

130 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bay Gas Storage Company, Ltd.

Docket No. PR08-17-000

ORDER ON STAFF PANEL

(Issued January 6, 2010)

1. In this order, the Commission addresses the outstanding petition made by Bay Gas Storage Company, Ltd. (Bay Gas) in order to set its Lost and Unaccounted-For (LAUF) tracker percentages for the annual period March 1, 2008 through February 28, 2009. On January 12, 2009, the Commission approved a Settlement in Docket No. PR07-9-000, establishing a tracking mechanism for recovery of LAUF in Bay Gas's General Terms and Conditions (GT&C).¹ The Commission also ordered Staff to convene a Staff Panel to consider the issues raised by the parties concerning Bay Gas's first annual filing in Docket No. PR08-17-000 to adjust its fuel retention percentages to be used in that tracker/true-up mechanism for 2008. Based on the submissions in this docket, the Commission finds that Bay Gas has demonstrated that its proposed total LAUF of 0.96 percent, composed of a Base Component of 0.574 percent and a True-up Component of 0.381 percent, is fair and equitable.² Accordingly, the Commission approves the petition effective March 1, 2008, as requested. The Commission also requires further proceedings regarding the contract of Florida Gas Transmission Company, LLC (Florida Gas) for service with Bay Gas.

I. Background

2. Bay Gas is an intrastate natural gas pipeline in Alabama that provides interstate transportation and storage services under section 311 of the Natural Gas Policy Act of 1978 (NGPA). In its March 9, 2007 rate petition in Docket No. PR07-9-000, Bay Gas

¹ *Bay Gas Storage Company, Ltd.*, 126 FERC ¶ 61,018 (January 12, 2009) (January 12 Order). Article VI of Bay Gas's Statement of Operating Conditions incorporates the amended General Terms and Conditions to Bay Gas's Storage and Transportation Service Agreements into the Statement of Operating Conditions.

² See 18 C.F.R. § 284.123(a) (2009).

proposed, among other things, to amend its GT&C to establish a tracker mechanism for the in-kind recovery of LAUF costs through a “Company Use charges reimbursement percentage (Company Use Percentage).” In its previous rate filings, Bay Gas had estimated the dollar cost of its LAUF volumes and included that estimation as part of the cost-of-service used to calculate its base transportation rates, rather than separately recovering LAUF gas in-kind.

3. In the January 12 Order, we approved an uncontested Settlement that resolved all issues with regard to the rate petition in Docket Nos. PR07-9-000 and PR07-9-001. As part of the Settlement, Bay Gas agreed to include a true-up component as part of its proposed LAUF tracking mechanism. The Settlement also lowered both Bay Gas’s proposed base rates and its initial Company Use Percentage, as compared to the initial filing. The Settlement lowered the Company Use Percentage from the originally proposed 0.18 percent to 0.10 percent; however, the Settlement provided that Bay Gas would use the 0.18 percent figure as the reference figure for true-up in the following year.

4. As approved by the settlement, Section II(E) of Bay Gas’s GT&C provides for Bay Gas to file annually to revise its Company Use Percentage effective on March 1 of each year. That percentage would include two components, a “revised percentage component” and a “true-up component.” The purpose of the “revised percentage component” is to recover Bay Gas’s projected LAUF quantities for the next year. Section II(A)(1) provides that the projections to be used in determining the “revised percentage component” will be based on actual experience during the preceding calendar year. Thus, the “revised percentage component” is calculated by dividing Bay Gas’s actual LAUF during the preceding calendar year by its total throughput during that year. Section II(A)(2) provides that the “true-up component” will true up any under- or over-recovery of Bay Gas’s actual LAUF quantities that occurred during the preceding calendar year.

5. On February 29, 2008, Bay Gas made its first annual tracker filing to adjust its Company Use Percentage. Bay Gas proposed to increase its Company Use Percentage to 0.96 percent, effective March 1, 2008. The proposed Company Use Percentage included a “revised percentage component” of 0.574 percent to recover projected LAUF during the following year. That percentage was calculated by dividing Bay Gas’s actual LAUF volumes during calendar year 2007 of 560,154 MMBtu by total book volumes during that year of 97,550,004 MMBtu.³ The proposed Company Use Percentage also included a true-up component of 0.381 percent. Bay Gas asserted that its actual LAUF during the

³ As Bay Gas explained in its filing, this calculation allocates 56.76 percent of its LAUF costs to its storage services. The LAUF retention percentages at issue in this filing apply only to transportation only services.

