

148 FERC ¶ 61,183  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Discovery Gas Transmission LLC

Docket No. RP14-173-000

ORDER FOLLOWING TECHNICAL CONFERENCE

(Issued September 10, 2014)

1. On November 15, 2013, Discovery Gas Transmission LLC (Discovery) filed a revised tariff record to increase its Hurricane Mitigation and Reliability Enhancement Surcharge (HMRE Surcharge) from \$0.00092 per Dth to \$0.0500 per Dth, the maximum allowed by Discovery's tariff. The proposed tariff record is based on Discovery's calculation of qualifying HMRE expenditures, including \$25 million of costs associated with Discovery's Junction Platform extension. On December 30, 2013, the Commission accepted and suspended Discovery's proposed tariff record for a nominal period, to be effective January 1, 2014, subject to refund and the outcome of a technical conference.<sup>1</sup>
2. On February 27, 2014, the Commission convened a technical conference to examine the issues raised with regard to Discovery's filing. Following the conference, Discovery, Indicated Shippers,<sup>2</sup> and LLOG Exploration Company, L.L.C. (LLOG) each filed Initial and Reply Comments.
3. As discussed below, the Commission approves the tariff record Discovery filed in the instant proceeding, subject to conditions.

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<sup>1</sup> *Discovery Gas Transmission, LLC*, 145 FERC ¶ 61,297 (2013) (2013 Order).

<sup>2</sup> Indicated Shippers include Anadarko US Offshore Corporation; Apache Deepwater LLC; Chevron U.S.A. Inc.; and ExxonMobil Gas & Power Marketing Company, a Division of Exxon Mobil Corporation (ExxonMobil).

## I. Background

4. The HMRE Surcharge was established as part of a settlement (Settlement) filed in Docket No. RP08-70-000 on November 16, 2007. One party, ExxonMobil, protested the Settlement. ExxonMobil argued, among other things, that the HMRE Surcharge was contrary to Commission policy and should not be approved. The Commission approved the Settlement for the consenting parties and severed ExxonMobil from the Settlement.<sup>3</sup> Subsequently, in 2011, ExxonMobil joined the Settlement by letter agreement thereby agreeing to be bound by the terms and conditions of the settlement, including the HMRE Surcharge.<sup>4</sup>

5. Section 27.1 of the General Terms and Conditions (GT&C) of Discovery's tariff provides, in relevant part, that Discovery shall have the right to seek recovery, through a limited NGA section 4 filing, of all capital costs and related operation and maintenance expenditures made by Discovery in connection with efforts

to mitigate the cost of damage to facilities caused by hurricanes (or other natural disasters including but not limited to tornados, rogue waves, erosion and mudslides (hereinafter, "Natural Disasters")), to maintain system reliability during and immediately after hurricanes (or other Natural Disasters), to repair and remediate facilities damaged by hurricanes (or other Natural Disasters) and to enhance overall system reliability.

Section 27.2 identifies five capital expenditures and operation and maintenance expenditures that qualify for inclusion in the HMRE Surcharge (Qualifying HMRE Expenditures), including:

27.2.1 Property damage insurance purchase costs in excess of \$509,575;

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<sup>3</sup> *Discovery Gas Transmission LLC*, 122 FERC ¶ 61,099 (2008) (Settlement Order). On March 6, 2008, Discovery filed tariff sheets to implement the terms of the Settlement, which the Commission approved. *Discovery Gas Transmission LLC*, Docket Nos. RP08-70-001, 002 (Apr. 4, 2008) (delegated letter order).

<sup>4</sup> *Discovery Gas Transmission, LLC*, Docket No. RP12-305-000 (Jan. 11, 2012) (delegated letter order).

27.2.2 Deductible (uncovered) amounts on any such property damage insurance claim;

27.2.3 Smart pigging operations and related pipeline modifications (including but not limited to cleaning and sizing pigs; the installation and use of pig launchers and receivers not already installed at certain points along the System; the removal of any restrictions or obstructions that would impede the pig, such as the installation or removal of certain valves, dents or bends in the pipeline; any digs necessary to analyze anomaly readings and backfills; and any repair or replacements required);

27.2.4 Construction modifications and repairs of pipeline shore approaches, levee crossings and other water/land interfaces including pipeline modifications, burials and matting...; and

27.2.5 Post-hurricane (or Natural Disaster) inspections not covered by insurance....

The HMRE Surcharge is a volumetric surcharge applicable to all transportation service provided through Discovery's Mainline Facilities.

6. Section 27.4 of the GT&C provides that the HMRE Surcharge, to be effective January 1 of each year, shall equal (1) the balance in the HMRE Deferred Cost Account<sup>5</sup> (including carrying charges) as of the prior September 30, divided by (2) projected transportation throughput on Discovery's Mainline Facilities for the period January 1 through December 31. Section 27.4 of the GT&C also provides that the HMRE Surcharge shall not exceed \$0.05 per Dth, but the \$0.05 per Dth cap does not limit the recovery of any Qualifying HMRE Expenditures credited to the HMRE Deferred Cost Account. Section 27.4.2 provides that any capital costs that are Qualifying HMRE Expenditures shall be recovered as expenses through the HMRE Deferred Cost Account without any associated return (other than carrying charges), depreciation or taxes.

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<sup>5</sup> Section 27.4.1 of the GT&C requires the establishment and maintenance of an HMRE Deferred Cost Account for qualifying HMRE expenditures.

### **Current Filing**

7. On November 15, 2013, Discovery filed to increase its HMRE Surcharge from \$0.00092 per Dth to \$0.0500 per Dth, the maximum allowed by Discovery's tariff. Discovery stated that its filing reflected costs incurred with respect to the following qualifying activities for the twelve months ended September 30, 2013: (1) combined onshore and offshore property insurance in excess of \$509,575 (\$775,667.29); (2) construction of a helipad at Valve Site 1 (\$141,444.87); (3) new pigging facilities to its onshore 30-inch pipeline in Terrebonne Parish to permit smart and routine pigging (\$3,620,073.50); (4) follow-up integrity management investigation and treatment procedures on Discovery's Point Au Chien 18-inch pipeline for an anomaly identified in a smart pig run (\$348,458.50); (5) inspection of certain offshore facilities that were located in the storm path of Hurricane Isaac (\$115,063.44); and (6) expenditures as part of the Junction Platform (\$25,403,687).<sup>6</sup> Discovery asserted that the first item was recoverable under section 27.2.1 of the GT&C, the second item was recoverable under section 27.2.4, the third, fourth, and sixth items were recoverable under section 27.2.3, and the fifth item was recoverable under 27.2.5.

