

R. Gordon Gooch v. Colonial Pipeline Company

ORDER ON COMPLAINT

142 FERC ¶ 61,220 (2013)

R. Gordon Gooch, a private citizen of the Commonwealth of Virginia, filed a complaint against Colonial Pipeline Company (Colonial) pursuant to section 13(1) of the Interstate Commerce Act (ICA). Colonial is an interstate pipeline that carries refined petroleum products such as jet fuel over an area extending from Houston, Texas to Linden, New Jersey. In his complaint Mr. Gooch primarily challenges Colonial's transportation rate tariff.

Mr. Gooch asserted that Colonial's rates are unjust and unreasonable and alleged that over-recoveries were made by Colonial. He stated that he is a "person" under section 13(1) and is therefore entitled to file a complaint. Mr. Gooch claimed that as a resident of Virginia he is affected by the rates charged by Colonial. He calculated his damages to be \$5.02 in 2011. He calculated this by using figures he found on Page 700 of FERC Form No. 6 to calculate an over-recovery amount then divided that amount by the number of residents served by Colonial (50 million).

The Commission dismissed the complaint because it failed to demonstrate that Mr. Gooch was adversely affected by Colonial's pipeline rates. Although the Commission agreed that Mr. Gooch is "any person" under section 13(1) and is authorized to file a complaint, he must show that he was "adversely affected" by the challenged rate. The Commission found his alleged damages to be too speculative and based upon rough calculations. Further, the Commission pointed out that the market price for petroleum products is influenced by a variety of factors before it gets to end-use consumers. Given this attenuated connection, the Commission ruled that the "adversely affected" requirement has not been met.

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142 FERC ¶ 61,220
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

R. Gordon Gooch

v.

Colonial Pipeline Company

Docket No. OR12-24-000

ORDER ON COMPLAINT

(Issued March 25, 2013)

1. On August 14, 2012, R. Gordon Gooch (Mr. Gooch) filed a complaint against Colonial Pipeline Company (Colonial) pursuant to section 13(1) of the Interstate Commerce Act (ICA)¹ challenging FERC Tariff Nos. 98.6.0, 99.8.0, and 100.6.0.² As discussed below, the Commission will dismiss the complaint.³

I. Background

2. Colonial is an interstate oil pipeline that transports petroleum products such as motor gasoline and jet fuel over an area extending from Houston, Texas to Linden, New Jersey, in the New York harbor area. This system serves numerous refineries in the Gulf Coast and Mid-Atlantic regions as well as consumer markets throughout the

¹ 49 U.S.C. App. § 13(1).

² Colonial Pipeline Company, FERC Oil Tariff, Product Pipeline Tariffs; Local Rates Tariff, FERC 98.6.0, 98.6.0; Tariff, FERC 99.8.0, 99.8.0; Tariff, FERC 100.6.0, 100.6.0.

³ On November 30, 2012, Chairman Jon Wellinghoff issued a memorandum to the file, documenting his decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated October 11, 2012, not to recuse himself from this docket.

Southeast and Mid-Atlantic United States. Colonial has the authority to charge market based rates for transportation in Louisiana, Mississippi, Pennsylvania, New Jersey and New York.

3. Tariff Nos. 99.8.0 and 100.6.0 provide the rates for transportation on Colonial's system. Tariff No. 98.6.0 provides the rules and regulations for Colonial's system.

II. Mr. Gooch's Complaint

4. Mr. Gooch asserts that Colonial's rates are unjust and unreasonable. Mr. Gooch states that in 2011, Colonial on Page 700 of its FERC Form No. 6 (Page 700) reported a cost of service of \$723,867,703 and revenues of \$975,118,102. He states that this represents an over-recovery of \$251,200,399. Mr. Gooch also states that Colonial reported significant over-recoveries for 2010 on Page 700.