March 9 to December 31, 2007 period exceeded the 0.18 percent reference figure from the Settlement in Docket No. PR07-9 by 160,715 MMBtu. Bay Gas divided this excess amount by its projected transportation-only volumes of 42,177,841 MMBtu to obtain the proposed 0.381 true-up percentage.

6. Southern Company Services, Inc. (SCS), Shell Energy North America (US), L.P. (Shell), and Florida Gas protested Bay Gas's filing. Because the parties were unable to settle that docket, the January 12 Order directed Staff to institute a Staff Panel, pursuant to section 284.123(b)(2)(ii) of the Commission's regulations, to determine whether the updated LAUF percentages reflected in Bay Gas's petition are fair and equitable. On February 26, 2009, the Commission's Staff conducted the Staff Panel.

II. Discussion

7. Shell and Florida Gas contend that Bay Gas has failed to meet its burden of demonstrating that its proposed LAUF percentage in its 2008 tracker filing are fair and equitable. Shell asserts that the percentage should be reduced to remove any gas losses resulting from a failure to properly measure Bay Gas's receipts at its Whistler Spur interconnection with Gulf South Gas Pipeline Co., LP (Gulf South). Florida Gas asserts that Bay Gas's data collection practices are so imprudent and flawed as to not support any level of LAUF, and therefore it argues that Bay Gas's LAUF percentage for 2008 should be 0.0 percent. For the reasons discussed below, the Commission rejects these contentions, and approves Bay Gas's proposed LAUF percentage.⁴

8. Florida Gas also contends that Bay Gas lacks contractual authority to impose any LAUF percentage on it. It states that it is litigating that issue in a Texas state court and accordingly requests that the Commission not address that issue. Bay Gas contends that the Commission should decide this issue and asserts that it does have contractual authority to impose the LAUF retention percentage on Florida Gas. In this order, the Commission requests briefs on certain issues concerning whether, and how, it should decide this issue.

⁴ SCS originally argued that the Settlement should be interpreted so as to prevent Bay Gas from taking advantage of the true-up mechanism for the initial post-settlement 2008 period. SCS March 20, 2009 filing at 4, 5. However, subsequently on July 13, 2009, SCS informed the Commission, "that it withdraws [those] portions of [its] prior filing that advocated the position that the settlement in Docket No. PR07-9 proscribed the true-up of ... LAUF in Bay Gas's February 28, 2008 filing." SCS July 13, 2009 filing at 1.

A. Support for LAUF Percentages

1. LAUF at Gulf South Interconnection

9. Bay Gas states that, as part of its effort to minimize lost fuel, on May 21, 2008, it asked Gulf South to inspect its ultrasonic meter at the Whistler Spur location where the two systems interconnect. Gulf South found that the interior walls of the meter had significant particulate accumulations. Once cleaned and reinstalled, Bay Gas reports, daily LAUF totals were reduced through June 13, 2008. On June 14, 2008, Gulf South experienced a lightning strike that resulted in a power outage negatively affecting its measurements. Bay Gas states that in July and August 2008, its overall LAUF dropped to 0.121 percent and 0.205 percent respectively, significantly below its LAUF in preceding months.⁵ At the Staff Panel, Bay Gas's witness testified that this represented a reduction of 0.3 to 0.4 percent in absolute terms from its previous overall LAUF levels of about 0.5 percent.⁶ Bay Gas states that experience since August 2008 has been more variable, with both increases and decreases in its monthly overall LAUF.⁷ Bay Gas further notes that, after negotiating with Gulf South over installing a filter, Bay Gas is now in the process of installing its own check meter on its side of the interconnection, in order to ensure that a similar incident does not affect LAUF totals in future years.

10. Shell points out that, under Commission policy, LAUF trackers may only recover gas losses that result from normal operations or routine maintenance.⁸ Shell asserts that Bay Gas's gas losses attributable to Gulf South's malfunctioning meter at the Whistler interconnection are not related to normal operations, but instead are due to Bay Gas and Gulf South's failure to properly maintain the meter at the Whistler interconnection. In its 2008 LAUF tracker filing, Bay Gas projected its gas losses for the March 2008-February 2009 period based upon its gas losses during 2007. Shell contends that because Gulf South did not clean its meter until May 2008, the projected gas losses in the instant filing include gas losses attributable to the improperly maintained measurement equipment.

