

133 FERC ¶ 61,140  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Arena Energy, LP,

Docket No. RP10-1045-000

Complainant

v.

Sea Robin Pipeline Company, LLC,

Respondent

ORDER ON COMPLAINT

(Issued November 18, 2010)

1. On August 2, 2010, Arena Energy, LP (Arena) filed a complaint (Complaint) against Sea Robin Pipeline Company, LLC (Sea Robin) alleging that Sea Robin impermissibly terminated an interruptible transportation service (ITS) agreement, Service Agreement No. 1545.<sup>1</sup> For the reasons set forth below, the Commission dismisses the Complaint.

**Background**

2. Complainant Arena is engaged in the exploration and production of natural gas in the Gulf of Mexico. Respondent Sea Robin operates an interstate natural gas pipeline system in the Gulf of Mexico, offshore Louisiana, and onshore Louisiana with its principal place of business located in Houston, Texas.

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<sup>1</sup> On September 9, 2010, Arena supplemented the Complaint.

3. Sea Robin provides jurisdictional services to its customers under its FERC Gas Tariff, Second Revised Tariff No. 1 (Tariff), which includes the General Terms and Conditions of the Tariff (GT&C) and specific terms that apply to its various transportation services. Sea Robin offers interruptible service through Rate Schedule ITS, and its Tariff includes a *pro forma* service agreement for ITS service. Section 2.7(a) of Rate Schedule ITS provides that the pipeline may “terminate the ITS Agreement if Shipper fails to cause gas to be delivered during any two (2) consecutive months when capacity is available....”

4. Arena has two ITS agreements with Sea Robin, Service Agreement Nos. 1544<sup>2</sup> and 1545.<sup>3</sup> The parties executed both of these service contracts on September 1, 2006, which conform to Sea Robin’s *pro forma* service agreement for ITS service. Section 4.1 of each Service Agreement provides, in pertinent part, that the agreement:

shall become effective as of the date hereof, and shall be in full force and effect for a primary term of 1 month and shall continue and remain in full force and effect for successive terms of 1 month each thereafter unless and until canceled [sic] by either party giving 30 days written notice to the other party prior to the end of the primary term and any extension thereof.

5. Section 4.2 of each Service Agreement provides that:

Notwithstanding the foregoing, to the extent permitted by law including such abandonment authorizations as may be necessary, Sea Robin shall have the right to terminate [the Service Agreement], and transportation service hereunder, upon thirty (30) Days written notice.

6. Section 7.2 of each Service Agreement incorporates by reference Exhibit C, Discount Information (Exhibit C). The discount information in Exhibit C provides:

Discounted Transportation Rate: \$0.02 per Dt (Dekatherm) plus ACA [Annual Charge Adjustment] and fuel.

The Discounted Rate applies to production from Vermilion [Block Nos. 52, 71, and 72] and South Marsh Island 233 leases received via the sales meter 94120.

Discounted Rate Effective From September 1, 2006 to August 31, 2011[.]

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<sup>2</sup> A copy is attached as Exhibit A to the Complaint.

<sup>3</sup> A copy is attached as Exhibit B to the Complaint.

7. While Arena has shipped gas under Service Agreement No. 1544, it has never used Service Agreement No. 1545.

8. On August 31, 2009, in Docket No. RP09-995-000, Sea Robin filed proposed tariff sheets to establish a Hurricane Recovery Surcharge to recover costs and expenses related to damages arising from Hurricane Ike, as well as any potential costs and expenses from other, future hurricane or tropical storms occurring while the surcharge was effective. On September 30, 2009, the Commission accepted and suspended Sea Robin's proposal, effective March 1, 2010, subject to refund and hearing procedures.<sup>4</sup> On March 1, 2010, Sea Robin filed revised tariff sheets, in Docket No. RP10-422-000, proposing to increase the Hurricane Recovery Surcharge from 4.01 cents per Dth to 7.29 cents per Dth, effective April 1, 2010. By letter order issued on March 31, 2010, the Commission accepted and suspended the revised tariff sheets, effective April 1, 2010, subject to refund and the outcome of the hearing in Docket No. RP09-995-000 and consolidated Docket No. RP10-422-000 (the Hurricane Recovery Surcharge proceedings).<sup>5</sup> The hearing was held on July 20-21, 2010.