8. In its filing, Discovery stated that the Junction Platform costs included in the HMRE Surcharge were incurred to resolve critical and long-term issues related to the pigging capability of Discovery's offshore mainline system. Discovery stated that its offshore pigging issues stemmed from declining production at the Lobster Platform, where Discovery's pigging operations currently originate.<sup>7</sup> Discovery stated that the lack of sufficient volumes is causing pigs to routinely stall during their run through the mainline facilities. Discovery stated that, at first, the Junction Platform was designed with the sole objective of adding new supplies from the deepwater Gulf of Mexico. Discovery stated that its original design plan for the Junction Platform contemplated building a 1.5 mile, 16-inch pipeline that would connect the new Junction Platform to its existing 30-inch offshore mainline system. As the pigging problem worsened, however,

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<sup>6</sup> Discovery Initial Filing at 2-3 and Schedule D. The Commission issued a certificate for the Junction Platform on May 24, 2013, in *Discovery Gas Transmission LLC*, 143 FERC ¶ 61,171 (2013) (Junction Platform Certificate Order).

<sup>7</sup> Discovery stated that its Discovery's pigging facilities allow for both routine pigging that sweeps to shore the accumulating retrograde liquids within the pipeline as well as "smart pigging" to ensure pipeline safety and integrity, for example, by investigating possible damage from storms, vessels, anchors, corrosion, etc. In addition, Discovery must also comply with pigging and other pipeline integrity requirements established by the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA).

Discovery revised its design plan for the Junction Platform to also address the pipeline's pigging-related issues. Accordingly, the project design was modified to increase the 16-inch connector line to a 30-inch diameter pipeline, lengthen the connecting pipeline from 1.5 miles to 9.5 miles, so that it would interconnect with the mainline immediately downstream of the Lobster Platform, and construct 30-inch pig launching facilities on the new Junction Platform, thereby moving the offshore base for Discovery's pigging operations from the Lobster Platform to the new Junction Platform. Thus, Discovery stated that the Junction Platform had two main objectives: (1) the addition of new supplies from the deepwater Gulf of Mexico; and (2) the resolution of Discovery's long-term system pigging issues.<sup>8</sup> Discovery stated that it only proposed to include in the HMRE Surcharge the increment of the Junction Platform costs associated with resolving Discovery's pigging issues<sup>9</sup> and, as explained in Discovery's certificate application, upon approval for recovery through the HMRE Surcharge, it would file to remove such costs from the Junction Platform's incremental recourse rate.<sup>10</sup>

9. Discovery stated that, as explained in the certificate application, "[b]ut for' the need to address the pigging issue, Discovery could have constructed a much shorter, smaller diameter, and less costly lateral between the Junction Platform and its existing mainline."<sup>11</sup> Discovery stated that, given that pigging operations are critical for an offshore pipeline system to sweep retrograde liquids to shore (normal pigging) and test system integrity (smart pigging),<sup>12</sup> the Commission's certificate order found that the Junction Platform "will provide system-wide benefits by providing Discovery and its existing customers a long-term solution for pigging of Discovery's offshore mainline,"

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<sup>8</sup> Discovery Initial Filing at 3 (citing Junction Platform Certificate Order, 143 FERC ¶ 61,171 at P 7).

<sup>9</sup> Discovery stated that the HMRE Surcharge filing included only the incremental pigging and related pipeline costs above the costs for the originally-planned 16-inch pipeline lateral, thereby limiting HMRE recovery only to amounts associated with resolving Discovery's long-term system pigging reliability issue. Discovery Initial Comments at 3.

<sup>10</sup> Discovery Initial Filing at 3 (citing Abbreviated Application For Certificate of Public Convenience and Necessity Under Section 7(c) of the Natural Gas Act, Docket No. CP12-516-000, at 14 (Sept. 7, 2012) (Application)).

<sup>11</sup> *Id.* (citing Application at 14 & n.14).

<sup>12</sup> *Id.* (citing Application at 16, 18-20).

thereby enhancing both “service to Discovery’s existing customers” and “overall system reliability.”<sup>13</sup>

10. Indicated Shippers and LLOG protested Discovery’s proposed increase in the HMRE Surcharge. In particular, they argued that Discovery’s proposal to include the Junction Platform expenses in the HMRE Surcharge did not meet the definition of those costs eligible to be included in the surcharge. Indicated Shippers and LLOG requested that the Commission order a technical conference to address the issues raised in the protests.

11. In the 2013 Order, the Commission accepted and suspended Discovery’s proposed tariff record, to be effective January 1, 2014, subject to refund and the outcome of a technical conference. The Commission found that Discovery’s filing raised a number of issues, which were best addressed at a technical conference. On February 27, 2014, the Commission convened a technical conference to examine the issues raised with regard to Discovery’s filing.<sup>14</sup> Pursuant to the procedural schedule agreed to by the parties at the technical conference, initial comments on the technical conference were due March 19, 2014, with reply comments due April 2, 2014. Discovery, Indicated Shippers, and LLOG each filed Initial and Reply Comments.