⁵ Bay Gas April 3, 2009 Reply Brief at 13. According to its February 6, 2009 initial filing in Docket No. PR09-13-000, Bay Gas's LAUF percentages for January, February, March, and April 2008 were 0.54, 0.48, 0.54, and 0.69 percent, respectively.

⁶ February 26, 2009 Staff Panel Tr. at 60 and 66.

⁷ According to its February 6, 2009 initial filing in Docket No. PR09-13-000, Bay Gas's LAUF percentages for September, October, November, and December 2008 were 0.64, 0.80, 0.68, and minus 0.61 percent, respectively.

⁸ See *Colorado Interstate Gas Co.*, 121 FERC ¶ 61,161 (2007) (*CIG I*), 121 FERC ¶ 61,161, at P 24 (2007), cited in Shell March 20, 2009 Comments at 2-3 & n.5.

Shell argues that allowing Bay Gas to deem as LAUF any volumes due to a poorly maintained meter would, as the Commission held in *CIG II*, “not only provide a disincentive for [the pipeline] to properly maintain and insure its facilities, it would also saddle shipper[s] with a risk against which they are in no position to insulate themselves.”⁹ Shell analogizes the situation to *Williams*,¹⁰ where the Commission disallowed recovery for a non-routine malfunction of underground storage mechanics. It concludes that those losses associated with the Gulf South interconnect go beyond routine maintenance and thus do not meet the Commission’s definition of acceptable LAUF volumes.

11. Florida Gas points to the measurement problem at the Whistler interconnection in support of its contention, discussed below, that Bay Gas has failed to support recovering any amount LAUF in its 2008 tracker filing. SCS agrees that the evidence presented by Bay Gas shows that a major cause of its LAUF can be traced to metering errors of deliveries by Gulf South to Bay Gas. However, rather than seeking a reduction in Bay Gas’s proposed LAUF retention percentage, it asserts that the Commission should require Gulf South to make Bay Gas and its shippers whole.

12. We find that any LAUF amounts which may be attributable to metering errors at Bay Gas’s Whistler interconnection with Gulf South are eligible for recovery through Bay Gas’s LAUF tracking mechanism. Both the quantities involved in this case and the reason for Bay Gas’s loss distinguish this case from *CIG* and *Williams*. In *Williams*, the pipeline sought to increase its storage fuel & loss percentage from 3.47 percent to 8.95 percent, because approximately 1.0 Bcf of storage gas migrated outside of the storage field boundary to production wells.¹¹ *CIG* lost 3 percent of all gas stored at its Ft. Morgan facility because of a well casing failure. In the instant filing, Bay Gas proposes to increase its LAUF percentage from the 0.10 percentage in the Settlement to 0.96 percent. This includes 0.574 percent component to recover projected LAUF based on Bay Gas’s 2007 LAUF, and a 0.386 true-up component. While intervenors seem to suggest that a full 0.3 to 0.4 percent should be subtracted from the 0.96 percent figure, it is not clear from the evidence that Gulf South’s delayed maintenance raised LAUF figures by that full amount for the January 2007-December 2007 period in which Bay

⁹ *Colorado Interstate Gas Company*, 123 FERC ¶ 61,183, at P 16 (Order on Rehearing of *CIG I*) (2008) (*CIG II*), cited in Shell Comments at 3 & n.9.

¹⁰ *Williams Natural Gas Co.*, 73 FERC ¶ 61,394, at 62,215 (1995) (*Williams*), order on reh’g, 74 FERC ¶ 61,215, at 61,698 (1996), cited in Shell Comments at 3 & n.7.

¹¹ *Williams*, 73 FERC ¶ 61,394 at 61,215.

Gas collected data for this filing.¹² While Bay Gas's LAUF did decrease by about 0.3 to 0.4 percent from its level of about 0.5 percent during July and August 2008, after Gulf South cleaned the meter in May 2008, during the next three months Bay Gas's LAUF rose back to levels approximating the prior 0.5 percent level. Moreover, there is no evidence that the significant particulate accumulations Gulf South found in the meter in May 2008 existed during 2007.

