UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Columbia Gas Transmission Corporation Docket No. RP06-46-001

ORDER ON REHEARING

(Issued May 2, 2006)

1. On December 22, 2006, Indicated Shippers[1] filed a request for rehearing of the Commission's November 22, 2005 Letter Order (November 22 Order).[2] The November 22 Order accepted revised tariff sheets filed by Columbia Gas Transmission Corporation (Columbia Gas) to modify its penalties for unauthorized overruns, violations of an operational flow order (OFO), and failure to comply with an order to interrupt service. Columbia Gas proposed to replace its existing fixed price penalties for these actions with penalties based on three times a daily index price. For the reasons discussed below, the Commission denies the request for rehearing of the November 22 Order.

<u>Background</u>

2. As adopted in Order No. 637,[3] section 284.12(b)(2)(v)[4] of the Commission's regulations provides, in part, that:

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[1] Indicated Shippers consists of BP American Production Company, BP Energy Company, and ConocoPhilllips Company.

[2] 113 FERC ¶ 61,191 (2005).

[3] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No.637, FERC Stats. and Regs., Reg. Preambles [1996-2000]* ¶ 31,091 (Order No. 637).

[4] 18 C.F. R. §284.12(b)(2)(v)(2005).

> A pipeline may include in its tariff transportation penalties only to the extent necessary to prevent the impairment of reliable service. Pipelines may not retain net penalty revenues, but must credit them to shippers in a manner to be prescribed in the pipeline's tariff.

3. In its October 24, 2005 filing in this proceeding, Columbia Gas proposed to revise the penalty provisions in section 19 of its General Terms and Conditions (GT&C) and certain penalty provisions in Rate Schedules GTS, FSS, and FBS. The penalty provisions at issue are the following: First, existing section 19.1 of the GT&C of Columbia Gas's tariff provides that if a shipper takes gas in excess of 103 percent of its Total Firm Entitlement (TFE) on any Day Columbia Gas shall assess a penalty of $10.00 per Dth. Columbia Gas's storage rate schedules contain a similar penalty for unauthorized overruns of shipper's Maximum Daily Withdrawal Quantity (MDWQ).[5] Section 19.7 of the GT&C provides that these unauthorized overrun penalties will only be imposed if a "Critical Day"[6] was declared by the pipeline and is in effect. Second, section 19.2 of the GT&C and provisions in various rate schedules,[7] provide for penalties if a shipper fails to interrupt service when ordered to do so by the pipeline pursuant to section 16 of the

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[5] Columbia Gas also proposed to revise Rate Schedule FSS, section 7(g), and Rate Schedule FBS, section 7(e), which provide for a penalty of $10.00 per Dth for excess withdrawals in excess of 103 percent of the MDWQ, which are also referred to as unauthorized overruns in this order.

[6] Section 19.7 provides, in part, that:

> A "Critical Day" for transportation and/or storage will be declared by Transporter whenever Transporter, in Transporter's reasonable discretion, determines (based on criteria such as weather forecasts, line pack, storage conditions, pipeline pressures, horsepower availability, system supply and demand, and other operational circumstances) that operating conditions are such that Transporter faces a threat to its system integrity and/or to Transporter's ability to meet its firm service obligations.

[7] FSS Rate Schedule, section 7(a); GTS Rate Schedule, section 6(a); and FBS Rate Schedule, section 7(a).

GT&C, Interruptions of Service.[8] Specifically, if the shipper delivers or takes gas in excess of 103 percent of the sum of the lowered Scheduled Daily Receipt Quantity or lowered Scheduled Daily Delivery Quantity in the interruption order, Columbia Gas assesses a penalty of $5.00 per Dth on the first three percent of the excess quantities, and $10.00 per Dth for quantities in excess of 103 percent. Finally, section 19.3 of the GT&C and various rate schedule provisions[9] provide that if a shipper fails to comply with an OFO, Columbia Gas shall assess a penalty of $5.00 per Dth per day. Section 19.3 of the GT&C provides that if a shipper fails to comply with an OFO issued by the pipeline pursuant to section 17, Operational Flow Orders, of the GT&C,[10] a penalty of $5.00 per Dth per day will be assessed on all quantities taken or delivered in violation of that OFO.

