

138 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

High Island Offshore System, L.L.C.

Docket Nos. RP09-487-000
RP10-307-000

ORDER ON RESERVED ISSUE

(Issued February 16, 2012)

1. On April 29, 2011, the Commission approved an uncontested settlement (Settlement) filed by High Island Offshore System, L.L.C. (HIOS) in Docket No. RP09-487-000 to resolve issues set for hearing by the Commission's April 30, 2009 order.¹ The Settlement contained an issue related to the applicability of a storm event tracker surcharge (Storm Event Surcharge) to certain Rate Schedule FT-2 shippers, which the Settlement reserved for later resolution. As discussed below, the Commission rules on this reserved issue and finds that the Storm Event Surcharge is applicable to all Rate Schedule FT-2 shippers on HIOS' system. In addition, the Commission also rules that a January 12, 2010 notification of reclassification of certain contracts from negotiated rate status to discount status filed by HIOS is without merit.

I. Background

2. On March 31, 2009, HIOS filed in Docket No. RP09-487-000 a general rate change application pursuant to section 4 of the Natural Gas Act (NGA). The proposal included a rate increase for HIOS' existing services, as well as changes in certain terms and conditions of service. On April 30, 2009, the Commission accepted and suspended HIOS' revised tariff sheets to be effective October 1, 2009, subject to refund, conditions, and the outcome of a hearing.²

¹ *High Island Offshore Sys., L.L.C.*, 135 FERC ¶ 61,105 (2011).

² *High Island Offshore Sys., L.L.C.*, 127 FERC ¶ 61,097 (2009).

3. On March 15, 2010, HIOS filed an offer of settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure. HIOS stated in its settlement proposal that the Settlement resolved all the issues set for hearing in the April 30, 2009 Order. In addition, HIOS proposed under the Settlement to initiate a Storm Event Surcharge applicable to its shippers. Specifically, section 3.1 of the Settlement authorizes HIOS to implement a new section 18 in the General Terms and Conditions (GT&C), which would provide for a new tracker mechanism by which HIOS could establish a volumetric surcharge applicable to all services for the recovery of costs associated with future storm events.³ Section 3.1 further provides that any surcharge filed for pursuant to GT&C section 18 will be based on HIOS' total throughput, and HIOS will not be permitted to propose any discount adjustment in the design of the surcharge. In addition, any surcharge shall not exceed \$0.02 per Dth.

4. Section 3.2(a) of the Settlement provides that any Settling Participant is permitted in its comments on the Settlement to contend that the new Storm Event Surcharge provided for in section 3.1 should not apply to "certain Rate Schedule FT-2 shippers" and provides that such applicability would be reserved by the Settlement for later Commission determination (Reserved Issue).⁴ In section 3.2(b) the Settling Participants requested that the Commission address the Reserved Issue in its order on the Settlement. Section 3.2(c) of the Settlement provides that Settling Participants may not withdraw their support or non-opposition from any other aspect of the Settlement in light of any Commission decision on the Reserved Issue.

5. On April 7, 2010, HIOS filed a motion to place the Settlement rates into effect, on an interim basis, pending Commission approval of the Settlement. The Commission accepted the proposed tariff sheet to be effective April 1, 2010, on an interim basis, subject to the outcome of the Commission's decision on the Settlement.⁵

³ Settlement section 3.1. Appendix B to the Settlement includes *pro forma* tariff sheets setting forth proposed Section 18 of HIOS' GT&C. That section generally provides that the costs eligible for recovery in the Storm Event Surcharge are actual costs resulting from a hurricane, tropical storm, or depression named or numbered by the U.S. National Weather Service, plus carrying costs at the Commission prescribed rate. The collection of eligible costs will generally be based on an amortization period of 36 months, subject to the \$0.02 per Dth cap. When HIOS' base rates are modified pursuant to NGA sections 4 or 5, any unrecovered eligible costs may be included in the cost-of-service used to calculate HIOS' base rates.

⁴ Settlement section 3.2(b).

⁵ *High Island Offshore Sys., L.L.C.*, 131 FERC ¶ 61,290 (2010).

