

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

ANR Pipeline Company

Docket No. RP07-99-001

ORDER DENYING REHEARING

(Issued March 5, 2007)

1. On January 8, 2007, High Island Offshore System, L.L.C. (HIOS) filed a request for rehearing of the Commission's December 27, 2006 order that accepted ANR Pipeline Company's (ANR) Rate Schedule X-64 annual cost redetermination filing, effective January 1, 2007, subject to refund and to the outcome of the hearing established by the order.¹ For the reasons set forth below, HIOS' request for rehearing is denied.

I. Background

2. Rate Schedule X-64 of ANR's FERC Gas Tariff Original Volume No. 2 is a Service Agreement dated August 4, 1977, between ANR and HIOS. Under the terms of this Service Agreement, approved by Commission order issued July 6, 1978, in Docket No. CP78-134,² ANR provides gas measurement, liquids separation, dehydration and related services for HIOS at ANR's Grand Chenier, Louisiana facilities. Under the Agreement, HIOS pays to ANR an annual charge equal to 66-2/3 percent of the annual cost of service for the Grand Chenier facilities. HIOS pays ANR monthly one-twelfth (1/12) of the annual service charge, which is redetermined as of January 1 of each year.

3. On December 1, 2006, ANR submitted its annual cost redetermination filing with the Commission. ANR filed a revised tariff sheet which reflected an increase in the currently monthly charge paid by HIOS to ANR from \$104,167 to \$354,302 for the gas separation, dehydration and related services provided to HIOS under Rate Schedule X-64. The cost of service includes plant additions related to the repair, replacement and enhancement of the Grand Chenier facility after Hurricane Rita, and

¹ *ANR Pipeline Co.*, 117 FERC ¶ 61,347 (2006) (December 27 Order).

² *Michigan Wisconsin Pipe Line Co.*, 4 FERC ¶ 61,028 (1978).

approximately \$2.6 million of uninsured operation and maintenance expenses related to the clean-up and repair of damages caused by Hurricane Rita.³

4. HIOS filed a protest, and a request for partial summary judgment, a maximum suspension period, and a hearing and technical conference. ANR filed an answer to HIOS' protest and HIOS filed a reply to ANR's answer.

5. On December 27, 2006, the Commission accepted and suspended ANR's filing, effective January 1, 2007, subject to refund and to the outcome of the hearing established by the order. The Commission stated in the December 27 Order that ANR's proposed rate change raises cost of service issues which are best addressed in a hearing. The Commission denied HIOS' request for a technical conference, and rejected HIOS' request for partial summary disposition, finding that ANR's filing raised genuine issues of material fact.

6. On January 8, 2007, HIOS filed a request for rehearing of the December 27 Order and requested expedited action on its request. In requesting expedited action, HIOS states that it does not currently have the costs associated with ANR's proposed 350 percent rate increase reflected in its existing and proposed rates, since they were not known and measurable when HIOS made its recent rate case filing in Docket No. RP06-540-000.

II. HIOS' Request for Rehearing

7. HIOS states that the Commission's decision not to suspend ANR's proposed rate increase for the maximum five month period is at odds with its longstanding practice and precedent. HIOS claims the Commission ignored its own well-established precedent holding that where a pipeline proposes a substantial rate increase, and where that rate increase is the subject of a protest, the Commission will exercise its discretion to suspend the rate increase for the full suspension period. HIOS points to the Commission's recent order in *Black Marlin Pipeline Co.*⁴ where the Commission rejected Black Marlin's request for a shortened suspension period, and distinguished Black Marlin's request from the request that the Commission granted in *Valley Gas Transmission, Inc.*⁵ which HIOS states is the only case cited in the December 27 Order to support the application of a

³ ANR included with its filing, a Statement of Nature, Reasons and Basis for Change, Statements A through O, and Statement P, the Prepared Direct Testimony of Gregory R. Schaller. ANR states that its Grand Chenier cost of service reflects costs for the twelve months ending September 30, 2006, as adjusted for known and measurable changes through December 31, 2006.