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[8] Section 16.1(a) provides, in part, that:

> If due to force majeure, other unforeseen conditions on Transporter's system, or operating conditions (such as, but not limited to, performing routine maintenance, making modifications, tests or repairs to Transporter's pipeline system or protection of the integrity and performance capability of its storage and transmission facilities), the gas available for delivery from Transporter's system or portion thereof is temporarily insufficient to meet all of Transporter's authorized firm services on any day, then Transporter, upon providing as much notice as possible, shall interrupt all such services in accordance with the priorities set forth at Section 16.4 below.

[9] FSS Rate Schedule, section 7(b); GTS Rate Schedule, section 6(b); and FBS Rate Schedule, sections 7(b).

[10] Section 17.1(a) provides, in part, that:

> Transporter, in its reasonable discretion, shall have the right to issue Operational Flow Orders (OFO) as specified in this Section upon determination by Transporter that action is required in order to alleviate conditions which threaten the integrity of Transporter's system, to maintain pipeline operations at the pressures required to provide reliable firm services, to have adequate supplies in the system to deliver on demand (including injection of gas into the mainline, providing line pack, and injecting gas into storage at the right place and time), to maintain and protect the integrity and performance capability of Transporter's storage fields, to maintain firm service to all Shippers and for all firm services, and to maintain the system in balance for the foregoing purposes.

4. The Commission reviewed all these penalties in Columbia Gas's Order No. 637 compliance proceeding,[11] and found that each of these penalties penalizes conduct that is appropriately subject to the substantial penalties under Order No. 637. In its October 24, 2005 filing, Columbia Gas did not propose to modify the conduct to which these penalties apply. It proposed only to modify the level of these penalties. Specifically, Columbia Gas proposed to replace the existing fixed level of these penalties with penalties equal to three times the midpoint of the range of prices reported for "Columbia Gas, Appalachia" published in the Daily price survey by Platts *Gas Daily* for the day on which the penalty was incurred.

The November 22 Order

5. In the November 22 Order, the Commission found that Columbia Gas's proposed change in the level of the subject penalties is reasonable. The Commission stated that it has consistently approved high penalties to deter conduct that might threaten pipeline operations. The Commission further stated that given the current increased gas prices and the potential for prices to continue rising, Columbia Gas could reasonably conclude that its current fixed penalties may no longer act as an effective deterrent to actions that might threaten pipeline operations. The Commission noted that Columbia Gas's proposed penalty provisions, based on multiples of price indices, are similar to others the Commission has approved and found to be just and reasonable. Finally, the Commission pointed out that penalty revenues are credited to shippers who abide by Columbia Gas's tariff.

The Request for Rehearing

6. In its request for rehearing of the November 22 Order, Indicated Shippers argues that the Commission's acceptance of Columbia Gas's proposed penalty increases contravened the regulatory policy enunciated in Order No. 637 and the Commission's regulations which state that "a pipeline may include in its tariff transportation penalties only to the extent necessary to prevent the impairment of reliable service."[12] Indicated Shippers further argues that the Commission's finding that the proposed penalty increase is just and reasonable is unsupported. Indicated Shippers contends that Columbia Gas presented no operational data or other explanation and that it is unclear whether the proposed penalties are just and reasonable or whether they will trigger the filing of penalty increases by other pipelines. Indicated Shippers asserts that Columbia Gas cites

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[11] 100 FERC ¶ 61,084 (2002), 104 FERC ¶ 61,168 (2003), and 105 FERC ¶ 61,127 (2003).

[12] *Citing* 18 C.F. R. §284.12(b)(2)(v)(2005).

no examples of OFO, unauthorized overrun, or failure to interrupt violations, shipper behavior or operational stress on its system, or potential adverse impacts on flexibility and competition. Indicated Shippers further asserts that the Commission appears to presuppose that only parties engaged in price arbitrage are penalized. Indicated Shippers contends that the Commission should direct Columbia Gas to make a supplemental filing to provide support for the proposal and that a technical conference should be convened to review the data and impact of the proposal.