13. Most significantly, CIG's and Williams' losses were due almost entirely to a major malfunction of equipment within their own possession and control. Williams failed to prevent stored gas from leaking from its storage units and migrating into a third party's land. CIG had a non-routine storage failure, due to a specific failure in its casing equipment. By contrast, Bay Gas fulfilled its duty of care by discovering the problem, reporting it to Gulf South, and urging Gulf South to perform maintenance, which Gulf South did. Gulf South is presumed to have responsibility to perform maintenance on its own system. Extending *CIG* and *Williams* to cover the malfunction of a neighboring system's equipment, as the intervening parties seem to urge, is unwarranted, especially when the amount of gas lost is not extraordinary. Because Bay Gas actively sought out and promptly solved the maintenance issue in question, the losses involved are more accurately characterized as the sort of losses inevitable in normal operations.

14. In addition, to the extent Bay Gas's projection in the instant filing of its 2008 LAUF was affected by Gulf South's failure to properly maintain the meter at Whistler, the true-up component of Bay Gas's 2009 LAUF tracking filing will provide at least some relief to its customers. Shell points out that Bay Gas's 2009 LAUF tracking filing shows that its actual LAUF volumes in 2008 were 374,212 Dth, as compared to the 580,154 Dth in 2007 used to project 2008 LAUF. The true-up in the 2009 LAUF tracking filing will provide for Bay Gas to return to its shippers any LAUF amounts collected in 2008 in excess of the actual LAUF of 374,212 Dth.

15. As an alternative solution, "SCS recommends that the Commission require Gulf South to make Bay Gas and its shippers whole for Gulf South's inflated measurement which contributed to an excess LAUF recovery by Bay Gas."¹³ The Commission rejects this option. Gulf South is not properly before the Commission in this proceeding. Any complaints regarding Gulf South's maintenance are best directed against Gulf South in a separate docket; otherwise the Commission cannot determine whether, or to what extent, Gulf South might be liable or culpable.

¹² See Bay Gas February 29, 2008 Initial Filing at Attachments 1-3.

¹³ SCS March 20, 2009 Comments at 3-4.

2. Measurement Error and System Maintenance; Evidentiary Record

16. Florida Gas contends that Bay Gas failed to include in its filing sufficient information to show that its proposed LAUF percentages are fair and equitable, as required by section 284.123(b) of the regulations, and that therefore the LAUF percentage must be set to zero for 2008. Florida Gas argues that the two sets of volume figures offered by Bay Gas as Attachments 1 and 3 to Bay Gas's filing are inconsistent, and that Bay Gas has failed to explain why. Florida Gas contends that Bay Gas should submit its LAUF figures in hourly increments in order to verify its claimed totals. Further, Florida Gas also argues that Bay Gas should "show how much LAUF is collected from each customer as would be necessary to establish that there is no undue discrimination."¹⁴

17. Bay Gas maintains that it has provided sufficient evidence to demonstrate that its proposed percentages are fair and equitable. Bay Gas notes that Florida Gas's present LAUF filing¹⁵ for its own system "included no customer detail at all, nor did it lay out the reasons and basis for any of its projections."¹⁶ Bay Gas states that it, by contrast, has provided a detailed series of demonstrations that met all of the Commission's requests for evidence. Regarding the differences between the volumes reported on Attachments 1 and 3 of its filing, Bay Gas explains that they are showing different things. Attachment 1 presents monthly metered receipts and deliveries in order to calculate total LAUF, while Attachment 3 presents total transportation and storage volumes in order to calculate how Bay Gas should allocate those LAUF volumes between transportation and storage customers under its Commission-approved formula. Thus, Attachment 3 has higher totals, because it includes intra-system flows from storage to pipeline, while Attachment 1 only shows volumes that leave the Bay Gas network.

18. The Commission finds that the record before it is sufficient to support Bay Gas's proposed LAUF percentages. The LAUF mechanism itself was approved in Docket No. PR07-9-000, so the Commission limits its review here to whether Bay Gas is collecting accurate data and applying it correctly to that pre-approved mechanism. Bay Gas's filings, its answers to Commission Staff's data request, and its demonstrations at the Staff Panel provide the Commission with a sufficient record to rule on its annual LAUF filing. We find that Bay Gas's Commission-approved LAUF formula requires it to collect data in a manner such as that used in Attachments 1 and 3 of its filing in order to have the

¹⁴ Florida Gas March 20, 2009 Brief at 7.

¹⁵ Docket No. RP09-403-000, filed with the Commission on February 27, 2009.

