129 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Columbia Gas Transmission, LLC Docket Nos. RP09-792-000
RP09-792-001

ORDER ON TARIFF FILING AND ESTABLISHING HEARING

(Issued October 15, 2009)

1. On June 30, 2009, Columbia Gas Transmission, LLC (Columbia) filed revised tariff sheets[1] to recover certain one-time third party transportation costs incurred to provide service during the outage of Columbia's Line 1278 located in Pike County, Pennsylvania. Columbia originally sought to recover these costs in its February 2009 annual Transportation Cost Rate Adjustment (TCRA) filing pursuant to section 36 of the General Terms and Conditions (GT&C) of its tariff. However, on March 31, 2009, the Commission issued an order requiring Columbia to remove these costs from that filing, without prejudice to making a separate, limited Natural Gas Act (NGA) section 4 filing to recover these costs.[2] On July 31, 2009, the Commission accepted and suspended Columbia's June 30 limited section 4 filing to be effective January 1, 2010, subject to refund and further order of the Commission.[3]

2. In this order, the Commission reconsiders its holding in the March 2009 Order that Columbia may not include these costs in its TCRA, requires Columbia to remove from the instant filing those costs which are not eligible for recovery in the TCRA until Columbia makes its next annual TCRA filing in February 2010, and establishes a hearing

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[1] Fifth Revised Sheet No. 25, Fifth Revised Sheet No. 26, Sixth Revised Sheet No. 28, Fifth Revised Sheet No. 29, and Fifth Revised Sheet No. 30 to Columbia's FERC Gas Tariff, Third Revised volume No. 1.

[2] *Columbia Gas Transmission, LLC.*, 126 FERC ¶ 61,319, at P 22 (2009) (March 2009 Order).

[3] *Columbia Gas Transmission, LLC.*, 128 FERC ¶ 61,115 (2009).

on the prudence of Columbia's incurrence of the third party transportation costs included in this filing.

Background

3. Section 36 of Columbia's GT&C provides for it to recover its "Operational 858 costs" through a tracking mechanism. Section 36.1(a) defines Operational 858 costs as "costs incurred for the transmission and compression of gas by others . . . including amounts paid to upstream pipelines for contracts retained as a result of Transporter's Order No. 636 restructuring, or utilized in Transporter's post-restructuring operations." Section 36.2 requires Columbia to make an annual TCRA rate filing on or before March 1 of each year to be effective April 1. The TCRA rates include two components: (1) the "Current Operational TCRA Rate," which recovers Operational 858 costs Columbia projects it will incur during the April to March annual period the TCRA rate will be in effect, and (2) the "Operational TCRA Surcharge," which trues up over- and under-recoveries during the preceding calendar year. Section 36.4(a)(1) and (2) of the GT&C provides that each component of the TCRA rates shall be allocated to the applicable rate schedules "on an as-billed basis and in a manner consistent with Transporter's currently effective cost allocation and rate design." Section 36.2 also permits Columbia to make TCRA filings at such other times as it determines necessary, but such periodic filings may only adjust the Current Operational TCRA Rate, and not the Operational TCRA Surcharge.

4. Columbia states that the third party transportation costs at issue in this proceeding arose in the following circumstances. In 2008, Columbia's affiliate Millennium Pipeline Company (Millennium) was constructing a new pipeline with an expected in-service date of December 22, 2008. Millennium would interconnect with Columbia at the Wagoner interconnect in Orange County, New York. Columbia's Line 1278 traverses northeastern Pennsylvania and then continues into New York, where it is designated as Line K, to the Wagoner interconnect. The maximum allowable operating pressure (MAOP) for Line 1278 is 800 psig. However, in order to make deliveries into Millennium, Columbia had to increase its MAOP at the Wagoner interconnect to 1000 psig. Therefore, Columbia requested authorization from the Department of Transportation (DOT) to increase the pressure in its Line 1278 from 800 psig to 1000 psig. Before making this request, it smart-pigged the parts of the line which had not been recently replaced. Based on the smart-pigging, it replaced sections of the line where the smart-pigging revealed damage to the line. DOT authorized the increase in pressure in July 2008.