7. Indicated Shippers argues that the Commission's reliance on industry-wide price increases and Commission orders involving other pipelines does not support the proposal by Columbia Gas. Indicated Shippers further argues that the approved penalties will lead to extremely conservative scheduling, particularly in the context of capacity rights on Columbia Gas's system, thereby potentially foregoing opportunities to compete. Indicated Shippers contends that while Columbia Gas relies on the potential for price arbitrage, it does not explain how this would or could occur or has occurred. Indicated Shippers further contends that the Commission's reliance on other orders contradicts the policies adopted in Order No. 637 by permitting penalty escalations which potentially limit shipper flexibility.[13] Indicated Shippers argues that the Commission mistakenly accepted Columbia Gas's proposals to increase its non-OFO unauthorized overrun and failure to interrupt penalties to the same level as its OFO penalties by failing to note the distinctions between them and based entirely on its finding that Columbia Gas must declare a "Critical Day" prior to imposing the unauthorized overrun penalty. Indicated Shippers further argues that the Commission should have considered the alternatives presented by other parties. Indicated Shippers contends that since Columbia Gas's tariff permits it to net out of the penalties revenues which it credits several categories of costs, Columbia Gas may not be disinterested in penalty imposition. Finally, Indicated Shippers contends that the unauthorized overrun and failure to interrupt penalties should be imposed on point operators not shippers consistent with Commission policy.[14]

Discussion

8. The Commission denies Indicated Shippers' request for rehearing of the November 22 Order. Indicated Shippers mistakenly argues that acceptance of the Columbia Gas proposal was in conflict with the Commission's stated policy and

[13] *Citing* Order No. 637 at 31,307-31,308.

[14] Indicated Shippers argues that the Commission failed to address the issues in Indicated Shippers' late-filed protest. To the extent those issues were not specifically addressed in the November 22 Order, such issues will be addressed in this order.

regulations which limit penalties to the extent necessary to prevent the impairment of reliable service.

9. As the Commission explained in Order No. 637-A,[15] in denying requests to change the requirement that penalties be justified solely on the basis of system reliability:

> The pipelines themselves recognize that "the fundamental purpose of penalties and OFOs is to protect the reliability of service to all shippers…." [footnote omitted] It was precisely this purpose that the Commission recognized in Order No. 636, when it permitted pipelines to develop and utilize OFOs and penalties as system management tools. Thus, the requirement that pipelines impose penalties "only to the extent necessary to prevent the impairment of reliable service" *simply reflects a formalized requirement that pipelines use penalties exclusively for their intended purpose. The Commission is not permitting pipelines to impose penalties for other purposes, such as enforcement of contract obligations, where unrelated to system reliability....The Commission reiterates that penalties may be required, especially during critical periods when system reliability is most in jeopardy.* [Emphasis added.]

Therefore, the limitation in the Commission's regulation was directed to limiting the intended purpose of the penalty to prevent the impairment of reliable service. However, the Commission expressly found that penalties may be imposed during critical periods.

10. With respect to the subject penalties contained in Columbia Gas's tariff, the Commission has previously found, in the orders concerning Columbia Gas's compliance with Order No. 637,[16] that these penalties are narrowly tailored to apply in situations where the shipper's conduct may impair reliable service. The Commission stated that:

> Upon review of the penalty provisions, the Commission finds that Columbia's existing transportation penalties are generally just and reasonable. Columbia's penalties for takes in excess of TFE … are acceptable in light of the new tariff language in section 19.7 which proposes that those penalties will only be assessed against shippers during a

[15] *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services, Order No. 637-A, FERC Stats. & Regs., Reg. Preambles [1996-2000]* ¶ 31,099 at 31,608-31,609 (2000) (Order No. 637-A).

[16] 100 FERC ¶ 61,084, 104 FERC ¶ 61,168, and 105 FERC ¶ 61,127 (2003).

> critical day. This new "critical day" provision complies with the requirement that penalties should not be imposed unless a pipeline's system integrity is threatened. [[17]]

The Commission further stated that:

> Columbia's penalty against shippers who fail to interrupt transportation or storage service is also acceptable since this penalty is limited to situations where the pipeline must interrupt services because of unforeseen conditions, announced system maintenance, or emergency situations which could threaten the operational performance of the pipeline. Columbia's existing OFO penalty is also reasonable since this penalty will only be assessed during critical periods when the integrity of the pipeline is threatened. [[18]]

11. In this proceeding, Columbia Gas has only proposed to change the level of the penalties, not the conduct to which they apply. Indicated Shippers argues that, in approving Columbia Gas's proposal, the Commission mistakenly relied on industry-wide price increase data and recently approved penalty increases. Indicated Shippers states[19] that the Commission relied on the following "findings:" (1) the increase in prices following the damage caused by Hurricanes Katrina and Rita; (2) the operational problems that could be created by that damage; and (3) Commission orders involving other pipelines that purportedly support the penalty increases. Indicated Shippers contends that none of these rationales supports Columbia Gas's proposal. The Commission disagrees.