6. On April 23, 2010, the Presiding Law Judge certified the Settlement to the Commission as uncontested.⁶ On March 28, 2011, HIOS filed a motion with the Commission requesting that it approve the uncontested Settlement. HIOS conceded that the Settlement originally contemplated that the Reserved Issue be resolved in conjunction with the Settlement but requested in the interest of time that the Commission approve the uncontested Settlement in all aspects and preserve the Reserved Issue for later consideration. On April 29, 2011, the Commission approved the Settlement, as fair and reasonable and in the public interest, subject to modification of the applicable standard of review.⁷ In the April 29, 2011 Order, the Commission stated that it was not ruling on the Reserved Issue and that, as requested by HIOS in HIOS' March 28, 2011 motion, the Commission would defer action on the Reserved Issue to provide the pipeline and its customers all the other benefits of the Settlement.

II. The Reserved Issue

7. Section 3.2 of the Settlement, as approved by the Commission, provides that the applicability of the Storm Event Surcharge to certain Rate-Schedule FT-2 shippers is a Reserved Issue that will be subject to additional Commission procedures. Specifically, section 3.2(a) states:

As part of its initial comments otherwise supporting or not opposing all other aspects of the Settlement without reservation, any Settling Participant shall be permitted to contend that the new storm event surcharge provided for in Section 3.1, above, should not apply to certain Rate Schedule FT-2 shippers ("Reserved Issue"). Settling Participants shall also be permitted to oppose such contentions and/or support the new storm event surcharge as proposed, and to argue that the Commission's decision on the Reserved Issue should have no precedential impact in other pipeline proceedings.

8. In their comments to the Settlement, BP America Production Company and BP Energy Company (BP), ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation (ExxonMobil), Enbridge Offshore Pipelines (UTOS) LLC (Enbridge), and Indicated Shippers,⁸ specifically address the Reserved Issue. BP and

⁶ *High Island Offshore Sys., L.L.C.*, 131 FERC ¶ 63,007 (2010).

⁷ *High Island Offshore Sys., L.L.C.*, 135 FERC ¶ 61,105.

⁸ Indicated Shippers include Apache Corporation, Chevron Natural Gas, a Division of Chevron U.S.A. Inc., Badger Oil Corporation, and Mariner Energy, Inc.

ExxonMobil assert that the Storm Event Surcharge should not apply to them as Rate Schedule FT-2 shippers and also challenge the overall validity of the Storm Event Surcharge. On the other hand, Indicated Shippers contend that the contractual language of the negotiated rate agreements clearly states that the Storm Event Surcharge applies to Rate Schedule FT-2 shippers. Enbridge also asserts that application of the Storm Event Surcharge to the Rate Schedule FT-2 shippers is appropriate.

9. To resolve the Reserved Issue before it, the Commission must determine whether shippers under Rate Schedule FT-2 may be subject to the Storm Event Surcharge. In order to fully consider an appropriate resolution of the Reserved Issue, the Commission must examine the FT-2 rate schedule and associated agreements according to which the protesting parties take service.

III. Discussion

10. For the reasons discussed below, the Commission finds that HIOS may apply the Storm Event Surcharge to the Rate Schedule FT-2 shippers on its system. However, HIOS must remove tariff language indicating that the surcharge may not be discounted. The Commission also interprets the BP and ExxonMobil service agreements as requiring those shippers to pay the Storm Event Surcharge.

A. Applicability of Storm Event Surcharge to Rate Schedule FT-2 Shippers

11. Section 18.1 of the *pro forma* tariff language included in Appendix B of the Settlement provides, “The [Storm Event Surcharge] shall be applicable to each Dekatherm of Gas transported under any Transportation Service Agreement in effect under this FERC Gas Tariff, including any discounted recourse rate or negotiated rate Transportation Service Agreement, and shall be paid in addition to the rates and charges otherwise applicable to such services.” A footnote to the term “negotiated rate Transportation Service Agreement” in the above sentences states “[m]ay require revision based on the outcome of the [r]eserved [i]ssue under Section 3.2 of the Stipulation and Agreement.” Additionally, section 18.6(d) of the GT&C states “[a]ny rate discount agreed to by HIOS shall not be considered a discount of any [Storm Event Surcharge].” However, section 18.6(d) is also accompanied by an identical footnote potentially limiting the statement based on the outcome of the reserved issue.

12. ExxonMobil and BP request that the Commission exclude the application of the Storm Event Surcharge to their contracts under Rate Schedule FT-2.⁹ ExxonMobil and BP state that they are firm shippers on the HIOS system pursuant to long-term negotiated rate transportation agreements under Rate Schedule FT-2. ExxonMobil states that it is subject to the same fixed contract rate as BP, which is lower than HIOS' maximum rate under Rate Schedule FT-2.¹⁰ BP asserts that the service agreements and associated negotiated rate letter agreements between HIOS and ExxonMobil and BP reflect the parties' life of lease contracts under which HIOS provides gathering/transmission service at a fixed rate.