## **II. Post-Technical Conference Comments**

12. The post-technical conference comments filed by Discovery, Indicated Shippers, and LLOG are generally consistent with the comments made in their earlier filings. Discovery maintains that its current filing includes only costs authorized by a plain language interpretation of GT&C section 27 and is consistent with previous HMRE Surcharge filings approved by the Commission. On the other hand, Indicated Shippers reiterate their objection to the estimated \$25,403,687 of Junction Platform expansion costs included in the HMRE surcharge proposal, arguing that the plain language of the tariff does not contemplate HMRE Surcharge recovery for projects that are unrelated to natural disasters and that the seven previous HMRE filings were related to or focused on natural disasters. LLOG argues that none of the costs included in Discovery’s current filing qualify as costs eligible for recovery through the HMRE Surcharge, as they are not related to hurricanes or natural disasters. Set forth below is a more detailed summary of the parties initial and reply comments.

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<sup>13</sup> *Id.* (citing Junction Platform Certificate Order, 143 FERC ¶ 61,171 at P 22).

<sup>14</sup> On March 4, 2014, Discovery filed with the Commission its technical conference presentation.

### A. Tariff Language

13. Discovery contends that the plain language of its tariff allows for the recovery of “all capital costs and related operation and maintenance expenditures . . . in connection with efforts . . . to enhance overall system reliability,”<sup>15</sup> and more specifically, “smart pigging operations and related pipeline modifications.”<sup>16</sup> It contends that sections 27.1 and 27.2 do not require or otherwise state that costs must be related to a natural disaster to be recoverable under the HMRE Surcharge. Discovery states that the Junction Platform costs included in the HMRE surcharge only represent the incremental pigging and related pipeline costs in excess of the costs for the originally-planned 16-inch pipeline lateral to be recovered by the incremental recourse rate. Discovery states that in the Certificate Order approving the construction of the pigging-related facilities, the Commission found that “the project will provide system-wide benefits by providing Discovery and its existing customers a long-term solution for pigging Discovery’s offshore mainline” and that “Discovery’s new facilities will enhance overall system reliability.”<sup>17</sup> Thus, Discovery avers that the subject costs serve a purpose specified under section 27.1 (“to enhance overall system reliability”) and constitute a qualifying expenditure under section 27.2.3 (“Smart pigging operations and related pipeline modifications”).

14. Discovery states that it appropriately put parties on notice in the Junction Platform certificate proceeding that it may seek HMRE surcharge recovery of the incremental pigging and related pipeline costs of the system pigging solution. Discovery states that, while the Commission appropriately did not rule on future HMRE Surcharge recovery in the context of the certificate proceeding, the Commission did fully recognize the dual objectives of the Junction Platform and also made findings regarding system-wide benefits of the pigging solution. Moreover, Discovery states that the Commission recognized that Discovery “specifically used 30-inch diameter pipeline in sizing the Mainline Extension to physically accommodate system pigging needs, not primarily to enable it to meet a reasonably-anticipated demand for additional capacity.”<sup>18</sup>

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<sup>15</sup> Discovery Initial Comments at 6 (citing section 27.1 of the GT&C).

<sup>16</sup> *Id.* (citing section 27.2.3 of the GT&C).

<sup>17</sup> *Id.* at 7 (citing Junction Platform Certificate Order, 143 FERC ¶ 61,171 at P 22).

<sup>18</sup> Discovery Reply Comments at 9 (citing *Discovery Gas Transmission LLC*, 145 FERC ¶ 61,145, at P 9 (2013)).

15. Indicated Shippers contend that the plain language of the tariff does not contemplate HMRE Surcharge recovery for projects that only promote system reliability.<sup>19</sup> Indicated Shippers also assert that Discovery's interpretation is inconsistent with Commission precedent approving trackers. Indicated Shippers state that Discovery has severed its limited section 4 rights from their purpose—recovery of costs related to natural disasters—into a free-form capital tracker, which is more than the Commission has authorized, more than shippers approved, and more than the tariff language can bear.<sup>20</sup> Indicated Shippers argue that limited section 4 rights associated with remediation of natural disasters should be held within their narrow scope if Commission oversight of offshore pipeline ratemaking is to retain any force.

16. Indicated Shippers contend that granting Discovery the rights it seeks would cut off Commission oversight of Discovery's ratemaking. Indicated Shippers state that the Commission only approved Discovery's proposed recourse rates on the condition that Discovery file a cost and revenue study and by its action in this case, Discovery will effectively exclude twenty percent of the Junction Platform costs from Commission review in a cost and revenue study by shifting those costs to the HMRE Surcharge. Indicated Shippers also state that Discovery will avoid the necessity of demonstrating the propriety of rolling in Junction Platform expansion costs simply by relabeling those costs as HMRE reliability costs. Indicated Shippers also contend that nothing in Discovery's Docket No. CP12-516 filing or the Certificate Order pre-approves Discovery's efforts to retroactively reprice the junction expansion and that the current proposal results in higher effective rates and direct adverse economic impacts for Indicated Shippers and all Junction Platform customers.<sup>21</sup>

17. Likewise, LLOG contends that Discovery's interpretation of section 27.1 and 27.2.3 fails for several reasons.<sup>22</sup> LLOG states that the allowance of smart pigging operations is only relevant if and to the extent such costs are permitted for inclusion by section 27.1. LLOG claims that a more cogent reading of section 27.1 shows that to be eligible for HMRE Surcharge recovery costs must arise from

(1) mitigating “the cost of damage to facilities caused by hurricanes (or other natural disasters .... )”; (2) maintaining

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<sup>19</sup> Indicated Shippers Initial Comments at 6.

<sup>20</sup> *Id.* at 10-11.

<sup>21</sup> *Id.* at 8-9.

<sup>22</sup> LLOG Initial Comments at 4.

system reliability “during and immediately after hurricanes (or other Natural Disasters); or (3) repairing and remediating facilities “damaged by hurricanes (or other Natural Disasters)” to enhance overall system reliability.

In other words, LLOG claims that costs associated with enhancing system reliability are only recoverable to the extent incurred during efforts to “repair and remediate facilities damaged by hurricanes (or other Natural Disasters).” LLOG states that Discovery’s interpretation of section 27.1 as permitting recovery of any costs incurred “to enhance overall system reliability” places a comma in section 27.1 where none exists. LLOG states that if the Commission accepts Discovery’s interpretation, any costs incurred however relating to “system reliability” would be eligible for recovery through the HMRE Surcharge. As an example, LLOG contends that the looping of Discovery’s mainline, if adding to system reliability, would be recoverable through the HMRE Surcharge. LLOG states that this would turn section 27.1 on its head.

