153 FERC ¶ 61,123
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sabine Pipe Line LLC Docket No. RP15-1322-000

ORDER ACCEPTING AND SUSPENDING TARIFF RECORDS
AND ESTABLISHING HEARING

(Issued October 30, 2015)

1. On September 30, 2015, Sabine Pipe Line LLC (Sabine) filed revised tariff records[1] comprising a general rate case pursuant to section 4 of the Natural Gas Act (NGA), as well as changes in Sabine's General Terms and Conditions (GT&C). Sabine proposes an effective date of November 1, 2015. For the reasons discussed below, the Commission accepts for filing and suspends Sabine's proposed rates, to be effective April 1, 2015, subject to refund and the outcome of a hearing established in this proceeding. The Commission accepts Sabine's proposed revisions to the GT&C of its tariff, effective November 1, 2015, as requested. Further, pursuant to NGA section 5, the Commission directs Sabine either to file tariff records to make its *force majeure* definition consistent with Commission policy or explain why it should not be required to do so.

I. **Background**

2. The Sabine system is comprised of 130 miles of transmission pipeline, from Jefferson County, Texas, to and including the Henry Hub near Erath, Louisiana. Sabine filed its last general section 4 rate case in May, 1986, in Docket No. RP86-86-000. That case was resolved by a settlement approved by the Commission on January 13, 1987.[2] This settlement established stated rates for daily firm reservation, monthly firm reservation, firm usage, and interruptible usage. Sabine states that its settlement rates were based on a cost of service of roughly $7 million and billing determinants of 72,000,000 dekatherms (Dth). In its Order No. 636 restructuring proceeding, Sabine

[1] *See* Appendix.

[2] *Sabine Pipe Line Co*., 38 FERC ¶ 61,014 (1987).

modified the settlement rates in order to use a straight fixed variable rate design, based on the same cost of service and billing determinants underlying the settlement.[3]

3. In the instant filing, Sabine proposes an updated cost of service of approximately $14 million with updated billing determinants of 20,440,000 Dth, the majority of which represent interruptible service. Sabine states that it filed this rate case to establish rates that will give it the opportunity to recover its operating and maintenance costs and a reasonable rate of return. As a result, Sabine is proposing a large rate increase, discussed in the subsequent sections.

4. Sabine is also proposing five tariff changes to its GT&C which:

a. enable Sabine to reserve available unsubscribed capacity for future expansion projects,

b. change the penalty calculation to include a published index rate,

c. limit its liability for certain damages,

d. outline the procedure for determining reservation charge credits for non-*force majeure* events and for certain orders issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA), and

e. clarify the language concerning electronic nominations, the Annual Charge Adjustment, and the Negotiated Rate Agreement chart.

II. Notice of Filing, Interventions, and Protests

5. Public notice of Sabine's filing was issued on October 6, 2015. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[4] Pursuant to Rule 214,[5] all timely motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

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[3] *Sabine Pipe Line Co.*, 63 FERC ¶ 61,010, at 61,094, *reh'g*, 64 FERC ¶ 61,007 (1993).

[4] 18 C.F.R. § 154.210 (2015).

[5] 18 C.F.R. § 385.214 (2015).

III. Revisions to General Terms & Conditions

A. Reservation of Capacity for Expansion Projects

6. Sabine is proposing to add language in GT&C section 7.2.4 of its tariff that will allow it to reserve available, unsubscribed capacity for future expansion projects. Sabine states that no such provision currently exists in its tariff and that this revision will enable it to better plan for future expansion projects. We find this to be a just and reasonable proposal, consistent with Commission policy.[6]

B. Penalty Provision

7. Sabine is proposing to revise the language in GT&C sections 7.6.7 and 7.6.12 of its tariff; these revisions pertain to the penalties associated with a shipper's failure to comply with an OFO or a shipper's delivery of a quantity that differs from the quantity Sabine issues in its notice of curtailment. The current tariff language provides for a penalty of $10.00 per Dth. Sabine is proposing to change this penalty to the higher of either (a) $10.00 per Dth or (b) three times the midpoint price reported for Henry Hub as published in the applicable Platts *Gas Daily* survey for the applicable flow date for each violation.

