126 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Colorado Interstate Gas Company Docket Nos. RP08-484-000
RP08-484-001

ORDER FOLLOWING TECHNICAL CONFERENCE

(Issued January 30, 2009)

1. On August 1, 2008, Colorado Interstate Gas Company (CIG) filed a revised tariff sheet[1] modifying its penalty crediting mechanism to credit retained penalty amounts, net of CIG's carrying costs, on an annual basis, with interest, as opposed to crediting such amounts on a 90-day basis. On August 8, 2008, CIG filed a substitute tariff sheet,[2] amending its August 1 filing. On August 28, 2008, the Commission issued an order[3] accepting and suspending the substitute tariff sheet, to become effective February 1, 2009, subject to refund and to a technical conference to address the issues raised by CIG's filings. The technical conference was held on October 7, 2008. Based on further review of the filings and comments on the technical conference, the Commission accepts CIG's proposed revisions to its penalty crediting mechanism, effective February 1, 2009, subject to CIG making a compliance filing consistent with this order.

I. **Background**

2. CIG's tariff provides for the crediting of cash-out and scheduling imbalance penalty (SIP) amounts to shippers. Currently, these amounts are credited net of costs, via a pro rata allocation based on transported quantities, to shippers every 90 days as a credit on shippers' invoices. In this filing, CIG proposes to change the timing of its penalty

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[1] Sixth Revised Sheet No. 320 to its FERC Gas Tariff, First Revised Volume No. 1.

[2] Substitute Sixth Revised Sheet No. 320 to its FERC Gas Tariff, First Revised Volume No. 1. CIG stated that this substitute tariff sheet removes a change to the refund calculation for penalty credits that CIG had not intended to propose at this time.

[3] *Colorado Interstate Gas Co.*, 124 FERC ¶ 61,191 (2008).

crediting mechanism to credit retained amounts annually rather than every 90 days. Additionally, CIG proposes to provide interest on retained amounts at rates accrued pursuant to 18 C.F.R. 154.501(d) (2008).

3. In its filing, CIG noted that it had recently updated its fuel tracking mechanism to account for the price differences between fuel and lost and unaccounted-for gas imbalances and related sources and dispositions of gas (Fuel Tracker Filing).[4] CIG argued that because its fuel and lost and unaccounted-for tracking mechanism, which is filed with the Commission on an annual basis, now considers the quantity of fuel and lost and unaccounted-for gas as well as the value of such amounts, including cash outs, it is no longer reasonable to treat the cash-out and SIP credits on a separate timeframe from the fuel and lost and unaccounted-for tracking mechanism. CIG also stated that it would provide, for the first time, an annual penalty crediting report outlining the applicable cash-out and SIP penalties and resulting crediting to shippers for each year. Additionally, CIG proposed to revise language describing the type of costs that it will offset against penalty revenues to include "carrying costs."

4. On August 14, 2008, Nexen Marketing USA, Inc. (Nexen) filed a protest. Nexen objected to CIG's proposal to eliminate its 90-day obligation to return penalty and excess cash-out revenues, arguing that CIG had not supported the proposed change in timing. Nexen argued that legitimate reasons exist to calculate and disperse penalty revenues more frequently. Nexen first argued that in light of customer turnover, a more expeditious return of penalty revenues increases the likelihood that the revenues will be returned to those customers from whom they were originally taken. Nexen also argued that by synchronizing the fuel tracking and penalty crediting mechanisms, CIG would likely be able to avoid crediting penalty and cash-out revenues altogether, thereby transforming its penalty crediting mechanism into a sort of pricing hedge for its operational activities, at the expense of CIG's customers. Finally, Nexen argued that CIG did not support its proposal to offset customers' penalty credits with "carrying costs," especially given that CIG's tariff currently allows it to offset penalty revenues with gas costs.

II. Supplemental Filing and Comments Following Technical Conference

5. As agreed by the parties at the technical conference, CIG made a supplemental filing to provide additional information regarding its August filings.[5] Subsequently,

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[4] CIG, August 1, 2008 Filing at 1 (citing *Colorado Interstate Gas Co.*, 122 FERC ¶ 61,191 (2008)). On August 8, 2008, CIG filed a substitute tariff sheet to correct an error contained on its initially filed tariff sheet.