18. LLOG adds that none of the costs included in Discovery’s filing qualify as costs eligible for recovery through the HMRE Surcharge.<sup>23</sup> LLOG states that the pig launcher upgrade on the 30-inch onshore mainline, the smart pig of PAC 18-inch line and remediation, and the valve site 1 helipad are all costs that are not related to hurricane or Natural Disasters and therefore, they do not meet the criteria set forth in Section 27.1. LLOG also notes that the Junction Platform has not yet been placed into service and is not expected to become operational until the third quarter of 2014. Thus, LLOG states, shippers have been paying the HMRE Surcharge since January 1, 2014, while the shippers for whom the facilities were constructed have not begun paying the incremental recourse rate designated by the certificating order.

19. In its reply comments, Discovery contends that the Indicated Shippers point to no tariff language supporting their position, and that LLOG mischaracterizes the tariff language. Discovery asserts that section 27.1 specifies four distinct allowable purposes and that while the first three purposes in the tariff limit recovery to costs associated with natural disasters, the fourth does not. Discovery contends that if the intention had been for all four purposes to be related to natural disasters, then the tariff would have so stated. Discovery contends that on this basis, the protests can and should be denied. Discovery also states that there will be no double recovery. If the current filing is approved, Discovery states that it will seek to remove such costs from the Junction Platform’s recourse rate in a later proceeding.

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<sup>23</sup> *Id.* at 7.

20. With respect to LLOG's interpretation of section 27.1, Discovery claims that LLOG's interpretation is based on changing the words of the tariff. Discovery states that LLOG deletes the word "and" prior to "to enhance overall system reliability" and adds the word "or" before "(3) repairing or remediating . . . ." Discovery states that LLOG's mischaracterization of the tariff attempts to change the plain language and meaning as written, contrary to accepted canons of interpretation.<sup>24</sup> Discovery also argues that LLOG's characterization of the Junction Platform omits one of the two objectives, i.e., it will "provide system-wide benefits" and "enhance overall system reliability."<sup>25</sup>

21. Contrary to Indicated Shippers' claim that Discovery's position would cut off Commission ratemaking oversight, Discovery contends in its reply comments that the annual HMRE filing is filed with, and reviewed by, the Commission and shippers have specific challenge rights, as evidenced by this instant proceeding. Discovery states that, additionally, the Commission has review authority of Discovery's incremental recourse rate established in the Junction Platform certificate proceeding and any change to that incremental recourse rate must be filed with and approved by the Commission, in addition to being publicly noticed and subject to shipper protest and comment. Discovery states that the policy at stake here is not the Commission's rate review authority, but the Commission's strong policy and precedent of enforcing tariffs.<sup>26</sup> Discovery also points out that the Commission has a strong policy of enforcing approved settlements and upholding the parties' settlement bargain<sup>27</sup> and in accordance with these policies, the

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<sup>24</sup> Discovery Reply Comments at 14.

<sup>25</sup> Junction Platform Certificate Order, 143 FERC ¶ 61,171 at P 22.

<sup>26</sup> Discovery Reply Comments at 11 (citing *Equitable Gas Co.*, 28 FERC ¶ 61,235, at 61,144 (1984); *Natural Gas Pipeline Co. of Am.*, 28 FERC ¶ 61,137, at 61,245 (1984) (same); *Tenn. Gas Pipeline Co.*, 27 FERC ¶ 61,352, at 61,686 (1984) (same); see also *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216, at P 175 (2010) ("[T]he Commission has the authority to enforce Commission-approved tariff provisions."); *Cal. ex rel. Lockyer v. Dynergy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) ("Once filed with a federal agency, such tariffs are the 'equivalent of federal regulation.'" (quoting *Cahnman v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998))); id. at 853 ("Under the filed rate doctrine, the terms of the filed tariff are considered to be the law and to therefore conclusively and exclusively enumerate the rights and liabilities of the contracting parties.") (internal quotations and citations omitted)).

<sup>27</sup> Discovery Reply Comments at 13 (citing *Trailblazer Pipeline Co.*, 106 FERC ¶ 61,034, at 61,128 (2004) ("It is the Commission's long-standing policy to encourage, not discourage, settlements. Rate case settlements almost always involve compromise, as

(continued...)

Commission should enforce section 27 of Discovery's Tariff as plainly written and as approved in the Settlement.

22. Discovery also challenges LLOG's claim that none of the costs included in the current filing are Qualifying HMRE Expenditures. Discovery states LLOG's only basis for this claim is its mistaken interpretation of section 27.1 and that so long as a cost constitutes a Qualifying HMRE Expenditure as defined in Section 27.2 and is incurred to serve one of the purposes listed in Section 27.1, such costs are recoverable through the HMRE Surcharge.

23. In their reply comments, Indicated Shippers argue that Discovery's contention that section 27.1 provides that one of several independent purposes of the HMRE Surcharge is to provide recovery of costs incurred "to enhance overall system reliability" is a misleading statement as it takes these words out-of-context.<sup>28</sup> Indicated Shippers argue that, instead, the plain language of the tariff describes recovery of costs related to repair, system reliability, and mitigation of damage to facilities – all that may result from a hurricane or "Natural Disaster," as so defined in Section 27.1 of Discovery's tariff. Like LLOG, Indicated Shippers also contend that none of the other costs in Discovery's filing qualify for recovery under the HMRE Surcharge.<sup>29</sup>

24. In its reply comments, LLOG states that it is irrelevant what percentage of Junction Platforms costs were included in the HMRE Surcharge or whether or not the Junction Platform expenses provide system-wide benefits or enhance overall system

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well as a considerable amount of time and expense of all parties, to resolve a multitude of contentious issues."); *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1177 & n.7 (D.C. Cir. 2005) ("While Indicated Shippers may regret purchasing Transco's IT service, 'wise or not, a deal is a deal,' and therefore 'people must abide by the consequences of their choices.'" (quoting *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988))); *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005) ("Like FERC, we think it obvious that pipelines and their customers might hesitate to enter rate settlements if a subset of settling parties could later pull the rug out from under them. Accordingly, although petitioners point out that approval of the proposed agreement here could have brought significant benefits such as 'rate certainty' and reduced litigation costs, FERC hardly abused its discretion in holding that a strong commitment to preexisting settlements would better serve the public interest than allowing modifications over the objection of one or more parties.").