13. BP and ExxonMobil argue that the Storm Event Surcharge should not apply to the Rate Schedule FT-2 shippers because they have negotiated rate contracts that contain fixed rates and such application will result in shifting some of HIOS' operating costs into the fixed rate.¹¹ ExxonMobil also argues that applying the Storm Event Surcharge to it would contravene the intent underlying the FT-2 service agreement, which is to establish a fixed rate for transportation services to establish rate stability during the long-term service agreement. Similarly, BP objects to the Storm Event Surcharge as "an unsupported commodity surcharge mechanism that will effectively shift some of the cost-of-service type costs . . . from the recourse base rates paid by the non-fixed rate shippers to a surcharge applicable to all shippers, including the existing fixed rate FT-2 shippers."¹² ExxonMobil contends that applying the Storm Event Surcharge to the Rate Schedule FT-2 shippers would render the protection of the fixed rate within its contract

⁹ BP America Production Company and BP Energy Company, April 5 Comments at 6 (BP Comments); ExxonMobil Gas & Power Marketing Company, April 5 Comments at 16 (ExxonMobil Comments).

¹⁰ As stated in HIOS' negotiated rate letter agreements with BP and ExxonMobil, HIOS agreed to a lower transportation rate with the FT-2 Shippers "in consideration of the gas reserves dedicated to HIOS under . . . certain Reserve Commitment Agreement[s]." *See High Island Offshore Sys., L.L.C.*, Filing, Docket No. RP02-118-004, Ex. B at 1 (filed Sept. 20, 2002); *High Island Offshore Sys., L.L.C.*, Filing, Docket No. RP02-118-005, Ex. B at 1 (filed Oct. 31, 2002).

¹¹ HIOS filed the service agreements with BP and ExxonMobil as "negotiated rate agreements" in accordance with the Commission's negotiated rate policy. As discussed further in the last section of this order, the Commission approved the agreements between HIOS and BP and HIOS and ExxonMobil as negotiated rate agreements by letter orders dated October 29, 2002 and November 18, 2002, respectively.

¹² BP Comments at 3.

illusory.¹³ Lastly, ExxonMobil asserts that its transportation service agreement simply “does not authorize HIOS to impose the surcharge.”¹⁴

14. Indicated Shippers assert that the language of the contracts held by the Rate Schedule FT-2 shippers is conclusive of this issue and permits HIOS to recover the Storm Event Surcharge from both BP and ExxonMobil.¹⁵ Indicated Shippers point out that paragraph 1 of both contracts clearly states that the rate to be paid under the contracts is the “lesser of Transporter’s applicable Maximum Rate or \$.15 per Dth **plus all applicable surcharges** and Transporter’s fuel and L&U.”¹⁶

15. In addition, Indicated Shippers request that, if the Commission determines that the Rate Schedule FT-2 shippers’ contracts are exempt from the Storm Event Surcharge, then the Commission should also clarify that HIOS should be required to absorb that portion of uncollected storm costs rather than reallocate costs to its other shippers, because under the Commission’s negotiated rate policy, the risk cannot be shifted to other customers.¹⁷

16. Enbridge asserts that the applicability of the Storm Event Surcharge to all shippers is appropriate, because it ensures that all beneficiaries of the pipeline’s repairs share in paying for the costs of those repairs. Enbridge points out that all of the pipeline’s shippers, including the Rate Schedule FT-2 shippers suffer when the HIOS system is shut down and benefit when it is repaired and again operational. Therefore, Enbridge argues that all shippers should pay for the costs to place the system back into service.

Commission Determination

17. The Commission finds that, to the extent sections 18.1 and 18.6(d) of the GT&C allow HIOS to require all Rate Schedule FT-2 shippers to pay the Storm Event Surcharge

¹³ ExxonMobil Comments at 9-10 & 14.

¹⁴ ExxonMobil Comments at 6.

¹⁵ Indicated Shippers April 14 Reply Comments at 3 (Indicated Shippers Comments).

¹⁶ FT-2 Transportation Agreement (emphasis added).

¹⁷ Indicated Shippers Comments at 3 (citing *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,242, *reh’g and clarification denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998)).

without regard to contrary terms of individual discount and negotiated rate agreements, it is contrary to Commission regulations and therefore, unjust and unreasonable. However, the Commission finds that the BP and ExxonMobil negotiated rate letter agreements do permit HIOS to recover the Storm Event Surcharge from those shippers.

