 90-county Gulf Coast market adopted by the Initial Decision is directly contrary to how Colonial defined its geographic origin markets in its application for market-based rates filed in 2000.[254] Additionally, Joint Shippers and Joint Complainants emphasize that the Initial Decision and Trial Staff excluded Corpus Christi from the Gulf Coast origin market because refineries in Corpus Christi do not ship on Colonial. They allege that the exclusion of Corpus Christi is inconsistent with and, thus, undermines the Initial Decision and Trial Staff's use of a SSNIP and intermediate transportation to combine the Gulf Coast into one market.[255] Finally Complainants criticize the Initial Decision's adoption of Trial Staff's competitive price proxy and advocate for the proxy proposed by Dr. Arthur.

ii. Colonial and Trial Staff

90. Colonial and Trial Staff defend the broader 90-county Gulf Coast market adopted by the Initial Decision based on Trial Staff's analysis.[256] Colonial asserts that the netback

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[251] Joint Complainants Br. on Exceptions at 51-54; *see also* Joint Shippers Br. on Exceptions at 18-19 (arguing Argus price data is superior to the data used by Trial Staff).

[252] Joint Complainants Br. on Exceptions at 51-53; Joint Shippers Br. on Exceptions at 35-36.

[253] Joint Shippers Br. on Exceptions at 80.

[254] Joint Shippers Br. on Exceptions at 78 (citing Ex. JC-0086 at 53-54 (Colonial market-based rate authority application identifying three origin markets, Corpus Christi to Lake Charles, Baton Rouge and Birmingham-Montgomery, based on location of refineries and ports and pipelines to serve them)); Joint Complainants Br. on Exceptions at 24-26. *See also* Initial Decision, 177 FERC ¶ 63,017 at P 125 (describing scope of Colonial's market-based rate authority).

[255] *E.g.*, Joint Complainants Br. on Exceptions at 34-36; Joint Shippers Br. on Exceptions at 77-78.

[256] Colonial Br. Opposing Exceptions at 17-18; Trial Staff Br. Opposing Exceptions at 22.

analysis prepared by its witness Ms. Carey generates a similar result for the Gulf Coast origin market.[257] Colonial and Trial Staff argue that the Initial Decision properly rejected Dr. Arthur's analysis as flawed and inconsistent with Commission precedent.[258]

91. Colonial and Trial Staff dispute Complainants' criticisms of the Initial Decision's reliance upon Trial Staff's geographic market analysis. Among other things, Colonial and Trial Staff argue that Trial Staff's detailed price test demonstrated that trucking and barging are appropriately considered as intermediate transportation to expand the market,[259] noting that Dr. Arthur himself acknowledged that a transportation alternative could serve both as an intermediate connection to other alternatives and as a good alternative in its own right.[260]

c. Commission Determination

92. We affirm the Initial Decision's finding that the relevant geographic Gulf Coast origin market is the 90-county Gulf Coast market.

93. The 90-county Gulf Coast market is supported by Trial Staff's detailed price analysis and takes into consideration competitive alternatives available and potentially

[257] Colonial Br. Opposing Exceptions at 19 (citing Exs. CPC-00135 at 185, 206, 225-230; CPC-00242; CPC-00243; BE-0016).

[258] Trial Staff Br. Opposing Exceptions at 23 (citing Initial Decision, 177 FERC ¶ 63,017 at P 212, as noting that "Dr. Arthur's application of the hypothetical monopolist test presumes the hypothetical monopolist controls and raises simultaneously the prices of all transportation services in the market;" *id.* P 215); Colonial Br. Opposing Exceptions at 19-20, 25-29. *See also* Ex. S-00291 at 40-41 ("Dr. Arthur's misplaced assumption that the hypothetical monopolist coordinates price increases on all transportation services will always result in the conclusion that it is impossible to expand the market to include alternatives not controlled by the hypothetical monopolist—even though the Commission has been clear that expanding markets to encompass good alternatives to the pipeline that are used or usable in the event of a SSNIP by the subject pipeline may be appropriate in defining geographic markets in market-based rate proceedings, and that those alternatives may be accessed via other facilities in the original proposed geographic market.").

[259] Trial Staff Br. Opposing Exceptions at 38; Colonial Br. Opposing Exceptions at 17-24.

[260] Trial Staff Br. Opposing Exceptions at 71 (citing Ex. JC-0200 at 40 n.110; Tr. 6762 (Arthur)).

available to Colonial shippers, consistent with Commission precedent.[261] Trial Staff's detailed price analysis conforms with Commission policy and presents a superior alternative to Complainants' approach.[262] As discussed above, Mr. Ruckert identified three initial narrow origin markets based on the refineries that delivered refined petroleum products at Colonial receipt points. Thereafter, Mr. Ruckert identified competitive alternatives by imposing a SSNIP based on a competitive price proxy.[263] Mr. Ruckert tested the rigor of his conclusions by incorporating into his analysis assumptions that were favorable to Complainants, including: (1) Dr. Arthur's proposed competitive price proxy; and (2) a sensitivity analysis for increased trucking and waterborne costs. Trial Staff's netback analysis supports expansion of the narrow markets into a single Gulf Coast origin market.

94. In contrast, we are unpersuaded by the analysis conducted by Complainants' witness Dr. Arthur in support of the proposal for three smaller markets within the Gulf Coast region. Dr. Arthur's hypothetical monopolist test is flawed because it simply assumes there are no economic means for a shipper to access alternatives outside the candidate market.[264] For example, by this assumption, Dr. Arthur appears to preclude the possibility that a refinery in his proposed Central Market could truck or use waterborne

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[261] *See Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 112; *Seaway I*, 146 FERC ¶ 61,115 at P 67; *see also White Cliffs Pipeline, L.L.C.*, Opinion No. 573, 173 FERC ¶ 61,155, at PP 32-33 (2020).

[262] We recognize that that there may be different approaches for identifying a geographic market. Our holding in this proceeding is that, on the record, the Initial Decision properly found that Trial Staff's analysis is superior to the analysis presented by Complainants and, accordingly, that Trial Staff's 90-county Gulf Coast market should be adopted in this case. We are not finding that Trial Staff's analysis is the only way to define the geographic market or that participants must follow Mr. Ruckert's methodology in all cases. *See Seaway I*, 146 FERC ¶ 61,115 at P 35 ("the appropriate geographic markets should be determined in each proceeding based on the facts"); *id.* P 39 ("The determination of a geographic market is a fact-specific inquiry and must be determined on a case-by-case basis"); *see also MPLX*, Opinion No. 578, 180 FERC ¶ 61,025 at P 19.

[263] Initial Decision, 177 FERC ¶ 63,017 at P 204 (citing Ex. S-00106).

[264] In contrast to Trial Staff, Dr. Arthur does not include any numerical analysis to support or illustrate his hypothetical monopolist test. For example, it is not clear exactly how Dr. Arthur applied the SSNIP to the alternatives or what transportation rates he considered for the alternatives.

transportation to a pipeline that is in his proposed Western Market.[265] Because the trucking is itself assumed to be uneconomic, the refinery in the Central Market is assumed to have no economic access to the pipeline in the Western Market. Accordingly, Dr. Arthur implicitly assumes that his proposed geographic market (whatever that geographic market is) reflects the areas in which a shipper may rationally look for transportation service, and under his test, his initial candidate geographic market will always be the final geographic market.[266]

95. We are also unpersuaded by Complainants' challenges to Trial Staff's analysis supporting the 90-county Gulf Coast market.

96. Complainants challenge Trial Staff's proposal to consolidate Dr. Arthur's proposed smaller candidate markets based upon intermediate trucking and barging from refineries in one market (*e.g.*, the West Gulf Coast Market) to pipelines in another market (*e.g.*, the Central Gulf Coast Market). We disagree with Complainants' claim that there must be evidence that shippers actually use trucking or barging as intermediate transportation to reach other pipelines in order to expand the Gulf Coast market.[267] The Commission has long approved the expansion of candidate geographic markets based on shared alternatives that are only accessible through intermediate forms of transportation like trucks and barges.[268] A properly conducted detailed price analysis can demonstrate that even unused alternatives in areas adjacent to the candidate market are sufficiently cost-competitive to be used by participants in candidate markets and thereby support expanding the candidate market.[269] Here, based on the netback analysis presented by

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[265] It is not reasonable to preclude that possibility. For example, Trial Staff presented evidence demonstrating that waterborne transportation could be used to reach alternatives in the Western Market. Ex. S-00107 at 41, 44.

[266] Dr. Arthur assumes there are no economic means for a shipper to access pipelines that originate outside that candidate market, the very question the hypothetical monopolist test is supposed to assess.

[267] *E.g.*, Joint Complainants Br. on Exceptions at 14.

[268] *Seaway*, Opinion No. 563, 163 FERC ¶ 61,127 at P 29; *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at PP 33-34.

[269] *Guttma*n, Opinion No. 558, 161 FERC ¶ 61,180 at P 112 ("Parties may utilize a detailed price analysis for determining geographic markets and good alternatives in market-based rate proceedings. . . ."); *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 33 (Commission precedent permits "the expansion of a geographic market to include alternatives that are available to shippers in the event a pipeline were to impose a supra-competitive price increase").

Trial Staff, we find that sufficient alternatives do exist to support Trial Staff's origin market analysis and expansion of candidate origin markets.[270] Intermediate forms of transportation to competing pipelines serve to connect refining centers within the Gulf Coast origin market into an economically connected single market. Trial Staff's analysis demonstrates that the existence of these competitively priced alternatives would operate as a constraint to an exercise of market power by Colonial even if shippers are not currently using trucking or barging to reach these other pipelines.

97. We disagree with Complainants' claim that Trial Staff's approach to defining the origin market is inconsistent with the Commission's geographic-origin-market analysis in *Guttman*.[271] In *Guttman*, the Commission affirmed an origin market definition by examining where the connected refinery, the only source for interstate movements on the pipeline, could acquire transportation service in response to a SSNIP.[272] Here, Trial Staff's analysis also examined where the refineries in the proposed candidate markets whose products move on Colonial could acquire alternative transportation service in response to a SSNIP by Colonial.[273] Contrary to Complainants' argument, the Commission in *Guttman* did not foreclose reliance on intermediate transportation to reach alternatives as a means to expand the geographic market definition. Instead, the issue in *Guttman* was whether the possibility of exchanges could be used to expand the candidate geographic market. The Commission found on that record that this possibility, which is not at issue in this proceeding, did not justify such an expansion.[274]

98. We are also not persuaded by Complainants' challenges to Trial Staff's reliance on OPIS price data.[275] The Commission has previously accepted analyses using OPIS price data in oil pipeline market-based rate cases.[276] Dr. Arthur acknowledges that he has relied on OPIS price data in past proceedings to evaluate pipelines that did not transport

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[270] Exs. S-00107, S-00108, and S-00109.

[271] *E.g.*, Joint Complainants Br. on Exceptions at 19-20.

[272] *Guttma*n, Opinion No. 558, 161 FERC ¶ 61,180 at PP 183-184.

[273] *See supra* P 82, Table 2; Ex. S-00106.

[274] *Guttma*n, Opinion No. 558, 161 FERC ¶ 61,180 at P 185.

[275] Mr. Ruckert relied on OPIS wholesale rack prices for domestic destinations (Ex. S-00106 at 92), whereas Dr. Arthur relied on Argus wholesale prices. Ex. JC-0083 at 91.

[276] *E.g.*, *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 141-143.

finished products.[277] However, here Dr. Arthur claims Trial Staff erred by using OPIS "rack prices associated with finished gasoline products instead of [Argus] wholesale prices associated with unfinished gasoline products that are actually shipped on Colonial."[278] However, Dr. Arthur concedes that Colonial moves both unfinished and finished gasoline products,[279] and he provides insufficient support for assuming that the majority of Colonial's volumes are unfinished products delivered to downstream pipelines.[280] Regarding distillates, Dr. Arthur's criticism does not apply to diesel, which is a finished product when transported on Colonial.[281]

99. Further, the OPIS price data relied on by Trial Staff is available at more destinations than the Argus price data, thereby producing a more robust market analysis. The record contains OPIS rack prices for 148 terminal destinations.[282] For each refinery in the candidate geographic markets, Mr. Ruckert evaluated 121 different combinations

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[277] *See* Tr. 6898-6900, 6907- 6910, 6913 (Arthur) (discussing analysis in the *Guttman* proceeding); Tr. 6916-6917 (discussing analysis in Docket No. OR17-11); Tr. 6924-6925 (discussing analysis in Docket No. OR02-10).

[278] Ex. JC-0200 at 8; *see also* Ex. JC-0083 at 94 (Argus reports unfinished gasoline products shipped on Colonial, in contrast to finished gasolines that include an oxygenate such as ethanol that are sold at wholesale terminals for loading into a truck for delivery to retail stations); *see also* Joint Complainants Br. on Exceptions at 51-54; Joint Shippers Br. on Exceptions at 18-19.

[279] Dr. Arthur concedes that Colonial moves Conventional 87 and this is a finished gasoline. *See* Tr. 6792-6793 (Arthur).