5. On November 4, 2008 Columbia began increasing the pressure on Line 1278 in 50 psig increments. On the morning of November 5, 2008 it increased the pressure to 1000 psig. Later that afternoon, the line ruptured. Columbia states that its investigation

revealed that the cause of the rupture was near-neutral pH stress corrosion cracking which could not have been detected by the smart-pigging operations it had performed.[4] Columbia repaired Line 1278, and repressurized the line to 800 psig on December 4, 2008.[5] However, DOT rescinded Columbia's authorization to increase the pressure to 1000 psig. Therefore, Columbia states that, in order to be able to make deliveries into Millennium, it had to install compression at Sparrowbush, near the Wagoner interconnect with Millennium.

6. In order to ensure that it could meet its firm obligations until the Sparrowbush Compressor Station was placed into service, Columbia entered into monthly contracts with Tennessee Gas Pipeline Company (Tennessee), Central New York Oil and Gas Company (CNYOG), Millennium, and Empire Pipeline Company (Empire) for emergency transportation service in December 2008 and January 2009. On January 6, 2009,[6] Columbia completed the Sparrowbush Compressor Station and placed it into service. Accordingly, Columbia terminated these contracts at the end of January 2009.

7. On February 26, 2009, Columbia made its annual TCRA filing to be effective April 1, 2009. Pursuant to section 36.4(a)(2) of its GT&C, the Operational TCRA Surcharge in that filing was to true up Columbia's over- and under-recoveries of its Operational 858 costs during calendar year 2008. Columbia treated its December 2008 payments to the four pipelines (totaling approximately $960,000)[7] as Operational 858 costs incurred in 2008, and accordingly included those emergency third-party transportation costs in its calculation of the Operational TCRA Surcharge.

8. In its March 2009 Order on Columbia's TCRA filing, the Commission required Columbia to remove emergency third-party transportation costs from the Operational TCRA Surcharge. The Commission stated that, while Columbia's emergency actions to continue service to its customers were to be encouraged, the Commission had held that tracking mechanisms should track only those costs related to normal pipeline operations.[8]

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[4] Columbia states that it performed smart pigging operations on 16.4 miles of the 71 miles of Line 1278 that had not been replaced between 2005 and 2007. *See* David W. Spencer Aff. at P 5.

[5] *See* Timothy R. Bucci Aff. at P 5.

[6] Columbia constructed the Sparrowbush Compressor station under an emergency certificate granted by the Commission.

[7] *See* March 2009 Order, 126 FERC ¶ 61,319 at P 6.

[8] March 2009 Order, 126 FERC ¶ 61,319 at P 22.

The Commission pointed out that it had found that pipelines should not recover through a fuel tracking mechanism gas lost due to an unusual, non-recurring event because such extraordinary losses are more appropriately recovered through a pipeline's insurance or the normal ratemaking process.[9] The Commission found that costs resulting from the rupture of Line 1278 are the type of costs that the Commission has determined are not appropriate for inclusion in a fuel tracker filing.[10] However, the Commission stated that its decision was "without prejudice to Columbia Gas making a separate, limited section 4 filing to recover these extraordinary one-time costs incurred to provide service during the outage of Line 1278, where issues such as prudence and offsets for insurance recoveries could be considered."[11] No party sought rehearing of the March 2009 Order.

9. On June 30, 2009, Columbia made the limited section 4 filing suggested by the March 2009 Order. It proposed a Line 1278 surcharge to recover the emergency third-party transportation costs it incurred in both December 2008 and January 2009. Columbia stated that those costs totaled $3,470,097, including carrying charges, comprising $3,358,606 in demand costs and $111,491 in commodity costs. Columbia proposed to recover these costs on an as-billed basis.[12] Columbia further stated that it would file to remove the surcharge from its tariff once all of the third-party transportation costs are recovered. In its filing, Columbia asserted that the Line 1278 rupture was an extraordinary *force majeure* event and that the costs associated with having its gas transported by other pipelines during the emergency *force majeure* event are eligible to be recovered through a surcharge pursuant to a limited NGA section 4 filing. Columbia asserts that contracting for third-party transportation was a prudent measure because it enabled Columbia to meet all of its firm delivery obligations throughout the *force majeure* event.[13]

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[9] *Id.*, citing *Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,388 (2008).

[10] *Id.*, citing *Columbia Gulf Transmission Co.*, 125 FERC ¶ 61,255 (2008).

[11] *Id.*

[12] Appendix B to the filing reflects the demand determinants used to derive the Line 1278 TCRA surcharge and the demand determinants are those projected to be in effect on August 1, 2009, consistent with section 36.4(a) of Columbia's GT&C. Throughput levels for Rate Schedules FTS, SST, OPT, GTS, NTS, ITS, and TPS are based on the twelve-month period ending July 31, 2009, adjusted for known and measurable changes.