18. Section 284.10(c)(5) of the Commission's regulations requires pipelines to file maximum and minimum transportation rates for both firm and interruptible service.¹⁸ Section 284.10(c)(4) of the Commission's regulations requires that the pipeline's minimum rate reflect only variable costs (i.e., costs that vary with the volume of throughput) and the maximum rate reflect both fixed (i.e., costs that remain constant regardless of the volume of throughput and are predominantly associated with capital investment in the pipeline system) and variable costs.¹⁹ For discounting purposes, the pipeline is permitted to charge "an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate."²⁰

19. The costs eligible for recovery in the Storm Event Surcharge clearly include fixed costs, which would be included in HIOS's maximum rates and not in its minimum rates. Therefore, the Commission's regulations require that the Storm Event Surcharge be discountable down to whatever portion of that surcharge might reflect variable costs. Accordingly, consistent with our holding in *Sea Robin Pipeline Co., LLC (Opinion No. 516)*,²¹ HIOS must file revised tariff records removing any language from its tariff records indicating that the Storm Event Surcharge is not discountable. HIOS may elect not to discount the Storm Event Surcharge with respect to future discounted rate agreements, provided it does so on a non-discriminatory basis. However, if HIOS provides a discount, future section 4 rate filings cannot modify the discount, so long as the rate remains within the maximum and minimum rate.²² The Commission also permits pipelines to enter into negotiated rates without any requirement that they be within the bounds set by the maximum and minimum recourse rates. Therefore, HIOS must also remove any tariff language indicating that all negotiated rate shippers must pay the Storm Event Surcharge, without regard to the terms of their individual negotiated rate agreements. Of course, HIOS need not enter into negotiated rates which exempt the

¹⁸ 18 C.F.R. § 284.10(c)(5)(i) (2011).

¹⁹ 18 C.F.R. § 284.10(c)(4) (2011).

²⁰ 18 C.F.R. § 284.10(c)(5)(ii) (2011).

²¹ 137 FERC ¶ 61,201, at P 93-94 (2011).

²² *Bay Gas Storage Ltd.*, 131 FERC ¶ 61,034, at P 45 (2010).

shipper from paying the Storm Event Surcharge. That is a matter to be addressed in each negotiated rate agreement.

20. We now turn to the terms of the BP and ExxonMobil FT-2 negotiated rate agreements to determine whether those agreements permit imposition of the Storm Event Surcharge. For the reasons discussed below, we interpret those agreements as requiring BP and ExxonMobil to pay the surcharge.

21. The BP and ExxonMobil service agreements must be interpreted as a whole, giving meaning to all provisions if at all possible. Consistent with the Rate Schedule FT-2 form of service agreement, section 4.1 of the BP and ExxonMobil service agreements provides:

[e]ach month, Shipper shall pay Transporter for the service hereunder, an amount determined in accordance with Transporter's Rate Schedule FT-2 and the applicable provisions of the General Terms and Conditions of Transporter's F.E.R.C. Gas Tariff, Third Revised Volume No. 1, as filed with the F.E.R.C. Such Rate Schedule and General Terms and Conditions are incorporated herein by reference and are made a part hereof. Subject to Exhibit B hereto, for all gas delivered . . . Shipper shall pay the currently effective rates and charges under Rate Schedule FT-2 as the same may be amended or superseded in accordance with applicable provisions of the Natural Gas Act and the rules and regulations of the F.E.R.C. The rates and charges shall be billed and paid for in accordance with the General Terms and Conditions applicable to Rate Schedule FT-2.

In addition, section 4.2 of the BP and ExxonMobil service agreements provides, “[i]t is agreed that Transporter may seek authorization from time to time from the F.E.R.C. for such rate adjustments as may be found necessary to assure Transporter just and reasonable rates.”

22. These provisions thus require BP and ExxonMobil to pay HIOS' just and reasonable maximum rates as approved by the Commission from time to time, subject only to any contrary provision in the Exhibit B negotiated rate letter agreements. Therefore, we must look to the specific terms of those letter agreements to determine if they exempt BP and ExxonMobil from paying a future surcharge approved by the Commission. Otherwise, we must defer to HIOS' generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for the applicable rate schedule.