5. Mr. Gooch states that he is a person under section 13(1) of the ICA, and thus, that he is entitled to file a complaint. Mr. Gooch states that he is a resident of the Commonwealth of Virginia, and, thus, he is affected by the rates charged by Colonial. Mr. Gooch estimates that as an end-user of petroleum products in the markets served by Colonial, he has suffered damages of \$5.02 in 2011, which he calculates by dividing \$251,200,399 by the 50,000,000 residents served by Colonial.

6. Mr. Gooch also filed his complaint against both Colonial and, under section 10 of the ICA, against its officers and directors. Mr. Gooch requests that his complaint be set for fast track processing.

III. Notice and Answers

7. Public notice of the complaint was issued August 18, 2012. On September 4, 2012, Colonial filed its answer. On September 13, 2012, Mr. Gooch filed a response to Colonial's answer. Rule 385.213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the decisional authority. In the instant case, the Commission will accept Mr. Gooch's answer because it has provided additional information that assisted our decision-making process.

8. In its answer, Colonial contends that the complaint against its rates should be dismissed because Mr. Gooch is not adversely affected by Colonial's rates. Colonial concedes that under section 13(1) of the ICA, "any person" may file a complaint. However, Colonial contends that such complainant must "demonstrate that it is adversely

affected by the action it challenges.”⁴ Colonial states that in order to sustain a complaint against an oil pipeline’s rates, a complainant is generally required to establish that it has “actually been charged each of the rates against which [it has] filed a complaint.”⁵ Colonial further asserts that absent some showing other than direct, financial harm, where a complainant fails to show that it uses the service at issue, its complaint will be dismissed.⁶ Colonial states that it makes sense that a complaint against a pipeline’s rates must be brought by a party that actually pays the rates because only a party paying rates will directly benefit from a reduction in the rates or be entitled to reparations.⁷ Colonial adds that a decision to investigate a complaint brought by a party with no direct financial interest in the rate at issue would be directly contrary to the goals of the Energy Policy Act of 1992,⁸ which directed the Commission to “streamline” the procedures “relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays.”⁹ Colonial also seeks to rely on Rule 206 of the Commission’s regulations, which governs complaints and requires that complaints show how the challenged actions “relate to or affect the complainant.”¹⁰

9. Colonial emphasizes that Mr. Gooch is not a shipper and that Mr. Gooch is not directly paying any rates for service on behalf of a shipper. Colonial states the \$5.02 damages claimed by Mr. Gooch as an end-user of petroleum products in the markets served by Colonial are too attenuated to support a complaint against Colonial’s rates. Colonial emphasizes that Mr. Gooch has not presented evidence showing that Colonial’s rates are passed onto him as a consumer or that the price paid by consumers for motor gasoline and other refined products is directly affected by the level of Colonial’s rates.

⁴ Colonial Answer at 5 (quoting *Continental Resources, Inc. v. Bridger Pipeline, LLC*, 113 FERC ¶ 61,178, at P 8 (2005); also citing *Chevron Products Co. v. SFPP, L.P.*, 99 FERC ¶ 61,196 (2002)).

⁵ *Id.* at 6 (citing *ConocoPhillips Co. v. SFPP, L.P.*, 137 FERC ¶ 61,005, at P 33 (2011)).

⁶ *Id.* at 6 (citing *America West Airlines, Inc. v. Calnev Pipe Line, L.C.C.*, 121 FERC ¶ 61,241, at P 18 (2007)).

⁷ *Id.* at 7 (citing *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 789-94 (D.C. Cir. 2006)).

⁸ Public L. No. 102-486, 106 Stat. 2776 (1992) (EPAAct 1992).

⁹ Colonial Answer at 8 (quoting EPAAct 1992 § 1802(a)).

¹⁰ *Id.* at 6 (quoting 18 C.F.R. § 385.206(b)(3)).