[13] Columbia included an Affidavit of David W. Spencer, which details the service outage and the associated third party transportation costs. Columbia also includes an Affidavit of Timothy R. Bucci, which asserts that Columbia's insurance would not cover

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10. Piedmont Natural Gas Company, Inc. (Piedmont), The City of Charlottesville (Charlottesville) and the City of Richmond (Richmond), Virginia Power Energy Marketing, Inc. (VPEM) and National Grid Gas Delivery Companies (National Grid), Old Dominion Electric Cooperative (ODEC), Washington Gas Light Company (Washington Gas), EQT Energy, LLC (EQT Energy), Delta Energy, LLC, and the New York State Public Service Commission (NYPSC) filed protests and/or comments to Columbia's June 30 , 2009 filing. Orange and Rockland Utilities, Inc. (O&R) filed an answer to National Grid's protest and ODEC's comments. On July 17, 2009, Columbia filed an answer.

11. The protests and comments raised numerous issues. National Grid argued that the Commission should reject Columbia's request because such recovery would violate the rule against retroactive ratemaking and the filed rate doctrine.[14] National Grid asserted that Columbia cited no section of its tariff that provides customers with notice that additional transportation costs, beyond those permitted in the TCRA set forth in GT&C section 36, will be charged. National Grid argued that it is well settled that without notice, the filed rate doctrine precludes adjustments to a pipeline's rates to recover prior period costs, such as the transportation costs that Columbia seeks to recover in this proceeding.[15]

12. ODEC argued that Columbia's filing does not contain information necessary to resolve whether Columbia's decision to contract for emergency transportation from the four pipelines was prudent. ODEC further argued that it is impossible to determine based on the June 30 filing whether the amounts at issue are reasonable and if they should be borne by customers that had no hand in causing the rupture. ODEC alleged that Columbia ignored more efficient alternatives, such as asking shippers to reduce their contract demand during the emergency period, or selecting other transportation and/or wheeling alternatives. ODEC also questioned Columbia's proposal to recover the costs over a twelve-month period, given that the costs were only incurred in select winter months. ODEC requested a technical conference to further pursue the issues.

13. Piedmont argued that cost recovery for this occurrence should be handled through normal business practices including insurance to the extent Columbia has such coverage

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the outage costs since the rupture was quickly repaired and Columbia's insurance only covers incidents lasting longer than 30 days.

[14] *Citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981).

[15] *Citing Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140-1141 (D.C. Cir. 1987).

or is self insured. Piedmont further argued that Columbia did not provide a basis or any authority to support its position. Piedmont asserted that Columbia increased the line pressure that caused the rupture in order to make deliveries into Millennium in anticipation of its December 22, 2008 in service date. Piedmont therefore argued that the costs associated with the rupture should be assigned to the Millennium project, an incremental independent project. Piedmont stated that Columbia, through its Commission approved rates, is already compensated for maintaining its facilities and the replacement of such facilities as required. Piedmont argued that isolating one cost item for special treatment is not the intended purpose for NGA section 4 filings. Piedmont therefore requested that the Commission reject the filing or, alternatively, suspend and set the issue for hearing.

14. Washington Gas argued that Columbia did not support its application with comprehensive data and information as required. Washington Gas asserted that the parties should have an opportunity to review all relevant communications between Columbia and DOT relating to the increased pressure. Washington Gas stated that it would not oppose an order granting Columbia regulatory asset treatment for the expenses, whereby the $3.5 million would be booked to Account No. 182.3 and held in that account until the pipeline files its next NGA section 4 general rate case, or the Commission initiates an NGA section 5 investigation of Columbia's rates. Washington Gas stated that Columbia could then seek amortization of the cost in its base rates and parties to the proceeding would be permitted to contest Columbia's application on any grounds.

15. Charlottesville and Richmond stated that the Commission has previously allowed a pipeline to establish a surcharge via a limited section 4 filing only for damage resulting from events outside the pipeline's control, such as Hurricane Katrina. They asserted that although the Commission stated in the March 2009 Order[16] that Columbia may seek to recover the costs associated with the rupture in a limited NGA section 4 filing, the Commission subsequently issued its decision in *CenterPoint*,[17] wherein the Commission rejected CenterPoint's limited NGA section 4 filing to recover line losses associated with a rupture. Charlottesville and Richmond stated that the instant proceeding is directly analogous to *CenterPoint*. They asserted that here, as in *CenterPoint*, the exceptional costs arose due to a line rupture that was caused by internal corrosion. They argued that the Commission found that the circumstances of the rupture were within CenterPoint's control. Charlottesville and Richmond concluded that in the instant proceeding, as in

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[16] 126 FERC ¶ 61,319 at P 22.