23. Paragraph 1 of Exhibit B to each service agreement provides that the specified rates are applicable only in accordance with the following:

In lieu of the Maximum Rates applicable to the service provided hereunder, for monthly periods during which Shipper is to pay a volumetric rate, Shipper shall pay Transporter the lesser of Transporter's applicable Maximum Rate or \$.15 per Dth **plus all applicable surcharges and Transporter's fuel and L & U**. For monthly periods during which Shipper is required to pay a reservation charge, Shipper shall pay Transporter: (i) the lesser of Transporter's Maximum monthly reservation charge or \$4.5625 per Dth per month, excluding all applicable surcharges, plus (ii) the FT-2 commodity charge on volumes actually transported, **plus (iii) any applicable surcharges and Transporter's fuel and L&U**; provided, however, that the reservation charge billed to Shipper shall be reduced to the extent necessary so that the sum of (a) that number determined by multiplying the reservation charge to be paid by twelve (12) and dividing the product so derived by three hundred sixty-five (365), plus (b) the commodity charge, shall not exceed fifteen cents (\$0.15) per Dth. The actual average rate per Dth reflected in such billing for the volume transported and which Transporter is entitled to collect may exceed fifteen cents (\$0.15) per Dth if the volume transported is less than the [Maximum Daily Quantity] for that billing period. (Emphasis added).

24. This contract language requires that BP and ExxonMobil shall pay certain agreed-upon rates "**plus all applicable surcharges and Transporter's fuel and L&U.**"²³ We interpret the phrase "applicable surcharges" to mean those surcharges in effect and applicable to service under HIOS' Rate Schedule FT-2, as they may change from time to time during the term of the BP and ExxonMobil service agreements. There is nothing in Exhibit B indicating that the referenced "applicable surcharges" are limited to only those surcharges that were applicable on the date of the agreement's execution. While the Storm Event Surcharge did not exist at the time BP and ExxonMobil entered into their service agreements, the *Memphis* Clause in section 4.2 of those service agreements made clear that new charges could be added. Moreover, as the courts have indicated, the Commission has every right to expect contracting parties to express clearly their

²³ FT-2 Transportation Agreement (emphasis added).

intentions and not require the Commission to read into their agreements what is not spelled out there.²⁴ If it were the intent of the parties to limit the “applicable surcharges” to those in effect on the date the BP and ExxonMobil service agreements were executed, they could have added language expressing such intent. But, they did not.²⁵

25. ExxonMobil attached to its comments an excerpt from testimony provided by a HIOS witness in HIOS’ Docket No. RP03-221-000 section 4 rate case. In that testimony, the HIOS witness stated that in its negotiations with BP and ExxonMobil, “HIOS chose to charge the maximum rate, the lesser of the maximum rate or, I believe, it’s 15 cents, which is the amount the producers were willing to pay to get to the beach.”²⁶ ExxonMobil contends that this testimony indicates that the parties’ intent in entering into the negotiated rate agreements was to establish a fixed rate that could not be increased through the addition of a Storm Event Surcharge. However, as HIOS points out, the cited testimony does not address the actual language of the ExxonMobil and BP negotiated rate letter agreements, which requires ExxonMobil and BP to pay “all applicable surcharges,” without any limitation on the nature of those surcharges. Moreover, section 11.1 of the two service agreements provides, “This Agreement, together with Exhibits A and B hereto, comprise the entire and complete form of transportation agreement between the undersigned parties.” Therefore, the express terms of the agreements cannot be modified based on statements of the parties not reflected in those agreements.

²⁴ See *Florida Power & Light Co.*, 67 FERC ¶ 61,141, at 61,396 (1994) (citing *Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347-48 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963); *accord*, *Boston Edison Co. v. FERC*, 856 F.2d 361, 367 (1st Cir. 1988); *Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1190 (D.C. Cir. 1985); *Mitchell Energy Corp. v. FPC*, 519 F.2d 36, 40-41 (5th Cir. 1975); *City of Chicago v. FPC*, 385 F.2d 629, 640 (D.C. Cir. 1967); *see also Ohio Power Co. v. FERC*, 744 F.2d 162, 167 n.5 (D.C. Cir. 1984) (major public utility experienced in making rate filings can properly be held to the letter of the language it drafted, i.e., is fairly chargeable with ability to state what it means); *Papago Tribal Util. Auth. v. FERC*, 610 F.2d 914, 929 (D.C. Cir. 1979) (major public utility is fairly chargeable with ability to state what it means)).