[280] For example, Dr. Arthur assumes that the vast majority of volumes delivered to Colonial's Linden delivery points were subsequently transferred onto Buckeye. *See* Ex. JC-0200 at 17-18. Dr. Arthur was not able to point to any evidence in the record or any analysis he conducted to support this assumption. *See* Tr. 6927-6931, 6939-6940, 6988-6993 (Arthur); *see also*, 7452-7453, 7546-7548 (Gardner) (representative of Colonial explaining that Colonial delivers to over 20 terminals in the Linden area from which volumes also move to marine facilities or truck racks for deliveries to the local market).

[281] As Trial Staff explains, evidence in the record shows volumes of distillates, including diesel, shipped on Colonial greatly exceeded Colonial's gasoline volumes. *See* Trial Staff Br. Opposing Exceptions at 19 (citing Ex. S-00421).

[282] Ex. S-00119; Ex. S-00106 at 93-94.

of transportation paths and sales destinations.[283] In contrast, Dr. Arthur's use of Argus price data resulted in a more limited analysis that for each refinery only considered wholesale spot prices at four locations.[284] An overly small price-data set risks excluding viable competitive alternatives, which could result in an improper finding of market power.[285] Recognizing this concern, we are reluctant to find Trial Staff's reliance on OPIS price data unreasonable based on the record.

100. We find unpersuasive Complainants' arguments that Trial Staff's analysis understated the netbacks for transportation on Colonial or failed to incorporate non-price constraints to pursuing alternative transportation options.[286] The Commission has explained that "non-price factors can be taken into account by adjusting the threshold price increase (above or below 15%) or by using a higher or lower competitive proxy."[287] Here, Trial Staff's analysis appropriately incorporated non-price factors by performing the netback analysis using different competitive price proxies (including Dr. Arthur's lower proxy) and adjusting the threshold price increase above and below 15%.[288] As explained above, Trial Staff also performed an additional sensitivity analysis using highly conservative assumptions, such as eliminating connecting carrier tariff rates for Colonial but not for other pipelines.[289] In light of these adjustments, we are unpersuaded that Trial Staff's analysis failed to make any allowance for circumstances of shipping on Colonial that may enhance shippers' ability to maximize profits on the pipeline or limit shippers'

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[283] Ex. S-00111; Ex. S-00106 at 91.

[284] Exs. JC-0200 at 181; JC-0208; JC-0209; Tr. 6793-6794 (Arthur).

[285] *See* Ex. S-00106 at 96 (explaining that including additional prices increases the probability that at least one location yields a higher netback than the post-SSNIP netback).

[286] *E.g.*, Joint Complainants Br. on Exceptions at 51-53; Joint Shippers Br. on Exceptions at 35-36.

[287] *Enterprise TE Prods. Pipeline Co.*, Opinion No. 529, 146 FERC ¶ 61,157, at P 45 (2014); *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 142.

[288] Ex. S-00106 at 135 (Mr. Ruckert also performed the netback analysis using threshold price increases of 10% and 20%); Tr. 8279 (Ruckert).

[289] Ex. S-00106 at 132-134; Ex. S-00136. *See White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 50 n.107 (accepting a netback analysis that included "a sensitivity analysis that allowed for consideration of non-price factors").

incentive to shift to alternatives.[290] Furthermore, as explained below, Complainants' approach for incorporating shippers' ability to shift between products to maximize revenues on Colonial, as employed in Dr. Arthur's analysis, skews the analysis in favor of finding that Colonial has superior netbacks to potential alternatives.[291]

101. We also reject Complainants' argument that a netback analysis requires multiple years of data. This standard has never been adopted or required by the Commission. Instead, on multiple occasions the Commission has adopted netback analyses based on one year of data.[292]

102. Further, Complainants are incorrect in claiming that Colonial's geographic origin market must align with the origin market definition from Colonial's market-based rate application in 2000.[293] The Commission is not bound by the market definitions Colonial proposed in an uncontested proceeding[294] over 20 years ago,[295] rather "the determination of whether a pipeline has market power is a fact-specific inquiry that should be

[290] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 142 ("In an economic sense, anything that influences purchasing decisions can be given a monetary or 'price' value, so non-price may not be the best descriptive term. However, there are considerations not reflected in the prevailing market prices that still affect whether an alternative will be utilized.").

[291] *See infra* P 123 (rejecting Dr. Arthur's use of the highest netback per cycle).

[292] *E.g.*, *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 214; *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 50.

[293] *E.g.*, Joint Complainants Br. on Exceptions at 24-26 (citing Ex. JC-0086); Joint Shippers Br. on Exceptions at 78.

[294] *Colonial Pipeline Co.*, 95 FERC ¶ 61,377, at 62,405 (2001) ("Colonial's Gulf Coast . . . origin markets . . . are uncontested and since Colonial's application shows an apparent absence of market power in these markets, we will grant Colonial authority to implement market-based rates in these origin . . . markets . . . .").

[295] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 241 (explaining that determinations from a prior market-based rate proceeding involving the subject pipeline did not bind the Commission's analysis in a future proceeding), *aff'd*, Opinion No. 558-A, 164 FERC ¶ 61,025 at P 63.

determined on a case-by-case basis with the most current information available."[296] Further, no participant in the prior proceedings involving Colonial's 2000 application for market-based rates proposed a broader market definition, and the Commission found that Colonial lacked market power based on the narrower geographic markets Colonial proposed.[297]

103. We disagree with Complainants' argument that exclusion of Corpus Christi from the Gulf Coast origin market undermines the use of intermediate transportation to join other regions of the Gulf Coast.[298] Geographic origin markets are expanded based on alternatives available to shippers when they are faced with a SSNIP and there is no evidence Colonial shippers would seek transportation alternatives in Corpus Christi. Thus, it is not necessary to expand the market further to include Corpus Christi.

104. Finally, although Complainants challenge Trial Staff's use of Colonial's market-based rate as a competitive price proxy, the evidence in the record shows that all of Trial Staff's competitive alternatives were also demonstrated to be cost competitive using Dr. Arthur's proposed proxy rate based on an estimate of Colonial's long-run marginal costs.[299] Thus, even adopting the proxy rate in the record that is most favorable

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[296] Opinion No. 558, 161 FERC ¶ 61,180 at P 241; *see also MPLX Ozark Pipe*, Opinion No. 578, 180 FERC ¶ 61,053 at P 28 ("in each case, the analysis of geographic markets is conducted based on its specific facts").

[297] *See Colonial Pipeline Co.*, 95 FERC ¶ 61,377; *see also MPLX Ozark Pipe*, Opinion No. 578, 180 FERC ¶ 61,053 at P 22 (finding the pipeline lacked market power and "there is no need to consider expanding the market definition beyond the [narrower] market, because expansion would only further increase the level of competition"); *Seaway Crude Pipeline Co.*, 157 FERC ¶ 63,024, at P 174 (2016) (finding a pipeline lacked market power based on the geographic market definition so there was no need to conduct additional analysis of more remote areas).

[298] *E.g.*, Joint Complainants Br. on Exceptions at 34-36; Joint Shippers Br. on Exceptions at 77-78.

[299] Ex. S-00106 at 120. Although Mr. Ruckert performed a baseline netback analysis using Colonial's current rate as the competitive price proxy, Trial Staff acknowledged that in a complaint setting it cannot be assumed that Colonial's current rate is at or below the competitive level. Trial Staff Br. Opposing Exceptions at 47; Ex. S-00106 at 118-19; *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 108-109 (explaining why, in a complaint against a pipeline with existing market-based rate authority, "utilizing a current market-based rate may . . . lead to an improper expansion of markets"). Because the use of Colonial's rate did not indicate that Colonial possesses market power, Mr. Ruckert conducted a second analysis applying the lower competitive

to Complainants,[300] Trial Staff's netback analysis supports expansion of the narrow markets into a single Gulf Coast origin market.[301]

105. Nonetheless we reject Complainants' assertion that the only appropriate method for determining the competitive price proxy for use in a netback analysis is an estimate of Colonial's long-run marginal cost. We find that the Initial Decision appropriately concluded that, along with Commission precedent, the evidence in this instance does not support using Dr. Arthur's methodology.[302] While it is true that in perfect competition, theory predicts the competitive price would equal long-run marginal cost, real-world markets do not necessarily exhibit the stylized characteristics of such theoretical constructs.[303] Further, we find the methodology used by Complainants' witness Dr. Arthur to estimate Colonial's long-run marginal cost deficient, because it relied upon uncertain assumptions. In particular, the method proposed by Dr. Arthur is sensitive to various assumptions, including uncertain forecasts of demand, expenses, and capital

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price proxy proposed by Complainants. This second analysis addresses any concern that Colonial's current rates may already exceed competitive levels, leading to an improper expansion of the markets. Mr. Ruckert's use of Dr. Arthur's conservative proxy supports the 90-county Gulf Coast market even using the proxy most favorable to Complainants in the record. *See* Exs. S-00106 at 119-120 (citing S-00110; S-00111; S-00112; S-00116; S-00117; S-001118); S-00291 at 19-20.

[300] *See* Tr. 8280 (Ruckert) (explaining that Dr. Arthur's proxy based on long-run marginal cost "would be the rate in this proceeding that would be most likely to lead to a conclusion that Colonial possesses market power"); *see also Seaway I*, 146 FERC ¶ 61,115 at P 67 ("If the proxy is too low, alternatives that are in fact competitively priced will be improperly excluded.").

[301] For this reason, we need not address Colonial's argument that the appropriate competitive price proxy is Magellan's rate. Colonial Br. on Exceptions at 36, 38. Even applying Complainants' much lower proxy as a conservative choice, Trial Staff's analysis finds that Colonial lacks market power in the Gulf Coast origin market.

[302] Initial Decision, 177 FERC ¶ 63,017 at PP 244-245; *see also Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 114 (explaining that the appropriate price proxy in a detailed price test is based on the marginal supplier); *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 51.

[303] Ex. S-00291 at 63-65.

investments.[304] Moreover, these estimates are based upon small incremental projects that may not fully capture the cost of larger pipelines.[305]

3. Competitive Alternatives

106. After the geographic markets has been identified, the Commission's market power framework requires the identification of competitive alternatives within the relevant market. This analysis seeks to identify alternatives that can discipline the price the pipeline is able to charge[306] because shippers can switch to those competitive alternatives if the pipeline were to charge monopolistic prices.[307] The Commission has explained that a detailed price analysis such as a netback analysis may be necessary to identify good competitive alternatives.[308]

a. Initial Decision

107. Relying upon Trial Staff's detailed price analysis, the Initial Decision found that eight pipelines[309] were good competitive alternatives to Colonial in the Gulf Coast origin market.[310] The Initial Decision also found local consumption and domestic waterborne

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[304] *Id.* at 68.

[305] *Id.* at 61.

[306] *See Seaway I*, 146 FERC ¶ 61,115 at P 45.

[307] *SFPP, L.P.*, 84 FERC ¶ 61,338, at 62,496 (1998).

[308] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 112; *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at PP 47, 50; *Seaway I*, 146 FERC ¶ 61,115 at PP 65-67. In a proceeding involving a pipeline with existing market-based rate authority, the Commission does not presume that used alternatives in the market are good alternatives. *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 125.

[309] Explorer; TEPPCO; ExxonMobil Pipeline Company (ExxonMobil); J.C. Nolan Pipeline Co., LLC (JC Nolan); Magellan; Plantation; Sunoco Pipeline L.P. (Sunoco); and V-Tex Logistics LLC (V-Tex).

[310] Initial Decision, 177 FERC ¶ 63,017 at P 377.

shipping to be good competitive alternatives.[311] However, the Initial Decision departed from Trial Staff's analysis in excluding international waterborne shipping.[312]

b. Positions of the Participants

i. Complainants

108. Complainants assert that the Initial Decision incorrectly included several competitive alternatives. Complainants claim that TEPPCO and Plantation should not be considered as competitive alternatives because those pipelines are operating at full capacity, and, accordingly, Complainants claim that shippers cannot shift volumes away from Colonial to TEPPCO and Plantation.[313]

109. Complainants also argue that the Initial Decision incorrectly found as competitive alternatives: (1) local consumption; (2) domestic waterborne transportation; and (3) intrastate Sunoco and ExxonMobil pipelines. They argue that Dr. Arthur's analysis shows that these alternatives yield inferior netbacks and are not good alternatives on the basis of price.[314] They argue that domestic waterborne transportation cannot be both intra-market transportation used to expand the geographic market and a competitive alternative to clear the market,[315] and they add that evidence in the record shows that shippers do not rely on domestic waterborne transportation to ship product out of the Gulf Coast.[316]

110. Complainants support the Initial Decision's exclusion of international waterborne shipments as a competitive alternative.[317] They argue that the Initial Decision correctly

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[311] *Id.* PP 313-320, 360-363.

[312] *Id.* PP 363, 320.

[313] Joint Complainants Br. on Exceptions at 35-36, 46-47; Joint Shippers Br. on Exceptions at 41-44, 48-51.