12. The Commission's primary concern with respect to penalties such as those at issue here, which only apply to conduct that is harmful to the system, is that the penalties be high enough to act as an effective deterrent to the harmful conduct. Since such conduct risks harm to other customers, as well as the pipeline, the Commission believes that significant penalties for such conduct are appropriate and consistent with Order No. 637. The Commission finds that Columbia Gas has provided adequate support for its proposed penalty levels equal to three times the commodity price of gas.

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[17] 100 FERC ¶ 61,084 at P 200.

[18] 100 FERC ¶ 61,084 at P 202.

[19] Request for Rehearing at 14.

13. The Commission considered the increase in price of gas to the Columbia Gas's system and the potential for gas price increases in finding that Columbia Gas could reasonably conclude that the existing penalty level was no longer adequate. Columbia Gas stated in its transmittal letter in this proceeding, among other things, that:

> With commodity prices in the production area currently exceeding $10 per Dth, the existing $5.00 or $10.00 per Dth penalties currently reflected in Columbia's Tariff clearly will not deter the type of shipper conduct that could threaten system integrity and compromise Columbia's ability to meet firm service obligations. The potential for significant increases in natural gas prices during periods of the upcoming winter heating season, coupled with decreased supplies resulting from the hurricane damaged infrastructure, makes implementing penalties that exceed the price of natural gas absolutely imperative in order to provide appropriate incentives for shippers to comply with tariff-based protections that are in place to preserve system integrity. [[20]]

14. The Commission finds it reasonable that penalties for excess takes of gas be significantly in excess of the commodity price of gas during periods when the pipeline is unable to provide the full amount of service its customers desire due to operational constraints. If the penalty for taking excess gas from the pipeline is less than or in the same general range as the price of purchasing needed gas elsewhere, then an economically rational shipper would have an incentive to incur the penalty, rather than purchasing the gas elsewhere. Moreover, a shipper with a particular need for gas, for example to meet contractual obligations to its own customers, may have an incentive to take excess gas even when the penalty is somewhat higher than the current commodity cost of gas. For example, it may be important to a shipper in the business of buying and selling gas to maintain its reputation as a reliable supplier of gas. In such circumstances, a shipper could be willing to incur a fairly significant penalty in order to meet its own contractual obligation to its customers. Indeed, a captive customer of the pipeline may have no alternative means of obtaining gas.[21] For these reasons, the Commission has

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[20] October 24, 2005 Transmittal Letter at 2.

[21] Indicated Shippers argues that while Columbia Gas relies on the potential for market advantage through price arbitrage, it does not explain how this would or could occur or if it has occurred. However, as explained above, the Commission's order is based on the need for penalties to be an effective deterrent to any shipper conduct that could impair reliable service, without regard to whether the reason a shipper takes the excess gas is for reasons of price arbitrage or the other reasons discussed above.

been willing to accept penalties for conduct that impairs operations that are a multiple of the commodity price of gas.[22]

15. Indicated Shippers contends that Columbia Gas failed to support its proposed change in the level of its penalties, because it failed to present examples of shipper misconduct causing operational problems under the existing penalties. With increased gas prices and the potential for prices to continue rising, it is reasonable to conclude that Columbia Gas's then-existing penalties might no longer act as an effective level to deterrent to actions that potentially threaten pipeline operations. The Commission finds it entirely appropriate for pipelines to anticipate problems and take action to forestall them, rather than waiting until such problems occur. Therefore, there is no need for Columbia Gas to present an example of a shipper violation or general shipper behavior or operational stress on its system.

16. Indicated Shippers argues that increased penalties will result in extremely conservative scheduling, particularly in the context of capacity rights on Columbia Gas's system, and potentially foregoing opportunities to compete. However, these penalties are specifically intended to discourage actions which would threaten reliable service. Shippers must be deterred from such conduct and may utilize other available tools required by Order No. 637, *i.e.*, imbalance management services, to avoid penalties and threats to reliable service. The goal of shipper flexibility does not include conduct which threatens system reliability and integrity. As the Commission stated in Order No. 637-A:

> The Commission has determined that shippers should be given the flexibility to exceed contractual limitations, unless such action jeopardizes system reliability and integrity. [[23]]

17. Columbia Gas's penalties are consistent with this policy. For example, since Columbia Gas's unauthorized overrun penalties apply only when it has issued a critical day notice, shippers may, consistent with Order No. 637, exceed their contractual

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[22] *Algonquin Gas Transmission, LLC*, 115 FERC ¶ 61,067 (2006) and the cases cited therein.