<sup>28</sup> Indicated Shippers Reply Comments at 4.

<sup>29</sup> Indicated Shippers Reply Comments at 6.

reliability because no portion of the Junction Platform costs is eligible to be recovered through the HMRE Surcharge.<sup>30</sup> LLOG states that, while the Junction Platform Certificate Order acknowledged that the project would provide system-wide benefits to Discovery and its existing customers, the Commission did not address whether the project's costs could be recovered through the HMRE Surcharge.

**B. Prior HMRE Surcharge Filings**

25. Discovery contends that the protesters' position is inconsistent with the history and practice under the HMRE Surcharge filings. Discovery states that its seven prior HMRE Surcharge filings have included both reliability-based and storm-based costs, as contemplated and in accordance with section 27 of the GT&C.<sup>31</sup> Moreover, it states that none of the previous filings were protested by any shipper, and that all filings were approved by the Commission. For example, Discovery states that its first HMRE Surcharge filing, made as part of the Settlement in Docket No. RP08-70, included three reliability-related expenditures that were not directly tied to storms. Yet, Discovery states that its shippers (with the exception of ExxonMobil) agreed to the specific costs in that filing and the Commission approved Discovery's filing without modification.

26. Indicated Shippers argue that Discovery's characterization of its past filings is unsound and that a review of those filings supports Indicated Shippers' tariff interpretation. Indicated Shippers contend that Discovery's filings in Docket Nos. RP08-70, RP09-78, RP09-390, RP10-144, RP11-1519, and RP12-151 were related to Natural Disasters<sup>32</sup> and Docket No. RP13-286 only contained minor expenses for reliability associated with the construction of a helipad.<sup>33</sup> Indicated Shippers state that,

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<sup>30</sup> LLOG Reply Comments at 4.

<sup>31</sup> Discovery Initial Comments at 8 and Attachment B.

<sup>32</sup> Indicated Shippers Initial Comments at 7 (citing Discovery Gas Transmission LLC Tariff Filing, Docket No. RP09-78-000, at 2 (Nov. 14, 2008) ("Discovery's filing reflects an increase in the HMRE surcharge primarily due to costs incurred as a result of Hurricanes Gustav and Ike in September, 2008."); Discovery Gas Transmission LLC Tariff Filing, Docket No. RP09-390-000, at 3 (Feb. 25, 2009) (pointing out the "the significant level of costs incurred to date as a result of Hurricane Ike"); Discovery Gas Transmission LLC Tariff Filing, Docket No. RP10-144-000, at 2 (Nov. 13, 2009) (reducing the HMRE surcharge approved under Docket No. RP09-390-000, which was related to "damage from Hurricane Ike"))).

<sup>33</sup> Indicated Shippers Initial Comments at 7 & n.12.

for example, in Docket No. RP11-1519, Discovery told the Commission “[a]ssuming no unanticipated incidents occur, there is a likelihood that the HMRE Deferred Cost Account may reach a zero, or credit, balance in the near future”<sup>34</sup> and requested authority to suspend collection of the HMRE surcharge under these circumstances. Indicated Shippers state that it would make little sense to request this authority if the HMRE surcharge were not triggered by a natural disaster.

27. With respect to the breakaway joint fitting in Docket No. RP11-1519, while Discovery contends that the decision exemplifies the recovery of reliability-related costs, Indicated Shippers argue that they were related to system reliability only in association with a natural disaster. Indicated Shippers state that Discovery told the Commission “[t]his increase is due primarily to: a) expenditures incurred by Discovery to install a breakaway joint fitting located in the South Timbalier 231 area to avoid potential flooding of its mainline system similar to that experienced during Hurricane Ike....”<sup>35</sup> Indicated Shippers contend that this confirms that the expenditure was related to system reliability.

28. Similarly, LLOG states that a review of the previous HMRE Surcharge filings reveals that all other costs (with the possible exception of the costs associated with smart pigging in Docket No. RP08-70-001) were attributable to capital costs and related operation and maintenance expenditures arising from hurricanes. LLOG states that it was not until the instant filing when Discovery chose to include costs related to non-hurricane expenditures.

29. In its reply comments, Discovery explains that the reliability-related pigging costs in its initial HMRE filing were required to comply with federal regulations rather than storm-related costs.<sup>36</sup> Discovery also states that Indicated Shippers’ own comments state that Discovery’s HMRE filing in Docket No. RP13-286 included costs associated with a reliability-related project, i.e., construction of a helipad.<sup>37</sup> Further, Discovery states that

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<sup>34</sup> *Id.* at 8-9 (citing Discovery Gas Transmission LLC Tariff Filing at 3, Discovery Gas Transmission LLC, Docket No. RP11-1519-000 (Nov. 12, 2010)).

<sup>35</sup> *Id.* at 8 (citing Discovery Gas Transmission LLC Tariff Filing, Docket No. RP11-1519-000, at 3 (Nov. 12, 2010)).

<sup>36</sup> Discovery Reply Comments at 6 (citing Compliance Filing Implementing Commission-Approved Settlement of Discovery Gas Transmission LLC, Docket No. RP08-70-001, Attachment I, at 1 (Mar. 6, 2008)).

<sup>37</sup> *Id.* at 6-7 (citing Indicated Shippers Initial comments at 7 & n.12).

the breakaway joint fitting included in Docket Nos. RP11-1519 and RP12-151 is another example of a proactive reliability-related project. While it explained that the breakaway joint fitting would avoid future damage similar to that experienced after Hurricane Ike,<sup>38</sup> Discovery states that same damage could result from an anchor drag or other causes. Discovery states that, to enhance overall system reliability, it installed a breakaway joint fitting at that pipeline interconnect and, since then, requires all new subsea lateral interconnects to include such a joint fitting.

