

130 FERC ¶ 61,191
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sea Robin Pipeline Company, LLC

Docket No. RP09-995-001

ORDER ON REQUEST FOR REHEARING

(Issued March 18, 2010)

1. On August 31, 2009, pursuant to section 154.403 of the Commission's regulations,¹ Sea Robin Pipeline Company, LLC (Sea Robin) filed revised tariff sheets to establish a mechanism to record and recover hurricane related costs not recovered from insurance proceeds or from third parties (Hurricane Surcharge). On September 30, 2009, the Commission accepted and suspended Sea Robin's proposed tariff sheets, to be effective March 1, 2010, subject to refund and established hearing procedures.² On October 30, 2009, ExxonMobil Gas & Power Marketing Company, A Division Of Exxon Mobil Corporation (ExxonMobil) and Hess Corporation (Hess) filed a request for rehearing of the Commission's September 30 Order.

2. For the reasons discussed below, the Commission denies ExxonMobil and Hess' request for rehearing.

I. Background

3. Sea Robin is engaged in the business of transporting natural gas supplies from various points in the Gulf of Mexico, offshore Louisiana, for processing and delivery to several interconnecting pipelines and one gas storage facility in the vicinity of Sea Robin's onshore terminus near Erath, Louisiana Parish. On August 31, 2009, Sea Robin made a Natural Gas Act (NGA) limited section 4 filing to establish a Hurricane Surcharge to record and recover hurricane-related costs incurred as a result of any hurricane or tropical storm named by the U.S. National Oceanic and Atmospheric

¹ 18 C.F.R. §154.403 (2009).

² *Sea Robin Pipeline Company, LLC*, 128 FERC ¶ 61,286 (2009) (September 30 Order).

Administration or the U.S. National Weather Service, including Hurricane Ike which caused damage to Sea Robin's facilities in September 2008.³ Sea Robin stated in its August 31 filing that its experience with Hurricane Ike demonstrated that such natural disasters have unpredictable cost and operating impacts on an offshore pipeline system and such volatility in costs is more appropriately managed through a surcharge mechanism than through adjustment of base tariff rates.

4. Under proposed section 24 of Sea Robin's General Terms and Conditions (GT&C), the Hurricane Surcharge would be collected through a volumetric surcharge applicable to all transportation service provided by Sea Robin, including shippers with a rate discount or a negotiated rate agreement. The Hurricane Surcharge would be in effect for forty eight months, beginning October 1, 2009 and continuing through September 30, 2013. The eligible costs for reimbursement through the Hurricane Surcharge are the capital and operation and maintenance (O&M) expenses incurred since September 1, 2008, including the cost of material, rental equipment, governmental charges, and any fees associated with the repair, remediation, and prevention of hurricane damage,⁴ less any proceeds received from Sea Robin's insurance carriers or third parties. Sea Robin will maintain a Hurricane Surcharge account which will be credited monthly with the revenue received from the Hurricane Surcharge and debited or credited monthly with carrying charges on the monthly balance. Any balance in the Hurricane Surcharge account on September 30, 2013 would be included in Sea Robin's general section 4 rate proceeding proposing new base rates effective January 1, 2014.⁵ Any capital-related

³ In its August 31 filing, Sea Robin stated that Hurricane Ike caused \$144.6 million in damages to its offshore Louisiana pipeline infrastructure.

⁴ Under Sea Robin's proposal, eligible costs will include, without limitation: cost incurred to repair or replace Sea Robin's facilities and equipment; costs to prevent hurricane damage; costs to maintain system reliability including service from third parties; retrieval and removal of Sea Robin's facilities and equipment including dewatering and disposal cost; raising or lowering the height or improving the durability of Sea Robin's facilities; pipeline burials or retrenching; preventive measures such as arranging for standby ships, divers, personnel and equipment; cost incurred to provide temporary housing for Sea Robin's personnel; diving vessels and equipment, radiographic equipment, pipeline pigging and operations or other inspection measures to assess potential damage to Sea Robin's facilities; installation of fencings, mattings and embankments; and miscellaneous expense associated with having personnel available to repair, operate or maintain Sea Robin's system other than measures taken in the ordinary course of business.