[314] Joint Shippers Br. on Exceptions at 25-26, 34, 54-55; Joint Complainants Br. on Exceptions at 53-56, 61, 93.

[315] Joint Complainants Br. on Exceptions at 57-60; Joint Shippers Br. on Exceptions at 29-31.

[316] Joint Shippers Br. on Exceptions at 22-23.

[317] Joint Complainants Br. on Exceptions at 19-25, 45-54; Joint Shippers Br. on Exceptions at 16-47.

declined to presume that a used alternative is a good alternative and correctly found Trial Staff's netback analysis deficient. They further argue that the Initial Decision correctly found that there is no substantial evidence that any of the Complainants have used waterborne shipments.

ii. Colonial and Trial Staff

111. Colonial and Trial Staff generally support the Initial Decision's findings regarding competitive alternatives. Contrary to Complainants' arguments, Colonial and Trial Staff argue that Commission precedent and economic principles support the Initial Decision's finding that full pipelines, such as TEPPCO and Plantation, can be good competitive alternatives.[318] Colonial and Trial Staff similarly assert that the Initial Decision properly recognized as competitive alternatives to Colonial: (1) local consumption; (2) domestic waterborne transportation; and (3) intrastate Sunoco and ExxonMobil pipelines.[319]

112. However, Trial Staff and Colonial claim that the Initial Decision erred by excluding international waterborne shipping.[320] According to Trial Staff and Colonial, the Initial Decision's rationale that "not one of the complaining participants in this proceeding was demonstrated to have used international waterborne shipping" is contrary to Commission precedent.[321] Trial Staff states that the Commission has been clear that "competitive alternatives . . . include[] those alternatives in the geographic market being used to dispose of that which constitutes the product market," regardless of which particular entity is using an alternative (i.e., a shipper on the subject pipeline or a non-shipper).[322] Trial Staff and Colonial further argue that the Initial Decision incorrectly concluded that there was insufficient evidence that international waterborne shipping is cost competitive, citing to Trial Staff's netback analyses.[323]

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[318] Colonial Br. Opposing Exceptions at 31-37; Trial Staff Br. Opposing Exceptions at 50-58.

[319] Colonial Br. Opposing Exceptions at 60; Trial Staff Br. Opposing Exceptions at 62-63.

[320] Trial Staff Br. on Exceptions at 9-17; Colonial Br. on Exceptions at 44-61.

[321] Trial Staff Br. on Exceptions at 10; Colonial Br. on Exceptions at 49.

[322] Trial Staff Br. on Exceptions at 10.

[323] *Id.* at 17-20; Colonial Br. on Exceptions at 44, 52.

c. Commission Determination

113. We find that Trial Staff's detailed price analysis properly identified the competitive alternatives in the Gulf Coast origin market. As discussed above, Trial Staff's analysis is consistent with Commission precedent and is supported in the record.[324] We find Dr. Arthur's analysis for identifying competitive alternatives flawed as explained below. Accordingly, we affirm the Initial Decision's findings consistent with Trial Staff's netback analysis that competitive alternatives in the Gulf Coast origin market include local consumption, domestic barging, and eight oil pipelines: Explorer, TEPPCO, ExxonMobil, JC Nolan, Magellan, Plantation, Sunoco, and V-Tex.

114. However, as discussed below and consistent with Trial Staff's netback analysis, we reverse the Initial Decision's exclusion of international waterborne shipping as a competitive alternative in the Gulf Coast origin market. We also reject arguments on challenges raised by Complainants regarding the competitive alternatives adopted by the Initial Decision.[325]

i. Initial Decision's Exclusion of International Waterborne Shipments

115. We reverse the Initial Decision and find that international waterborne transportation is appropriately included in the Gulf Coast market power analysis as a competitive alternative to Colonial. Although recognizing the ability of a detailed price test to support inclusion of an unused competitive alternative under the Commission's policy,[326] the Initial Decision found the Trial Staff's netback analysis was based on only a single data point to estimate voyage-related waterborne transportation costs.[327] However, Trial Staff relied on hundreds of data points when developing their voyage-related cost

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[324] *See supra* P 93. As discussed above, based on the record, we are not persuaded by Complainants' arguments challenging Trial Staff's product price data and claiming that Trial Staff understated the netbacks for transportation on Colonial. *See supra* PP 98-100.

[325] We do not address Colonial's argument that the Initial Decision erred by excluding rail as a competitive alternative in the Gulf Coast origin market. As Colonial acknowledges, the exclusion of rail does not impact the determination that the Gulf Coast origin market is sufficiently competitive. Colonial Br. on Exceptions at 61.

[326] Initial Decision, 177 FERC ¶ 63,017 at PP 322, 338.

[327] *Id.* P 338; *see also id.* P 344 (referencing "the lonely single data point on voyage-related costs in the netback calculation"); *id.* at P 347.

inputs.[328] Mr. Ruckert also considered publicly available data from the Energy Information Administration to verify the waterborne transportation costs.[329] Mr. Ruckert conducted an additional sensitivity analysis that further mitigates concerns with the international waterborne transportation cost figures used in his netback analysis. Mr. Ruckert performed the sensitivity analysis using waterborne transportation costs that were 25% higher than those supported by the data and increased truck unloading fees by 50%.[330] The average waterborne transportation costs under the sensitivity analysis that incorporated the 25% increase were higher than the average waterborne transportation rates used in Dr. Arthur's analysis, which were based on data from Argus and Navigistics.[331] Even under those assumptions, Trial Staff's netback analysis shows that international waterborne shipments are competitively priced compared to Colonial at each proxy rate for at least 50% of the total production in the Gulf Coast origin market.[332] Therefore, we disagree with the Initial Decision that Trial Staff's netback analysis for international waterborne shipping is unsupported.

116. Further, the Initial Decision incorrectly found that the absence of "material evidence that shows actual shifting of transported refined petroleum barrels away from the subject pipeline to international waterborne barging" indicates that international shipping yields an unfavorable netback and thus should be excluded.[333] Instead, as explained above, a detailed netback analysis is a sufficient means to show an alternative is price competitive and should be included regardless of evidence of actual use by shippers on the subject pipeline.[334] Here, Trial Staff furnished such analysis. Moreover,

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[328] Mr. Ruckert relied on information provided by Colonial witness Ms. Carey, that was based on data provided in discovery as well as publicly available international charter rates. Ex. S-00127; Ex. CPC-00142.

[329] Ex. S-00106 at 103-106.

[330] *Id.* at 132-135.

[331] Ex. S-00136; Tr. 8266, 8295-8296 (Ruckert).

[332] Ex. S-00106 at 134.

[333] Initial Decision, 177 FERC ¶ 63,017 at PP 341-342.

[334] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 112; *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at PP 47; 50; *Seaway I*, 146 FERC ¶ 61,115 at PP 65-67.

we note that there is evidence in the record showing that shippers in the Gulf Coast origin market are currently using international waterborne transportation.[335]

ii. Complainants' Objections to the Competitive Alternatives Lack Merit

117. As discussed below, we are not persuaded by Complainants' challenges to the Initial Decision's inclusion of TEPPCO and Plantation pipelines, local consumption, domestic waterborne transportation, and Sunoco and ExxonMobil pipelines.

118. As an initial matter, we are unpersuaded by Complainants' arguments that certain alternatives (including local consumption, domestic waterborne transportation, Sunoco, and ExxonMobil) must be excluded because there is no evidence shippers actually use these alternatives and no evidence shippers are actually diverting product from Colonial to such alternatives.[336] Complainants rely on the same flawed reasoning discussed above that an alternative is not competitive unless there is evidence that shippers are actually shifting volumes off the subject pipeline to increase volumes on the alternative.[337] We reiterate that a detailed netback analysis is a sufficient means to show an alternative is

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[335] *See* Exs. CPC-00135 at 40-41, 65, 192, 210, 220; S-00106 at 147. The Initial Decision appears to disregard this based on an incorrect premise that requires evidence Complainants themselves are exporting products by international waterborne shipments. *See* Initial Decision, 177 FERC ¶ 63,017 at PP 324-337. The Commission has rejected attempts to define good alternatives by focusing only on whether the subject pipeline's current shippers use such alternatives, finding this "removes price entirely from the analysis." *Seaway*, Opinion No. 563, 163 FERC ¶ 61,127 at P 55; *see also id.* at PP 46-49. The Initial Decision's even narrower focus on only the alternatives used by the subject pipeline's shippers that are also complainants in this proceeding exhibits the same flaw and risks excluding good competitive alternatives that offer good netbacks in terms of price. As the Commission has found, "[t]his is contrary to the important [tenet] of market power analyses that good alternatives must be determined competitive in terms of price." *Id.* P 55 (citing *Seaway I*, 146 FERC ¶ 61,115 at P 53). However, we need not address further whether the record supports a finding that international waterborne transportation is a used alternative, as our determination here relies on Trial Staff's netback analysis and does not assume that used alternatives are good alternatives. *See Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 125.

[336] *E.g.*, Joint Complainants Br. on Exception at 30.

[337] *E.g.*, Joint Complainants Br. on Exceptions at 14.

price competitive[338] and should be included regardless of evidence of actual use by shippers on the subject pipeline.[339]

iii. TEPPCO and Plantation

119. We reject Complainants' arguments that pipelines such as TEPPCO and Plantation that are at or near full capacity are not good competitive alternatives. The Commission has found that alternatives operating at full capacity should be included in the market analysis.[340] The primary market power statistic, HHI, expresses the concentration of sellers within the relevant market.[341] Since HHI is a market-level statistic, it would be calculated the same for any subject pipeline for which a given market is the relevant market for evaluation of market power. Alternatives that are operating at full capacity are serving the market, and thus part of market discipline.[342] As the Commission explained in Opinion No. 573, "[b]y this reasoning, the market share of an alternative … should not be excluded if it is at full capacity."[343]

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[338] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 112; *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at PP 47; 50; *Seaway I*, 146 FERC ¶ 61,115 at PP 65-67.

[339] Accordingly, we deny Joint Shippers' September 21, 2022 motion to lodge Colonial's answer filed on September 7, 2022 in Docket No. OR22-5-000. According to Joint Shippers, Colonial admits in the answer that its system has been routinely allocated contrary to Colonial's arguments in this proceeding. *See*, *e.g.*, Colonial Br. Opposing Exceptions at 48. Joint Shippers argue that this shows that local consumption and domestic waterborne transportation are not good alternatives, because if such alternatives offered favorable netbacks, shippers would shift volumes to these other alternatives and Colonial would not routinely be full. Joint Shippers Motion to Lodge, Docket No. OR18-7-002, et al., at 4 (filed Sept. 21, 2022) (citing Joint Shippers Br. on Exceptions at 28, 55). As discussed above, we are unpersuaded by arguments that an absence of shippers shifting volumes away from Colonial demonstrates that other alternatives are not good alternatives, and we instead find that Trial Staff's detailed netback analysis is sufficient to show these alternatives are price competitive.

[340] *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 52; *see also Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 211, 214.

[341] *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 52.

[342] Tr. 8486-8487 (Norman).

[343] *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at P 52.

iv. **Local Consumption**

120. We affirm the Initial Decision's holding that local consumption is a good competitive alternative. Trial Staff's netback analysis indicates that local consumption provides a competitive alternative to Colonial.[344]

121. Moreover, Complainants' own witness's data suggest that local consumption is price competitive. Dr. Arthur's netback differentials reveal that local consumption of three types of gasoline moved on Colonial Line 1 provided a netback higher than or equal to shipping on Colonial in a significant percentage of the five-day nomination cycles in 2019: 58% for Conventional 87 gasoline, 75% for Conventional Blendstock for Oxygenate Blending (CBOB), and 40% for Reformulated Gasoline Blendstock for Oxygenate Blending (RBOB). Likewise, for distillates moved on Colonial Line 2, local consumption provided a netback higher than or equal to shipping on Colonial: 54% for ultra-low sulfur diesel (ULSD) and 61% for jet fuel.[345]

122. We are unpersuaded by Complainants' counterargument relying upon Figure 23 and Figure 24 from Dr. Arthur's testimony that local consumption is not competitive with transportation on Colonial.[346] These tables show a rolling 12-month average netback on Colonial Line 1 for moving the highest-valued of three gasoline products (Conventional 87, CBOB, and RBOB) and on Colonial Line 2 for moving the highest-valued of two distillate products (ULSD and jet fuel).[347] Under Dr. Arthur's methodology, a positive netback occurred when the value of the product at the destination

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[344] *See*, *e.g.*, Ex. S-00111 at 3 (showing that local consumption provides a competitive alternative at 16 out of 25 refineries in his analysis); S-00136 (making a similar showing).

[345] *See* Ex. JC-0208 at 8-9; *see also* Tr. 6834-6835 (Arthur) (Dr. Arthur conceding that the rolling annual average netback for CBOB is negative for every cycle in 2018 and 2019 even when using his own estimate of Colonial's long-run marginal costs); *Id.* at 6836 (Dr. Arthur conceding that the rolling 12-month average for conventional 87 is negative for 90% of the cycles in 20); *Id.* at 6836-37 (Dr. Arthur conceding that the rolling 12-month average for RBOB is negative for every cycle in 2018 and for some cycles in 2019).