[17] *Citing CenterPoint Energy Gas Transmission Co.*, 127 FERC ¶ 61,096 (2009) (*CenterPoint)*.

CenterPoint, ultimate control of the system and, therefore, responsibility for the rupture, rests with the pipeline. They also argued that the fact that Columbia incurred additional costs because of the rupture does not mean that it is under-recovering its overall cost of service. Charlottesville and Richmond further argued that if Columbia determines that the added expense associated with the rupture of Line 1278 would cause it to under-recover its overall cost of service, then Columbia should pursue the matter in a full NGA section 4 rate proceeding. They urged the Commission to reject Columbia's proposal.

16. Charlottesville and Richmond also requested that the Commission exercise its NGA section 5 authority and require Columbia to modify its tariff to provide for revenue crediting to its customers when it cannot provide the firm service for which they have contracted.

17. VPEM also argued that Columbia's June 30 filing contravenes the Commission's recent decision in *CenterPoint*. VPEM further argued that, the decision not to replace the sixty-year-old pipeline was Columbia's alone. VPEM contended that, therefore, the subsequent rupture cannot be said to be the result of events beyond the pipeline's control. VPEM argued that in *CenterPoint* the Commission reasoned that pipelines have the responsibility to maintain their systems to prevent losses like those incurred in the rupture and, therefore, Columbia's decision to employ third party transportation to avoid curtailments does not shift the cost responsibility to Columbia's shippers. VPEM asserted that allowing Columbia to pass through costs in this case would create incentives to defer maintenance and reduce insurance coverage and contends that the Commission should reject the proposed surcharge.

18. EQT Energy argued that it does not use Line 1278 or transport gas into the Millennium pipeline system. EQT Energy stated that transportation service to EQT Energy, therefore, was not affected by the Line 1278 rupture and Columbia did not enter into the third-party transportation arrangements for EQT Energy's benefit. Therefore, EQT Energy argued that Columbia did not demonstrate that assessing EQT Energy the proposed Line 1278 Surcharge is just and reasonable. EQT Energy requested that the Commission reject Columbia's proposed tariff filing.

19. NYPSC asserted that the Commission's regulations and the principles of test period ratemaking do not generally provide for the recovery of isolated costs. NYPSC is concerned that there has been no showing that the recovery of these isolated costs, in addition to the existing rates, will produce overall rates that are just and reasonable. NYPSC argued that Columbia did not demonstrate that the third party transportation expense is an extraordinary loss that will have an impact on its ability to generate a just and reasonable return. Accordingly, NYPSC urged the Commission to establish a technical conference.

20. O&R requested that the Commission deny National Grid's request for rejection and grant Old Dominion's request for a technical conference. O&R stated that National Grid's assertion that the Commission must deny relief is incorrect. O&R argued that the industry has been on notice since at least *Colorado Interstate Gas Co.*,[18] that when a pipeline suffers an extraordinary, one-time loss that could not reasonably have been predicted when it filed its last section 4 rate case, the pipeline may be able to recover that cost in a separate limited section 4 proceeding. O&R further argued that granting Old Dominion's request for a technical conference would provide all stakeholders and the Commission an opportunity to fully explore Columbia's prudence, both before and after the Line 1278 rupture.

21. Columbia argued in its answer that section 16.1 of its GT&C provides that Columbia has the right to interrupt firm service if there is a *force majeure* or other unforeseen condition on its system and that it arranged the third party transportation in order to avoid curtailing firm service. Columbia asserted that disallowing the recovery of these costs would encourage pipelines to curtail firm service, rather than take other measures to continue service until new facilities can be placed into service.

22. Columbia stated that the Commission's decision in *CenterPoint* to reject CenterPoint's gas loss was based on its determination that the loss did not rise to the level of an extraordinary, onetime loss that could not be predicted when a pipeline filed its last general section 4 rate case. Columbia stated that the Commission has already held that the third-party transportation costs Columbia is seeking to recover through the Line 1278 Surcharge are "extraordinary one-time costs incurred to provide service during the outage of Line 1278."[19] Columbia pointed out that the Commission specifically invited Columbia to file "a separate, limited section 4 filing."[20] Columbia therefore argues that the Commission should distinguish *CenterPoint* and find that recovery of these costs through a limited section 4 filing is appropriate.