9. Sea Robin sent a letter to Arena on April 23, 2010, terminating Service Agreement No. 1545 for inactivity, effective May 31, 2010.<sup>6</sup> Arena replied by letter on May 6, 2010,<sup>7</sup> that Sea Robin was contractually obligated to transport gas on behalf of Arena under that discounted rate for a term commencing September 1, 2006 through August 31, 2011. Sea Robin responded by letter on May 10, 2010,<sup>8</sup> that Service Agreement No. 1545 was terminated pursuant to section 4.2 of the agreement and in accordance with the terms of section 2.7 of Rate Schedule ITS. Sea Robin also tendered Service Agreement No. 1864<sup>9</sup> and a new discount rate sheet<sup>10</sup> providing for a two cent per Dth discount rate plus ACA, fuel, and the Hurricane Recovery Surcharge proposed in

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<sup>4</sup> See *Sea Robin Pipeline Co., LLC*, 128 FERC ¶ 61,286 (2009).

<sup>5</sup> See *Sea Robin Pipeline Co., LLC*, 130 FERC ¶ 61,261 (2010).

<sup>6</sup> A copy of Sea Robin's April 23, 2010 letter is attached as Exhibit C to the Complaint.

<sup>7</sup> A copy of Arena's May 6, 2010 letter is attached as Exhibit D to the Complaint.

<sup>8</sup> A copy of Sea Robin's May 10, 2010 letter is attached as Exhibit E to the Complaint.

<sup>9</sup> A copy of this proposed ITS agreement is attached as Exhibit F to the Complaint.

<sup>10</sup> A copy of this proposed discount sheet is attached as Exhibit G to the Complaint.

Docket Nos. RP09-995-000 and RP10-422-000. Arena responded by letter rejecting Sea Robin's proposal on May 12, 2010.<sup>11</sup>

### **The Complaint**

10. Arena argues that Sea Robin's position that the interruptible nature of Service Agreement No. 1545 allows termination of that contract is contrary to the parties' intention and the clear language of the discount and term. Arena contends that both the subject service contracts were negotiated together and in exchange for Sea Robin providing Arena with the agreed-upon discounted rate for the term September 1, 2006 through August 31, 2011, and Arena constructed the necessary facilities to interconnect its gas reserves and production to Sea Robin's pipeline. Arena further contends that, as agreed, it would use Service Agreement No. 1544 to transport gas onshore, and use Service Agreement No. 1545 to deliver replacement gas to Hess Corporation (Hess) to reimburse Hess for any plant thermal reduction when Arena processed its gas to satisfy the gas quality specifications in Sea Robin's Tariff. Arena asserts that all of its gas delivered to Sea Robin has met those gas quality specifications, and thus it has not needed to use Service Agreement No. 1545. Arena further asserts that, if it must process its gas, Arena is contractually entitled to use Service Agreement No. 1545 to deliver gas to Hess at the agreed discounted rate for the entire term of the discount.

11. Arena contends that this position is entirely consistent with section 20.1(d) of Sea Robin's GT&C which provides that Sea Robin may agree to a discounted rate that may apply, "[o]nly during specified periods of the year or over specifically-defined periods of time." Arena further contends that, section 7.2 of Service Agreement No. 1545 expressly incorporates Exhibit C into and as a part of that contract. Arena argues that, therefore, the September 1, 2006 through August 31, 2011 term of the discounted rate set forth in Exhibit C prevails over the month-to-month term set forth in section 4.1 of Service Agreement No. 1545. Arena further argues that it would make no sense for Arena to commit to transport gas if the parties' intent, as expressly set forth in Service Agreement No. 1545, was not to provide service at the agreed-upon discounted rate for the full term of the discount.<sup>12</sup> Arena claims that without this offer Sea Robin and other pipelines would have a license to lure any shipper into expending the capital necessary to construct the facilities to interconnect and dedicate gas reserves and production and to forego other, competitive transportation opportunities in reliance on Sea Robin's offer which Sea Robin could terminate at any time upon 30 days notice and offer a new contract with no

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<sup>11</sup> A copy of Arena's May 12, 2010 letter is attached as Exhibit H to the Complaint.