Colonial states that allowing a party such as Mr. Gooch to pursue a complaint would increase litigation and impede the ability of the pipeline and shippers to resolve disputes, allowing any agreement to be undermined by a single consumer. Colonial states that allowing such consumer complaints is inconsistent with the ICA, which focuses on the relationship between the carrier and its shippers rather than consumers generally.¹¹

10. Colonial also alleges that Mr. Gooch's complaint lacks the necessary specificity to establish a *prima facie* case against Colonial's rates. Colonial claims Mr. Gooch failed to identify specific rates and has not provided evidence for why those rates are unjust and unreasonable. Thus, Colonial states that the complaint has provided no justification for alleging that any of Colonial's market-based rates exceed the just and reasonable level. Colonial also contends that Mr. Gooch fails to grapple with the portion of Colonial's rates that were in effect on October 24, 1992, and which are subject to grandfathering under section 1803(b) of the EPAct of 1992. Colonial explains that these grandfathered rates can only be challenged if the "substantially changed circumstances" test is satisfied,¹² and Colonial asserts that Mr. Gooch does not attempt to perform this type of analysis.

11. Colonial states that Mr. Gooch's complaint focuses solely on Colonial's rates and does not address the rules and regulations contained within Colonial's Tariff No. 98.6.¹³ Thus, Colonial states the Commission should dismiss Mr. Gooch's complaint for failure to "allege reasonable grounds" to investigate Colonial's rules and regulations. Colonial also asserts the Commission should dismiss the complaint against its officers and directors because section 13(1) of the ICA only contemplates complaints against common carriers, not individual officers or directors.

12. Responding to Colonial's answer, Mr. Gooch re-emphasizes that section 13(1) of the ICA allows any person to file a complaint. Mr. Gooch states that he has based his complaint upon page 700 data and explains that page 700 and other publically available information do not allow him to evaluate Colonial's rates at particular origins and destinations.

¹¹ *Id.* at 9 (*Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 104 & n.62 (2010)).

¹² *Id.* at 15 (*Tesoro Refining and Marketing Co. v. Calnev Pipe Line LLC*, 134 FERC ¶ 61,214 (2011)).

¹³ Colonial states that Tariff No. 98.6 was superseded by Tariff No. 98.7.0, which was filed in Docket No. IS12-456-000 and became effective on July 12, 2012.

IV. Discussion

13. As discussed below, Mr. Gooch's complaint has failed to demonstrate that he is adversely affected by Colonial's pipeline rates. Therefore, consistent with the discussion below, the Commission will dismiss Mr. Gooch's complaint.

14. Section 13(1) of the ICA and Rule 206 of the Commission's regulations¹⁴ authorize "any person" to file a complaint before the Commission. Although a complainant need not be a shipper, a non-shipper complainant must show that it is, in some way, "adversely affected" by the challenged rate or practice.¹⁵

15. Mr. Gooch fails to demonstrate that he has been adversely affected by Colonial's alleged over-earnings. The damages claimed by Mr. Gooch are too speculative to demonstrate that he has been adversely affected by Colonial's alleged over-earnings. Mr. Gooch's calculation of damages is based upon a rough calculation that divides Colonial's alleged over-recoveries of \$251,200,399, based upon page 700 data, by 50 million, reflecting the 50 million consumers living in the entire area served by Colonial. However, it is not clear that the pipeline's transportation costs have such an effect on the retail motor gasoline prices paid by Mr. Gooch. The market price for petroleum products, such as motor gasoline, is influenced by a variety of factors, and the relatively insignificant influence of marginal changes in pipeline rates can be subsumed by other market forces. Mr. Gooch has not demonstrated that the pipeline's transportation costs are not wholly or in part absorbed by the pipeline's shippers or other intermediaries before Mr. Gooch pays for motor gasoline. Thus, Mr. Gooch has not demonstrated that transportation costs associated with any alleged over-recoveries by Colonial are passed onto him via the price for retail motor gasoline.

16. Similarly, Mr. Gooch has not demonstrated that he is adversely affected by Colonial's rules and regulations tariff. The discussion in Mr. Gooch's complaint and the response in his answer only address Colonial's rates. Accordingly, this portion of Mr. Gooch's complaint is dismissed.