23. Columbia urged the Commission to reject VPEM's, Piedmont's, and Washington Gas's arguments regarding the prudency of Columbia's decision to pressure-test Line 1278 and the transportation service Columbia relied on to meet its firm service obligations. Columbia asserted that the smart-pig tools that it used are the industry standard for verifying the line pressure capability and test for discrepancies in the thickness of the wall of the pipe, which is the most common cause of integrity issues.

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[18] 121 FERC ¶ 61,161 (2007); *reh'g denied*, 123 FERC ¶ 61,183 (2008). *See also Columbia Gulf Transmission Co.*, 125 FERC ¶ 61,255 (2008).

[19] March 2009 Order, 126 FERC ¶ 61,319 at P 22.

[20] *Id*.

Columbia further asserted that stress corrosion cracking, which was the cause of the Line 1278 rupture, is much less common and can not be detected with standard smart pigging tools. Columbia argued that its reliance on smart pigging was prudent and reasonable because it had no reason to suspect stress corrosion cracking on Line 1278 and its testing was accepted by the DOT.

24. On July 31, 2009, the Commission accepted and suspended Columbia's limited section 4 filing, to be effective January 1, 2010, subject to refund and further order of the Commission.[21] The Commission stated that it required additional time to consider the significant issues raised by the parties as to whether Columbia's filing is just and reasonable and is otherwise lawful.

Discussion

25. The Commission has determined that Columbia may be able to recover the emergency third party transportation costs through its TCRA, but only to the extent that those costs were prudently incurred. Because the current record is insufficient to resolve the issues raised by the parties concerning prudence, the Commission is setting the issue of prudence for hearing before an Administrative Law Judge.

26. National Grid asserts that Columbia incurred the costs at issue here for the sole purpose of providing service in December 2008 and January 2009. National Grid argues that the rule against retroactive ratemaking and the filed rate doctrine prohibit a pipeline from increasing its current rates to recover its costs of providing service in a past period, without prior notice that the rates charged during that period were subject to change.[22] National Grid states that Columbia gave no such notice during the December 2008-January 2009 period, and therefore Columbia may not recover these costs. National Grid points out that the Commission has held that the instant third party transportation costs are not eligible for recovery in the TCRA set forth in GT&C section 36, and states that Columbia has cited no other section of its tariff that provided its customers with the required notice.

27. The Commission agrees with National Grid that the instant costs relate solely to the transportation service Columbia provided during December 2008 and January 2009. Columbia's contracts with Tennessee, CNYOG, Millennium, and Empire for emergency

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[21] The Commission rejected as moot one superseded tariff sheet. The Commission also accepted all pleadings that had been filed as of the date of the order, including the various answers.

[22] *Citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981).

transportation service were only in effect during those two months and have no nexus to its performance of current service.[23] Therefore, absent prior notice, the filed rate doctrine and the rule against retroactive ratemaking would prohibit Columbia from adding a surcharge to its current rates to recover these costs. Under the filed rate doctrine, a pipeline may not charge a rate different from the one on file with the Commission for a particular service.[24] Under the rule against retroactive ratemaking, which derives from the filed rate doctrine, "the Commission is prohibited from adjusting current rates to make up for previous over- or under-collections of costs in prior periods."[25] Thus, "even charges that are imposed prospectively, and therefore satisfy the filed rate doctrine, are improper if they are based on the pipeline's losses in a prior period."[26]

28. However, while the March 2009 Order held that the third party transportation costs at issue here were not eligible for recovery in the TCRA, the Commission has reconsidered that ruling for the reasons discussed below. Therefore, the Commission finds that during the period December 2008-January 2009, section 36 of Columbia's GT&C concerning the TCRA did provide notice that the instant costs could be recovered subsequently as provided in section 36. The court has held that the "filed rate doctrine and bar on retroactive ratemaking are satisfied … 'when parties have notice that a rate is

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[23] Contrast *Chandeleur Pipe Line Co*., 117 FERC ¶ 61,250 (2006), in which the Commission accepted a pipeline's limited section 4 filing to recover the costs of repairing damage to its facilities caused by a hurricane. Costs of that nature may be treated as current costs, because the pipeline will be using the repaired facilities to provide current and future service.