<sup>12</sup> Identical language is set forth in Service Agreement No. 1544.

discount or with added charges. Arena states that, it does not dispute the interruptible nature of the Sea Robin's ITS agreement, only Sea Robin's claim that the general 30-day termination language in that agreement permits it to unilaterally terminate that contract, when a specific term has been negotiated and incorporated into the contract by mutual agreement of the parties.

12. Arena contends that, as evidence of the parties' mutual intent that the agreed-upon discount would remain effective for the entire term of the discount, the parties executed a Letter Agreement, on January 25, 2008 (Letter Agreement), confirming their mutual agreement as to the potential impact Sea Robin's then-pending general rate case would have on the discounted rates set forth in both Service Agreement Nos. 1544 and 1545.<sup>13</sup> Arena asserts that, although the contemplated increase in Sea Robin's minimum base transmission rate never occurred rendering the Letter Agreement moot, it is clear from the express language of the Letter Agreement that the discounted rates set forth in both Service Agreement Nos. 1544 and 1545 were for a set term through August 31, 2011. Arena further asserts there would have been no reason for the parties to enter into the Letter Agreement if the discounts could be terminated prior to August 31, 2011.

13. Arena asserts Sea Robin stated, in Docket No. RP09-995-000, that the terms of the discounted rates provided under both Service Agreement Nos. 1544 and 1545 do not permit the imposition of the Hurricane Recovery Surcharge on Arena. However, Arena asserts Sea Robin, in filed testimony in the Docket No. RP09-995-000 hearing contends that certain boilerplate provisions in Sea Robin's Tariff override the language of individual discount agreements and permit Sea Robin to assess the Hurricane Recovery Surcharge on all shippers receiving discounted transportation service.<sup>14</sup> Arena further asserts Sea Robin stated that in the event the Commission does not rule that shippers receiving discounted transportation service must pay the Hurricane Recovery Surcharge, Sea Robin will explore terminating these service agreements and replacing them with new service agreements.<sup>15</sup> Arena maintains that on or about April 10, 2010, May 10, 2010, June 10, 2010, and July 10, 2010, Arena received invoices from Sea Robin for transportation under Service Agreement No. 1544 for March, April, May, and June 2010 which included the Hurricane Recovery Surcharge. Arena states that it objected to these invoices, and raised this issue in the Hurricane Surcharge Recovery proceedings, in light of Sea Robin's earlier statements that the imposition of the Hurricane Recovery Surcharge was not permitted.

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<sup>13</sup> See Exhibit I for a copy of the January 25, 2008 Letter Agreement.

<sup>14</sup> Citing Prepared Rebuttal Testimony of Michael T. Langston, at 21, Lines 1-14.

<sup>15</sup> Citing Prepared Rebuttal Testimony of Michael T. Langston, at 26, Lines 10-14.

14. Arena argues that the timing of Sea Robin's proposed termination of Service Agreement No. 1545 is troublesome, given the coincidental implementation of the proposed Hurricane Recovery Surcharge. Arena states that the Hurricane Recovery Surcharge became conditionally effective on March 1, 2010, and the first sets of invoices reflecting the surcharge were sent to shippers on or about April 10, 2010. Arena believes that Sea Robin itself concluded that imposing the Hurricane Recovery Surcharge on Arena was precluded. Arena contends that, while it has never used Service Agreement No. 1545, Sea Robin never attempted to invoke section 2.7(a) of Rate Schedule ITS until now. Arena further argues that, as set forth in Exhibit E of the Complaint, Sea Robin responded to Arena's objection to the termination by agreeing to honor the two cents per Dth discounted rate, but under a new service agreement and new discount letter. Arena asserts that, Exhibit G, Paragraph 3, of the proposed discount letter would obligate Arena to reimburse Sea Robin for, among other things, any "Hurricane Surcharges," as well as all "future surcharges." Arena contends this broadens the scope of the limited surcharge reimbursement obligations set forth in Exhibit C and clearly is an attempt by Sea Robin to force Arena to pay the Hurricane Recovery Surcharge through a backdoor maneuver.