[346] Joint Shippers Br. on Ex. at 31-40; Joint Complainants Br. on Ex. at 55-56.

[347] Thus, for Line 1, if in nomination cycle 1 of 2019, CBOB gave the highest netback, Dr. Arthur would use that netback for cycle 1 in his rolling average and discard the netbacks for RBOB and Conventional 87. If in nomination cycle 2, Conventional 87 gave the highest netback, Dr. Arthur would use that netback for cycle 2 in this rolling average and discard the netbacks for CBOB and RBOB.

exceeded the value of the product at the origin plus Dr. Arthur's estimate of transportation costs.

123. Contrary to Complainants' assertions, this analysis fails to support a finding that local consumption is not competitive with Colonial. By considering only the highest netback on Colonial in any given cycle, Dr. Arthur's analysis is skewed toward showing that shipping on Colonial provides a superior netback to local consumption.[348] Furthermore, the use of rolling 12-month averages further obscures those months in which local consumption was more profitable than moving on Colonial.[349] Dr. Arthur's methodology also includes aggressive assumptions as Dr. Arthur concedes that shippers will not always ship the most valued product in every cycle.[350] Finally, the fact that there is a positive netback on Colonial for moving either ULSD or jet fuel (but not necessarily both) in most months does not establish that local consumption is not competing with Colonial.[351]

[348] A simplified hypothetical illustrates how Dr. Arthur's methodology systematically favors Colonial. Assume that for any given cycle on Colonial Line 2 there is (a) a 50% chance as to whether the netback for jet fuel is positive or negative and (b) a 50% chance as to whether the netback for ULSD is positive or negative. Applying basic probability principles to Dr. Arthur's methodology, Colonial would have a positive netback relative to local consumption 75% of the cycles (i.e., local consumption is only favored when the both ULSD and jet fuel have negative netbacks) and a 12-month average would be positive. Thus, even in a hypothetical situation in which there is a 50-50 chance that a positive netback ensues from moving product on Colonial, Dr. Arthur's methodology is biased toward finding that local consumption does not compete with Colonial.

[349] We recognize that every witness in this proceeding used 12-month averages. It is the combination of first selecting the most highly valued product in each cycle and then applying averaging that systematically exaggerates Colonial's netbacks in Dr. Arthur's analysis.

[350] Tr. 6826 (Arthur). Dr. Arthur further conceded that shippers may not be able to identify the best netback at the destination due to changing prices and transit time. Tr. 6828.

[351] Even if the netback for jet fuel from Houston to Linden, New Jersey on Colonial is positive, the netback for ULSD may be negative because the local area has high demand for ULSD. Although this makes jet fuel the attractive option for Colonial, local consumption is still a competitive alternative with Colonial for a product (ULSD) that Colonial moves.

v. Domestic Waterborne

124. We affirm the Initial Decision's holding that domestic waterborne transportation is a good competitive alternative.[352]

125. We are unpersuaded by Complainants' arguments for excluding domestic waterborne shipments.[353] Complainants allege that the netbacks in the Gulf Coast for domestic waterborne shipping cannot be better than the Gulf Coast spot prices because waterborne is an easily expandible alternative.[354] However, Mr. Ruckert's netback analysis demonstrates that domestic waterborne shipments often provide netbacks that are superior to those achieved by selling locally,[355] including when applying his sensitivity analysis that used domestic waterborne shipping costs above those advanced by any party or witness in this proceeding (including Dr. Arthur).[356] Moreover, given that local consumption in the Gulf Coast consistently provided superior netbacks to the post-SSNIP

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[352] Contrary to Complainants' assertions, the record demonstrates that entities are currently using domestic waterborne transportation for refined products. Exs. CPC-00135 at 41, 192, 215; S-00106 at 147. *See also* Initial Decision, 177 FERC ¶ 63,017 at P 319 (citing Ex. CPC-00142 at 104). However, we acknowledge that in a market free from regulatory price constraints, used alternatives cannot be presumed to be good in terms of price. *See Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 125. Thus, our determination relies upon record evidence that domestic waterborne transportation is a good alternative to Colonial in terms of price based upon Mr. Ruckert's netback calculations.

[353] *See, e.g.*, Joint Complainants Br. on Exceptions at 54-55; Joint Shippers Br. on Exceptions at 20-23.

[354] Complainants emphasize that the parties stipulated that dock constraints do not present any physical, economic, or other barriers to the ability to transport refined petroleum products via waterborne transportation. Joint Complainants Br. on Exceptions at 48 (citing Ex. JC-0321 at 3, 10).

[355] *See*, *e.g.*, Ex. S-00111 at 4-78 (of the total of 251 of the waterborne alternatives considered by Trial Staff, 128 of them offered superior netbacks to local consumption). Moreover, for each of the 25 refineries considered by Trial Staff, at least one waterborne alternative offered a higher return than local consumption. *Id.*

[356] *See*, *e.g.*, Ex. S-00136 at 4-78 (of the total of 251 of the waterborne alternatives considered by Trial Staff, 91 of them offered superior netbacks to local consumption). Moreover, notwithstanding the conservative assumptions in the sensitivity analysis, for each of the 25 refineries considered by Trial Staff, at least one waterborne alternative offered a higher return than local consumption. *Id.*

competitive price proxies, a netback for domestic waterborne shipments that equals the Gulf Coast spot price would still qualify as a good alternative.[357]

126. Similarly lacking merit are Complainants' arguments, relying on evidence in the record that transportation rates for vessels transporting between domestic ports are higher than Colonial's rates,[358] that domestic waterborne transportation is not a good alternative. Specifically, Complainants also cite to Colonial's internal documents and certain shipper statements to allege that domestic tanker movements are not competitive.[359] Likewise, Complainants allege that the Initial Decision should have relied upon "objective Argus data."[360] However, Mr. Ruckert used domestic barge rates that were actually paid by Complainants,[361] and the domestic barge rates used by Mr. Ruckert were also consistent with prices in Energy Information Administration reports.[362] Moreover, as discussed above, when Mr. Ruckert applied a sensitivity analysis that increased average domestic waterborne rates above any waterborne rates proposed in this proceeding (including Dr. Arthur's rates),[363] those rates remained competitive to a conservative post-SSNIP competitive price proxy based upon Dr. Arthur's long-run marginal cost.[364]

127. We further disagree with Complainants' arguments that domestic barging cannot be considered both an intermediate, in-market mode of transportation for purposes of defining the relevant origin market and a competitive alternative to Colonial available to

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[357] *See*, *e.g.*, Ex. S-00111 at 10-12 (showing that the local sales netback on line 121 is better than 11 out of 13 netbacks provided by Colonial as shown on lines 1 through 13); S-00136 (after applying Trial Staff's sensitivity analysis, showing that the local sales netback on line 121 is better than 10 out of 13 netbacks provided by Colonial as shown on lines 1 through 13).

[358] Joint Complainants Br. on Exceptions at 54-55; Joint Shippers Br. on Exceptions at 20-23.

[359] Joint Shippers Br. on Exceptions at 21-22.

[360] Joint Shippers Br. on Exceptions at 19.

[361] Trial Staff Br. Opposing Exceptions at 64.

[362] Ex. S-00106 at 105-06; Ex. S-00137 at 8.

[363] *See* Trial Staff Br. Opposing Exceptions at 66 (citing Ex. JC-0200 at 151).

[364] Exs. S-00106 at 133-134; S-00137 at 8.

clear production from the defined origin market.[365] Domestic barging within the defined market serves to internally connect that market and define it as such. Domestic barging from within the market to distribution markets beyond its borders serves as a competitive alternative to Colonial and other modes of clearing production from the origin market.[366]

128. Finally, we dismiss the argument Joint Shippers raise in their Brief on Exceptions that Trial Staff's market analysis, upon which the Initial Decision relies, double-counted domestic waterborne shipments and local consumption. The argument is untimely as Joint Shippers failed to raise this issue at hearing or in post-hearing briefs.[367] In addition, the record does not substantiate Joint Shippers' claim that most of the capacity reflected as domestic waterborne transportation in Trial Staff's HHI calculation duplicates capacity reflected there as local consumption.[368] As an initial matter, Dr. Norman and Ms. Carey, who sponsor the data upon which Joint Shippers rely for their argument, each describe developing the data to reflect only volumes that clear production from the Gulf Coast origin market to distribution markets beyond.[369] Moreover, Joint Shippers claim 1,114 thousand barrels per day (MBPD) of waterborne shipments[370] are used for local

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[365] Joint Complainants Br. on Exceptions at 57-60; Joint Shippers Br. on Exceptions at 29-31.

[366] Trial Br. Opposing Exceptions at 71.

[367] *Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 556, 161 FERC ¶ 61,059, at P 53 (2017); *Bluegrass Generation Co*., *L.L.C*., 118 FERC ¶ 61,214, at P 95 (2007), *reh'g denied*, 121 FERC ¶ 61,018 (2007); *Pub. Serv. Co. of N.M.*, Opinion No. 133, 17 FERC ¶ 61,123, at 61,244 (1981) (finding an argument was improperly raised for the first time on exceptions because "[p]arties are expected to present all argument and authority on which they rely during the hearing process" so that "the Commission may receive the benefits of the reasoned consideration of the presiding judge on all pertinent issues"). By delaying until the briefs on exceptions to raise this argument, Joint Shippers also impaired the ability of Colonial and Trial Staff to respond.

[368] Joint Shippers Br. on Exception at 29-30 & app. B (citing Exs. S-00291 at 83 and CPC-00139 at 17).

[369] Ex. S-00291 at 94; Ex. CPC-00135 at 192-93.

[370] Joint Shippers Br. on Exceptions at 40 (claiming that 545 MPB of domestic inland shipments and 569 of domestic Jones Act shipments are simply deliveries within the 90-county Gulf Coast market).

consumption in the geographic market, whereas Dr. Norman only identified a total local consumption of 693 MBPD.[371] Joint Shippers' argument is unsupported in the record.[372]

vi. <u>Sunoco and ExxonMobil</u>

129. We reject Complainants' arguments that Sunoco and ExxonMobil are not good competitive alternatives. As with domestic waterborne shipments, Complainants assert that netbacks on these pipelines should be approximately equal to the local Houston sale price.[373] Dr. Arthur provides no empirical data to support this position. In contrast, Trial Staff performed a detailed price analysis based upon netbacks and concluded that shipping on ExxonMobil or Sunoco can yield a higher netback than selling locally into the Gulf Coast.[374] Moreover, Trial Staff's netback analysis demonstrates that local consumption frequently provides a superior netback to the post-SSNIP competitive price proxies.[375] Thus, even if the netbacks for these pipelines are approximately equal to the Gulf Coast commodity price, both pipelines would still qualify as good alternatives.[376]

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[371] Ex. S-00291 at 83.

[372] Even if the Commission were to credit Joint Shippers' argument, the effect on HHI would not support a finding that Colonial has market power: eliminating domestic waterborne transportation entirely from Trial Staff's analysis would result in an HHI of approximately 1,353. This estimate is especially conservative given that even Joint Shippers concede that significant sums of domestic waterborne transportation (426 MBPD) leave the geographic market.

[373] Joint Complainants Br. on Exceptions at 61.

[374] *Compare* Ex. S-00108 at 43 (showing a netback of 170.67 for ExxonMobil on line 14 and a netback of 171.94 for Sunoco on line 17) *with id*. at 45 (showing a local sales netback of 170.39 near the Phillips 66 Westlake, LA refinery on line 121).

[375] *See*, *e.g.*, Ex. S-00111 at 43, 45 (showing that the local sales netback on line 121 is better than the netbacks provided by Colonial as shown on lines 2, 4, and 5 even when using Dr. Arthur's competitive price proxy).

[376] Moreover, we note the Sunoco and ExxonMobil make a minimal contribution to the total HHI: 1 for ExxonMobil and 0 for Sunoco due to rounding. Ex. S-00291 at 83.

4. Market Analysis

a. Initial Decision

130. The Initial Decision found that Colonial lacks market power in the Gulf Coast origin market based on an HHI of 1,617 with a Colonial market share of 36.1%.[377] The Initial Decision also concluded that it was unnecessary to consider the secondary market factors presented by Complainants for the Gulf Coast origin market given its HHI of 1,617.[378]

b. Positions of the Participants

131. Complainants claim that the record evidence supports a finding that Colonial has significant market power in relevant markets based upon the following HHI figures in the smaller origin markets they propose, reflecting all of their positions on the issues: Houston to Hebert, 4,447; Baton Rouge to Pascagoula, 10,000; and Lake Charles to Krotz Springs, 10,000.[379] Joint Shippers claim that the Initial Decision erred by failing to consider secondary market factors that indicate Colonial's dominant market position in the Gulf Coast origin market given Colonial's market share of between 46% and 55%.[380]

132. Trial Staff and Colonial support the Initial Decision's finding that Colonial continues to lack significant market power in the Gulf Coast origin market but claim that it erred by excluding international waterborne shipments from the competitive alternatives. Trial Staff and Colonial state that including international waterborne shipments would adjust the Gulf Coast origin market statistics as follows: HHI, 967; market share, 27.9%; and excess capacity ratio, 1.4.[381] Regarding consideration of secondary factors, Trial Staff states Joint Shippers' arguments are contrary to the record evidence and inconsistent with Commission precedent.[382]

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[377] Initial Decision, 177 FERC ¶ 63,017 at PP 409, 415.