30. Discovery states that canons of interpretation require that such course of performance be “given great weight in the interpretation” of the tariff.<sup>39</sup> Discovery also states that the Commission has recognized that “[c]ourse of performance under a contract is considered the most persuasive evidence of the parties’ agreed intent.”<sup>40</sup> Accordingly, Discovery contends that its course of performance under the HMRE Tariff provisions (recovering costs incurred to enhance overall system reliability not tied to natural disasters) further supports acceptance of the HMRE Filing.

31. In their reply comments, Indicated Shippers argue that history and practice of the HMRE Surcharge actually preclude inclusion of the Junction Platform costs. Indicated Shippers assert that costs recovered through Docket Nos. RP08-70, RP09-78, RP09-390, and RP10-144, including reliability-driven costs, were related to natural disasters. Indicated Shippers also claim that undercutting Discovery’s claims of “history and

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<sup>38</sup> *Id.* at 7 (citing Application to Revise Hurricane Mitigation and Reliability Surcharge, Docket No. RP11-1519-000, at Schedule F (Nov. 12, 2010); Application to Revise Hurricane Mitigation and Reliability Surcharge, Docket No. RP12-151-000, Transmittal at 2 and Schedule F (Nov. 15, 2011)).

<sup>39</sup> *Id.* (citing Restatement (Second) of Contracts § 202(4) (1981) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”)).

<sup>40</sup> *Id.* (citing *United Illuminating Co. v. Dominion Energy Mktg., Inc.*, 121 FERC ¶ 61,043, at P 36 (2007); *Williston Basin Interstate Pipeline Co.*, 64 FERC ¶ 61,121, at 61,956 (1993) (course of performance is best indicator of what parties intended); 4 Samuel Williston, *A Treatise On the Law of Contracts* § 623 (3d ed. 1961) (“The practical construction placed upon a contract by the parties themselves constitutes the highest evidence of their intent that whatever was done by them in the performance of the contract was done under its terms as they understood and intended same should be done.”)).

practice” is the fact that the costs proposed to be recovered in the instant docket exceed the reliability-driven costs requested to be recovered in any single previous HMRE surcharge filing by a factor of twelve.

32. Similarly, in its reply comments, LLOG states that the inclusion of Junction Platform expenses is inconsistent with the types of costs Discovery has included in prior HMRE Surcharge filings.<sup>41</sup> LLOG states that, with the exception of costs associated with smart pigging the 20-inch line (Larose to Tetco Del) included in the HMRE Surcharge filing in Docket No. RP08-70-001, all other costs recovered through the HMRE Surcharge since its inception were attributable to capital costs and related operation and maintenance expenditures arising from hurricanes.

### **C. ExxonMobil Settlement Protest**

33. Discovery contends that the fact that the HMRE Surcharge is not tied solely to storm-related costs was confirmed by ExxonMobil, one of the Indicated Shippers, at the time the HMRE Surcharge was proposed and approved by the Commission in the Settlement. Discovery asserts that ExxonMobil originally opposed the Settlement, in significant part because ExxonMobil understood that the language of the tariff did not limit the HMRE Surcharge to costs related to natural disasters. Discovery states that in ExxonMobil’s protest to the Settlement,<sup>42</sup> it raised the issue that the HMRE Surcharge includes a “smart pig operation” and that “[n]o information is provided to indicate that this cost is attributable to hurricanes or natural disasters.”<sup>43</sup> Discovery asserts that ExxonMobil additionally stated that Discovery’s “all risk” insurance costs allowed under the HMRE tariff provisions “typically include[] all damages regardless of cause, unless expressly excluded from the coverage.”<sup>44</sup> Discovery states that the Commission nonetheless approved the Settlement, without modification, for all parties that consented to the Settlement (which were all but ExxonMobil) and severed ExxonMobil from the

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<sup>41</sup> LLOG Reply Comments at 4-5.

<sup>42</sup> Discovery Initial Comments at 9 (citing Motion for Leave to Intervene, Protest and Request for Summary Rejection of ExxonMobil Gas & Power Marketing Company, a Division of Exxon Mobil Corporation, Docket No. RP08-70-000 (Nov. 27, 2007)).

<sup>43</sup> *Id.* (citing Motion for Leave to Intervene, Protest and Request for Summary Rejection of ExxonMobil Gas & Power Marketing Company, a Division of Exxon Mobil Corporation, Docket No. RP08-70-000, at 8 n.12 (Nov. 27, 2007)).

<sup>44</sup> *Id.*

Settlement in light of its protest.<sup>45</sup> Discovery contends that ExxonMobil's protest of the Settlement underscored for all shippers and the Commission that the consenting parties were agreeing to, and the Commission was approving, a surcharge that would permit Discovery to recover certain prescribed reliability costs not specifically tied to storms or other natural disasters.

34. Indicated Shippers state that the Commission did not approve Discovery's interpretation of the HMRE Surcharge in Docket No. RP08-70. Indicated Shippers state that ExxonMobil originally opposed the HMRE surcharge, arguing that "In addition . . . Discovery's proposed settlement would establish an annual cost tracker for *largely undefined costs of mitigation attributable to hurricanes and other natural disasters . . .*" (italics added).<sup>46</sup> Indicated Shippers state that ExxonMobil did not address the issue of whether the HMRE surcharge could possibly be understood to encompass any reliability-related cost not associated with a hurricane or natural disaster, nor did Discovery raise the issue. Indicated Shippers state that Discovery argued "[h]aving recently suffered the destruction of critical infrastructure by natural disaster, ExxonMobil's opposition here is difficult to understand." Indicated Shippers state that Discovery also supported its proposed HMRE Surcharge by comparing it to one granted to Chandeleur Pipeline to recover \$3.9 million associated with Hurricane Katrina.<sup>47</sup> Indicated Shippers state that in response to ExxonMobil's protest, the Commission did not resolve the issue on the merits because ExxonMobil was severed from the Settlement and the Commission never opined on the issue now in contention.