8. Sabine's proposal to base its penalty for violating an OFO or curtailment order on a multiple of a price index is consistent with Commission policy.[7] However, the Commission also requires that, when a pipeline makes a tariff filing proposing to use a new price index in its tariff, the pipeline bears the burden of showing that the index satisfies the criteria set forth in the Commission's 2004 Price Index Order.[8] These criteria are as follows:

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[6] *E.g.*, *MoGas Pipeline LLC*, 126 FERC ¶ 61,064, at PP 38-39 (2009) (A pipeline may "reserve capacity for future expansion projects", provided that "before reserving any capacity for an expansion, [the pipeline] will post the capacity for competitive bidding,") *order on compliance*, 130 FERC ¶ 61,128, at P 20 (2010). *Midwestern Gas Transmission Co.*, 106 FERC ¶ 61,229 at PP 6-9 (2004) (Commission has consistently approved proposals to reserve capacity for expansions because use of existing capacity to meet the needs of those interested in an expansion can minimize the need for construction.)

[7] *See, e.g., Algonquin Gas Transmission, LLC,* 113 FERC ¶ 61,146, at P 6 (2005) (accepting a penalty equal to three times the daily *Gas Daily* posting for the relevant point), *reh'g denied*, 115 FERC ¶ 61,067, at PP 8-16 (2006), and cases cited therein.

[8] *Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets*, 109 FERC ¶ 61,184 at P 68 (2004 Price Index Order).

f. The index must be published or provided by an index developer that has met all or substantially all of the standards in five areas addressing: (1) code of conduct and confidentiality; (2) completeness; (3) data verification, error correction, and monitoring; (4) verifiability; and (5) accessibility.[9]

g. For a particular price index location to be used in a jurisdictional tariff, the index location must meet or exceed one or more of the minimum criteria for liquidity, *i.e.*, the index must be developed based on a sufficient number of reported transactions involving sufficient volumes of natural gas or electricity.[10]

The 2004 Price Index Order stated that, if a pipeline proposes to use an index location published by one of the price index developers approved in the Price Index Order and demonstrates that the index location meets one or more of the applicable liquidity criteria for the appropriate review period, the Commission will apply a presumption that the proposed index location will result in just and reasonable charges.[11]

9. In this case, Sabine proposes to use a price index published by Platts in *Gas Daily*. In the 2004 Price Index Order, the Commission found that Platts satisfied the five standards applicable to Price Index publishers.[12] Therefore, Sabine's proposal to use the *Gas Daily* index for the Henry Hub satisfies first set of criteria listed above concerning the publisher of the proposed price index.

10. In its supplemental filing, Sabine shows that the proposed *Gas Daily* Henry Hub price index satisfies the Commission's liquidity criteria. In particular, Sabine's supplemental filing demonstrates that, over the last 90 days, physical trades at the Henry Hub were far in excess of the 25,000 MMBtu/d standard set in the 2004 Price Index Order, often by a factor of ten, and that the number of trades each day is consistently in the double digits. Accordingly, we accept the revised penalty provision.

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[9] *Id.* P 39 and Ordering Para. (C) (citing *Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121, at P 33 (2003) (2003 Index Policy Statement)).

[10] *Id.* P 66 and Ordering Para. (D).

[11] *Id.*

[12] 2004 Price Index Order at P 39 (emphasis added).

C. Liability

11. Sabine is proposing to add language in GT&C section 7.18.1 of its tariff that will revise the limits of its liability. Specifically, Sabine states it would be liable for indirect, special, consequential, incidental, punitive, or exemplary damages only to the extent it engages in gross negligence or willful misconduct. We find this to be a just and reasonable proposal, consistent with Commission policy.[13]

D. Reservation Charge Crediting Mechanism

12. Sabine is proposing to replace its existing reservation charge crediting provisions in GT&C section 7.19.2 of its tariff with revised provisions consistent with the Commission's reservation charge crediting policies. Sabine proposes to provide full reservation charge credits for non-*force majeure* outages of primary firm service. It proposes to provide partial reservation charge credits during *force majeure* outages of primary firm service pursuant to the Safe Harbor Method. Under that method, Sabine will provide no credits during the first 10 days of the *force majeure* outage, and full credits thereafter. Sabine also proposes to provide partial reservation charges pursuant to this same method for outages due to compliance with orders issued by the Pipeline and Hazardous Materials Safety Administration pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code for a two year transitional period.