¹⁶ Bay Gas April 3, 2009 Reply Brief at 33.

proper inputs needed for its formula. Thus, the differences between the two attachments reflect Bay Gas's LAUF formula, and not any errors as Florida Gas alleges.

19. The extra evidence requested by Florida Gas, such as LAUF data broken down into hourly components or apportioned by shipper, is not relevant to the accounting question. Bay Gas's Commission-approved LAUF formula requires it to charge the same LAUF recovery percentages to all volumes shipped and to all volumes stored, regardless of the identity of the customer. Breaking down LAUF statistics by customer, as Florida Gas proposes, is unnecessary, as Bay Gas cannot and should not be adjusting its LAUF charges to accommodate particular customers. We find that Bay Gas's LAUF formula does not discriminate precisely because it treats all shippers equally, according to their volumes shipped or stored. This method is consistent with the manner in which similar costs are recovered by other intrastate and interstate pipelines. Hourly data likewise would not assist in reviewing Bay Gas's implementation of its formula.

20. Bay Gas argues that its system is maintained to a standard above generally accepted industry practice, and that its LAUF measurements are accurate. Bay Gas further maintains that the record shows that it has been thorough and conscientious in accurately measuring its LAUF and minimizing system losses. Bay Gas argues that during the time period in question its system operations met industry standards, and that it has verified its records through both auditing and rigorous physical inspections. To support and verify its claims, Bay Gas files reports from two independent auditors, Russel Treat of EnerSys Corporation (EnerSys) and Tony Mazac of CoastalFlowTM Gas Measurement, Inc. (CoastalFlow).¹⁷

21. Florida Gas argues that Bay Gas "has not operated its gas measurement consistent with industry standards and that its data collection practices are so imprudent and flawed as to not support any level of LAUF."¹⁸ Florida Gas claims that the audit from CoastalFlow cannot be used as evidence, because the CoastalFlow audit covers November 2005 to March 2006, while the LAUF volumes used for calculating Bay Gas's LAUF percentage in this proceeding are January 2007 to December 2007.¹⁹ Florida Gas argues that the CoastalFlow audit does demonstrate, however, that Bay Gas's "data is not

¹⁷ See EnerSys Measurement Assessment, Bay Gas February 20, 2009 Responses to Data Request at Attachment 20-B (EnerSys Measurement Assessment); CoastalFlow Report, Bay Gas February 20, 2009 Responses to Data Request at Attachment 20-A (CoastalFlow Report).

¹⁸ Florida Gas March 20, 2009 Brief at 8.

¹⁹ *Id.* at 6; Staff Panel Tr. at 49 (statement of Michael Langston for Florida Gas).

collected in accordance with minimum industry standards”²⁰ because for seven of Bay Gas’s 24 meters, there is no audit trail. Florida Gas argues that this constitutes a violation of Chapter 21 of the American Petroleum Institute’s Manual of Measurement Standards. Florida Gas notes that CoastalFlow did not file its report until June 2008, and argues that therefore Bay Gas can be presumed to have not followed the report’s recommendation to comply with Chapter 21 until some time after June 2008, if ever. Florida Gas further argues that the CoastalFlow report’s statement that “ghost events ... present the possibility for calculation errors,” means that “the data submitted by Bay Gas ... certainly is unreliable.”²¹

22. Florida Gas further argues that the EnerSys assessment demonstrates that Bay Gas committed significant measurement errors. Florida Gas notes that the EnerSys assessment found hourly imbalances to be much higher than recommended, and found that several meters had unexpected and inconsistent configurations.²² Florida Gas notes that Bay Gas did not receive the report until after the January 2007 to December 2007 time period in question, and that Bay Gas testified that it has only implemented some of EnerSys’s recommendations.

23. As a general matter, the Commission’s standard for reviewing the prudence of a pipeline’s conduct of its business under its tariff is well established:

We reiterate that managers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time. We note that while in hindsight it may be clear that a management decision was wrong, our task is to review the prudence of the utility’s actions and costs resulting there from based on the particular circumstances existing either at the time the

²⁰ *Id.* at 8.

²¹ *Id.* at 10 (citing CoastalFlow Report at 2).