35. In its reply comments, Discovery contends that the position now advanced by the Indicated Shippers is wholly inconsistent with ExxonMobil's correct understanding of the tariff at the time it was negotiated and approved.

36. In their reply comments, Indicated Shippers argue that Discovery mischaracterizes the concerns expressed by ExxonMobil in its protest of the Settlement. Indicated

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<sup>45</sup> Discovery Initial Comments at 9 (citing Settlement Order, 122 FERC ¶ 61,099 at P 1).

<sup>46</sup> Indicated Shippers Initial Comments at 9 (citing Motion for Leave to Intervene, Protest, and Request for Summary Rejection of ExxonMobil Gas & Power Marketing Company, A Division of Exxon Mobil Corporation, Docket No. RP08-70-000, at 7 (Nov. 27, 2007)).

<sup>47</sup> *Id.* at 9-10 (citing Answer of Discovery Gas Transmission LLC to ExxonMobil Gas & Power Marketing Company's Motion for Summary Rejection, Discovery Gas Transmission LLC, Docket No. RP08-70-000, at 9 (Dec. 3, 2007)).

Shippers state that read in context, ExxonMobil objected to the inclusion of smart pigging costs related to compliance with basic Department of Transportation safety regulations that were unrelated to natural disasters. Moreover, Indicated Shippers state that ExxonMobil did not disconnect the HMRE surcharge from natural disasters, but was concerned that the HMRE surcharge would be “an annual cost tracker for largely undefined costs of mitigation attributable to hurricanes and other natural disasters. . . .”<sup>48</sup> Indicated Shippers state that this reflects the same understanding the Commission had of ExxonMobil’s objections, as described in its order.

37. In its reply comments, LLOG argues that Discovery’s assertion that the protest by a single party (i.e., ExxonMobil) can somehow be extrapolated into a collective interpretation of the Settlement by consenting parties is without merit.

### **III. Discussion**

38. As discussed in more detail below, the Commission approves the tariff record Discovery filed in the instant proceeding, subject to conditions.

39. Based upon our review of GT&C sections 27.1 and 27.2 of Discovery’s tariff, the Commission finds that Discovery may recover the costs detailed in its instant filing through the HMRE Surcharge, subject to the condition that Discovery must file to remove the Junction Platform costs included in the HMRE Surcharge from the incremental recourse rate for the Junction Platform. Section 27.1 of the tariff provides that Discovery may recover in the HMRE all capital costs and related operation and maintenance expenditures incurred for certain purposes. Section 27.2 identifies five specific capital expenditures and operation and maintenance expenditures (Qualifying HMRE Expenditures) that qualify for inclusion in the HMRE Surcharge.

40. Indicated Shippers and LLOG do not dispute that each of the costs Discovery seeks to recover through the HMRE qualifies as one of the five specific types of capital expenditures and operation and maintenance expenditures listed in sections 27.2.1, 27.2.3, 27.2.4, and 27.2.5. For example, the Junction Platform costs Discovery seeks to include in the HMRE are qualifying expenditures for “Smart pigging operations and related pipeline modifications” under section 27.2.3.

41. However, Indicated Shippers and LLOG contend that, even though the costs at issue are “qualifying expenditures” under section 27.2, Discovery did not incur those costs for one of the purposes listed in section 27.1, and therefore Discovery may not

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<sup>48</sup> Indicated Shippers Reply Comments at 5 (citing Indicated Shippers Initial Comments at 9 (emphasis in original)).

recover them through the HMRE. Section 27.1 requires that costs included in the HMRE be incurred for the following purposes:

to mitigate the cost of damage to facilities caused by hurricanes (or other natural disasters including but not limited to tornados, rogue waves, erosion and mudslides (hereinafter, “Natural Disasters”)), to maintain system reliability during and immediately after hurricanes (or other Natural Disasters), to repair and remediate facilities damaged by hurricanes (or other Natural Disasters) and to enhance overall system reliability.

42. Indicated Shippers and LLOG interpret this language as requiring that all costs included in the HMRE be associated with a natural disaster, and therefore argue that the costs at issue here do not qualify for recovery in the HMRE, because none of them are associated with a specific natural disaster. The Commission disagrees. The Commission interprets section 27.1 to set forth four distinct purposes, the last of which is “to enhance overall system reliability.” While the first three purposes set forth in section 27.1 specifically limit recovery to costs associated with natural disasters, the fourth purpose (i.e., “to enhance overall system reliability”) does not. The courts have indicated that the Commission has every right to expect contracting parties to express clearly their intentions and not require the Commission to read into their agreements what is not spelled out there.<sup>49</sup> The Fourth Circuit made this same point succinctly: “It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant.”<sup>50</sup> If it were the intent of the settling parties that enhancements to overall system reliability be related to natural disasters, then the tariff language included in the

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<sup>49</sup> 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 Utility Authority v. FERC*, 610 F.2d 914, 929 (D.C. Cir. 1979) (major public utility is fairly chargeable with ability to state what it means)).

<sup>50</sup> *Consolidated Gas Supply Corporation v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984), cert. denied, 472 U.S. 1008 (1985).

Settlement and later incorporated into Discovery's tariff should have so stated.<sup>51</sup> But, it does not. Thus, to the extent the costs included in Discovery's filing "enhance overall system reliability," which Indicated Shippers and LLOG do not dispute, those costs satisfy section 27.1.

43. The Commission finds that LLOG's and Indicated Shippers' alternative interpretations of section 27.1 are without merit. As Discovery points out, LLOG's interpretation of section 27.1 changes the wording of section 27.1. LLOG leaves out of section 27.1 the word "and" which precedes the phrase "to enhance overall system reliability," so as to make that phrase modify the preceding phrase concerning the repair and remediation of facilities damaged by natural disasters. However, we find it more reasonable to interpret each of the four infinitive verb forms in section 27.1 ("to mitigate . . .," "to maintain . . .," "to repair and remediate . . .," and "to enhance . . .") as separate phrases identifying a separate purpose for which the qualifying expenditures may have been incurred. Indicated Shippers do not point to any specific language in section 27.1 to support their interpretation. Accordingly, we reject these interpretations.