⁴ *Black Marlin Pipeline Co.*, 117 FERC ¶ 61,253 at P 20 (2006).

⁵ *Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 at 61,495 (1980).

nominal suspension period in this proceeding. Further, HIOS states that after observing that Black Marlin could have avoided the harsh consequences of which it complained by filing its rate increase sooner, the Commission exercised its discretion to suspend its filing for the full five-month period because Black Marlin's proposed increase far exceeds the proposed increase in *Valley Gas* and in light of "the fact that the [p]rotestors here request a full five-month suspension."⁶ HIOS submits that likewise, ANR had every opportunity to submit its filing sooner and allow for the impact of a potential suspension. HIOS states that like Black Marlin, ANR's proposed 350 percent rate increase far exceeds the increase that the Commission suspended for a nominal period in *Valley Gas* and like Black Marlin, ANR's substantial proposed increase is the subject of a protest and a request for the full suspension period.

8. HIOS also contends that the Commission erred by apparently concluding that the annual rate redetermination provision in Rate Schedule X-64 somehow trumped the Commission's suspension power. HIOS states the requirement (or the right) of a jurisdictional pipeline to restate its rates on annual or other periodic basis has nothing to do with the Commission's authority to determine the length of the suspension for such rates. HIOS contends that the Commission erred by apparently concluding that the mere presence of an annual redetermination provision in Rate Schedule X-64 somehow prevented the Commission from exercising its discretion to suspend ANR's proposed 350 percent rate increase for the maximum suspension period.

9. HIOS claims that although it established in its protest and its reply, numerous facts that demonstrated that ANR's proposed rate increase should be suspended for the standard five-month period, the December 27 Order failed to mention, let alone address, any of those facts and thus provided no reasoned explanation for its decisionmaking. HIOS states that for example, it showed that to the extent ANR would be harmed by the imposition of the standard suspension period, ANR could have avoided such harm by among other things filing its proposed increase earlier – thereby anticipating the impact of any suspension or otherwise allowing the parties to resolve their differences.⁷

10. Moreover, HIOS states that to the extent the Commission wanted to consider the possibility of "harsh and inequitable" results, it cannot be overlooked that HIOS does not currently have the increased costs in its currently suspended rates, because such increased costs were not known and measurable when HIOS made its relatively recent rate case filing now pending before the Commission in Docket No. RP06-540-000. HIOS states that it is prevented by 18 CFR § 154.205(b) from filing to increase its own currently suspended rates. HIOS complains that the Commission provided no explanation of why it disregarded the tangible harm facing HIOS at the same time it acted to spare ANR from an unarticulated harm that was largely ANR's control to mitigate. HIOS suggests that the

⁶ See *Black Marlin*, *supra* at P 20.

⁷ HIOS cites its reply at page 3.

Commission should explain why it is appropriate to suspend for five months HIOS' proposed rate increase, but not ANR's more substantial proposed increase.

11. HIOS further asserts that the Commission erred by not suspending ANR's rates in order to require ANR to remove from its rates any costs associated with facilities not in service at the end of the test period. HIOS points to sections 154.303(c)(1) of the Commission's regulations that provides that a pipeline's filed rates may include the costs of facilities expected to be in service by the end of the test period and section 154.303(c)(2) provides that when a pipeline files a motion to place such filed rates into effect, the filing must exclude the costs associated with any facilities not in service at the end of the test period.

12. HIOS contends that ANR's Schedule C-2 estimates \$4.8 million of capital expenditures that ANR expects to place in service by the end of the test period, *i.e.*, by December 31, 2006. HIOS claims it was an error for the Commission to not impose the maximum suspension period on ANR in order to provide time for ANR to remove from its proposed rates, via a motion to place rates into effect, any costs associated with facilities not in service by the end of the test period.