⁵ Sea Robin is required by settlement to file a general section 4 rate case no later than January 1, 2014.

eligible costs for which Sea Robin is reimbursed through collection of the Hurricane Surcharge would not be debited to Sea Robin's gross plant accounts.⁶

5. On September 30, 2009, the Commission accepted and suspended Sea Robin's proposed tariff sheets, to be effective March 1, 2010, subject to refund and the outcome of a hearing.⁷ The Commission found that Sea Robin may recover hurricane-related costs through a special tracking mechanism established in a limited section 4 filing without filing a general section 4 rate case. The Commission also found that such recovery did not violate the filed rate doctrine or rule against retroactive ratemaking. However, the Commission established a hearing to consider all other issues raised by the protests, including, but not limited to, the types of existing and future hurricane-related costs that should be eligible for inclusion in the Hurricane Surcharge (e.g., capital costs, depreciation, costs related to prevention of hurricane damage, and carrying costs).

6. On October 30, 2009, ExxonMobil and Hess filed a request for rehearing of the September 30 Order. In their request for rehearing, ExxonMobil and Hess raise generally the same arguments they raised in their initial protest.

II. Discussion

7. For the reasons discussed below, the Commission denies ExxonMobil and Hess's request for rehearing of the September 30 order.

A. NGA, Filed Rate Doctrine and Rule Against Retroactive Ratemaking

1. ExxonMobil and Hess Argument

8. ExxonMobil and Hess argue that by permitting Sea Robin to recover hurricane-related costs in a limited NGA section 4 filing, the Commission has contravened the statutory balance between sections 4 and 5 of the NGA in favor of Sea Robin. They argue that the September 30 Order permits Sea Robin to circumvent the ordinary requirement that a pipeline file a general rate increase under section 4(e) of the NGA and thereby permit a review of its entire cost of service. ExxonMobil and Hess also argue that neither *Discovery*⁸ nor *Stingray*⁹ supports Sea Robin's recovery of hurricane-related costs in a limited section 4 filing. ExxonMobil and Hess state that in both *Discovery* and

⁶ Sea Robin proposed an initial Hurricane Surcharge of \$0.0401 per Dth.

⁷ September 30 Order, 128 FERC ¶ 61,286.

⁸ *Discovery Gas Transmission LLC*, 122 FERC ¶ 61,099 (2008).

⁹ *Stingray Pipeline Company, L.L.C.*, 127 FERC ¶ 61,308 (2009).

Stingray, the Commission accepted hurricane cost trackers, but only as part of general section 4 rate case settlements. ExxonMobil and Hess assert that the Commission must grant rehearing and direct Sea Robin to file a general section 4(e) rate increase if it wishes to increase its rates to recover new capital costs and O&M expenses attributable to hurricanes.

9. ExxonMobil and Hess also argue that the filed rate doctrine and rule against retroactive ratemaking prohibit Sea Robin from imposing the Hurricane Surcharge on its shippers. ExxonMobil and Hess state that the filed rate doctrine protects shippers from charges higher than those on file at the time they receive service and the rule against retroactive ratemaking prohibits Sea Robin from imposing surcharges for past under-recovery of costs, even if the surcharges for these past costs are applied to future services. ExxonMobil and Hess state that Sea Robin's tariff did not provide for the Hurricane Surcharge mechanism at the time these costs were incurred and consequently, shipper had no notice that Sea Robin would file to recover these costs in this manner.

10. Further, ExxonMobil and Hess contend that there is no indication that the O&M costs Sea Robin intends to recover are past costs incurred to provide future service. ExxonMobil and Hess contend that despite Sea Robin's claims that it incurred the costs to restore its services, it has not restored all of its services even now and thus, Sea Robin did not incur these costs solely for future service. ExxonMobil and Hess also contend that the costs Sea Robin seeks to recover were incurred in part to maintain past services and though Sea Robin's capital costs were presumably incurred to perform past and future service, Sea Robin proposes to recover all of these costs from future services.