[24] *Arkansas Louisiana Gas Co.*, 453 U.S. 571. *See also Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992); *Texas Eastern Transmission Corp. v. FERC*, 102 F.3d 174, 188-89 (D.C. Cir. 1996) (filed rate doctrine "seeks to prevent customers from relying on certain rates, only to find later that their purchasing decisions have been upset and their costs increased."); *Public Utilities Comm'n of California v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993) ("when determining whether a FERC order violates either the filed rate doctrine or the rule against retroactive ratemaking, this court inquires whether, as a practical matter, the purchasers of the [energy] had sufficient notice that the approved rate was subject to change.").

[25] *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (J. Williams, *concurring*).

[26] *Id.*

tentative and may be later adjusted with retroactive effect.'"[27] Accordingly, the Commission rejects National Grid's contention that Columbia must absorb these costs, and the Commission will permit Columbia to recover these costs in a manner consistent with the TCRA mechanism in section 36 of Columbia's GT&C.

29. Section 36.1(a) of Columbia's GT&C defines the Operational 858 costs that may be recovered through the TCRA broadly as "costs incurred for the transmission and compression of gas by others . . . including amounts paid to upstream pipelines for contracts . . . utilized in Transporter's post-restructuring operations." The costs at issue here satisfy this definition. Columbia incurred these costs to purchase transportation service on other pipelines in order to ship gas to its shippers. These costs were thus incurred to obtain transmission of gas by other pipelines under contracts utilized in Columbia's post-restructuring operations.

30. The March 2009 Order excluded the third-party transportation costs from the TCRA based on the Commission's holdings in cases involving fuel cost tracking mechanisms that such mechanisms should only track costs related to normal pipeline operations. In those cases, the Commission excluded extraordinary gas losses caused by unusual, non-recurring events such as hurricanes from recovery through a fuel tracking mechanism.[28] Upon further consideration, the Commission finds that the precedent established in those cases is not applicable here.

31. Pipeline fuel tracking mechanisms generally allow the pipeline to track its costs of both fuel used in its operations and "lost and unaccounted-for gas." Pipelines seeking to recover extraordinary gas losses through such mechanisms have asserted that the extraordinary losses constitute "lost and unaccounted-for gas," and thus fit within the definition of the type of cost that can be included in a fuel tracking mechanism. However, as the Commission explained in a recent order in *ANR Pipeline Co.*,[29] the term "lost and unaccounted-for gas" is commonly understood in the industry to mean gas

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[27] *Id*. (quoting *Consolidated Edison Co. of New York* v. *FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003)). *See also CPUC v. FERC*, 988 F.2d 154, 164 n.9 (D.C. Cir. 1993) ("Although our prior cases have addressed the issue of notice primarily in relation to the filed rate doctrine, we find it similarly applicable in relation to the prohibition against retroactive ratemaking, which serves the same purposes.").

[28] *See, e.g., Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,388 (2008).

[29] 128 FERC ¶ 61,128 (2009).

which is inevitably lost through routine pipeline operations.[30] Therefore, the phrase "lost and unaccounted-for gas" does not encompass extraordinary losses not associated with routine maintenance or other normal operations.[31] The Commission also held that the definition of lost and unaccounted-for gas in the tariff necessarily incorporates common industry usage and Commission precedent addressing the term "lost and unaccounted-for gas." Accordingly, extraordinary gas losses do not fall within the category of costs pipeline tariffs authorize to be recovered through a tracking mechanism for "lost and unaccounted-for gas."

32. In the instant case, Columbia is not seeking to recover any gas lost as a result of the rupture of Line 1278, but costs it incurred to purchase transportation service on other pipelines in order to continue providing service to its customers. Unlike the case with mechanisms tracking a pipeline's costs of lost and unaccounted-for gas, Columbia's tariff definition of Operational 858 costs eligible for recovery through the TCRA does not limit such costs to those incurred during routine operations. In fact, the Commission has previously allowed Columbia to recover through its TCRA third party transportation costs incurred to continue providing service when Columbia's system was out of service for construction.[32] Moreover, Columbia's customers did benefit from its incurrence of the subject third-party transportation costs, because Columbia used those transportation contracts to provide service to its customers. The March 2009 Order recognized this when it stated that "Columbia's emergency actions to continue service to its customers were to be encouraged." By contrast, a pipeline's extraordinary gas losses do not provide any benefit to its customers.