²² *Id.* at 11 (citing EnerSys Measurement Assessment at 9-11).

challenged costs were actually incurred, or the time the utility became committed to incur those expenses.²³

Further, in the narrower context of LAUF, as the Supreme Court has stated, “‘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.”²⁴

24. With these standards in mind, the evidence before us demonstrates that Bay Gas has behaved prudently and acted in good faith to account for its gas and minimize system losses. The record shows, for example, that Bay Gas has meters and probes throughout its system which generate a “Daily Unaccounted for Report.”²⁵ Bay Gas’s operators review this report and other readings, conduct a check-and-balance process, and use the report to adjust scheduling and equipment. Bay Gas also recalibrates all of its meters at least monthly, and more often if it finds any anomalies. It cleans and refurbishes meter parts on a schedule that exceeds manufacturer requirements.²⁶ Further, both of the independent audits filed in this docket verify that Bay Gas’s system meets minimum standards. While both EnerSys and CoastalFlow found flaws and room for improvement, by and large the audits counseled Bay Gas on ways to improve above and beyond minimum industry standards.

25. EnerSys assessed Bay Gas’s systems, practice, and skills, and developed a plan for Bay Gas to improve control over imbalances. EnerSys finds that the Bay Gas system is relatively complex and not easily subdivided, and that its gas flows are relatively dynamic, making it a challenging system to analyze. EnerSys reports that Bay Gas’s staff is energetic, qualified, and persistent. EnerSys asserts that it found some deficiencies in Bay Gas’s audit trail, but found no material inaccuracies in reported volumes. It recommends upgrades to Bay Gas’s documentation and its software, but concludes that Bay Gas’s systems, practice, and skills conform to generally accepted industry practice.²⁷

²³ *New England Power Co.*, 31 FERC ¶ 61,047, at 61,084 (1985); *aff’d sub.nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986), *quoted in, e.g., Dakota Gasification Co.*, Opinion No. 410, 77 FERC ¶ 61,271, at 61,271 (1996), and *Entergy Services, Inc.*, 124 FERC ¶ 63,026, at P 278 (2008).

²⁴ *West Ohio Gas Co. v. Pub. Util. Comm’n of Ohio*, 294 U.S. 63, 67 (1935).

²⁵ See Bay Gas Response to Data Request No. 20.

²⁶ See *id.*

²⁷ Staff Panel Tr. at 23-27.

The testimony of Russel Treat of EnerSys concludes that EnerSys found Bay Gas “to be consistent with generally accepted industry practice,” and “did not find any material inaccuracies in reported volumes.”²⁸

26. CoastalFlow reviewed Bay Gas’s system and records for the period from March 2007 to June 2008 to determine if its LAUF volumes were correctly calculated.²⁹ It notes several items in Bay Gas’s records, which it refers to as “ghost events”, where meters deviated from expected hourly values. Florida Gas argues that, because CoastalFlow found an incomplete audit trail at seven meters, that it is “impossible for Bay Gas to comply with the minimum standards for the daily operation of meters.”³⁰ The testimony of Tony Mazac of CoastalFlow, however, reaches the conclusion that despite these “random events,” Bay Gas’s LAUF figures contain “no measurement error... and no instances of volume overstatement or understatement.”³¹

27. While Bay Gas’s audits did uncover some discrepancies in Bay Gas’s own records, on balance we find that Bay Gas’s own errors had a minimal effect on its LAUF calculations, and that Bay Gas had in place, and continues to have, procedures consistent with generally accepted industry practice that avoid and correct errors. The evidence also shows that Bay Gas experienced some initially unexplained losses, but also that those losses were consistent with the losses inevitable on even a well-managed system. Therefore, we do not find sufficient reason to deduct an amount from Bay Gas’s proposed LAUF based on measurement errors.

28. We are satisfied that Bay Gas is committed to maintaining accurate measurements, and that the LAUF volumes used to reach its proposed percentages for the annual period commencing March 1, 2008 were sufficiently accurate. During the period of time at issue, we find that Bay Gas’s lost gas was a result of normal operations, which is the sort of loss that the LAUF mechanism is intended to recover.³² Based on the submissions made in this docket, we find that Bay Gas has demonstrated that its proposed LAUF percentages are fair and equitable.

²⁸ Staff Panel Tr. at 25.

²⁹ Staff Panel Tr. at 22, 57.

³⁰ Florida Gas March 20, 2009 Brief at 9.

³¹ Staff Panel Tr. at 22.

