129 FERC ¶ 61,002
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 1, 2009

In Reply Refer To:
Gulf Crossing Pipeline Company, LLC
Docket No. RP09-1008-000

Gulf Crossing Pipeline Company, LLC
9 Greenway Plaza, Suite 2800
Houston, Texas 77046

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

Reference: Original Sheet No. 1307A to FERC Gas Tariff Original Volume No. 1.

Dear Mr. Stephens:

1. On September 1, 2009, Gulf Crossing Pipeline Company, LLC (Gulf Crossing) filed the above referenced tariff sheet to add a new section 21.11 of its General Terms and Conditions. Gulf Crossing asserts that under this proposed provision both Gulf Crossing and its customers waive the right to recover consequential damages from the other for damages arising out of breach of contract, negligence, tort, and strict liability. Gulf Crossing further asserts that the waiver does not limit either party's ability to recover damages arising out of gross negligence or willful misconduct, nor does it impact either party's right to recover direct damages. For the reasons discussed below, the Commission will accept and suspend the tariff sheet to be effective on March 1, 2010, or an earlier date specified in a further order of the Commission, subject to refund and conditions. The Commission will refer the proceeding to the Commission's Dispute Resolution Service (DRS).

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

> In no event shall either Customer or Gulf Crossing be liable to the other for and Gulf Crossing and Customer each expressly releases the other from punitive or exemplary, special, indirect, incidental or consequential damages (including without limitation, loss of profit, loss of revenue), whether such damages arise out of breach of contract, tariff or warranty, negligence, tort, strict liability, product

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

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

4. On September 1, 2009, Texas Gas Transmission, LLC, in Docket No. RP09-1009-000 and Gulf South Pipeline Company, LP, in Docket No. RP09-1008-000, both also owned by Boardwalk Pipeline Partners, LP (Boardwalk), filed proposed tariff provisions which are identical to those under consideration here. Both of those filings were protested. In contemporaneously issued orders, the Commission is accepting and suspending those filings and referring them to its DRS.

5. Public notice of the filing was issued on September 2, 2009. Interventions and protests were due on or before September 14, 2009. Pursuant to Rule 214 (18 C.F.R. 385.214 (2009)), all timely filed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. No comments or protests were filed.

6. Gulf Crossing's filing contains the same significant issues regarding the distinction between permitted and waived damages raised by the protestors in the other Boardwalk-owned pipeline proceedings concerning the identical proposed waiver. Therefore, the Commission will also refer this proceeding to the DRS. As the Commission has previously noted, it applies two general principles to the issue of liability: there should be no liability without fault; and a person should not be able to avoid all liability caused by his own gross negligence or intentional actions.[1] The Commission believes, that within those parameters, the issues raised by the filing would best be resolved through the DRS process. To that end, the Commission will direct the

[1] *Arkla Energy Resources Company*, 64 FERC ¶ 61,166, at 62,490 (1993).

Director of its Dispute Resolution Service[2] to convene a meeting, within 14 days of the date of issuance of this order, to arrange a process that may foster negotiation and agreement regarding the proposed revised tariff sheet. Gulf Crossing must report the status of the negotiations to the Commission within 60 days of the date of issuance of this order. The Commission urges that a resolution of these issues be achieved in such time as to allow any settlement to be put into effect within the five-month suspension period ordered below. Accordingly, the Commission will accept and suspend the effectiveness of the revised tariff sheet subject to refund and conditions. The conditional acceptance is subject to further review by the Commission.

7. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards. *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension). It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (minimum suspension). Such circumstances do not exist here. Therefore, the Commission accepts and suspends Gulf Crossing's proposed tariff sheet, to be effective on March 1, 2010, or an earlier date if specified in a further order of the Commission, subject to refund and conditions set forth in this order. Gulf Crossing is directed to report to the Commission on the progress of any negotiations to the Commission within sixty (60) days of the date of issuance of this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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