[23] Order No. 637-A at 31,608. In addition, Order No. 637-A (at 31,605) stated in its discussion of OFOs that "[T]he reliability of service to all customers should be of greater concern than the reduction in one shipper's flexibility, where system reliability is a genuine or legitimate concern." This principle is equally applicable in the context of penalties.

limitations without incurring the unauthorized overrun penalty at issue here during non-critical periods. Similarly, the other penalties at issue here only apply when there is an operational need for them.

18. Indicated Shippers contends that the Commission's reliance on orders in other proceedings contradicts Order No. 637 by limiting shipper flexibility. Indicated Shippers asserts that the Commission has not explained why the approved penalties will not result in the escalation of penalties by other pipelines which the Commission sought to avoid in Order No. 637. However, the Commission has found the approved penalties to be just and reasonable in order to deter conduct which threatens system reliability on the Columbia Gas system consistent with Order No. 637. Columbia Gas does not allege the instant penalties are necessary in order to match the penalty levels of competing pipelines. Rather, the instant penalties are intended to minimize incentives to take excess gas that would exist regardless of the penalty levels on other pipelines. To the extent other pipelines are authorized to revise their penalties, such penalties must also be found to be consistent with the requirements of Order No. 637. In addition, as pointed out above, with respect to shipper flexibility, conduct which threatens system reliability or integrity is not consistent with the shipper flexibility which the Commission seeks to promote.[24]

19. Indicated Shippers argues that the Commission has failed to properly distinguish OFO penalties from failure to interrupt and unauthorized overrun penalties and has only relied on orders involving increases to OFO penalties. Indicated Shippers further argues that the Commission has accepted the non-OFO unauthorized overrun and failure to interrupt penalties at the same level as its OFO penalties based entirely on the finding that Columbia Gas must declare a "Critical Day" prior to imposing the unauthorized overrun penalty. Indicated Shippers contends that Columbia Gas's argument that these penalties act to avoid the need to issue OFOs does not explain the level of the penalty. However, while the Commission, in the November 22 Order, did recognize the different circumstances under which unauthorized overrun, failure to interrupt, and OFO penalties are imposed, it also pointed out that it has consistently approved high penalties to deter such conduct that might threaten pipeline operations.

[24] Indicated Shippers also argues that *Midwestern Gas Transmission Company*, 112 FERC ¶ 61,345 (2005) and *Viking Gas Transmission Company*, 112 FERC ¶ 61,098 (2005)) which it characterizes as the orders on which Columbia Gas principally relied, were both un-protested letter orders which do not reflect Commission policy. However, these and other orders are consistent with the Commission policy to establish penalties at levels to prevent conduct that would impair system reliability established in Order No. 637.

20. As discussed above, the Commission has found, in the orders on compliance with Order No. 637, that the unauthorized overrun, failure to interrupt, and OFO penalties are all consistent with the limited purpose of preventing the impairment of reliable service required by Order No. 637. Columbia Gas, in its transmittal letter, explained that the unauthorized overrun and failure to interrupt penalties apply across a broader set of operating circumstances than OFOs and may reduce the need to issue OFOs and that the shipper's actions may be before an OFO is issued or may be the root cause of the OFO.[25] Columbia Gas further explained that the revision of these penalties is supported by the same reasons supporting modification of the OFO penalties, the need to ensure that all shippers have the proper incentive to comply with tariff provisions that preserve Columbia Gas's system integrity.[26] Unauthorized overrun penalties require that a Critical Day be declared, and failure to interrupt penalties apply where the pipeline must interrupt services when, because of force majeure, other unforeseen conditions, or operating conditions (such as, but not limited to, performing routine maintenance, making modifications, tests or repairs to its pipeline system or protection of the integrity and performance capability of its storage and transmission facilities), the gas available for delivery from Transporter's system or portion thereof is temporarily insufficient to meet all of Transporter's authorized firm services on any day.[27] Similar to OFO penalties, the shipper conduct deterred by the unauthorized overrun and failure to interrupt penalties has a potential negative impact on system reliability and other shippers on the system and it is of critical importance that the level be sufficient to deter such conduct.