²⁵ See *Opinion No. 516*, 137 FERC ¶ 61,201, at P 93-94, interpreting the phrase “applicable surcharges” in a discounted rate agreement at issue in that case also to permit the imposition of a hurricane surcharge. When BP and ExxonMobil entered into the negotiated rate letter agreements with HIOS, only one surcharge existed, a line pack commodity surcharge.

²⁶ April 5, 2010 ExxonMobil comments at 9-10.

26. Accordingly, we interpret the BP and ExxonMobil FT-2 service agreements to permit HIOS to collect the Storm Event Surcharge consistent with section 18 of HIOS GT&C, as modified above.

B. Double Recovery of Costs

27. BP asserts that the Storm Event Surcharge may result in potential double recovery by HIOS and therefore the Storm Event Surcharge should not apply to it.²⁷ Specifically, BP states that section 1.2(a) of the Settlement states that HIOS proposed in this rate proceeding to recover unreimbursed hurricane damage repair costs. Section 1.2(a) continues that, therefore, commencing on the effective date of the Settlement, HIOS shall be authorized to commence amortizing a total of \$9,469,142 for such regulatory asset over a three-year period. BP accordingly claims that “the settlement rates already reflect at a minimum more than \$9.4 million of hurricane-related costs, with the settlement rates not decreasing after the amortization period,” and “[n]othing in the [S]ettlement would require HIOS to adjust its settlement base rates after the full amount of HIOS’ unreimbursed hurricane-related costs are recovered by HIOS.”²⁸ Therefore, BP argues, “the settlement base rates specifically include a certain minimum amount of hurricane-related O[perations & M[aintenance] costs on a going forward basis, with the settlement base rates continuing to reflect such costs after HIOS’ past hurricane costs are fully reimbursed.”²⁹

28. HIOS responds that “the Settlement rates were explicitly agreed to on a ‘black box’ basis,” so that “there is no way of discerning any underlying costs or attributing them to hurricane-related expenses in order to try and see how those costs were allegedly double counted.”³⁰ HIOS also asserts that there is no need for the Commission to resolve matters related to the Storm Event Surcharge at this time, because the issue is not ripe.

29. The Commission agrees with HIOS’ assertion that the double recovery issue is not ripe.³¹ HIOS has not yet filed to recover any costs pursuant to the Storm Event

²⁷ BP Comments at 3.

²⁸ *Id.* at 3-4.

²⁹ *Id.* at 4.

³⁰ HIOS Reply Comments at 4.

³¹ As noted above, the Commission finds that the resolution of the issue of whether HIOS’ generally applicable tariff provides for the collection of the Storm Event

Surcharge. Proposed section 18(a) provides that, when HIOS does make such a filing, interested parties will have the right to protest any such filing. Therefore, at the time HIOS files to impose the Storm Event Surcharge in accordance with its tariff, protesting parties may raise arguments concerning whether the actual costs included in that filing would result in a double recovery of costs, and the Commission will establish appropriate procedures for the resolution of that issue. For example, in *Sea Robin Pipeline Company, LLC (Sea Robin)*, the Commission established a hearing to consider similar issues raised by protesting parties.³²

C. Validity of the Storm Event Surcharge

30. Although the protesting parties maintain that they are not proposing that the Commission reject the Storm Event Surcharge, they raise arguments challenging the overall validity of the Storm Event Surcharge.³³ ExxonMobil argues that allowing hurricane repair costs to be recovered in a limited section 4 surcharge filing undermines traditional cost-of-service ratemaking under section 4 of the NGA³⁴ by enabling the pipeline to increase rates to reflect certain specified costs without a comprehensive examination of the overall cost of service required by a general section 4 rate proceeding.³⁵ ExxonMobil argues that HIOS' proposed Storm Event Surcharge is distinguishable from the "defined circumstances" in which the Commission has previously allowed cost trackers.³⁶ Similarly, BP asserts that the Storm Event Surcharge

Surcharge from Rate Schedule FT-2 shippers is ripe. The Rate Schedule FT-2 shippers' negotiated rate letter agreement demonstrates that Rate Schedule FT-2 shippers are responsible for all applicable surcharges, including the Storm Event Surcharge.

³² 128 FERC ¶ 61,286, at P 38 (2009).

³³ See ExxonMobil Comments at 13, n.17 (stating that "ExxonMobil is not proposing that the Commission reject the surcharge provision or the tracker mechanism that would be established in this Settlement. ExxonMobil seeks only a holding that the surcharge does not apply to ExxonMobil's fixed rate contract under Rate Schedule FT-2.").