2. Commission Determination

11. Nothing in NGA section 4 prohibits the Commission from allowing a pipeline to make a limited section 4 filing to recover a particular type of cost in appropriate circumstances. As ExxonMobil and Hess point out, the Commission's general policy is to require pipelines seeking to increase their rates to file a general section 4 rate case in which the pipeline's entire cost of service can be considered so that any offsetting cost decreases can be taken into account. However, there are exceptions to this policy. As stated in the September 30 Order, current Commission policy permits pipelines to establish a surcharge via a limited section 4 filing to recover extraordinary, one-time losses resulting from events outside the pipeline's control.¹⁰ Under this policy, the Commission permitted Chandeleur Pipe Line Co. to establish a surcharge via a limited

¹⁰ See, e.g., *ANR Pipeline Co.*, 128 FERC ¶ 61,128 (2009) (*ANR*); *CenterPoint Energy Gas Transmission Co.*, 127 FERC ¶ 61,096, at P 23 (2009) (*CenterPoint*); and *Columbia Gulf Transmission Co.*, 123 FERC ¶ 61,216 (2008) (*Columbia*).

section 4 filing to recover expenses incurred to place its system back in service after Hurricane Katrina.¹¹

12. Similarly, Sea Robin's proposal is a method to recover the costs incurred to place its system back in service as a result of Hurricane Ike and other future storms. Not only are such extraordinary costs outside the pipeline's control, both the incurrence and level of such costs is not sufficiently predictable that an allowance for such costs could have been included in Sea Robin's annual cost of service in its last general section 4 rate case. While hurricanes may be expected to occur in the Gulf of Mexico at irregular intervals,¹² no two hurricanes cause the same damage, nor is it predictable when and how often they will occur. However, Sea Robin's incurrence of this type of cost benefits its customers by allowing it to resume full service as quickly as possible following a catastrophic event. Therefore, the Commission finds it reasonable to permit Sea Robin to recover costs related to hurricane damage through a mechanism established outside of a general section 4 rate case.

13. The Commission recognizes that, unlike in *Chandeleur*, Sea Robin's instant filing is not limited to losses incurred as a result of the one-time event of a single hurricane, but also includes a mechanism to recover similar costs Sea Robin may incur as a result of other hurricanes before its next general section 4 rate case. However, because the Commission has held that Sea Robin may recover hurricane-related costs in a limited section 4 filing, the Commission finds it reasonable for Sea Robin to have in place a mechanism to recover future such costs incurred prior to its next general section 4 rate case. This will provide Sea Robin's shippers notice of how such costs will be recovered. The Commission's approval of hurricane cost trackers in general section 4 rate cases in *Discovery* and *Stingray* does not preclude the Commission from permitting Sea Robin to establish a hurricane cost tracker in a limited section 4 filing.

14. We also continue to disagree with ExxonMobil and Hess' assertion that Sea Robin's Hurricane Surcharge necessarily violates the filed rate doctrine and the rule against retroactive ratemaking because it includes costs incurred prior to Sea Robin's filing. Sea Robin's proposed Hurricane Surcharge does not violate the filed rate doctrine because it would only affect the rates to be charged for future service. The Hurricane Surcharge does not retroactively change rates provided for service before the effective date of the Hurricane Surcharge.¹³ Further, to the extent Sea Robin is not recovering in

¹¹ See *Chandeleur Pipe Line Co.*, 117 FERC ¶ 61,250 (2006) (*Chandeleur*).

¹² See the discussion below at P 21.

¹³ See *Public Utilities Commission of the State of California v. FERC*, 988 F.2d 154, 160-61 (D.C. Cir. 1993), and *Western Resources, Inc. v. FERC*, 72 F.3d 147, 152 (D.C. Cir. 1995).

the Hurricane Surcharge past costs which it incurred solely to provide past service and is instead recovering past costs incurred to provide future service, it also does not violate the rule against retroactive ratemaking.¹⁴ Contrary to ExxonMobil and Hess' assertion, to the extent the hurricane-related costs are the latter kind, they may be treated as current costs because the pipeline will be using the repaired facilities to provide current and future service.¹⁵ Whether the hurricane-related costs Sea Robin proposes to include in the Hurricane Surcharge are, in fact, past costs incurred to provide future service is an issue of material fact that cannot be resolved on the record before us, and is more appropriately addressed in the hearing ordered in the September 30 Order.