[378] *Id.* PP 409, 454-455.

[379] Joint Complainants Br. on Exceptions at 63.

[380] Joint Shippers Br. on Exceptions at 58-71.

[381] Colonial Br. on Exceptions at 61-63; Trial Staff Br. Opposing Exceptions at 77 (citing Ex. S-00291 at 83).

[382] Trial Staff Br. Opposing Exceptions at 77.

c. Commission Determination

133. We affirm the Initial Decision's finding that Colonial lacks significant market power in the Gulf Coast origin market; however, we do so based upon market statistics sponsored by Trial Staff: an HHI of 967 and Colonial market share of 27.9% as calculated in Appendix C.[383] We further affirm the Initial Decision's finding that no secondary considerations are necessary for the Gulf Coast origin market because of its low HHI.

B. Alabama Origin Market

134. The issues raised in the briefs on exceptions specific to the Alabama origin market are limited. Our holdings regarding burden of proof for the Gulf Coast market also apply to the Alabama market.[384] Therefore, we will not revisit that issue here. Moreover, the participants' differences regarding the Alabama geographic market do not alter the Commission's HHI and market share statistics using the Commission's effective capacity method.[385] All participants also agree that the competitive alternatives to Colonial in the Alabama market are local consumption and very limited waterborne transportation.[386] Furthermore, no participant challenges the Initial Decision's findings that the HHI for the Alabama market is 2,489[387] and Colonial has a 49.9% market share as shown in Appendix D.[388] No participant disputes that the Hunt Refinery is the sole source of

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[383] Initial Decision, 177 FERC ¶ 63,017 at P 409.

[384] *See supra* PP 77-78.

[385] The Initial Decision adopted Trial Staff's proposed 16-county geographic market as shown in Appendix B and rejected Colonial's proposal for a larger 40-county geographic market. Initial Decision, 177 FERC ¶ 63,017 at P 209. Although Colonial challenges this determination on exceptions, adopting Colonial's proposed geographic market would not alter the Commission's HHI and market share market statistics. Because adopting Colonial's geographic market would not change our conclusions, we need not address this issue here.

[386] Initial Decision, 177 FERC ¶ 63,017 at PP 349, 397.

[387] Ex. S-00291 at 84. The Initial Decision sometimes reports this figure at 2,498, reflecting an apparent typographical error. *See* Initial Decision, 177 FERC ¶ 63,017 at PP 410, 438.

[388] Initial Decision, 177 FERC ¶ 63,017 at P 397.

petroleum product production in the Alabama market and thus the sole source of product placed on Colonial in the Alabama market.

135. However, as discussed below, Colonial challenges in its brief on exceptions the Initial Decision's holding that the Commission should revoke Colonial's market-based rate authority based upon the above market statistics and an evaluation of competitive factors.[389] In contrast, Trial Staff urges the Commission to affirm the Initial Decision.[390] We reverse the Initial Decision for the reasons discussed below.

1. Initial Decision

136. The Initial Decision held that the Commission should revoke Colonial's market-based rate authority in the Alabama market.[391] The Initial Decision stated that an HHI of 2,500 is usually the threshold indicating competitiveness.[392] The Initial Decision explained that the HHI of 2,489 and market share of 49.9% supported a close call analysis.[393] In performing the close call analysis, the Initial Decision dismissed the significance of the pro-competitive factors advocated by Colonial.[394] Accordingly, given the market statistics and the absence of pro-competitive factors, the Initial Decision concluded that the Commission should revoke Colonial's market-based rate authority in the Alabama market.[395]

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[389] *Id.* PP 8, 410-413, 473.

[390] Complainants' briefs opposing exceptions did not address Colonial's market-based rate authority in the Alabama market.

[391] Initial Decision, 177 FERC ¶ 63,017 at P 408.

[392] *Id.* P 398.

[393] *Id.* P 416. The Initial Decision found that substantial evidence supporting the market power analysis indicated that this is a "close call." Under a close call analysis, the Commission considers evidence of secondary competitive factors in making a determination. *Id*; *see also id.* P 439 ("Should the [HHI] calculation and market share measures result in a 'close call,' meaning that the [HHI] hovers around 2,500, Commission precedent requires a consideration of secondary market measures that may meaningfully inform the market-power analysis one way or the other.").

[394] *Id.* PP 410-414, 434-438.

[395] *Id.* P 473.

2. Position of the Participants

137. Colonial challenges the Initial Decision's determination that the Commission should revoke Colonial's market-based rate authority in the Alabama market. Colonial argues that because the Alabama market HHI of 2,489 is below 2,500, the Initial Decision should have simply dismissed the challenge to its authority without applying a close call analysis.[396] Furthermore, Colonial argues the Initial Decision incorrectly applied the close call analysis by wrongly dismissing three pro-competitive factors: (1) a potential new connection to Plantation; (2) the potential for expandable waterborne transportation to serve a significant portion of the refinery's output; and (3) local consumption that is approximately "two to four times" larger than the single refinery's output.[397]

138. In contrast, Trial Staff argues that the Commission should affirm the Initial Decision's finding that Colonial's market-based rate authority should be revoked. Trial Staff asserts that the 2,489 HHI and 49.9% market share are based upon "stylized presumptions"[398] that exaggerate the ability of local consumption to absorb production in the Alabama market. Thus, Trial Staff states, these market statistics exaggerate the competitiveness of the Alabama market.[399] Trial Staff also contends that Colonial's pro-competitive factors lack merit. Trial Staff asserts that for a potential connection to a new pipeline to be treated as a pro-competitive factor, there must be some evidence that a connection has actually been considered.[400] Trial Staff contends that waterborne expansion is logistically restricted and thus should not be considered a pro-competitive factor.[401] Finally, Trial Staff argues that Colonial's argument that local consumption exceeds the Hunt Refinery production is also flawed.[402]

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[396] Colonial Br. on Exceptions at 17-18.

[397] *Id.* at 24-25.

[398] Trial Staff Br. Opposing Exceptions at 87.

[399] *Id.*

[400] *Id.* at 89.

[401] *Id.*

[402] *Id.*

3. <u>Discussion</u>

139. As explained below, we reverse the Initial Decision's determination that Colonial's market-based rate authority should be revoked in the Alabama origin market because the evidence does not demonstrate that Colonial has the ability to exercise market power in that market. In doing so, however, we reject several of the arguments raised by Colonial on exceptions.

140. As an initial matter, we reject Colonial's argument that the Commission should dismiss the challenge to its market based-rate authority simply because the record supports an HHI of 2,489, which is below 2,500.[403] As discussed above, no participant challenges the Initial Decision's findings that the HHI for the Alabama market is 2,489 and that Colonial has a 49.9% market share.[404] Contrary to Colonial's assertions, these figures present a close call,[405] which requires careful scrutiny of any additional pro- or anti-competitive factors.[406] This close call analysis is particularly important here where a

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[403] Colonial Br. on Exceptions at 17.

[404] Initial Decision, 177 FERC ¶ 63,017 at P 397. Both Colonial and Trial Staff's witnesses calculated an HHI of 2,489 and Colonial's market share of approximately 50% using the Commission's preferred effective capacity method. Appendix D.

[405] The Commission has stated that 2,500 is usually the threshold indicating competitiveness. *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 298; *Marketlink, LLC*, 169 FERC ¶ 61,194, at P 25 (2019). *See also Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at 62,390 (1999) (stating that a pipeline with an HHI of 2,500 and a market share of 46% was cause for concern). Commission precedent supports the granting of an application for market-based rate authority in each case where the HHI is 1,800 or less and in most (but not all) cases where the HHI is less than 2,500. *White Cliffs*, Opinion No. 573, 173 FERC ¶ 61,155 at n.129 (citations omitted); *MPLX*, Opinion No. 578, 180 FERC ¶ 61,053 at n.134 (citations omitted). However, as explained above, the Commission's market power determination is a fact-specific, case-by-case inquiry. *See, e.g.*, Guttman Rehearing, Opinion No. 558-A, 164 FERC ¶ 61,025 at PP 13, 22, 63 (citing *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 241). The Commission has not had the opportunity to consider every combination of HHIs and market shares in the past and how those would interact with every conceivable fact-specific circumstance. Accordingly, we reject the argument that the Commission would be precluded from denying market-based rate authority where the HHI was below 2,500 and the market share is below 70%. Colonial Br. on Exceptions at 17-19.

[406] *Seaway*, Opinion No. 563, 163 FERC ¶ 61,127 at P 93 (potential competition is only considered in a close case); *MPLX Ozark Pipe Line LLC*, Opinion No. 578-A, 181 FERC ¶ 61,242, at P 18 (2022) (MPLX Rehearing) ("Secondary anticompetitive

single waterborne shipment consisting of 0.2% of market capacity provides the differential between the HHI of 2,489 and the 2,500 threshold indicating competitiveness.[407]

141. Turning to the competitive factors, we find that the pro-competitive factors advanced by Colonial should either be rejected or given minimal weight. First, we are not persuaded to consider as a pro-competitive factor a potential connection between the Hunt Refinery and Plantation. The Commission has considered potential new entrants as pro-competitive factors where there was evidence the potential alternative was planned or being actively pursued by market participants.[408] However, there is no evidence in this record that a potential connection between Plantation and the Hunt Refinery has ever been contemplated.[409] Furthermore, although Colonial witness Ms. Carey provided a price analysis purporting to show that a potential connection with Plantation would constrain an exercise of market power by Colonial,[410] her analysis is flawed and appears to be skewed toward a finding that the Plantation connection is economically

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factors are typically only relevant where the HHI calculation indicates a close call as to whether market power exists.”). Contrary to Colonial’s assertions, the Initial Decision did not improperly shift the burden to support pro- or anti-competitive factors related to the Alabama market. Colonial Br. on Exceptions at 24. Rather, the Commission has required parties that advocate pro- or anti-competitive factors to provide justification for their claims. *See Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 295-299; Guttman Rehearing, Opinion No. 558-A, 164 FERC ¶ 61,025 at PP 52-54; *MPLX*, Opinion No. 578, 180 FERC ¶ 61,053 at P 54; MPLX Rehearing, Opinion No. 578-A, 181 FERC ¶ 61,242 at P 17.

[407] *See* Appendix D; *see also* Ex. S-00291 at 82 (citing Ex. CPC-00139 at 4, 21).

[408] *See Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 284, 289, 293, 296 (the refinery was taking active steps to implement connections with other alternatives and expand dock capacity); *Seaway*, Opinion No. 563, 163 FERC ¶ 61,127 at PP 90, 93 (new pipeline was expected to begin service within the coming months).

[409] Ex. S-00215 at 5, 12-13 (discussing lack of evidence in this proceeding showing that a connection with Plantation is being pursued or has been considered in the past); Tr. 7824-7825 (Carey) (acknowledging the lack of information from the refinery as to whether they would be interested in undertaking a connection or not); Tr. 7852 (Carey) (acknowledging no evidence that a connection is being actively considered by either the refinery or Plantation).

[410] Exs. CPC-00241 at 11-12; CPC-00245; CPC-00246; CPC-00247.

competitive.[411] Ms. Carey used one cost estimate for the Plantation connection,[412] but Colonial witness Mr. Gardner identified a "likely range" for costs of the hypothetical Plantation connection that extended significantly higher.[413] Moreover, project costs above those used by Ms. Carey (but still within the "likely range" proposed by Mr. Gardner) would lead to a negative net present value in Ms. Carey's analysis.[414] Additionally, Ms. Carey used Colonial's rate as the competitive price proxy, but Colonial's rate could already reflect an exercise of market power resulting in "the inclusion of improper competitive alternatives" in the analysis.[415] Further, Ms. Carey assumed that an excessive percentage of Colonial's distillate volumes for the Alabama Market would shift to the new connection with Plantation,[416] given that some

[411] A detailed price test is not required in all instances to consider potential competition as a pro-competitive factor. *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 296; *Seaway*, Opinion No. 563, 163 FERC ¶ 61,127 at P 95; *MPLX*, Opinion No. 578, 180 FERC ¶ 61,053 at P 42. However here, where there is no evidence that market participants are planning or actively contemplating a potential alternative that would require significant capital expenditure to enter the market, a detailed price analysis is necessary to support considering such alternative as a pro-competitive factor. Further, the Commission will carefully evaluate the price analysis along with all evidence in the record bearing on the likelihood and economic attractiveness of the potential new entry. *See W. Tex. Gulf Pipe Line Co.*, Opinion No. 584, 184 FERC ¶ 61,182, at P 39 (2023) ("Given the additional complexity involved in evaluating potential new entrants that require significant capital expenditure to offer service in the market and are not currently planned, the Commission must carefully scrutinize the detailed price analyses and all available evidence in the record bearing on the likelihood and economic attractiveness of the potential new entries."); *Enterprise Prods. Partners L.P.*, 152 FERC ¶ 61,203, at P 42 (2015) ("While entry and expansion are considered in the Commission's market-power analysis, it cannot be assumed that such entry will occur, or to what extent.").