[5] As a result of this supplemental filing, BP America Production Company and BP Energy Company (collectively BP) filed a motion to intervene out-of-time. Pursuant to

(continued)

initial comments were filed by CIG, Nexen, and Black Hills Utility Holdings, Inc. (Black Hills). Reply comments were filed by CIG and Nexen.

6. In its October 14, 2008 supplemental filing, CIG included *pro forma* tariff sheets to clarify its terminology associated with the timing differences between the time of an imbalance cash out and the subsequent purchase or sale of gas to resolve the related physical imbalance. In its August filings, CIG used the term "carrying costs" to describe such costs. Due to confusion over the terminology, CIG proposes a new term "Imbalance Resolution Timing Costs" to describe the same costs. CIG defines this term as "the difference between the cashout price paid or received by Shipper/Operator and the price of gas at the time the physical imbalance is resolved by Transporter (such price determined by using transporter's accounting practices and using actual prices paid or received when applicable and otherwise using the average Cash Out Index Price)."[6] CIG states that its revised tariff sheets define and explain the use of the term as it relates to the costs to be netted against penalty dollars. Additionally, CIG included in its supplemental filing its technical conference presentation.[7]

7. In its initial comments, CIG argues that it has met its burden to show that its proposal is just and reasonable. CIG reiterates the details of its proposal, stating that it will continue to calculate penalties net of costs on a monthly basis; however, instead of crediting revenues on a rolling basis every 90 days, it will now credit those revenues once a year. CIG states that it will now attribute interest to net monthly revenue amounts consistent with 18 C.F.R. § 154.501(d) (2008), which will compensate shippers for the timing differences associated with moving to annual credits. CIG also notes that it will also file an annual report detailing the penalty revenues and any costs netted against those revenues prior to crediting, which will provide transparency to its net penalty crediting process and facilitate review by shippers and the Commission. CIG contends that the

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Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.214(d) (2008), the Commission will grant BP's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

[6] Citing CIG's revised *pro forma* Third Revised Sheet No. 231B in its October 14, 2008 Supplement Filing.

[7] CIG notes that the presentation it filed here differs from the one it presented at the technical conference only insofar as it excludes the old terminology (i.e., "carrying costs").

Commission has approved the annual crediting of penalties for other pipelines,[8] and should therefore approve CIG's proposal here.

8. CIG also argues that its cost/revenue true-up—proposed in the Fuel Tracker Filing—and its proposal here are factually related because the cost/revenue true-up includes system balancing activities and cash-outs, and the net penalty credits are based on penalties received pursuant to cash-outs and system imbalance penalties. CIG states that the same information in its annual cost/revenue true-up report will be used for its proposed annual penalty crediting report, and therefore efficiency and transparency will be enhanced if the reports are prepared, filed, and reviewed at the same time. Moreover, CIG argues that its proposal is further justified by the fact that the calculation of net costs, i.e., the costs attributable to penalties received in a particular month, may not be realized or determined within the current 90-day crediting requirement.

9. CIG also clarifies that costs associated with the value of gas "bought" and "sold" to deal with shipper imbalances will be netted against penalty revenues. CIG states that its proposed tariff language requires CIG to credit penalties received that are in excess of its costs, including any imbalance resolution costs. CIG argues that this language provides additional clarity to one of the costs which may be netted against penalty amounts.

10. In its initial comments, Nexen states that it continues to oppose CIG's proposal to eliminate its obligation to return penalty and excess cash-out revenues every 90 days in favor of an annual crediting mechanism. Nexen further states the technical conference confirmed its suspicions that CIG's proposal is designed to ensure that CIG will retain penalty revenues as offsets to alleged annual operational purchase costs, rather than disbursing them to shippers. Nexen argues that this proposal, therefore, serves as a means for CIG to grant itself rehearing of the Commission's requirement in the Fuel Tracker Filing that CIG separately account for imbalance-related operational activity and fuel-related imbalance activity. Therefore, Nexen urges the Commission to reject the proposal.