17. The Commission also rejects Mr. Gooch's complaint against Colonial's officers and directors pursuant to section 10 of the ICA. Section 10 relates to misdemeanor proceedings before a U.S. District Court, not actions before the Commission. Section 13(1) of the ICA, which provides for complaints before the Commission only allows for complaints against common carriers, not individuals. Thus, any complaint against the officers and directors of Colonial is not properly before the Commission. Additionally, even if section 13(1) contemplated a complaint against such

¹⁴ 18 C.F.R. § 385.206 (2012).

¹⁵ *Continental Resources*, 113 FERC ¶ 61,178 at P 8.

individuals, as discussed above, Mr. Gooch has failed to demonstrate that he is adversely affected by Colonial's rates or practices.

18. The Commission is committed to increasing the transparency of publicly available oil pipeline information. In this regard, the Commission notes that it has proposed to modify Page 700 of the Form No. 6 to enable the calculation by interested parties of a pipeline's actual rate of return on equity.¹⁶

The Commission orders:

Consistent with the discussion in the body of this order, Mr. Gooch's complaint is dismissed.

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

Commissioner Norris is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶ *Revisions to Page 700 of FERC Form No. 6*, Notice of Proposed Rulemaking, 77 Fed. Reg. 59,343 (Sept. 27, 2012), FERC Stats. & Regs. ¶ 32,692 (2012).

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(Issued March 25, 2013)

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

Although I concur in dismissing the complaint for failing to demonstrate that Mr. Gooch has been harmed, decisions like these do not make it easy for consumers to bring complaints against oil pipelines that may be charging unjust rates. In fact, it would appear to be practically impossible for a private citizen, such as Mr. Gooch, to ever be able to prove that he has been adversely affected by the pipeline's rates.

For the complaint process under the Interstate Commerce Act to mean anything, this agency must be in a position to offer guidance and provide adequate reasoning when ruling on a complaint. Today's order does neither. For instance, while the majority finds the damages sought by the complainant to be "too speculative", no guidance is offered as to the level of detail the Commission would find satisfactory. Additionally, while the order rules that the complainant did not demonstrate whether the pipeline's rates actually increase the cost of his gasoline purchases, the order does not offer any insight into the particular type of evidence that could support such a finding.

In spite of having more than seven months to review this complaint, the order neglects to provide any meaningful guidance to instruct how "any person" can mount a successful challenge against an oil pipeline that may be charging unjust and unreasonable rates. Instead, by failing to offer such guidance, this order may have the effect of discouraging future complaints from retail consumers and other non-shippers.

Until we are in a position to provide the public with an understanding as to the evidentiary burden the complainant bears in bringing a complaint against an oil pipeline, we are not meeting our statutory responsibility to ensure just and reasonable rates.

For this reason, I write separately.

Philip D. Moeller
Commissioner

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NORRIS, Commissioner, *concurring*:

I write separately to express my concern that today's order could serve to effectively bar consumers from successfully bringing a complaint against an oil pipeline that may be charging unjust and unreasonable rates.

The Commission has relied upon the complaint process under the Interstate Commerce Act to ensure just and reasonable rates for customers of existing oil pipelines that may be over-earning. In his complaint, however, Mr. Gooch suggests that shippers may tolerate potential pipeline over-earnings and choose not to bring complaints before the Commission. In the absence of complaints from shippers, retail consumers like Mr. Gooch that are not direct customers of the pipeline are left vulnerable to unjust and unreasonable rates, unless they themselves have recourse to file a complaint.

In today's order, the Commission correctly dismisses Mr. Gooch's complaint because he did not adequately demonstrate that he has been adversely affected by Colonial's pipeline rates, as required by the Commission's regulations and precedent. In doing so, however, the order reveals some of the difficulties an entity that is not a shipper may face in demonstrating that it has been adversely affected.

The Interstate Commerce Act authorizes "any person" to file a complaint before the Commission, and we are obligated to give meaning to that right under the statute. Going forward, I remain open to future Interstate Commerce Act complaints from retail consumers and other non-shippers, as well as coalitions of consumers, that may be able to adequately demonstrate that they are adversely impacted. This is one way in which we can meet our statutory responsibility to ensure just and reasonable rates.

For these reasons, I respectfully concur.

John R. Norris, Commissioner