13. HIOS further asserts that the December 27 Order, rejected HIOS' request to order ANR to remove non-recurring costs from its proposed rates because "we find that ANR's filing raises genuine issues of material fact." HIOS argues that the December 27 Order, however, fails to identify a single issue of material fact that would prevent the Commission from granting HIOS' motion for summary disposition. HIOS states that no such issues of material fact exist.

14. HIOS contends that ANR's witness admits in his testimony that ANR's rates include \$8 million in repair costs from the prior period but states it expects to spend only \$488,902 in 2007, proving the non-recurring nature of the costs it has included in its rates. Consequently, HIOS maintains that there is no genuine issue of fact that is relevant to deciding whether the Hurricane Rita related costs are non-recurring; they are not, as conceded by ANR's own witness.

15. Moreover, HIOS suggests that even when ANR's proposed rate increase is viewed in a light most favorable to ANR, the inclusion of non-recurring costs in ANR's rates cannot be reconciled with the rule against retroactive ratemaking or the Commission's regulations, which provide that "the base period factors must be adjusted to eliminate non-recurring items."⁸ Thus, HIOS posits that ANR's inclusion of \$2.5 million of non-recurring expenses related to clean-up costs following Hurricane Rita cannot be reconciled with the Commission's regulations or policies.

⁸ 18 C.F.R. § 154.303(a)(4) (2006).

16. HIOS requests the Commission to expeditiously grant rehearing and: (1) suspend ANR's proposed rate increase for the maximum five-month period, (2) order ANR to refund amounts collected for the period that is unsupported, excessive, and should have been suspended but was not, and (3) order ANR to remove from its proposed rate the \$2.5 million of non-recurring costs.

III. Discussion

17. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 383.213(a)(2) (2006), answers to rehearing requests are not accepted unless otherwise ordered by the Commission. Although we can accept answers when it can assist us in further clarifying the issues, in this case it is unnecessary for us to render our decision. Therefore, we will reject ANR's answer.

18. HIOS' request for rehearing is denied. First, HIOS claims that the Commission erred in not exercising its discretion to suspend ANR's filing for the statutory maximum five month period. In our December 27 Order, we stated that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. We found that such circumstances exist here where "Rate Schedule X-64 provides for an annual redetermination of rates."⁹ Thus, we exercised our discretion to suspend ANR's filing for a shorter period (*i.e.*, one day suspension), and permitted ANR's filing to become effective January 1, 2007, subject to refund.

19. The notion that ANR's annual redetermination provisions somehow trumped HIOS's right to a five month suspension is unfounded. In making its decision, the Commission considered a number of factors, including the fact that ANR makes annual filings under Rate Schedule X-64. Because HIOS looks at the same facts and seeks a different outcome, does not invalidate the Commission's decision.

20. Contrary to HIOS' arguments, our action to suspend ANR's filing for a shorter period was reasonable and entirely consistent with the exercise of our discretion. In *Exxon Pipeline Company v. United States*, 725 F.2d 1467 (D.C. Cir. 1984), the court explained that the Commission is required to state its reasons both for suspending a proposed rate and for selecting the length of the suspension (which, as noted above, the Commission has done), the court did not require the express, substantive issue-by-issue discussion that HIOS requests. *See* 725 F.2d at 1473. Moreover, the court expressly held that once the Commission's reasons passed what the court characterized as a "minimal threshold test," the court would "not. . . take the next step and review the merits of a given case" because to do so "would disrupt the Commission's regulatory function, by forcing a consideration of the reasonableness of a proposed rate prior to a final

⁹ *ANR Pipeline Co.*, 117 FERC ¶ 61,347 at P 19.

[Commission] ruling on that very question." Similarly, as we found in accepting ANR's 1984 Rate Schedule X-64 annual redetermination filing:

Rate Schedule X-64 was originally certificated with tariff provisions that provided for a flat monthly charge and required annual redeterminations. Those provisions, which are still effective, were designed to ensure that costs and revenues remain in balance. Consequently we shall exercise our discretion to suspend for a shorter period. We will suspend the tariff sheet and permit it to become effective January 1, 1985, subject to refund.¹⁰

Thus, we did not err and HIOS' request for rehearing of this issue is denied.