11. Nexen acknowledges CIG's replacement of the term "carrying costs" with "imbalance resolution timing costs." Nexen states that while it appreciates CIG's efforts to refine its proposal, Nexen will continue to discuss the matter with CIG to ensure that any final replacement language for "carrying costs" is strictly limited to language that would permit CIG to offset actual net cash-out revenues with actual net operational expenditures for those operational transactions that are a direct consequence of the physical imbalance that generated the cash-out revenues.

[8] Citing *Black Marlin Pipeline Co.*, 101 FERC ¶ 61,087, at P 9 (2002).

12. In its initial comments, Black Hills states that it has two concerns with the filing. First, Black Hills states that while CIG's proposal concerns costs netted against penalties, such penalties should be returned to shippers and not used as a revenue source for the pipeline. Second, Black Hills states that at the technical conference, CIG could not specifically define what costs beyond its gas costs would be included in the offset. Further, Black Hills states that CIG's newly proposed category of costs, i.e., imbalance resolution timing costs, submitted in its supplemental filing raises additional questions. Specifically, Black Hills states that it is unclear how these costs differ from $4,169,924 of costs related to shipper imbalance activities reported in CIG's recent annual fuel filing.[9] Black Hills argues that CIG's filing here and in the annual fuel filing are inextricably linked and that it is difficult to understand the costs at issue here without first analyzing CIG's proposed shipper imbalance related costs in the annual fuel filing.

13. Regardless of the relationship with the annual fuel filing, Black Hills states that CIG seems to want not only to combine the treatment of fuel costs, cash-outs and penalties, but also to have the latitude to determine how to treat those unrelated costs without any guidelines or oversight. Black Hills further states that CIG appears to seek the ability to determine unilaterally what costs it would like to offset against penalties, when to resolve physical imbalances once a penalty has been assessed, and to choose the price at which to resolve the penalty. Black Hills argues that these categories of costs—fuel, lost and unaccounted for, and imbalances—should be separately accounted for in the fuel percentage, lost and unaccounted for percentage, and cash-out mechanism, respectively.

14. In its reply comments, CIG reiterates its contention that the proposed revisions to its penalty crediting mechanism are just and reasonable. CIG objects to Blacks Hills' claim that CIG's filing combines fuel costs, cash-outs and penalties and would give CIG the latitude to determine how to treat unrelated costs without and guidelines or oversight. CIG rejects both claims and asserts that its proposal seeks to highlight gas costs incurred because of shipper imbalances, not to give CIG unfettered discretion to offset costs against penalties. CIG further states that its proposal would not affect the requirements of its fuel tracker filing. CIG notes that its proposal would provide increased transparency due to the new reporting requirement and the fact that CIG's penalty credit report would be filed concurrent with CIG's annual fuel filing. CIG also states that its proposal would provide increased administrative efficiency through the joint preparation and review of these filings.

15. CIG contends that its proposal is designed to improve the language of its penalty crediting mechanism and to facilitate the offsetting of appropriate costs (if any) associated with changes in the price of gas from the time the imbalance is cashed out to

[9] CIG, August 29, 2008 Annual Fuel Filing, Docket No. RP08-600-000, at 17.

the time the physical imbalance is resolved. CIG points out that its proposal does not "ensure" that it will keep future penalty revenues, arguing that under its current tariff, it is already permitted to net gas costs, including imbalance resolution timing costs, against penalty revenues. CIG indicates that its proposal would clarify this existing right, not add a new one. CIG also points out that imbalance resolution timing costs may be either positive or negative and states that an offset against penalty credits would take place only in the event of a net loss to CIG.

16. CIG states that its proposal to clarify the costs it may offset against penalty revenues is just and reasonable and that there is no fundamental difference between the phrases "Transporter's Gas costs" (in CIG's existing tariff) and "Transporter's costs, including Imbalance Resolution Timing Costs." CIG states that it is making the change so that shippers are aware that such costs can be recovered in the cash-out mechanism.

17. CIG next addresses Black Hills' question regarding how the imbalance resolution timing costs differ from the costs reported in CIG's annual fuel filing filed in Docket No. RP08-600-000. CIG explains that the costs and revenues assigned to shipper imbalance activities included in the informational schedules in its filing in Docket No. RP08-600-000 are the same costs and revenues that would be included in CIG's annual penalty report and used to offset penalty revenues.