B. Periodic Rate Adjustment Regulations

1. ExxonMobil and Hess Argument

15. ExxonMobil and Hess contend that Sea Robin's proposed Hurricane Surcharge is inconsistent with section 154.403 of the Commission's regulations concerning periodic rate adjustments. First, ExxonMobil and Hess argue that section 154.403(d)(4) prohibits recovery of costs incurred before Sea Robin's Hurricane Surcharge mechanism becomes effective. Specifically, ExxonMobil and Hess state that under that section a pipeline "must not recover costs and is not obligated to return revenues which are applicable to the period pre-dating the effectiveness of the tariff language setting forth the periodic rate change mechanism, unless permitted or required to do so by the Commission."¹⁶ Citing *High Island*, ExxonMobil and Hess claim that the Commission has previously rejected as unlawful tariff filings by pipelines to establish new recovery mechanisms and in the same filing propose to recover from future services costs incurred before the Commission made the new mechanism effective.¹⁷ ExxonMobil and Hess claim that Sea Robin violated this prohibition by simultaneously proposing to adopt a new tracker mechanism and to use that mechanism to recover costs that Sea Robin had already incurred, dating back to January 1, 2008.

¹⁴ *See Id.*

¹⁵ *See Id.* *See also Columbia Gas Transmission, LLC*, 129 FERC ¶ 61,037, at P 27 & n.23 (2009).

¹⁶ ExxonMobil and Hess Rehearing Request at 16 (citing 18 C.F.R. §154.403(d)(4) (2009)).

¹⁷ ExxonMobil and Hess Rehearing Request at 18 (citing *High Island Offshore System, L.L.C.*, 112 FERC ¶ 61,050, at P 145 (2005)).

16. Second, ExxonMobil and Hess argue that, because Sea Robin's proposed Hurricane Surcharge includes capital costs and O&M expenses, it violates section 154.403(a) which limits use of such mechanism to "a single cost item or revenue item."¹⁸ Further, ExxonMobil and Hess argue that Sea Robin's proposed "eligible costs" span a broad and diverse range of costs, from repair of damaged facilities to preventative measures, which normally are recovered in a general section 4 rate case.

17. Finally, ExxonMobil and Hess argue that the periodic rate adjustment regulations are not designed for the recovery of costs, such as hurricane costs, that are by their very nature "rare, catastrophic, and non-recurring event[s] that the Commission has specifically determined are unrecoverable in tracking mechanisms."¹⁹ ExxonMobil and Hess state that the Commission has permitted exceptions to its general policy against cost trackers²⁰ for a few discrete cost items, but the Commission has not permitted tracking of costs that are (a) as diverse as the Sea Robin costs and (b) costs of a type already recovered in cost of service.

2. Commission Determination

18. The Commission finds that Sea Robin's proposed Hurricane Surcharge is generally consistent with section 154.403 of the Commission's regulations, subject to the outcome of the issues the Commission has set for hearing. While the claimed costs related to Hurricane Ike do predate the effectiveness of the proposed surcharge, section 154.403(d)(4) expressly allows the Commission to permit an exception to the general rule against including such costs. In the instant case, the Commission finds Sea Robin's proposal to include the previously incurred Hurricane Ike costs in the proposed surcharge to be reasonable. As already discussed, the inclusion of Hurricane Ike costs does not violate the filed rate doctrine or the rule against retroactive ratemaking. In addition, because the Hurricane Ike costs are the same type of costs as the prospective hurricane-related costs Sea Robin proposes to include in the surcharge, it is reasonable to use the same mechanism to recover those costs.

¹⁸ ExxonMobil and Hess Rehearing Request at 14. Section 154.403 of the Commission's regulations applies to the "pass through, on a period basis, of a single cost item or revenue item for which pass through is not regulated under another section of this subpart, and to revisions on a periodic basis of a gas reimbursement percentage." 18 C.F.R. § 154.403(a) (2009).

¹⁹ ExxonMobil and Hess Rehearing Request at 15 (citing *CenterPoint*, 127 FERC ¶ 61,096 at P 23).

²⁰ ExxonMobil and Hess Rehearing Request at 15-16 (citing *Fuel Retention Practices of Natural Gas Companies*, 120 FERC 61,255, at P 4 (2007)).

