

129 FERC ¶ 61,004  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

October 1, 2009

In Reply Refer To:  
Gulf South Pipeline Company, LP  
Docket No. RP09-1010-000

Gulf South Pipeline Company, LP  
9 Greenway Plaza, Suite 2800  
Houston, Texas 77046

Attention: J. Kyle Stephens, Vice President  
Regulatory Affairs and Rates

Reference: Original Sheet No. 4022 and Sheet No. 4023 to FERC Gas Tariff, Sixth  
Revised Volume No. 1.

Dear Mr. Stephens:

1. On September 1, 2009, Gulf South Pipeline Company, LP (Gulf South) filed the above referenced tariff sheets to add a new section 35.5 of its General Terms and Conditions. Gulf South asserts that under this proposed provision both Gulf South and its customers waive the right to recover consequential damages from the other for damages arising out of breach of contract, negligence, tort, and strict liability. Gulf South further asserts that the waiver does not limit either party's ability to recover damages arising out of gross negligence or willful misconduct, nor does it impact either party's right to recover direct damages. For the reasons discussed below, the Commission will accept and suspend the tariff sheets to be effective on March 1, 2010, or an earlier date specified in a further order of the Commission, subject to refund and conditions. The Commission will refer the proceeding to the Commission's Dispute Resolution Service.

2. Gulf South's proposed tariff provision "Waiver of Consequential Damages" states the following:

In no event shall either Customer or Gulf South be liable to the other for and Gulf South and Customer each expressly releases the other from punitive or exemplary, special, indirect, incidental or consequential damages (including without limitation, loss of profit, loss of revenue), whether such damages arise out of

breach of contract, tariff or warranty, negligence, tort, strict liability, product liability, statutory liability, indemnity, contribution or any other legal theory; provided, however, unless otherwise agreed to by Gulf South and Customer, the foregoing shall not limit Gulf South's liability, if any, to Customer, nor Customer's liability, if any, to Gulf South, for punitive or exemplary, special, indirect, incidental or consequential damages arising out of the gross negligence, undue discrimination, willful misconduct, or bad faith of such liable party.

3. Gulf South contends that the Commission routinely allowed pipelines to include provisions in their tariff that limit their liability for negligence to direct damages, so that they are only liable for indirect, consequential, incidental or punitive damages when there is gross negligence, undue discrimination or willful misconduct or bad faith. Gulf South further contends that the Commission has previously found an almost identical provision to the one being proposed by Gulf South to be just and reasonable in *ANR Pipeline Company*, 100 FERC ¶ 61,132 (2002) (*ANR*).

4. Public notice of the filing was issued on September 2, 2009. Interventions and protests were due on or before September 14, 2009. Pursuant to Rule 214 (18 C.F.R. 385.214 (2009)), all timely filed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. The American Forest and Paper Association, Independent Petroleum Association of America, and Process Gas Consumers Group (collectively, the Associations) filed a protest in this proceeding. On September 18, 2009, Gulf South filed an answer to the protest. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Gulf South's answer because it has provided information that assisted us in our decision-making process.

5. The Associations assert that the Commission generally applies two principles to the issue of liability: there should be no liability without fault and a person should not be able to avoid all liability caused by his own gross negligence or intentional actions. The Associations further assert that Gulf South's proposal is similar to the one accepted by the Commission in *ANR*, but that Gulf South's provision fails to make clear that each party remains liable to the other for direct damages. The Associations note that *ANR Pipeline Company's* approved "Waiver of Consequential Damage" language contains the following sentence: Nothing herein will limit Transporter's liability, if any, to Shipper, nor Shipper's liability, if any, to Transporter, for direct damages." The Associations therefore request that Gulf South's proposed provision be amended to include similar missing language and suggests the following language be inserted by Gulf South:

Nothing herein will limit Gulf South's liability, if any, to Customer, nor Customer's liability, if any, to Gulf South, for direct damages.

6. In its answer, Gulf South asserts the Commission should reject the protest submitted by the Associations. Gulf South asserts that its proposed consequential damages clause does not affect a party's ability to pursue direct damages and therefore, direct damages are not limited by the proposed consequential damages clause. Further, Gulf South states that the general principles of liability cited by the Associations are basic tenets of the law and by no means require a broad statement regarding direct damages to be included in pipeline tariffs.

7. The protestor has raised significant issues concerning Gulf South's filing. As the Commission has previously noted, it applies two general principles to the issue of liability: there should be no liability without fault; and a person should not be able to avoid all liability caused by his own gross negligence or intentional actions.<sup>1</sup> The Commission believes, that within those parameters, the issues raised by the protestor would best be resolved through a settlement acceptable to all parties. To that end, the Commission will direct the Director of its Dispute Resolution Service<sup>2</sup> to convene a meeting of the parties, within 14 days of the date of issuance of this order, to arrange a process that may foster negotiation and agreement regarding the proposed revised tariff sheets. Gulf South must report the status of the negotiations to the Commission within 60 days of the date of issuance of this order. The Commission urges the parties to attempt to achieve resolution of these issues in such time as to allow any settlement to be put into effect within the five-month suspension period ordered below. Accordingly, the Commission will accept and suspend the effectiveness of the revised tariff sheets subject to refund and conditions. The conditional acceptance is subject to further review by the Commission.

8. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards. *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension). It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (minimum suspension). Such circumstances do not exist here. Therefore, the Commission accepts and suspends Gulf South's proposed tariff sheets, to be effective on March 1, 2010, or an earlier date if specified in a further order of the Commission, subject to refund and conditions set forth

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<sup>1</sup> *Arkla Energy Resources Company*, 64 FERC ¶ 61,166, at 62,490 (1993).

<sup>2</sup> The Director of the Commission's Dispute Resolution Service is Nils Nichols, who can be contacted at (202) 502-8638 or at (877) FERC-ADR ((877) 337-2237 or (202) 502-6651).

in this order. Gulf South is directed to report to the Commission on the progress of any negotiations to the Commission within sixty (60) days of the date of issuance of this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.