44. The Commission also finds that the course of performance by Discovery and its customers in Discovery's previous HMRE Surcharge proceedings is probative of the parties' intent. Beginning with its first HMRE Surcharge filing, Discovery sought to recover reliability-related costs unrelated to hurricanes or natural disasters under the HMRE Surcharge. For example, in its first HMRE Surcharge filing in Docket No. RP08-70, which was made as part of the Settlement, Discovery sought to recover costs for a smart pig operation to comply with Department of Transportation Regulations. ExxonMobil, who is one of the Indicated Shippers, protested the Settlement and the HMRE Surcharge, arguing that the costs Discovery could recover under the HMRE Surcharge were undefined.<sup>52</sup> Along those lines, ExxonMobil pointed out that the pigging-related costs were not specifically related to a hurricane or other natural disaster. No other party protested the then-proposed HMRE Surcharge or the Settlement. ExxonMobil was severed from the Settlement in light of its protest, and the Commission

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<sup>51</sup> Compare Sea Robin Pipeline Company, LLC FERC Gas Tariff, Section 24.1 ("The purpose of this Section 24 is to establish a mechanism to recover through a volumetric surcharge the costs incurred by Sea Robin resulting from any hurricane or tropical storm named by the U.S. National Oceanic and Atmospheric Administration or the U. S. National Weather Service (Hurricane), or successor agency.").

<sup>52</sup> ExxonMobil Protest, Docket No. RP08-70-000, at 7-9 (filed Nov. 27, 2007).

approved the Settlement for the consenting parties, as proposed.<sup>53</sup> Despite its earlier protestations, ExxonMobil joined the Settlement by letter agreement in 2011.<sup>54</sup>

45. Discovery continued to seek the recovery of costs unrelated to hurricanes or natural disasters in subsequent Hurricane Surcharge filings.<sup>55</sup> For example, in Docket No. RP13-286, Discovery sought to recover costs associated with the construction of a helipad at Valve Site 1 to permit rapid deployment to the site. Indicated Shippers acknowledge in their initial comments that these were expenses for reliability.<sup>56</sup> However, neither Indicated Shippers or LLOG's or any other party protested Discovery's inclusion of the helipad costs despite those costs being unrelated to a natural disaster. We find that the course of performance demonstrated by Discovery and its customers in the previous HMRE Surcharge proceedings is indicative of the parties' intent when they agreed to the Settlement—that the HMRE Surcharge allows Discovery to recover reliability-related costs unrelated to hurricanes or natural disasters.<sup>57</sup>

46. Indicated Shippers also argue that Discovery's interpretation is inconsistent with Commission precedent concerning the costs that may be recovered through a tracking mechanism and would cut off Commission oversight of Discovery's rates. LLOG is similarly concerned that allowing the inclusion of Junction Platform costs would allow the unconstrained recovery of reliability costs without rate review. It is immaterial to the interpretation of section 27, and in particular section 27.1, whether Discovery's current filing is consistent with the terms and conditions of other Commission-approved trackers. Section 27 was approved as part of a settlement for consenting parties. While one of the Indicated Shippers, ExxonMobil, was initially severed from the Settlement as a contesting party, it subsequently chose to become a party to the settlement. Therefore, absent a request to modify section 27 under section 5 of the Natural Gas Act, which no

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<sup>53</sup> Settlement Order, 122 FERC ¶ 61,099.

<sup>54</sup> *Discovery Gas Transmission, LLC*, Docket No. RP12-305-000 (Jan. 11, 2012) (delegated letter order).

<sup>55</sup> *See, e.g.*, Discovery Initial Comments Attachment B.

<sup>56</sup> Indicated Shippers Initial Comments at 7 & n.12.

<sup>57</sup> *See, e.g., Cities of Bethany v. FERC*, 727 F.2d 1131, at 1144 (D.C. Cir. 1984) (parties' course of performance under a contract may give meaning to otherwise unclear contract terms). *See also United Illuminating Co. v. Dominion Energy Mktg., Inc.*, 121 FERC ¶ 61,043 at P 36; *Williston Basin Interstate Pipeline Co.*, 64 FERC at 61,956 (course of performance is best indicator of what parties intended).

party has sought, it is only relevant whether Discovery's filing is consistent with its tariff, in particular the terms and conditions of the HMRE Surcharge in section 27 of the GT&C. For the "tariff has the force of law and is binding on all, including the Commission, absent a modification of the tariff."<sup>58</sup> As explained above, we find Discovery's filing to be consistent with section 27. Further, Discovery's interpretation of section 27 does not cut off Commission oversight. Any change to Discovery's incremental recourse rate established in the Junction Platform certificate proceeding must be filed with and approved by the Commission, as well as noticed and subject to shipper comment. The Commission also has review authority with respect to any costs Discovery seeks to recover under the HMRE Surcharge or in a subsequent rate case.

47. Indicated Shippers also argue that the HMRE Surcharge results in higher effective rates for all Indicated Shippers. The Indicated Shippers' desire to avoid paying higher rates is not a reason to deny Discovery recovery of qualifying HMRE costs. Further, as designed, the HMRE Surcharge is capped at \$0.05 per Dth, thereby mitigating the rate impact on shippers, including the Indicated Shippers.

48. Under section 27.4.2 of the GT&C, costs that are Qualifying HMRE Expenditures shall be recovered without any associated return, depreciation or taxes. Accordingly, Discovery is required to remove any Qualifying HMRE Expenditures associated with the Junction Project from the incremental recourse rate for the Junction Platform.

The Commission orders:

The Commission approves the tariff record Discovery filed in the instant proceeding, subject to conditions, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>58</sup> See, e.g., *Tennessee Gas Pipeline Co.*, 27 FERC ¶ 61,352, at 61,686 (1984) (citing *East Tennessee et al. v. FERC*, 631 F.2d 796 (D.C. Cir. 1980)).