13. Sabine proposes to calculate reservation charge credits based on historic usage when Sabine has given advance notice of the outage before shippers have submitted scheduling nominations for the day of the outage. If the outage is announced less than seven days in advance, Sabine will calculate the credits based on the average quantity scheduled and confirmed for the customer during the seven days immediately prior to the start of the outage, less the quantity actually delivered. If the outage is announced further in advance, Sabine will calculate the credits based on the average quantity scheduled and confirmed during the same calendar days in the prior year, less the quantity actually delivered during the outage.[14]

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[13] *E.g.*, *Enable Gas Transmission, LLC*, 152 FERC ¶ 61,052, at P 161 (2015) (Approving language which limits Enable's liablity to general damages in cases of simple negligence, but "does not limit Enable's liability for 'special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits ...' in cases of gross negligence, bad faith, or willful misconduct."), *order in compliance with and on rehearing from CenterPoint Energy Gas Transmission Co., LLC*, 144 FERC ¶ 61,195 (2013).

[14] Sabine, Ex. SPL-5 (Testimony of Robert A. Guenther) at 7.

14. We find Sabine's proposed reservation charge crediting provisions to be consistent with the Commission's reservation charge crediting policy.[15]

15. However, in our review of the crediting mechanism, we also reviewed Sabine's existing definition of *force majeure,* and we find that certain aspects of that definition are inconsistent with Commission policy. The Commission has defined *force majeure* outages as events that are both "unexpected and uncontrollable."[16]

16. Currently, section 7.19.5 (b) includes as *force majeure*:

> Acts of Government including, without limitation, laws, orders, rules, decrees, judgments, judicial actions, regulations, acts of arrest or restraint, and any threats of any of the foregoing, by any government (de jure or de facto), or any agency, subdivision, or instrumentality thereof, having, claiming or asserting authority or jurisdiction over the severance, productions, gathering, transportation, handling, sale, receipt or delivery of the subject matter of any Service Agreement, or any part thereof, or over materials, equipment, supplies or personnel, or any part thereof, necessary to the severance, production, gathering, transportation, handling, sale, receipt or delivery of the subject matter of any Service Agreement when any such Act of Government directly or indirectly contributes to or results in either party's inability to perform its obligations.

17. This provision appears to treat all service outages related to government actions as *force majeure* events. The Commission has recognized that the actions of an administrative or regulatory agency may support declaration of a *force majeure* event, but only in certain circumstances.[17] In recent orders,[18] the Commission has clarified the

[15] *See, e.g.*, *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,143 (2014) (approving a similar method of calculating credits), and *Enable Gas Transmission, LLC*, 152 FERC ¶ 61,052 (2015) (same).

[16] *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007) (*North Baja v. FERC*), *aff'g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005). *See also, e.g., Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,038, at P 103 (2015) (*Algonquin*).

[17] *Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, *order on reh'g*, 107 FERC ¶ 61,074, at P 32 (2004); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008).

basic distinction as to whether outages resulting from governmental actions are *force majeure* or non-*force majeure* events, as follows. Outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including PHMSA's integrity management regulations, are non-*force majeure* events requiring full reservation credits. However, outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are *force majeure* events requiring only partial crediting. Sabine's definition of *force majeure* appears to define all outages resulting from government action as *force majeure* events, including outages required to comply with government requirements concerning routine maintenance. The above provision appears to be inconsistent with this policy, because it can be interpreted as treating outages resulting from regular, periodic system maintenance outage in order to comply with safety or environmental regulations as *force majeure* events.

18. In addition, section 7.19.5(e) includes as *force majeure*:

> Failure of facilities … regardless of whether such failure of facilities may have resulted from fault, negligence, omission, or inadvertence, directly or indirectly, of either party hereto, or by any person acting on its behalf or under its direction.

19. However, as described above, the Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. Outages due to the pipeline's own fault or negligence cannot be considered "uncontrollable." Accordingly, this provision also appears to be inconsistent with Commission policy.

20. For these reasons, we find that sections 7.19.5 (b) and 7.19.5 (e) of Sabine's existing tariff are inconsistent with the Commission's policies concerning what service outages may be treated as *force majeure* events for which only partial reservation charge credits are required. Thus, pursuant to NGA section 5, we direct Sabine, within 30 days of the date of this order, either to file revised tariff records to conform with the Commission's policies consistent with the discussion in this order or explain why it should not be required to do so.

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[18] *Algonquin*, 153 FERC ¶ 61,038, at PP 103-144 (2015), *TransColorado Gas Transmission Co. LLC*, 144 FERC ¶ 61,175, at PP 35-43 (2013), and *Gulf South Pipeline Co. LP*, 144 FERC ¶ 61,215, at PP 31-34 (2013).