[412] Ex. CPC-0245 at 1, 3.

[413] Ex. CPC-00238 at 4; *see also* Ex. CPC-00241 at 11-12. Ms. Carey based her analysis on testimony provided by Mr. Gardner. Ex. CPC-0245 at 1. Mr. Gardner explained that the Plantation connection is "estimated to cost approximately $21.5 million to construct, but given the inherent uncertainty associated with early conceptual design, the likely range is between $15 and $30 million." Ex. CPC-00238 at 4.

[414] Ex. CPC-00245 at 3.

[415] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 109; *supra* P 104 n.298.

[416] Ex. CPC-00245 at 3.

transportation paths on Colonial provide superior netbacks post-SSNIP to *any* Plantation path.[417] Also, Ms. Carey's analysis relies upon an assumption that volumes originating at the new origin on Plantation would increase on a compounding basis by a certain percentage each year without providing support for this projection.[418] Finally, Colonial offered no evidence showing that Plantation has sufficient excess capacity to support the new service, and the need to expand or displace existing volumes on Plantation could undercut the economic benefits of making the capital investment necessary to build the connection.[419] Given these deficiencies,[420] we need not address every aspect of Ms. Carey's analysis, but we are not persuaded to consider the potential connection with Plantation as a pro-competitive factor.[421]

142. Second, we attribute little significance to the potential expansion of waterborne consumption on the Black Warrior River.[422] The record demonstrates that a shallow depth of nine feet and a system of locks sharply constrains any potential expansion of waterborne transportation on the Black Warrior River.[423] The record also indicates that

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[417] Ex., CPC-00246 at 3-4.

[418] *See* Ex. CPC-00245 at 3.

[419] *See West Texas*, Opinion No. 584, 184 FERC ¶ 61,182 at PP 39, 44 n.117, 52; *see also* Ex. S-00215 at 11-12 (noting capacity constraints on Plantation's mainline encompassing the potential Alabama origin point).

[420] We also note that without fully explaining how this affected the analysis, Ms. Carey's analysis (including the cost estimates) was limited to a connection only moving distillates. *See* Ex. CPC-00245 at 1.

[421] The Initial Decision stated that the "record nominally supports accepting" the connection with Plantation as a pro-competitive factor and then the Initial Decision proceeded to completely dismiss the significance of the hypothetical connection. Initial Decision, 177 FERC ¶ 63,017 at PP 413, 437. As stated above, given the lack of evidence that such a connection has actually been contemplated and the flaws in Ms. Carey's study, we find that the connection with Plantation should be completely rejected as a pro-competitive factor.

[422] Waterborne transportation represents only a small fraction of the market (0.2%) included in the market statistics. Initial Decision, 177 FERC ¶ 63,017 at P 436; Ex. S-00291 at 84. This figure is based on a single movement from a single dock in 2018. *See* Appendix D; Ex. S-00291 at 82 (citing Ex. CPC-00139 at 4, 21).

[423] Ex. S-00291 at 82; Ex. S-00295; Initial Decision, 177 FERC ¶ 63,017 at P 436; Tr. 7804-7807 (Carey).

the refinery's dock is configured for the import of crude oil and export of certain products such as asphalt that cannot be moved by pipeline, rather than only refined products.[424] Further, we find no support for Colonial's claim that "[a]ny problem with river locks not accommodating a two-barge tow can be avoided simply by disconnecting the barges and moving them individually through the locks."[425]

143. Third, we are not convinced by Colonial's argument that local consumption exceeding Hunt Refinery output by "two to four times"[426] should serve as a pro-competitive factor. Colonial's argument relies upon the Commission precedent related to the excess capacity ratio market statistic,[427] but Colonial advances a different calculation that inflates the relative significance of local consumption.[428] When the

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[424] Ex. S-00428 at 10; Tr. 7778-7780, 7785-7786, 7794-7798 (Carey).

[425] Colonial Br. on Exceptions at 24. Colonial witness Ms. Carey conceded a two-barge tug would not fit on the river, but then assumed this problem could be addressed by expanding a downstream dock and running two barges separately. Tr. 7806 (Carey). However, she acknowledged she did not confirm whether the refinery's dock has the capability to berth two barges. Tr. 7771-7773, 7774 (Carey).

[426] Colonial Br. on Exceptions at 22-23.

[427] *Id.* at 23 (citing *Kaneb Pipe Line Operating P'ship, L.P.*, 83 FERC ¶ 61,183, at 61,761 (1998)).

[428] For an origin market, excess capacity ratio is calculated by dividing capacity available (used and unused) to clear product from a market (pipeline, waterborne or local consumption) by the annual production in the market. Colonial's calculation did not follow the Commission's effective capacity method that caps the capacity of each alternative at the production in the market. *See infra* note 433. *See also, e.g.*, *Kaneb Pipe Line Operating P'ship, L.P.*, 83 FERC ¶ 61,183, at app. tbl. 2; *Magellan Pipeline Co. L.P.*, 132 FERC ¶ 61,016, at P 31 (2010); *Sunoco Pipeline L.P.*, 114 FERC ¶ 61,036, at PP 80, 84, 86 (2006); *MPLX*, Opinion No. 578, 180 FERC ¶ 61,053 at P 44; *West Shore Pipeline Co.*, 100 FERC ¶ 61,001 at PP 9-10; *TE Prods. Pipeline Co., L.P.*, 92 FERC ¶ 61,121, at 61,472-74 (2000). Moreover, Colonial's calculation did not include its own capacity, whereas the Commission's excess capacity ratio includes both Colonial's capacity and local consumption. Although Colonial cites to Opinion No. 360 as supporting its alternative approach, that case predated the Commission's current market-based rate regulations, predated the Commission's use of the effective capacity method, and involved an experimental program that imposed a rate cap and other restrictions that are not present here. *See* Colonial Br. on Exceptions at 23 (citing *Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 FERC ¶ 61,473, at 62,669-71 (1990)); *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at P 75.

excess capacity ratio is calculated consistent with the Commission's policy, the result is 2.0.[429] Moreover, we agree with Trial Staff's arguments for assigning limited importance to the excess capacity ratio in this case. As explained by Trial Staff, the excess capacity ratio of 2.0 may exaggerate the ability of local consumption to absorb the Hunt Refinery's production.[430] Trial Staff also points out that Colonial is the only pipeline serving the Alabama market, and that Colonial itself accounts for half of the Alabama market's excess capacity ratio.[431] We find that the record is too inconclusive to assign significant weight to the excess capacity ratio for purposes of analyzing Colonial's market power in the Alabama market.[432]

144. Although we are not persuaded by Colonial's pro-competitive factors, Trial Staff fails to identify persuasive anti-competitive factors. Trial Staff asserts that "stylized" market statistics overstate the competitiveness of the Alabama market due to limits on the ability of local consumption to absorb production from the Hunt Refinery.[433] However, Trial Staff's own detailed price test supported the inclusion of local consumption as a competitive alternative that lead to the HHI below 2,500 and a market share below

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[429] Trial Staff witness Dr. Norman calculated a capacity ratio of 2.0 based upon the effective capacity method in which both Colonial's total capacity and the total local consumption are reduced to the Hunt Refinery production of 37 MBPD. Ex. S-00291 at 84. Adding the 37 MBPD attributed to Colonial to the 37 MBPD attributed to local consumption leads to a total of 74 MBPD, which is double the 37 MBPD production at the Hunt Refinery and produces a capacity ratio of 2.0. *Id.*

[430] There is no record evidence that local consumption currently includes significant market share in the Alabama market. *See* Tr. 7820-7823; 8141 (Carey). Moreover, the Hunt Refinery's truck racks are currently used, at least in part, for the outbound transportation of asphalt. Ex. S-00428 at 12; Tr. 7786 (Carey).

[431] Trial Staff Br. Opposing Exceptions at 87. *See also* Ex. S-00291 at 96. Colonial also has delivery points in the Alabama market that can supply local consumption. Thus, to the extent that the Hunt Refinery seeks to serve local consumption, it is likely competing with shippers using Colonial.

[432] The excess capacity ratio has long been assigned less importance than the HHI and market share statistics. The HHI and market share receive substantially more weight in the Commission's market power analysis. *See* 18 C.F.R. § 381.1(c)(7) (requiring market share and HHI, but not the excess capacity ratio, to be filed as part of a market-based rate application); Ex. S-00291 at 96 (excess capacity may be considered when the HHI and market share support a close call analysis).

[433] Trial Staff Br. Opposing Exceptions at 87.

50%.[434] Trial Staff fails to explain this incongruity.[435] While Trial Staff's concerns regarding local consumption suffice to diminish Colonial's argument that the excess capacity ratio should be considered a pro-competitive factor, such concerns do not satisfy the burden of proof to show that Colonial possesses market power.

145. Accordingly, we reverse the Initial Decision and we decline to revoke Colonial's market-based rate authority for the Alabama origin market. We emphasize that Trial Staff had the burden of proof to justify the revocation of Colonial's market-based rate.[436] Colonial's HHI is below 2,500 and its market share is below 50% while the analysis of the competitive factors is inconclusive. Therefore, we find that Trial Staff did not meet the burden of proof to demonstrate that Colonial possesses market power.[437]

The Commission orders:

(A) The findings on the issues addressed in the Initial Decision are affirmed, in part, and reversed, in part, as discussed in the body of this order.

(B) The exceptions to the Initial Decision are resolved as stated in the body of this order; to the extent an exception is not discussed, it should be considered denied.

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[434] *See, e.g.*, Exs. S-00108 at 81 (showing that local consumption is competitive with Colonial in the Alabama market); S-00111 at 81 (same); S-00136 at 81 (same).

[435] Trial Staff did not sufficiently explain the reasons for its different conclusions when (a) identifying local consumption as a competitive alternative and (b) conducting the close call analysis where they sought to minimize any significance attributable to local consumption. Although Trial Staff cites *Guttman* to support their position, *Guttman* involved a situation in which trucking was *excluded* both as a competitive alternative and as a procompetitive factor. Trial Staff Br. Opposing Exceptions at 87 n.421 (citing *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 241, 288). Here, Trial Staff *included* trucking to local consumption as a competitive alternative based on its detailed price analysis, but Trial Staff then challenged the availability of trucking to local consumption in the close call analysis.

[436] *Guttman*, Opinion No. 558, 161 FERC ¶ 61,180 at PP 87, 303.

[437] Because we decline to revoke Colonial's market-based rate authority for the Gulf Coast and Alabama origin markets, we need not address Colonial's arguments on exceptions challenging the Initial Decision's findings related to forward-looking cost-based rates or the Complainants' arguments on exceptions that the Commission should award reparations. Colonial Br. on Exceptions at 26-30; Joint Complainants Br. on Exceptions at 72-86; Joint Shippers Br. on Exceptions at 84-88.

(C) Colonial is directed to file a PLA charge and a PLA cost tracker and true-up mechanism consistent with this order within 60 days after this order issues, including supporting workpapers, explanatory statements, and any other supporting documentation.