21. Indicated Shippers also argues that the Commission accepted a distinction by Columbia Gas between Critical Days and OFOs in Columbia Gas's Order No. 637 implementation proceeding.[28] However, Columbia Gas's response in that proceeding concerned the Commission's requirement that it explain how the Critical Day works in conjunction with the OFO. While the operation of OFOs is different from Critical Days, *i.e.*, the Critical Day notice is designed to discourage overruns of firm entitlements and thereby avoid the need for issuing an OFO. These differences did not impact the Commission's previous finding that the Critical Day requirement complied with the requirement that penalties should not be imposed unless a pipeline's system integrity is threatened.[29] Therefore, as discussed above, in the orders on compliance with Order No.

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[25] October 24, 2005 Transmittal Letter at 5.

[26] *Id*.

[27] Section 16.1 of the GT&C of Columbia Gas's FERC Gas Tariff.

[28] *Citing* 104 FERC ¶ 61,168 at P 29.

[29] 100 FERC ¶ 61,084 at P 200.

637, the Commission found that penalties assessed under both OFOs and Critical Days were consistent with its requirement that penalties be imposed to the extent necessary to prevent impairment of system reliability.

22. Indicated Shippers argues that the Commission should have considered other alternatives presented by parties.[30] However, the alternatives presented fail to support a finding that Columbia Gas's proposed level has not been shown to be a just and reasonable deterrent to the offending conduct. Indicated Shippers also contends that the Commission's reliance on orders approving similar penalties is misplaced because it has set no upper limit on penalties and that the Commission suggests that it has no choice but to accept Columbia Gas's proposal. Concerning the level of these penalties, under the statutory scheme set forth in the Natural Gas Act, the pipeline has the initiative through a section 4 filing to propose rates, terms, and conditions for the service it provides.[31] If the pipeline shows that its proposal is just and reasonable, the Commission must accept it, regardless of whether other rates, terms, or conditions might also be just and reasonable.[32] The level of penalties must be intended to prevent shipper behavior that could threaten the pipeline's operational integrity in the absence of such penalties. The shipper behavior which is deterred has a potential negative impact on the system and other shippers on the system and it is of critical importance that the level be sufficient to deter such conduct. The pipeline must have penalty provisions in place which are at a sufficient level to prevent impairment of reliable service. The level of penalties necessary to deter the conduct is a matter of the exercise of reasonable judgment. The level of penalties to deter impairment of reliable service approved in this case is similar to that proposed by other pipelines and approved by the Commission. Finally, the penalties charged to the offending shippers are credited to the non-offending shippers who were not responsible for the actions which threatened the system.

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[30] Amerada Hess Corporation proposed that Columbia Gas take the existing flat penalties of $5.00 and $10.00 per Dth, and have them serve as an adder to 100 percent of the index price. South Jersey Gas Company stated that any increase over the Gas Daily midpoint would provide an incentive to avoid overruns. Process Gas Consumers Group proposed that the Commission direct Columbia Gas to adopt either (i) penalties based on an index price plus twenty percent of that price, or (ii) penalties based on an index price plus a fixed additional amount, such as twenty dollars ($20) and asserted that, if commodity prices drop significantly, its proposed alternatives could, in fact, result in higher penalties than those approved.

[31] *See United Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

[32] *See Western Resources, Inc. v. FERC*, 9 F.3d 1568 at 1578 (D.C. Cir. 1993).

23. Indicated Shippers argues that Columbia Gas may not be disinterested in penalty imposition since Columbia Gas's tariff permits Columbia Gas to exclude from its penalty revenues several categories of costs. Section 19.6 of Columbia Gas's GT&C does allow it to exclude for penalty revenues credited "(A) Transporter's actual gas, transportation and retainage costs for the replenishment of gas quantities with respect to NTS Rate Schedule Section 6(b), SIT Rate Schedule Section 3(d), PAL Rate Schedule Section 5(b), and Section 9.7(b) of the General Terms and Conditions; and (B) overrun transportation and storage revenues" under any rate schedule. These provisions are intended to ensure that Columbia Gas is reimbursed for actual costs incurred with excess takes of gas. The fact that Columbia Gas is permitted to recover such costs does not undercut our point that the requirement that it credit net revenues removes its incentive to increase penalty levels so as to use penalties as a profit center.