15. Arena argues that, assuming *arguendo*, Sea Robin was not contractually obligated to provide service under Service Agreement No. 1545 at the agreed-upon discounted rate for the term of the discount, it is clear that Sea Robin's proposal to terminate that contract was not made to ease any administrative burden associated with administering the contract,<sup>16</sup> rather, revising the terms and conditions of the discount appears to be the sole motivation. Arena asserts that, within four days of receiving its objections, Sea Robin offered a new ITS agreement under the identical rate and terms and conditions of service, except for the requirement to pay the Hurricane Recovery Surcharge. Arena further argues that individually negotiated terms and conditions in specific contracts, such as the term of a discounted rate must prevail over generic tariff provisions set forth in Sea Robin's rate schedule.<sup>17</sup> Arena contends that the Commission should not permit Sea Robin to invoke its right to terminate an interruptible transportation agreement due to

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<sup>16</sup> Citing *Sea Robin Pipeline Co., LLC*, 83 FERC ¶ 61,121, at 61,557 (1998) (*Sea Robin*), where the Commission held that a tariff provision permitting automatic termination of an unused pooling service agreement is reasonable because keeping track of inactive services or contracts may become administratively infeasible and, therefore, automatic termination of an unused contract or service would be prudent. The Commission pointed out that Rate Schedule ITS included a similar provision, citing section 4(b) of that rate schedule now found in section 5.1 of the *pro forma* service agreement.

<sup>17</sup> Citing, e.g., *Tennessee Gas Pipeline Co.*, 65 FERC ¶ 61,224, at 62,125 (1993) (*Tennessee*).

inactivity when it contractually obligated itself to provide service at a discounted rate for a set term, as here. Arena argues that the Commission must address this issue in light of Sea Robin's assertions that generic, boiler plate provisions in its Tariff override individually negotiated discounted rate agreements.

### **Notice of Filings and Responsive Pleadings**

16. Notice of Arena's complaint was issued on August 3, 2010, with interventions and protests due by August 23, 2010. Pursuant to Rule 214, 18 C.F.R. § 385.214, all timely filed motions to intervene and any 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 the proceeding or place additional burdens on existing parties.

17. On August 23, 2010, Sea Robin filed an answer to the Complaint (Answer). On the same day, ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation (ExxonMobil), Hess, and Apache Corporation (Apache) filed motions to intervene and comments in support of the Complaint. On September 16, 2010, Arena filed an answer (Arena's Answer) to Sea Robin's Answer. On October 1, 2010, Sea Robin filed an answer to Arena's Answer (Sea Robin's Second Answer). On October 14, 2010, Arena filed an answer to Sea Robin's Second Answer (Arena's Second Answer).

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept all the responsive pleadings filed in this proceeding because they have provided information that assisted us in our decision-making process.

### **Sea Robin's Answer**

19. Sea Robin argues that the clear and express terms of Rate Schedule ITS and Service Agreement No. 1545 preclude the relief sought by Arena and support the termination. Sea Robin contends the Complaint reflects a simple contract dispute and Arena's references to the Hurricane Recovery Surcharge proceedings are outside the scope of this proceeding. Sea Robin further contends that it has not argued that it is the interruptible nature of Service Agreement No. 1545 that allows for its termination. Sea Robin asserts that section 2.7(a) of Rate Schedule ITS provides that the pipeline may "terminate the ITS Agreement if Shipper fails to cause gas to be delivered during any two (2) consecutive months when capacity is available" and since Arena never requested service the agreement was subject to termination under that provision. Sea Robin also asserts that it exercised its right under section 4.2 of Service Agreement No. 1545 "to terminate [the] service agreement, and the transportation service [there under], upon thirty (30) days written notice," when it sent the April 23, 2010 letter. Finally, Sea Robin contends that the April 23, 2010 letter also effectuated its termination rights since section 4.1 provides that Service Agreement No. 1545 remained effective only until it was

“cancelled by either party giving 30 days written notice to the other party prior to the end of the primary term or any extension thereof.”

20. Sea Robin maintains that, while the discount information in Exhibit C reflects the time frame during which the stated discount rate will apply to Service Agreement No. 1545, it does so only while the agreement is effective and does not override the operation of Rate Schedule ITS section 2.7 or sections 4.1 and 4.2 of Service Agreement No. 1545. Sea Robin further asserts that Arena’s position is wholly inconsistent with both Commission policy and basic principles of contract construction rendering the terms of the contract subordinate to and seemingly in conflict with those of its attachments.