³² See *CIG I* at P 11 (quoting *Williams*, 73 FERC ¶ 61,394 at 62,215).

B. Contractual Authority

29. In its brief following the Staff Panel, Florida Gas contended that it is exempt from being charged Bay Gas's in-kind LAUF charge, because it has a fixed rate contract which is inclusive of LAUF and predates Bay Gas's establishment of a separate tracker mechanism for the in-kind recovery of LAUF costs. Specifically, Florida Gas stated that it "has a firm transportation agreement with Bay Gas dated December 10, 1997. The agreement is for 32,000 MMBtu per day for a fixed rate. The fixed rate in the agreement does not provide for a separate LAUF charge."³³ However, Florida Gas stated that it is litigating this issue in Texas state court,³⁴ and in subsequent pleadings it has clarified that it does not desire the Commission to address this issue in this proceeding.³⁵

30. In its reply brief and subsequent pleadings, Bay Gas has objected to Florida Gas's effort to limit the issues in this proceeding. Bay Gas argues that its most significant dispute with Florida Gas remains the question of whether Florida Gas is exempt from the Commission-approved LAUF mechanism. Bay Gas urges the Commission to interpret Bay Gas's contract with Florida Gas, rather than leave the issue for a Texas state court to interpret. Bay Gas argues that the Commission may and should "consider all issues necessary and appropriate for an equitable resolution of these proceedings."³⁶

31. Substantively, Bay Gas asserts that various provisions in its Statement of Operating Conditions (SOC) and its GT&C, which is incorporated into the SOC, authorize it to impose its LAUF tracking mechanism on Florida Gas. Bay Gas points out that Article X of the SOC states that the SOC and the GT&C "take precedence over conflicting language in and of Bay Gas's Service Agreements or amendments thereto, unless such language specifically states that it is an exception to the Statement." Bay Gas also states that Sections IV, V, and XIII of the GT&C provide that its service agreements are subject to the requirements of NGPA section 311 and that if any provision of those agreements is inconsistent with a law, order, or regulation, the latter will control.³⁷ Bay Gas also points out that Section IV of its GT&C expressly authorizes Bas Gas to revise and restructure its rates, providing that:

³³ Florida Gas March 20, 2009 filing at 2.

³⁴ *Id.* at 3 & n.7.

³⁵ Florida Gas April 17, 2009 filing at 1-2.

³⁶ Bay Gas April 22, 2009 objection at 2.

³⁷ Bay Gas April 3, 2009 reply brief at 20.

Bay Gas reserves that right to seek authorization from the Federal Energy Regulatory Commission (FERC) or other appropriate agency to increase, decrease or restructure the rates (including market based rates) and Company Use charges in effect at any time as may be found necessary to assure Bay Gas' right to charge and collect fair and equitable rates within the meaning of Section 311 of the [NGPA] and the FERC's rules and regulations thereunder.³⁸

32. Bay Gas also interprets the Settlement approved in the Docket No. PR07-9-000 proceeding as subjecting all of Bay Gas's shippers to the LAUF tracking mechanism agreed to in that Settlement, regardless of whether those shippers had fixed rate contracts.

33. On November 17, 2009, Bay Gas filed a motion for expedited consideration of this issue. Bay Gas reports that the Texas state court has set a trial date of May 7, 2010. Bay Gas urges the Commission to act well in advance of this trial date in order to avoid the possibility of the Texas state court acting on pre-trial motions in a manner inconsistent with the Commission's proceedings. On November 24, 2009, Florida Gas filed an answer, opposing Bay Gas's motion. Florida Gas attached to its motion a copy of a motion for partial summary judgment, which it has filed with the Texas state court. Among the attachments to that motion is a copy of Florida Gas's firm transportation service agreement with Bay Gas, executed in December 1997. On November 30, 2009, Bay Gas filed an answer again requesting the Commission to decide the contract issue.

34. Before the Commission decides whether, and to what extent, to address the contractual issues raised by the parties, the Commission requires certain additional information. First, in Docket No. PR07-9-000, Bay Gas filed both firm and interruptible transportation service agreements with Florida Gas, subject to requests for privileged treatment pursuant to Section 388.112 of the Commission's regulations. However, as described above, Florida Gas's November 24, 2009 filing includes a copy of its 1997 firm transportation service agreement,³⁹ without any request for privileged treatment. Bay Gas, in its November 30 answer, does not object to Florida Gas's public disclosure of that service agreement. It thus appears that both Florida Gas and Bay Gas have consented to the public disclosure of their 1997 firm service agreement. However, the only copy of the interruptible service agreement available to the Commission is the copy filed in Docket No. PR07-9-000 subject to a request for privileged treatment. The Commission requests that the parties confirm that they also consent to the public disclosure of that

³⁸ Section IV of the GT&C included in the SOC.