24. Finally, Indicated Shippers argues that the unauthorized overrun and failure to interrupt penalties should be imposed on point operators, not shippers, consistent with Commission policy. Indicated Shippers contends that at least with respect to firm and interruptible transportation services, Columbia Gas tariff provides for imposition of penalties on shippers who may lack control over receipts or deliveries into the Columbia Gas system. Indicated Shippers further contends that the Commission should examine Columbia Gas's tariff to ensure that the penalties are consistent with Commission policy that penalties be imposed only on the parties whose conduct is potentially harmful to the system.

25. While Indicated Shippers requests an examination by the Commission of whether Columbia Gas should be required to impose some penalties on point operators rather than shippers, the Commission did consider this matter in Columbia Gas's Order No. 637 proceeding. For instance, in the October 27, 2003 Order on compliance with Order No. 637,[33] the Commission examined the role of delivery point operators on Columbia Gas. As discussed in that order, Columbia Gas has several types of delivery point operators. Delivery point operators who have both transportation and storage contracts with Columbia Gas are assessed penalties, since any penalized volumes at those points are treated as withdrawals or injections from the delivery point operator's storage inventory. Thus, other shippers at such points are not assessed penalties. Similarly, Operational Balancing Agreements (OBAs) are in effect at interconnections with downstream pipelines. Thus, penalties are not assessed at those points. Accordingly, the only situation where shippers other than the delivery point operator incur penalties is at points where the point operator does not have a storage contract with the pipeline. At such points, the point operator and each shipper behind the delivery point operator agree in advance on the allocation to be used, known as a Predetermined Allocation Agreement

[33] 105 FERC ¶ 61,127 (2003).

(PDA), and penalties are assessed pursuant to the agreed upon allocation. In that situation, it is appropriate that Columbia Gas assess the penalties pursuant to the PDA to which all the shippers at the point are a party.

26. Indicated Shippers' reliance on the cases which it cited is misplaced.[34] While the Commission has approved proposals to impose penalties on point operators under certain circumstances, there is no Commission policy which requires that point operators be ultimately responsible for the penalties. For example, in the *Gulf South* order cited by Indicated Shippers, Gulf south proposed to impose an OFO penalty on the point operator only where the point operator failed to provide the necessary information to enable Gulf South to accurately assess the penalty against the customers at the point. Otherwise, Gulf South proposed, and the Commission approved, imposition of the penalty directly on the customers. Accordingly, Indicated Shippers has not supported its request for a further examination of the extent to which Columbia Gas should be permitted to assess penalties against customers, rather than point operators.

27. The Commission concludes, based upon the above discussion, that contrary to Indicated Shippers' arguments none of the further support requested by Indicated Shippers[35] or a technical conference is required.[36] Accordingly, rehearing is denied.

[34] *Williams Natural Gas Company*, 73 FERC ¶ 61,023 at 61,046(1995) (*Williams*), *Gulf South Pipeline Company, LP*, 98 FERC ¶ 61,278 at 62,175 (2002) (*Gulf South*), and *Koch Gateway Pipeline Company*, 77 FERC ¶ 61,098 (1996) (*Koch*).

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[35] Indicated Shippers states the Commission has required pipelines to file some form of supporting information for proposed penalty increases such as, *i.e.*, a showing that penalties imposed by competing pipelines are at levels comparable with the proposed penalties, citing *Tennessee Gas Pipeline Company*, 99 FERC ¶ 61,017 at P 246 (2002)(*Tennessee*). However, in *Tennessee*, the Commission found that the pipeline could not propose an increase in fixed penalties in the context of a section 5 proceeding and that it was free to file a future section 4 proceeding.

[36] Indicated Shippers cites *Panhandle Eastern Pipe Line Company*, 78 FERC ¶ 61,202 (1997) and *Northern Natural Gas Company*, 76 FERC ¶ 61,108 at 61,555-61,556 (1996) where the Commission directed that technical conferences be convened. However, among other things, these proceedings were prior to the penalty requirements established and compliance determinations in the Order No. 637 proceedings.

<u>The Commission orders</u>:

The request for rehearing of the November 22 Order is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.