18. In its reply comments, Nexen remains opposed to CIG's proposal to eliminate its obligation to return penalty and excess cash-out revenues to its customers every 90 days and urges the Commission to reject its proposal. Nexen reiterates its belief that the proposal would permit CIG to grant itself rehearing of the Commission's requirement in Docket No. RP07-666-000 that CIG separately account for imbalance-related operational activity and fuel-related imbalance activity. Nexen states that the Commission should disregard CIG's proposal to accrue interest on cash-out and penalty revenues in lieu of crediting them to shippers every 90 days, arguing that CIG will never actually pay such interest because penalties will be used as offsets to other costs. Nexen next disputes CIG's claim that its proposal would allow CIG to reduce its administrative costs and argues that CIG should be required to bear the cost consequences of its proposals rather than impose them on its shippers. Finally, Nexen is concerned about CIG's proposal to collect imbalance resolution timing costs. Nexen contends that CIG should not be permitted to artificially revalue its cash-out and penalty revenues to the detriment of the shippers. Nexen states that it is not clear if CIG is prohibited from making such artificial valuation adjustments under its imbalance resolution timing costs concept and requests that the Commission reject both CIG's original "carrying costs" proposal as well as its revised "imbalance resolution timing costs" proposal.

III. <u>Discussion</u>

19. We generally find CIG's proposal to amend the timing of its penalty crediting mechanism, including CIG's proposal to include interest on penalty revenues and provide

an annual penalty crediting report, to be reasonable. However, we reject CIG's proposal to expand the types of costs it may offset against penalty revenue credits by including in those offsets either "carrying costs," or "imbalance resolution timing costs."[10] For that reason, CIG must make a compliance filing within 30 days of the date this order issues removing such language from its revised tariff sheets.

20. CIG's current penalty mechanism requires it to credit penalties that are in excess of its gas costs on a pro rata basis to firm and interruptible shippers based on the quantity transported for each shipper.[11] CIG's proposal seeks, among other things, to change the language describing these offsetting "gas costs" with "imbalance resolution timing costs."[12] CIG contends that this change would not expand the universe of costs eligible to be offset against penalty revenues; rather, it would clarify an existing right to offset such costs against penalty revenues.

21. We disagree with this understanding of CIG's current penalty revenue mechanism. The term used to describe eligible offsets in CIG's current penalty revenue crediting mechanism—"gas costs"—encompasses only the *actual* costs CIG incurs in making up for shortfalls due to shipper imbalances. CIG's proposed term, on the other hand, would allow CIG to offset its penalty revenues with costs that it has *not actually incurred*, but which exist, in theory, due to the revaluation of gas costs at the time the physical imbalance is resolved at either the actual price paid or received, *or at the average Cash Out Index Price*. By using the Cash Out Index Price to value gas at a point in time when no actual purchase or sale occurred, i.e., when no change in CIG's actual costs or revenues took place, CIG would be offsetting actual penalty revenues against "costs" that have yet to be incurred. Moreover, due to fluctuations in the price of gas and the timing of CIG's gas purchases, such costs may never actually be incurred.

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[10] In its initially filed tariff sheets, CIG included the term "carrying costs." Due to confusion caused by the term, CIG's supplemental filing included pro forma tariff sheets replacing this term with "imbalance resolution timing costs."

[11] CIG, FERC Gas Tariff, First Revised Vol. No. 1, Fifth Revised Sheet No. 320 (including § 7.13 of the General Terms and Conditions).

[12] As indicated above, CIG defines these costs as comprising "the difference between the cashout price paid or received by Shipper/Operator and the price of gas at the time the physical imbalance is resolved by Transporter (such price determined by using transporter's accounting practices and using actual prices paid or received when applicable and otherwise using the average Cash Out Index Price)." Citing CIG's revised *pro forma* Third Revised Sheet No. 231B in its October 14, 2008 Supplement Filing.