³⁹ That contract is identified as Contract No. FTMA98.

contract, and any other relevant contractual documents among the parties that may be submitted to the Commission pursuant to this order.⁴⁰

35. Second, the primary term of the firm service agreement between Bay Gas and Florida Gas has expired. Florida Gas included in its November 24, 2009 filing a copy of a November 26, 2007 letter to Bay Gas in which it exercised rollover rights to extend that contract. It is not clear from the present record whether the interruptible transportation service agreement remains in effect. The Commission therefore directs Bay Gas to (1) clarify whether it agrees that Florida Gas's November 26, 2007 letter properly extended its firm service agreement with Florida Gas, (2) clarify whether the interruptible service agreement remains in effect, and (3) provide any other relevant contracts and agreements between Florida Gas and Bay Gas regarding the firm and interruptible NGPA section 311 service provided by Bay Gas to Florida Gas, including any document which may have extended the interruptible service agreement.

36. Third, Bay Gas relies heavily on Section IV of its GT&C as authorizing it to add an in-kind LAUF charge to the existing discounted rates in its contracts with Florida Gas. That section appears to constitute, in essence, a *Memphis* clause, authorizing Bay Gas to propose certain unilateral changes in contracts.⁴¹ However, a *Memphis* clause does not ordinarily authorize a pipeline to unilaterally modify a contractually agreed-upon discounted rate, at least so long as the discounted rate remains within the pipeline's maximum and minimum rates. In this connection, the Commission has held that, because LAUF is a variable cost, pipelines may not discount the rates through which they recover their LAUF costs.⁴² The Commission requests Bay Gas and Florida Gas to brief whether and how these policies should be applied in this case. Specifically, the parties should address the following questions:

- (1) Should Section IV be interpreted as permitting Bay Gas to add an in-kind LAUF charge to Florida Gas's existing discounted rate, despite the fact that rate was executed at a time when Bay Gas recovered its LAUF costs

⁴⁰ See *Monroe Gas Storage Company, LLC*, 128 FERC ¶ 61,033 (2009) (requiring pipeline to file publicly any contracts that the Commission is to rule on).

⁴¹ See *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 110-113 (1958).

⁴² *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119 (2002). While interstate pipelines may use their negotiated rate authority to negotiate rates below their variable costs, the Commission has not granted negotiated rate authority to NGPA section 311 intrastate pipelines.

through its base rates? Has Bay Gas ever used that section to increase a shipper's discounted rate in any other situation?

- (2) Should Bay Gas and Florida Gas be required to renegotiate their contracts in light of the new in-kind LAUF charge, so that Florida Gas is subject to the in-kind LAUF charge, but the existing discounted base rate is lowered so that the overall amounts paid by Florida Gas to Bay Gas are equivalent to the original contracted-for rate? Do any provisions of the contracts between Florida Gas and Bay Gas provide for such a renegotiation, when necessary to bring the contracts into compliance with Commission policy?
- (3) Should the existing contracts between Florida Gas and Bay Gas be grandfathered, so as not to require any renegotiation?
- (4) Should Florida Gas's failure to contest the Settlement in Docket No. PR07-9-000 be interpreted as a waiver of whatever rights it may have had under its contracts not to be subjected to an increase in its discounted rate?

37. The Commission directs that Bay Gas and Florida Gas file their responses to the above questions, together with the requested information, on or before 20 days from the date of this order. Bay Gas and Florida Gas may file replies on or before 30 days from the date of this order.

The Commission orders:

(A) The Commission finds Bay Gas's proposed total LAUF percentage of 0.96 percent, composed of a base component of 0.574 percent and a true-up component of 0.381 percent for the annual period March 1, 2008 through February 28, 2009, to be fair and equitable, and approves its petition effective March 1, 2008, as requested.

(B) Bay Gas and Florida Gas must file the information and briefs requested in the body of this order on or before 20 days from the date of this order. Bay Gas and Florida Gas may file replies on or before 30 days from the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.