21. Next, HIOS claims that the Commission erred by not suspending ANR's rates in order to ascertain whether ANR removed from its rates costs associated with facilities not in service at the end of the test period (*i.e.*, by December 31, 2006) as required by 18 C.F.R. § 154.302(c)(2). In its protest to ANR's filing, HIOS argued that the lack of evidentiary support that characterized ANR's filing is visible in several areas that HIOS identified in the limited time available to file a protest.¹¹ HIOS gave some examples, such as ANR's capital expenditures and argued that ANR offers no evidence to substantiate that the projects for which costs were incurred will be in service by December 31, 2006, *i.e.*, the end of the test period. Further, HIOS observed that ANR failed to provide support for its claim that it will recover only 71.22 percent of its hurricane related repair costs from insurance or why over 70 percent of the proposed new facilities are considered "enhancements" and were not eligible for insurance reimbursement. HIOS also raised the issue of whether ANR's allocation to HIOS of unreimbursed hurricane related costs is a system-wide allocation or if ANR attributes less insurance reimbursement to Grand Chenier than to other facilities. HIOS also maintains that ANR has not supported its assertion in Statement H-1 that its billable fringe benefit percentage for 2006 is 61 percent. HIOS claims that just as troubling is ANR's assertion that it allocates administrative and general ("A&G") costs based on a formula in an operating agreement between ANR and HIOS which HIOS claims is no longer in effect and has not been in effect since 1999. HIOS also contends that ANR has also failed to provide support for its proposed allocation of system-wide ANR costs. Consequently, HIOS concludes that the December 1 filing raises material issues of fact that need to be investigated and resolved.¹²

¹⁰ *ANR Pipeline Co.*, 29 FERC 61,385 at 61,821 (1984). In the same order, the Commission also established a hearing concerning the lawfulness of ANR's proposed rates.

¹¹ See HIOS Protest at Page 11-14. HIOS' discussion is found under the section entitled, "C. The December 1 Filing Lacks the Required Evidentiary Support".

¹² See HIOS's Protest at page 14.

22. The Commission did not have sufficient evidence to summarily dispose of the issues sought by HIOS. There is insufficient support in the rate schedule for the elimination of costs which HIOS claims are “non-recurring.” In fact, ANR contends that the subject costs are not non-recurring. In these circumstances, it was proper for the Commission to direct the parties to address the issues in the hearing.

23. With respect to the issue of whether the inclusion of Hurricane Rita damage expenses is appropriate, the Commission has recently allowed both oil and natural gas pipelines to recover the costs of repairing hurricane damage through special surcharges. In both *Chevron Pipe Line Company*, 115 FERC ¶ 61,117 at P 31 (2006) and *Chandeleur Pipe Line Company*, 117 FERC ¶ 61,250 at P 7 (2006), the Commission approved a surcharge to recover the extraordinary expenses incurred as a result of Hurricane Katrina. The Commission did not find that the costs were non-recurring.¹³ Rather, the Commission permitted the recovery of the costs through a surcharge to allow the pipeline to avoid the burden of a section 4 rate case. *See Chandeleur, supra*. Here, where facts were in dispute, including whether the costs at issue are properly to be characterized as recurring or non-recurring, a hearing was necessary, but not a full suspension, as the amounts to be charged remain subject to refund. Further, if any refunds are required, such refunds accrue interest as calculated pursuant to the Commission’s regulations.¹⁴ Moreover, since the X-64 rates are only in effect for a year, a maximum suspension period would have had a disproportionately large impact. Accordingly, the Commission properly found that the issue of the costs of repairs resulting from Hurricane Rita would best be addressed in the hearing with the proposed rate suspended for a nominal period, but fully subject to refund with interest.

The Commission orders:

HIOS’ request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.

¹³ See ANR’s Answer to HIOS’s Protest at pages 9-10.

¹⁴ 18 C.F.R. §154.501(d) (2006).