22. The Commission has previously rejected pipelines' efforts to offset costs that were not actually incurred against penalty revenues. In *ANR Pipeline Co.*, the Commission addressed an effort by the pipeline in its monthly cash-out report to offset costs of gas it "deemed" to have purchased on the spot market to replace gas delivered to customers in excess of receipts.[13] Interpreting the term "net revenues," which was not defined in ANR's tariff, the Commission determined that "the most reasonable interpretation of 'revenues net of costs' is to include actual costs of operating the program, as opposed to an accrual based upon assumed purchases at an index price that may not be paid."[14] The Commission further stated that the purpose of the annual cash-out reconciliation was to ensure that cash-outs were not a source of revenue. Consequently, the Commission found that ANR's practice of pricing replacement purchases that were not actually made at a deemed index price was not just and reasonable.[15]

23. Here, CIG makes an argument similar to the one advanced by the pipeline in *ANR*. CIG claims that under its current mechanism, it may net "imbalance resolution timing costs,"[16] which, as noted above, could include what amounts to "deemed" purchases at the cash-out price when no actual purchases were made. We disagree with such a reading of the tariff. CIG's current tariff only permits it to collect "gas costs," which the Commission finds pertains only to the *actual costs* incurred by CIG in purchasing gas to make up for shortfalls due to shipper imbalances. CIG's revised proposal adds language that permits CIG to deem that a transaction took place at the cash-out price even though an actual purchase did not take place, and thereby would allow CIG to offset a broader category of costs than it may currently offset under its tariff. The Commission clarifies, for the reasons stated here and in *ANR*, that CIG may not offset such "imbalance resolution timing costs" under its current penalty revenue crediting mechanism.

24. Furthermore, for the same reasons, we find that CIG may not revise its tariff to include the offsetting of these additional costs. Under CIG's proposal, the possibility exists, as it did in *ANR*, that CIG would make (or conceivably lose) money on the differential between the cost of gas valued at the cash-out price and the ultimate cost of the actual purchases.[17] Such gains and losses would be inappropriate under the Commission's penalty policies, which seek to prevent pipelines from using penalties as

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[13] *ANR Pipeline Co.*, 80 FERC ¶ 61,173, at 61,726 (1997) (*ANR*).

[14] *Id.* at 61,728.

[15] *Id.*

[16] CIG, Reply Comments at 5.

[17] *ANR*, 80 FERC at 61,728.

revenue centers and to provide pipelines with an incentive to develop non-penalty mechanisms that give shippers incentives to control their imbalances.[18] Therefore, we reject CIG's proposal to revise its tariff to allow the pipeline to offset costs not actually incurred against its penalty revenues. To the extent that CIG experiences timing differences between the incurrence of gas costs due to shipper imbalances and their resolution at a later time, it may accrue those costs in an appropriate account and propose a method for their recovery consistent with Commission policy.

25. In its comments, CIG focuses on the idea that its proposal is justified because the cost/revenue true-up in its fuel tracking mechanism is annual, and is related to its penalty crediting mechanism. CIG argues that making annual filings pursuant to the two mechanisms at the same time would provide administrative efficiency. We find that position to be reasonable, and therefore grant CIG's request to change the timing of its penalty crediting mechanism and include interest on those penalty amounts. However, the annual nature of the fuel tracking mechanism and the penalty crediting mechanism does not support CIG's proposed expansion of the universe of costs it may offset against penalty revenues. CIG may not offset these costs in its penalty revenue crediting mechanism simply because it identifies but does not recover such "costs" in its cost/revenue true-up. The two mechanisms operate independently of each other. Therefore, we reject CIG's argument that its fuel tracking mechanism's cost/revenue true-up compels us to allow CIG to offset imbalance resolution timing costs in its penalty revenue crediting mechanism.

26. Therefore, we accept CIG's proposed revisions to its penalty crediting mechanism, effective February 1, 2009, subject to CIG making a compliance filing within 30 days of the date this order issues that removes language permitting CIG to offset carrying costs and/or imbalance resolution timing costs not yet actually incurred.

<u>The Commission orders</u>:

(A) CIG's proposed tariff sheets are accepted, effective February 1, 2009, subject to the condition discussed above.

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[18] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,315-16, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

(B) CIG must file amended tariff sheets within 30 days of the date this order issues consistent with the discussion above.

By the Commission. Commissioner Kelliher not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.