E. Clarifying Changes

21. Sabine is proposing a number of minor changes to clarify certain parts of its tariff. These include: a) clarifying that it will accept nominations electronically in GT&C section 7.5.1, b) clarifying that the Annual Charge Adjustment provided for in its rate schedules is an additional charge, and c) clarifying the Negotiated Rate Agreement chart in GT&C section 7.26.5. Additional minor changes not explicitly mentioned by Sabine in its transmittal, but evident in the submitted redlined tariff, include: a) changing the word “Website” to “website” and adding Sabine’s website address to the rate schedules, b) adding “Reservation Charge Adjustment” to the definitions, which refers readers to GT&C section 7.19.2(a), and c) changing headers and numbering to the extent these are necessitated by the forgoing changes. We accept these minor edits as just and reasonable.

IV. General Section 4 Rate Case

A. Proposal

22. Sabine is proposing to increase the reservation charge for Rate Schedule FT-1 from $0.0871 per Dth/d ($2.6518 per Dth/Month) to $0.5546 per Dth/d ($16.8677 per Dth/Month) and decrease the usage charge for Rate Schedule FT-1 from $0.0100 per Dth to $0.0026 per Dth. Sabine is also proposing to increase its rate for Rate Schedule IT-1 service from $0.0981 per Dth/d to $0.5571 per Dth/d. Sabine states that its proposed rates are designed on a 100 percent load factor basis, using a cost of service of $14,066,455 and annual billing determinants of 20,440,000 Dth, of which only 6,000 Dth/d are from current firm contracts and 50,000 Dth/d are from additional throughput at maximum rates imputed over and above base and test period volumes. Sabine proposes an overall rate of return of 10.647 percent. This reflects a rate of return on equity of 13.50 percent, a capital structure of 68.18 percent equity to 31.82 percent debt, and a cost of debt of 4.53 percent. Sabine states that its base period reflects twelve months of actual experience ended May 31, 2015, and is adjusted through the “test period” ending February 29, 2016.

B. Hearing Procedures

23. The Commission finds that Sabine’s proposal to increase its rates substantially raises typical rate case issues that warrant further investigation. While no party has filed a protest of this proposed rate increase, the filing raises issues of material fact that cannot be resolved on the record before us. Accordingly, the Commission will establish a hearing to explore various issues, including, but not limited to, cost of service including O&M and A&G expenses, the depreciation rate, the rate of return, cost allocation and rate design issues, and throughput. The Commission finds that it is appropriate to examine these issues in the context of a hearing where a factual record can be developed.

C. **Suspension**

24. Based upon a review of the filing, the Commission finds that Sabine's proposed tariff records setting forth new rates have not been shown to be just and reasonable, and may be unjust, unreasonable and unduly discriminatory or otherwise unlawful. Accordingly, the Commission shall accept for filing and suspend Sabine's revised tariff records on rates for five months, to be effective April 1, 2016, subject to refund and the outcome of the hearing ordered herein.

25. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards.[19] It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.[20] Such circumstances do not exist here. Therefore, the Commission will suspend the proposed tariff records, to be effective April 1, 2016, subject to refund and the outcome of a hearing established herein.

The Commission orders:

(A) As listed in the appendix, certain tariff records are accepted for filing and suspended, to be effective April 1, 2016, subject to refund and the outcome of the hearing established herein.

(B) As listed in the appendix, certain tariff records are accepted effective November 1, 2015, as requested.

(C) Sabine is directed, within 30 days of the date of this order, pursuant to NGA section 5, either to revise Section 7.19, Force Majeure discussed above, consistent with the discussion in this order or explain why it should not be required to do so.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the NGA, particularly sections 4, 5, 8, 9, and 15 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held

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[19] *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

[20] *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).

concerning the justness and reasonableness of Sabine's proposed tariff revisions, as discussed in the body of this order.

(E) A presiding judge, to be designated by the Chief Judge pursuant to 18 C.F.R. § 375.304, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. The prehearing conference is for the purpose of clarification of the positions of the participants and consideration by the presiding judge of any procedural issues and discovery dates necessary for the hearing. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Sabine Pipe Line LLC
FERC NGA Gas Tariff
First Revised Volume No. 1

Accepted for filing and suspended, effective April 1, 2016, subject to refund and hearing

Section 5, Statement of Transportation Rates, 11.0.0

Accepted effective November 1, 2015

Section 7.1, Definitions, 5.0.0
Section 7.2.0, Operating Provisions for Firm Service, 2.0.0
Section 7.5, Nomination Procedures, 2.0.0
Baseline Filing, Liability and Warranty, 1.0.0 (section 7.18)
Section 7.26, Negotiated Rates, 2.0.0
Section 7.6, Scheduling and Curtailment, 2.0.0

Subject to further action under section 5

Section 7.19, Force Majeure, 2.0.0