³⁴ *Id.* at 11.

³⁵ BP Comments at 2 n.3; ExxonMobil Comments at 6.

³⁶ ExxonMobil Comments at 11-13. ExxonMobil recognizes that the Commission has approved hurricane cost trackers in other orders, generally in conjunction with settlements (citing *Sea Robin*, 128 FERC ¶ 61,286, *reh'g*, 130 FERC ¶ 61,191 (2010)), *appeal dismissed*, *ExxonMobil Gas & Marketing Co., et al. v. FERC*, No. 10-1098 (D.C.

(continued...)

is not supported by substantial record evidence and is unjust, unreasonable, and contrary to the public interest.

31. ExxonMobil and BP point out that HIOS did not propose the Storm Event Surcharge in its initial filing in this rate proceeding and did not propose any changes to the Rate Schedule FT-2 shippers' fixed rate under their Rate Schedule FT-2 service agreements.³⁷ Therefore, ExxonMobil argues, imposing the Storm Event Surcharge on the Rate Schedule FT-2 shippers would place them "in a position worse than the worst reasonably conceivable litigation outcome in this proceeding,"³⁸ and would "indicate that [the Rate Schedule FT-2 shippers] would have been better off contesting the Settlement, contrary to the Commission policy favoring settlements."³⁹ Therefore, ExxonMobil asserts that imposing the Storm Event Surcharge on its FT-2 agreement, when it received no rate reduction or other benefit from the Settlement, would be inequitable and preferential.⁴⁰

Commission Determination

32. The issue before the Commission is the Reserved Issue set forth by the Settlement, namely the applicability of the Storm Event Surcharge to the Rate Schedule FT-2 shippers. Therefore, the protesting parties' arguments challenging the overall validity of the Storm Event Surcharge are beyond the scope and otherwise lack merit.

33. The Commission approved HIOS' Storm Event Surcharge when it approved the Settlement.⁴¹ The issues raised by the protesting parties challenging the validity of the Storm Event Surcharge are rendered moot by the Commission's approval of the

Cir. Oct. 21, 2011); *Stingray Pipeline Co., L.L.C.*, 127 FERC ¶ 61,308 (2009); *Discovery Gas Transmission LLC*, 122 FERC ¶ 61,099 (2008); *Chandeleur Pipe Line Co.*, 117 FERC ¶ 61,250 (2006)). ExxonMobil states that it has challenged several of those orders.

³⁷ BP Comments at 5; ExxonMobil Comments at 15.

³⁸ BP Comments at 5.

³⁹ ExxonMobil Comments at 15 (citing *El Paso Natural Gas Co.*, 115 FERC ¶ 61,259, at P 21, 28 (2006)).

⁴⁰ *Id.*

⁴¹ See *High Island Offshore Sys., L.L.C.*, 135 FERC ¶ 61,105 (2011).

Settlement. In addition, the Commission has rejected like arguments that a pipeline can recover hurricane-related costs through a special tracking mechanism established in a limited section 4 filing without filing a general section 4 rate case.⁴² As the Commission explained in *Sea Robin*,

[C]urrent Commission policy permits a surcharge via a limited section 4 filing ‘to recover extraordinary, one-time losses resulting from events outside the pipeline’s control.’ . . . Sea Robin’s proposal is a method to recover the costs incurred to place its system back in service as a result of Hurricane Ike and other future storms. Not only are such extraordinary costs outside the pipeline’s control, both the incurrence and level of such costs is not sufficiently predictable that an allowance for such costs could have been included in Sea Robin’s annual cost of service in its last general section 4 rate case. While hurricanes may be expected to occur in the Gulf of Mexico at irregular intervals, no two hurricanes cause the same damage, nor is it predictable when and how often they will occur. However, Sea Robin’s incurrence of this type of cost benefits its customers by allowing it to resume full service as quickly as possible following a catastrophic event. Therefore, the Commission finds it reasonable to permit Sea Robin to recover costs related to hurricane damage through a mechanism established outside of a general section 4 rate case. . . . [S]uch a surcharge mechanism provides the pipeline and its customers certainty as to what categories of costs may be recovered and how they will be allocated among shippers.⁴³

IV. Negotiated Rate Agreements

34. On January 12, 2010, HIOS filed a letter in Docket No. RP10-307-000 “notifying” the Commission that it does not regard the ExxonMobil and BP FT-2 service agreements and associated letter agreements included in Exhibit B of each service agreement to be “negotiated rate agreements.” HIOS’ January 12 letter contends instead that these agreements are “classic discounted rates rather than negotiated rates.”