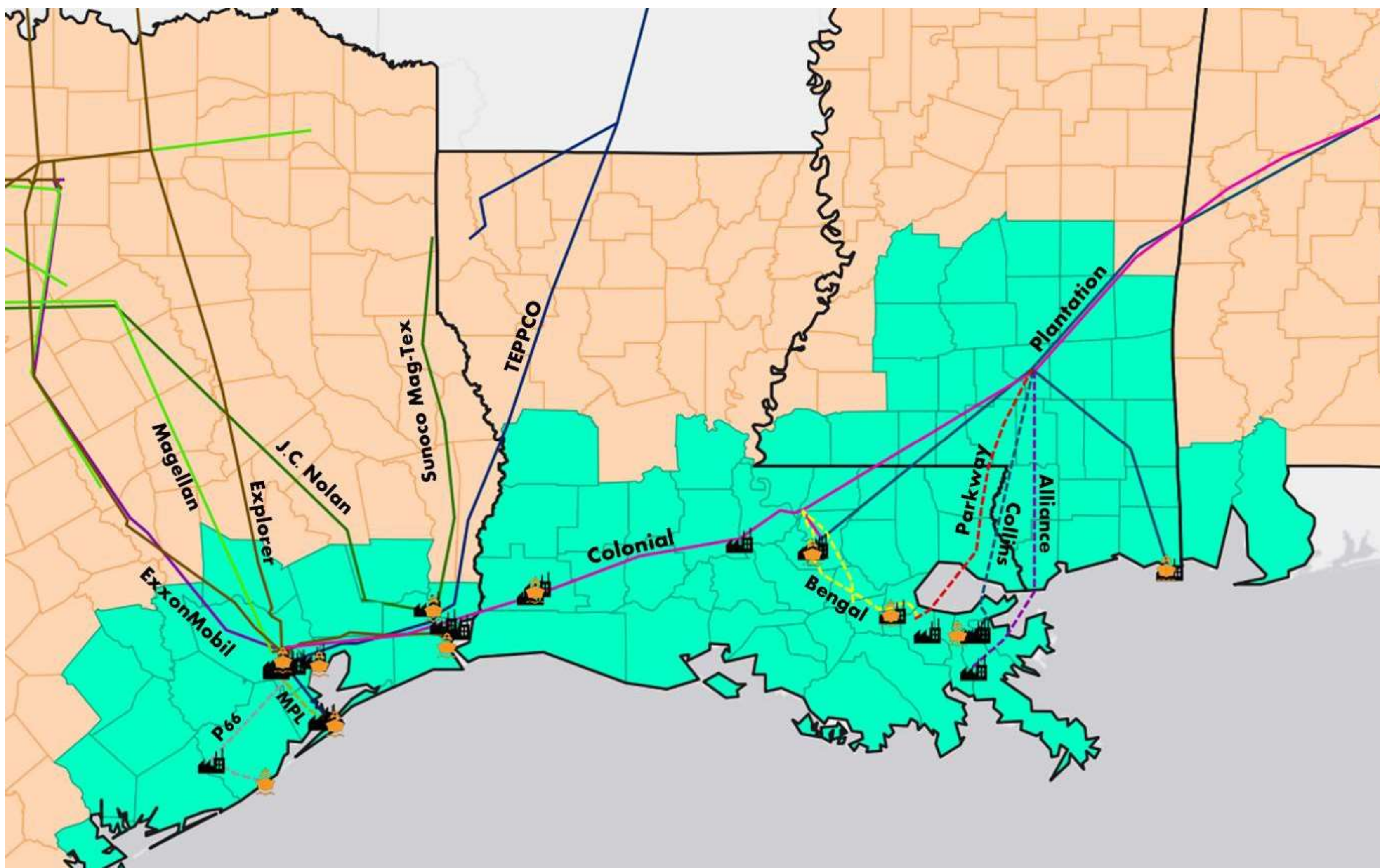
(D) Comments on the compliance filing directed in Ordering Paragraph (C) are due 75 days after this order issues and reply comments are due 90 days after this order issues.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

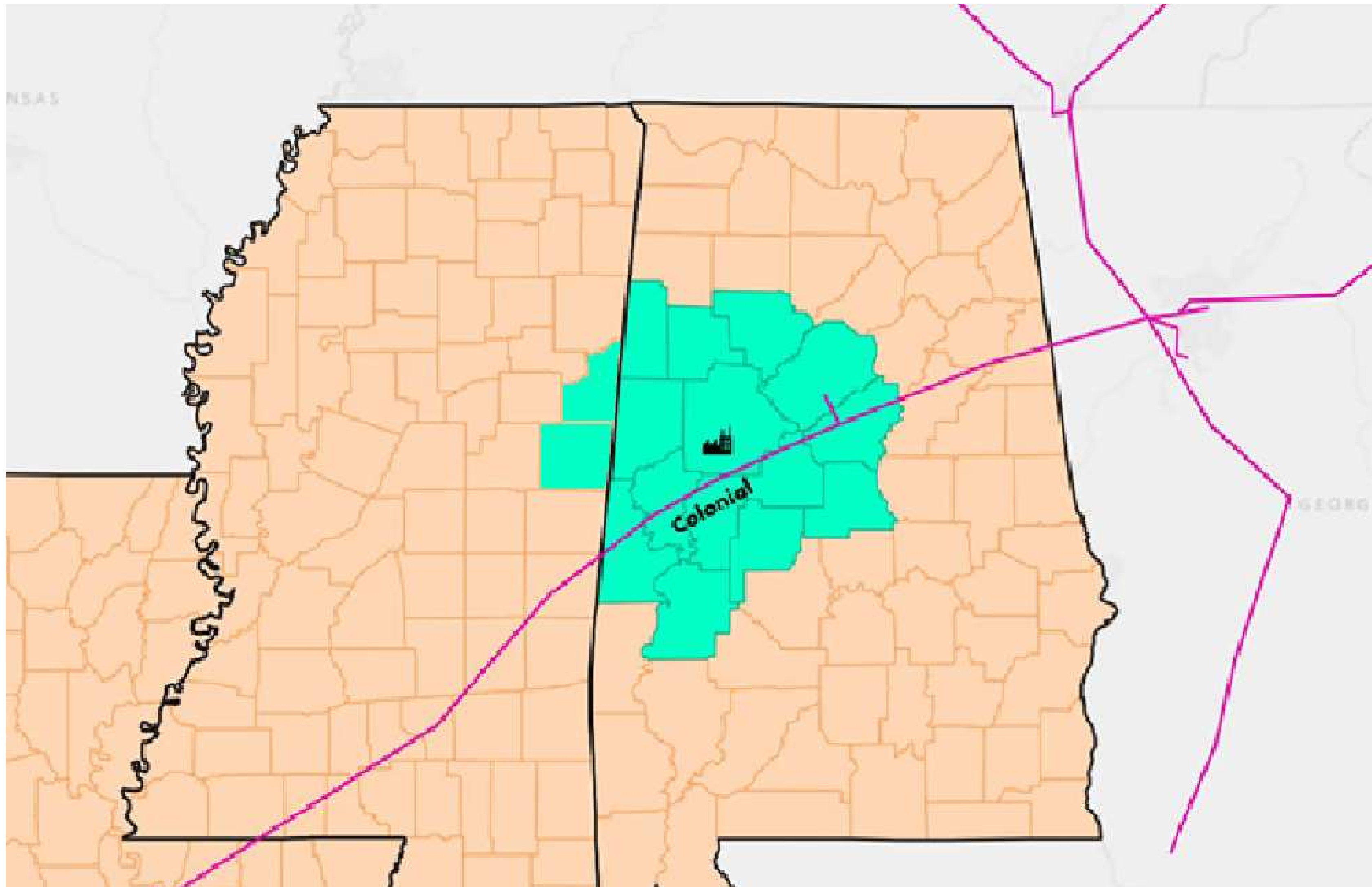
Debbie-Anne A. Reese,
Deputy Secretary.

Appendix A: Map, 90-County Gulf Coast Market



Source: Ex. S-00137 at 3, Figure 3.

Appendix B: Map, 16-County Alabama Market



Source: Modified Ex. S-00137 at 5, Figure 5 to include Lowndes and Noxubee Counties, Mississippi

Appendix C: Market Statistics, 90-County Gulf Coast Market

Pipeline		Ownership	Location	Unadjusted Capacity (MBPD)	Unadjusted Capacity Grouped by Ownership (MBPD)	Adjusted FERC Staff Effective Capacity (MBPD)	Market Share (%)	HHI Contribution
Colonial	[a]	Various	Houston, TX - New York, NY	2,544	2,544	2,544	27.9	780
Plantation	[b]	Kinder Morgan	Baton Rouge, LA - Washington, DC	700	700	700	7.7	59
TEPPCO	[c]	Enterprise	Houston, TX- Chicago, IL/Lima, OH	240	240	240	2.6	7
Explorer	[d]	Various	Port Arthur, TX - Chicago, IL	740	740	740	8.1	66
Magellan	[e]	Magellan	Houston, TX- Tulsa, OK/Albuquerque, NM	415	415	415	4.6	21
V-Tex Logistics	[f]	Valero	Houston, TX- El Paso, TX/New Mexico	60	60	60	0.7	0
Sunoco	[g]	Energy Transfer	Port Arthur, TX - Waskom, TX	17	47	47	0.5	0
J C Nolan	[h]	Energy Transfer	Port Arthur, TX - Midland, TX	30				0
ExxonMobil	[i]	ExxonMobil	Houston, TX - Irving, TX	68	68	68	0.7	1
Total Pipelines				**4,814**	**4,814**	**4,814**	**52.8**	**934**
Other								
Local Consumption	[j]	Various	Within 75 Miles of Gulf Coast Refineries	693	693	693	7.6	0
Waterborne Exports	[k]	Various	Various Ports/Waterways	2,062	2,062	2,062	22.6	0
Waterborne Receipts (Jones Act)	[k]	American Petroleum Tankers	Various Ports/Waterways	108	108	108	1.2	1
Waterborne Receipts (Jones Act)	[k]	Chevron Shipping Co	Various Ports/Waterways	69	69	69	0.8	1
Waterborne Receipts	[k]	Crowley	Various Ports/Waterways	246	331	331	3.6	13

Pipeline		Ownership	Location	Unadjusted Capacity (MBPD)	Unadjusted Capacity Grouped by Ownership (MBPD)	Adjusted FERC Staff Effective Capacity (MBPD)	Market Share (%)	HHI Contribution
(Jones Act)		Petroleum Service						
Waterborne Receipts (Jones Act)	[k]	OSG Ship Management	Various Ports/Waterways	223	323	323	3.5	13
Waterborne Receipts (Jones Act)	[k]	Seabulk Traders	Various Ports/Waterways	92	92	92	1.0	1
Waterborne Receipts (Jones Act)	[k]	Remaining Jones Act Vessels	Various Ports/Waterways	31	31	31	0.3	0
Waterborne Receipts (Inland)	[k]	Bouchard Transportation	Various Ports/Waterways	123	123	123	1.4	2
Waterborne Receipts (Inland)	[k]	OSG Ship Management	Various Ports/Waterways	100				0
Waterborne Receipts (Inland)	[k]	Kirby Inland/offshore	Various Ports/Waterways	93	93	93	1.0	1
Waterborne Receipts (Inland)	[k]	Crowley Petroleum Service	Various Ports/Waterways	85				0
Waterborne Receipts (Inland)	[k]	Reinauer Transporation	Various Ports/Waterways	77	77	77	0.8	1
Waterborne Receipts (Inland)	[k]	Intreprid Ship Management	Various Ports/Waterways	54	54	54	0.6	0
Waterborne Receipts (Inland)	[k]	Penn Maritime	Various Ports/Waterways	54	54	54	0.6	0
Waterborne Receipts (Inland)	[k]	K-Sea Operating	Various Ports/Waterways	46	46	46	0.5	0
Waterborne Receipts (Inland)	[k]	Motan Towing	Various Ports/Waterways	46	46	46	0.5	0
Waterborne Receipts (Inland)	[k]	Remaining Inland Barges	Various Ports/Waterways	93	93	93	1.0	
Total Other				**4,296**	**4,296**	**4,296**	**47.2**	**34**
Grand Total				**9,110**	**9,110**	**9,110**	**100.0**	**967**

Source: Ex. S-00291 at 83.

Appendix D: Market Statistics, 16-County Alabama Market

Pipeline		Ownership	Location	Unadjusted Capacity (MBPD)	Unadjusted Capacity Grouped by Ownership (MBPD)	Adjusted FERC Staff Effective Capacity (MBPD)	Market Share (%)	HHI Contribution
Colonial	[a]	Various	Houston, TX- New York, NY	408	408	37	49.9	2,489
Total Pipelines				**408**	**408**	**37**	**49.9**	**2,489**
Other								
Local Consumption	[b]	Various	Within 75 Miles of Hunt Refinery	71	71	37	49.9	
Waterborne Exports	[c]	Various	Black Warrior and Tombigbee Rivers, AL	0	0	0	0.2	
Total Other				**71**	**71**	**37**	**50.1**	**0**
Grand Total				**479**	**479**	**74**	**100.0**	**2,489**

Source: Ex. S-00291 at 84.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

	Docket Nos.	
Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company v. Colonial Pipeline Company		OR18-7-002
BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc. v. Colonial Pipeline Company		OR18-12-002
TransMontaigne Product Services LLC v. Colonial Pipeline Company		OR18-17-002
Southwest Airlines Co. and United Aviation Fuels Corporation v. Colonial Pipeline Company		OR19-1-001
Phillips 66 Company v. Colonial Pipeline Company		OR19-4-001
American Airlines, Inc. v. Colonial Pipeline Company		OR19-16-001
Metroplex Energy, Inc. v. Colonial Pipeline Company		OR19-20-000
Gunvor USA LLC v. Colonial Pipeline Company		OR19-27-000
Pilot Travel Centers, LLC v. Colonial Pipeline Company		OR19-36-000
Sheetz, Inc. v. Colonial Pipeline Company		OR20-7-000
Apex Oil Company, Inc. and FutureFuel Chemical Company v. Colonial Pipeline Company		OR20-9-000 (consolidated)

(Issued November 16, 2023)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in the Commission's decision to affirm the Initial Decision's[1] determination that Colonial Pipeline Company (Colonial) should retain market-based rate authority for the Gulf Coast origin market, and I also concur in the decision to reverse the Initial Decision's holding that Colonial's market-based rate authority should be revoked for the Alabama origin market.[2]

2. While I agree, in the main, with the foregoing determinations regarding Colonial's market-based rate authority, there are certainly other parts of the order that I would have handled differently. I will not list every determination about which I have quibbles, but

[1] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 177 FERC ¶ 63,017 (2021) (Initial Decision).