19. *High Island* is distinguishable from the instant case. In *High Island*, the Commission found that High Island's proposed initial fuel and lost and unaccounted for true-up percentage constituted retroactive ratemaking because it included under-recovered fuel costs that related solely to service provided before the newly proposed fuel tracker and true-up mechanism became effective. High Island was attempting to recover past under-recovered fuel costs, which it incurred solely to provide past service, before the new fuel tracker and true-up mechanism became effective and therefore, was a violation of the rule against retroactive ratemaking. As stated above and in the September 30 Order, to the extent Sea Robin is not recovering in the Hurricane Surcharge past costs which it incurred solely to provide past service and instead using the facilities at issue to provide future service, the hurricane-related costs, as is true of all a pipeline's investments in used and useful facilities, would be related to all current and future service performed using the relevant facilities and therefore, not retroactive ratemaking.

20. On the issue of whether Sea Robin's proposed Hurricane Surcharge violates section 154.403(a) limiting the use of a periodic rate adjustment mechanism to "a single cost item or revenue item," the Commission first notes that the issue of what costs may be included in the surcharge has been set for hearing. Therefore, Exxon Mobil and Hess may raise at hearing the issue of whether, and to what extent, Sea Robin should be allowed to include any particular hurricane-related cost, including capital costs, in the Hurricane Surcharge.²¹ In any event, the costs to be included in the surcharge are limited to costs incurred as a result of a hurricane and, in that sense, may be treated as a single cost item.

21. Finally, ExxonMobil and Hess assert that the periodic rate adjustment regulations are simply not designed for the recovery of costs, such as hurricane costs, that are by their very nature "rare, catastrophic, and non-recurring events[s] that the Commission has specifically determined are unrecoverable in tracking mechanisms." The Commission disagrees. While it is unpredictable just when a hurricane will occur, experience unfortunately shows that hurricanes do repeatedly occur in the Gulf of Mexico area. It can therefore be expected that offshore pipelines in the Gulf of Mexico, such as Sea Robin, will suffer hurricane damage at recurring, if irregular, intervals. In such circumstances it is reasonable for the pipeline to have in its tariff a mechanism for the recovery of such costs, thereby providing both the pipeline and its customers some

²¹ ExxonMobil and Hess also contend that the Commission failed to discuss Sea Robin's proposed effective depreciation rate of 25 percent for its claimed capital costs. ExxonMobil and Hess state that Sea Robin proposes to recover its capital costs in a mere four years, without any indication that these pipeline facilities would have a useful life any shorter than typical for offshore facilities. This issue also may be raised in the hearing.

certainty as to what categories of such costs may be recovered and how they will be allocated among customers.

22. The *CenterPoint* order, quoted by ExxonMobil and Hess, involved a different type of situation from that at issue here. In *CenterPoint*, the pipeline made a limited section 4 filing to recover via a surcharge gas losses associated with a rupture of the pipeline's Line O caused by corrosion. The Commission found that:

The failure of Line O does not appear to be the result of forces beyond the pipeline's control where questions of prudent operation are more or less irrelevant. Rather the Line O loss appears to the result from a line failure that the pipeline could either avoid through system maintenance or insure itself against.²²

23. Based on these findings, the Commission concluded that CenterPoint could not recover the Line O loss either in a limited section 4 filing to recover a one-time extraordinary loss or as part of CenterPoint's fuel cost tracker. Thus, the holdings in *CenterPoint* turned on the fact that the pipeline failure causing the loss was within the pipeline's control. By contrast, hurricane damage of the type at issue here is outside the pipeline's control. In fact, the Commission found that CenterPoint's proposal was distinguishable from Chandeleur's limited section 4 filing to recover costs incurred as result of Hurricane Katrina on this ground.²³ The Commission having found that pipelines may recover hurricane damage in a limited section 4 filing and that offshore pipelines may suffer such damage on a recurring basis, it is reasonable for such a pipeline to include in its tariff a tracking mechanism for the recovery of such costs.

The Commission orders:

The Commission denies ExxonMobil and Hess' request for rehearing of the September 30 Order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²² *CenterPoint*, 127 FERC ¶ 61,096 at P 22.

²³ *Id.*