35. Public notice of the filing was issued on January 14, 2010. Interventions and protests were due as provided in section 154.210 of the Commission’s regulations (18 C.F.R. § 154.210 (2011)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2011)), all timely filed motions to intervene and any unopposed motions to intervene out-of-time

⁴² *Sea Robin*, 128 FERC ¶ 61,286, at P 38, *order on reh’g*, 130 FERC ¶ 61,191, at P 11.

⁴³ *Sea Robin Pipeline Co., LLC*, 130 FERC ¶ 61,191, at P 11, 12, and 21.

filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On January 25, 2010 and February 2, 2010, a number of interveners filed protests.⁴⁴ On January 25, 2010, ExxonMobil Gas & Power Marketing Company filed a comment. The protests and comment are addressed below.

36. Protestors point out that HIOS, when it filed the transportation service agreements with ExxonMobil and BP with the Commission, described the agreements as negotiated rate agreements. Protestors note that the Commission approved the agreements as negotiated rate agreements and that nothing has changed in the rate terms of the contracts. Protestors maintain that the rate terms qualify the contracts as negotiated rates.

37. Protestors also argue that this attempt to turn a negotiated rate into a discount rate is contrary to Commission policy. Protestors also assert that HIOS has not requested that the Commission take any actions pursuant to the HIOS “notification.” Protestors contend that it would be unjust and unreasonable for the Commission to permit HIOS to reclassify the contracts as discounted rate contract, because such reclassification would make it easier for HIOS to attempt to shift costs from its newly acquired East Breaks system to its other shippers.

Commission Determination

38. The Commission finds that both the BP and the ExxonMobil FT-2 service agreements are negotiated rate agreements. HIOS filed its service agreement with BP on September 30, 2002 and its service agreement with ExxonMobil on October 31, 2002.⁴⁵ Exhibit B to each service agreement contains the heading “RE: Negotiated Rate Letter Agreement.” Section 7 of the BP Exhibit B and section 6 of the ExxonMobil Exhibit B each provide, “This Negotiated Rate Agreement will be filed with and subject to the approval of the Federal Energy Regulatory Commission.” In its transmittal sheet to each filing, HIOS stated that it was filing the agreements pursuant to its negotiated rate authority in section 25 of its GT&C, and it stated that each agreement was a negotiated rate agreement, because it “contains potentially fixed volumetric rates.”⁴⁶ The

⁴⁴ Bandon Oil and Gas, LP; El Paso E&P Company, L.P.; Indicated Shippers; LLOG Exploration Offshore, Inc.; and Walter Oil & Gas Corporation.

⁴⁵ HIOS filed the BP agreement in Docket No. RP02-118-004 and the ExxonMobil agreement in Docket No. RP02-118-005.

⁴⁶ September 30, 2002 BP Transmittal Sheet at 2, and October 31, 2002 ExxonMobil transmittal sheet at November 1, 2002.

Commission accepted the two filings on October 29 and November 18, 2002 respectively as negotiated rate agreements.

39. The Commission attaches little weight to HIOS' January 12, 2010 letter "notifying" the Commission that it does not regard the service agreements to be "negotiated rate agreements." HIOS having filed the service agreements as "negotiated rate agreements" in accordance with the Commission's negotiated rate policy, and the Commission having approved them as such, HIOS cannot during the terms of those service agreements, unilaterally reclassify them as discounted rate agreements.⁴⁷ If HIOS desires to amend a negotiated rate agreement on file with the Commission in order to make it a discounted rate agreement, it must obtain the agreement of the shipper to such a contract modification, and then make a tariff filing with the Commission in order to remove the previously filed negotiated rate agreement from its filed negotiated rate agreements. Therefore, in the absence of such a filing, the ExxonMobil and BP FT-2 service agreements and associated letter agreements continue to be negotiated rate agreements.

The Commission orders:

(A) HIOS' Storm Event Surcharge is accepted, subject to HIOS Filing revised tariff language consistent within 20 days of the issuance of this order, consistent with the discussion above.

(B) The ExxonMobil and BP FT-2 service agreements and associated letter agreements continue to be negotiated rate agreements.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁷ *Shell Energy North America (US), L.P.*, 126 FERC ¶ 61,120, at P 25 (2009).