[2] *See Epsilon Trading, LLC v. Colonial Pipeline Co.*, 185 FERC ¶ 61,125 (2023) (Order on Initial Decision).

will instead focus on two parts of this order: (1) whether there was a violation of the Interstate Commerce Act (ICA); and (2) reparations.

3. The Commission states that it "reverse[s] the Initial Decision and hold[s] that Colonial's tariff gives Colonial authority to assess a [product loss allocation (PLA)] charge."[3] I would have instead found that Colonial violated the ICA by not filing its PLA charge. As today's order explains, "Colonial incurs net costs arising from normal system operations associated with product loss, compatible interface which downgrades product, and incompatible interface which creates transmix (PLA costs)."[4] The fact of the matter is that the PLA is scarcely explained in Colonial's tariff. The Initial Decision correctly observed that there is a "description in the tariff" of the PLA charge, and the PLA charge is "further detailed in the shipper manual, but the rate or charge to shippers is neither posted as a filed rate nor Commission-approved."[5]

4. The ICA requires pipelines to file with the Commission all "rates, fares, and charges" for jurisdictional oil transportation service.[6] I recognize that Colonial argues that "the PLA charge is not a charge 'for transportation' in the same sense as a transportation rate."[7] I disagree, however, with Colonial's suggestion that this is not a

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[3] *See id*. P 11.

[4] *Id*. P 12 (footnotes omitted).

[5] Initial Decision, 177 FERC ¶ 63,017 at P 627; *see also id*. P 654 ("Colonial failed to abide by its obligations under the Interstate Commerce Act and the Commission's regulations, and persisted in charging its shippers an unfiled rate . . . .").

[6] 49 U.S.C. app. § 6(1); *see also id.* § 6(7) (prohibiting pipelines from transporting oil in interstate commerce without filing the "rates, fares, and charges upon which the [oil is] transported").

[7] Colonial January 27, 2022 Brief on Exceptions Regarding Partial Initial Decision at 82; *see also id*. at 82-83 ("Colonial's PLA account incurs Settlement Costs because, in the process of balancing the gains and losses among shippers relating to various forms of interface (as well as product losses incurred in normal operation), the proceeds from shippers who incurred gains and sales of transmix do not typically equal the payments to shippers who incurred losses. . . . As noted above, Colonial maintains the PLA account to track the costs associated with '(i) product gains and losses, and (ii) the disposition of transmix that occurs in the daily operation of the pipeline.' . . . In any given month, Colonial may have under-delivered or over-delivered to a shipper, and it is the pricing differential of different refined products shipped on Colonial that causes the PLA account to incur Settlement Costs, which it recovers through its PLA charges. . . . The PLA charge is a balancing mechanism to recover any product loss costs incurred by Colonial that are not otherwise mitigated. . . . The overall intent is to keep all shippers (and

"charge" for jurisdictional service that is thus required to be filed in the tariff. As the Commission recognizes, "[a] PLA charge is assessed on each barrel shipped in interstate service on Colonial's system and thereby increases the cost of jurisdictional oil transportation service,"[8] "the management of product loss and interface results in costs and revenues to Colonial, and Colonial uses its PLA mechanism to recover its net costs from its shippers,"[9] and the Commission therefore finds that "Colonial uses its PLA mechanism to recover costs from a jurisdictional transportation service."[10]

5. In addition, the filed rate doctrine requires that such charges should be included in the tariff:

> Under the [I]nterstate [C]ommerce [A]ct, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice, of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.[11]

6. "[T]he filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the [regulated entity] provides . . .

Colonial) whole rather than to charge the shipper for transportation itself. Thus, the requirement for 'transportation rates' to be set forth in the tariff is simply inapplicable here.").

[8] *See* Order on Initial Decision, 185 FERC ¶ 61,125 at P 16 (citing Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0, Item 75(c)) ("A product loss allocation charge . . . based on origin and delivery shall be assessed on each delivered barrel.")).

[9] *Id*. (citing Ex. CPC-00111 (Brock) at 6:16-9:14, 10:3-11(describing the accounting process for the PLA account)).

[10] *Id*.

[11] *Louisville & N. R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

the services covered by the tariff."[12] Moreover, the Commission's regulations provide that pipelines "must publish in their tariffs . . . charges . . . which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of service to the shipper."[13]

7. In today's order, the Commission states "that Item 75 in Colonial's tariff gives Colonial authority to assess a PLA charge" and my colleagues "find that Colonial acted in accordance with its tariff when Colonial assessed and administered the PLA charge" and then the Commission "reverse[s] the Initial Decision's finding that Colonial's tariff did not authorize the PLA charge merely because the exact PLA charge was not expressly stated."[14] Item 75(c) of Colonial's tariff states,

> [a] product loss allocation charge ("PLA Charge") based on origin and delivery shall be assessed on each delivered barrel. Carrier administers the PLA Charge to recover, but not over-recover, any loss amounts incurred by the carrier that are not otherwise mitigated by the activities described throughout this section. The PLA Charge shall be routinely evaluated to determine if it needs to be adjusted, upward or downward, to ensure the carrier's ultimate collections reflect its actual experience. Any PLA Charge change, upward or downward, will be communicated to shippers through a bulletin issued thirty days prior to the change going into effect.[15]

Nothing in this tariff provision sufficiently informs shippers of the mechanism by which the PLA charge may be assessed to discern the method by which Colonial might derive the particular amount required.[16] Instead, I have come to understand that the PLA

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[12] *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004), *opinion amended on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004) (internal quotation marks and citation omitted).

[13] 18 C.F.R. § 341.8 (2022).

[14] Order on Initial Decision, 185 FERC ¶ 61,125 at P 17..

[15] *Id.* P 17 n.27 (citing Ex. CPC-00113 at 15 (Colonial FERC ICA Oil Pipeline tariff No. 98.37.0)).

[16] The Commission acknowledges as much in its finding that the referenced tariff provision is not just and reasonable. Order on Initial Decision, 185 FERC ¶ 61,125 at P 23 ("We find that Colonial's PLA mechanism is unjust and unreasonable because it

charges and other information pertaining to the charges are contained only in Section 2.9 of Colonial's shipper manual. The tariff provision referenced above does not even make note of the shipper manual. Because the ICA requires charges such as these to be included in the tariff, I dissent from the Commission's decision to not find a tariff violation.

8. *Second*, I want to address the question of reparations. The ICA has a few provisions regarding reparations.[17] In today's order, my colleagues "reverse the Initial Decision and hold that reparations are not warranted regarding the PLA issues in this case."[18] My colleagues state that "[t]he Commission has discretion as to the level of reparations to award, if any."[19] I acknowledge that court and Commission precedent state that the Commission has discretion in awarding reparations.[20] There are two provisions

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(1) gives Colonial sole discretion over how and when Colonial adjusts the PLA charges, (2) allows Colonial to manage the PLA account with insufficient transparency or accountability to Colonial's shippers and the Commission, and (3) assigns different charges for short- and long-haul movements without sufficient justification") (footnote omitted).

[17] *See I.C.C. v. Atl. Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966) (explaining the provisions of the ICA that pertain to reparations).

[18] Order on Initial Decision, 185 FERC ¶ 61,125 at P 2.

[19] *Id*. P 56 (citing *Chevron Prods. Co. v. SFPP, L.P.*, 127 FERC ¶ 63,024, at P 501 (2009); *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022, at 61,112 (2000) ("Reparations have traditionally been considered an equitable remedy, and whether they are granted is a matter of Commission's discretion."); *SFPP, L.P. v. FERC*, 592 F.3d 189, 195 (D.C. Cir. 2010) (rejecting argument that "FERC erroneously denied that it had equitable discretion to fashion a remedy" because "FERC acknowledged an award of reparations is an equitable remedy and that it was not compelled to award reparations.")).

[20] *See, e.g.*, *SFPP, L.P. v. FERC*, 592 F.3d at195 (recognizing FERC has acknowledged that "an award of reparations is an equitable remedy and that [the Commission] was not compelled to award reparations," stating that "FERC not only acknowledged its discretion, but carefully exercised it, explaining that reparations were appropriate because the record suggested SFPP had abused its market power by 'extract[ing] an economic rent based on the difference between its own costs for resolving the operating issues at Watson Station and the costs each of the shippers would have incurred on its own hook,'" and holding that "because FERC's reasoned order of reparations falls within its discretion, SFPP fails to demonstrate that FERC was arbitrary or capricious, or abused its discretion") (citations omitted); *Chevron Prod. Co. v. SFPP, L.P.*, 127 FERC ¶ 63,024 at P 501 ("So long as rates are determined to be unjust and

of the ICA in particular that I consider to foreclose the "discretion" that the Commission has historically claimed in the face of ICA violations.[21] Specifically, section 16(1) of the ICA states,

> If, after hearing on a complaint made as provided in section 13 of this Appendix, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission *shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named*.[22]

And ICA section 16(3) "allows reparations for up to two years prior to the date of the filing of a complaint if the rates paid in those two years exceed the just and reasonable rate established in the complaint proceeding."[23] Another provision relevant to remedies is ICA section 8, which provides:

> In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier *shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter*, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed

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unreasonable, '[t]here is no dispute that reparations are available to some degree;' however, it is within the Commission's discretion whether to award reparations.") (citation omitted). Nevertheless, despite the confusion caused by the terminology employed, and the courts' and Commission's muddling of different remedial regimes, I return to the plain terms of the statute.

[21] Before I begin, I pause to note that I may appear to conflate the terminology for remedies at law (*e.g.*, damages) and equity (*e.g.*, restitution) throughout this discussion, but such is the verbiage employed in both the statute and the Commission's precedent—for now, I am stuck with it.

[22] 49 U.S.C. app. § 16(1) (emphasis added).

[23] *BP W. Coast Prod., LLC v. FERC*, 374 F.3d 1263, 1306 (D.C. Cir. 2004) (citing 49 U.S.C. app. § 16(3)(b)).

and collected as part of the costs in the case.[24]

9. ICA section 8 states that when a common carrier does something that is "prohibited" by the ICA, is "unlawful," or if the common carrier "omit[s] to do any act, matter, or thing in this chapter required to be done . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter."[25] Section 16 of the ICA provides that if, after the necessary process following a complaint, "the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission *shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named*."[26] Reading both sections 8 and 16 together, it establishes that if there is a violation of the ICA, the common carrier is liable for the full amount of damages that result from that violation and that the Commission shall direct the common carrier to pay the amount that the complainant is entitled. The use of the word "shall" in those provisions drastically restricts any discretion that may be afforded the Commission in providing a remedy.[27]

10. While I do not believe that the Commission has unfettered discretion to fashion remedies in the face of ICA violations, and since there was a violation of the ICA because Colonial failed to file the PLA charges in its tariff, the Commission is required to award the full damages to which the complainants are entitled during the time period provided for in the ICA. However, the order correctly finds that complainants are entitled to none because "[t]he record . . . shows that, using its tracker and true-up mechanism, Colonial has returned over-collections to shippers over time and drawn the PLA account balance to zero by adjusting the PLA charges."[28] This is because "[r]ecovery cannot be had unless it is shown, that as a result of [the common carrier's]

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[24] 49 U.S.C. app. § 8 (emphasis added).

[25] *Id.* § 8.

[26] *Id*. § 16 (emphasis added).

[27] *Compare* SHALL, Black's Law Dictionary (11th ed. 2019) (defining "shall" to mean "Has a duty to; more broadly, is required to"), *with* DISCRETION, Black's Law Dictionary (11th ed. 2019) (defining "discretion" to mean "with Freedom in the exercise of judgment; the power of free decision-making"), *and* DISCRETION, Black's Law Dictionary (11th ed. 2019) (defining "administrative discretion" to mean "[a] public official's or agency's power to exercise judgment in the discharge of its duties").

[28] Order on Initial Decision, 185 FERC ¶ 61,125 at P 66.

acts, damages in some amount susceptible of expression in figures resulted."[29] Should I, or the Commission, be laboring under a misapprehension on this matter, it should be further brought to our attention on rehearing, should the complainants disagree and decide to seek rehearing.

11. *Finally*, I want to point out that today's order states that "[t]he discussion in [the] order includes citations to nonpublic information, only to the extent necessary to identify where relevant nonpublic information may be found in the record."[30] This order is long; the record is longer. And while it is my typical practice to check every citation in the orders to which my name is affixed in order to confirm whether privileged information has been disclosed, it was simply not possible given the amount of time available before the order was brought forth for the Commission's consideration. To the extent to which this order may have inadvertently disclosed privileged information, I disagree with its inclusion and, indeed, object to its inclusion in any order. This concern is not new. While I did not take the opportunity to address this issue in a separate statement, my uncertainty as to whether privileged information was disclosed in a recent proceeding was one of the reasons that I concurred in the result in *West Texas Gulf Pipe Line Co. LLC*, 184 FERC ¶ 61,182 (2023)—I do not support any reasoning in any Commission order that amounts to a disclosure of privileged information.

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly
Commissioner

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[29] *I.C.C. v. U.S. ex rel. Campbell*, 289 U.S. 385, 390 (1933) (internal quotation marks & citation omitted).

[30] *Id.* P 3 n.2.