33. Accordingly, the Commission concludes that the March 2009 Order erred in holding that the costs of the third party transportation services Columbia purchased in December 2008 and January 2009 were not eligible for recovery through the TCRA.[33] It

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[30] Among other things, the Commission stated that in 1935 the Supreme Court recognized that "lost and unaccounted-for" gas is that which is inevitably lost through routine pipeline operations. It stated that "'unaccounted-for gas' . . . is gas lost as a result of leakage, condensation, expansion or contraction. There is no dispute that a certain loss through these causes is unavoidable, no matter how carefully the business is conducted." *West Ohio Gas Co. v. Pub. Util. Comm'n of Ohio*, 294 U.S. 63, 67 (1935).

[31] *Colorado Interstate Gas Company*, 123 FERC ¶ 61,183, at P 16 (2008).

[32] *Columbia Gas Transmission Corp*., 105 FERC ¶ 61,041, at P 8-9 (2003).

[33] While Columbia did not seek rehearing of the March 2009 Order on this issue, the Commission recognizes that Columbia may not have believed it was aggrieved by that order because that order stated that its ruling was "without prejudice to

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follows that during the December 2008-January 2009 period when Columbia incurred these costs in order to provide service to its customers, its tariff provided the customers notice that Columbia would recover the costs through its TCRA, assuming it can show that the costs were prudently incurred. In these circumstances, the Commission finds that Columbia should recover these costs consistent with the method set forth in its TCRA.

34. Pursuant to section 36.2 of its GT&C, Columbia makes its annual TCRA rate filings by March 1 of each year to be effective April 1. As provided in GT&C section 36.4(a)(2), each such filing includes an "Operational TCRA Surcharge" to true up cost over- and under-recoveries during the preceding calendar year. Therefore, that section permitted Columbia to reflect its December 2008 payments to the four pipelines in the Operational TCRA Surcharge included in its 2009 annual TCRA filing taking effect last April 1. However, Columbia's January 2009 payments to the pipelines are not eligible for inclusion in the Operational TCRA Surcharge until Columbia makes its 2010 annual TCRA filing to take effect on April 1, 2010. While Columbia did include the December 2008 payments in its February 26, 2009 annual TCRA filing, the Commission required Columbia to remove those costs, and Columbia did so.

35. In these circumstances, the Commission will permit Columbia to place into effect on November 1, 2009, the surcharge proposed in the instant limited section 4 filing, subject to the following conditions. First, Columbia must recalculate the surcharge so that it is designed to recover, during the period November 1, 2009 through March 31, 2010, only the costs of Columbia's December 2008 payments to the four pipelines. In addition, consistent with Sections 36.4(a)(1) and (2) of its GT&C, Columbia must allocate the revised surcharge to the applicable rate schedules "on an as-billed basis and in manner consistent with Transporter's currently effective cost allocation and rate design." This will enable Columbia to recover the December 2008 payments in a manner as nearly consistent as possible in current circumstances with the recovery method set forth in section 36 of its GT&C. Columbia may not seek recovery of its January 2010 payments to the four pipelines until it makes its 2010 annual TCRA filing.

36. Finally, the protesters have raised significant issues as to whether Columbia's incurrence of these costs was prudent. Accordingly, the Commission will set for hearing

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Columbia Gas making a separate, limited section 4 filing to recover these extraordinary one-time costs incurred to provide service during the outage of Line 1278."

before an Administrative Law Judge all issues concerning prudence of Columbia's incurrence of the third party transportation costs included in this filing.[34]

37. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[35] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.[36] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Columbia may move the tariff sheets suspended by the March 2009 Order into effect on November 1, 2009, subject to refund and the other conditions in this order.

(B) On or before 30 days from the date of this order, Columbia must file revised tariff sheets to be effective November 1, 2009, consistent with the discussion in this order.

(C) Pursuant to the authority of the Natural Gas Act, particularly sections 4, 5, 8, 9, and 15 thereof, and the Commission's rules and regulations, a public hearing shall be held in the captioned docket concerning the lawfulness of Columbia's proposed rates.

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[34] *See, e.g., Sea Robin Pipeline Co.*, 128 FERC ¶ 61,286 at P 35, 44 (2009) (establishing a hearing to examine the prudence of certain one-time costs proposed to be recovered in a tracker and other issues).

[35] 18 C.F.R. § 385.603 (2009).

[36] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.