21. Sea Robin argues that Arena incorrectly asserts that section 4.1 allows Sea Robin to lure shippers into expending the capital necessary to construct the facilities to interconnect and dedicate gas reserves and production to Sea Robin’s pipeline and forego other, competitive transportation opportunities. Sea Robin contends that Arena assumes that shippers who enter into those agreements are incapable of reading the terms of the service agreement and Rate Schedule ITS. Sea Robin further contends that to the extent there is potential for detrimental reliance that risk is borne by both the shipper, Arena in this case, and Sea Robin.

22. With respect to the financial impact on Arena, Sea Robin asserts that Arena relies on an expectation theory of damages, alleging that it may, at some point, require services previously available under Service Agreement No. 1545, despite the fact Arena did not use those services and has not required such processing service at any point from June 1, 2010. Sea Robin argues, therefore, no specific harm is or can be alleged.

### **Intervenors’ Comments in Support of Complaint**

23. In their supporting comments, ExxonMobil, Hess, and Apache argue that Sea Robin’s wrongful termination of discount agreements contravenes fundamental legal principles and regulatory policies including the sanctity of contracts and the goal of developing a competitive natural gas market. ExxonMobil asserts that it has two discount agreements with Sea Robin for interruptible service with multi-year terms providing that ExxonMobil dedicate specific volumes and, while not necessarily applicable, the issues raised here are significant to ExxonMobil. ExxonMobil contends that Sea Robin’s termination appears intended to potentially render moot the Hurricane Recovery Surcharge proceedings since Sea Robin has stated that it may terminate other discounted interruptible service agreements if it receives an adverse ruling.

24. Hess states it is also a shipper under a discounted interruptible service agreement which Sea Robin has similarly terminated. Hess contends that The District of Columbia Circuit has stated that *Mobile-Sierra* doctrine holds that where parties have negotiated a natural gas shipment contract that sets firm prices or dictates a specific method for computing shipping charges and that denies either party the right to change such prices or

charges unilaterally, FERC may abrogate or modify the contract only if the public interest so requires.<sup>18</sup> Hess argues that Sea Robin's unilateral abrogation of discount agreements contravenes the *Mobile-Sierra* doctrine<sup>19</sup> and fundamental regulatory policies. Hess asserts that Sea Robin's discounted rate agreements establish the rates Sea Robin will charge the parties to those agreements during the agreed-upon term.

25. Hess asserts that section 20.1(d) of Sea Robin's GT&C specifies several categories of discount provisions which Sea Robin may offer, including "discount terms" that may apply "over specifically-defined periods of time." Hess further asserts that section 2.3 of the *pro forma* ITS service agreement makes the agreement subject to the GT&C, including the discount provision applicable to a specifically defined time period, and, therefore, does not permit Sea Robin to terminate Service Agreement No. 1545.

26. Apache argues that section 4.2 of the ITS Form of Service Agreement contains the express term "to the extent permitted by law." Apache asserts that Sea Robin has cited no law which permits it to unilaterally terminate a contract prior to its stated contract term and there is no such law. Apache further asserts the Commission previously rejected tariff provisions that would permit the pipeline to either unilaterally modify a contract provision, and/or unilaterally terminate a contract. Apache contends that section 4.2 cannot be interpreted in a manner that would conflict with the principles of contract interpretation rendering the obligation to provide service through August 31, 2011, a meaningless obligation. Apache further contends that the Commission must interpret a specifically stated contract term as controlling over other more general provisions and further, the pipeline can not reasonably rely on any other tariff provisions to modify that date.<sup>20</sup>

27. Apache argues that section 2.7(a) of Rate Schedule ITS is also not a reasonable basis for terminating the ITS Agreement. Apache asserts that, while Arena did not use Service Agreement No. 1545 since its execution in 2006, Sea Robin did not invoke section 2.7(a) until now. Apache further contends that the contract interpretation principles and arguments with respect to section 4.2 apply equally to section 2.7(a). Apache asserts that Sea Robin's motive in terminating the contract was solely a desire to modify the agreement unilaterally since Sea Robin tendered an identical alternative agreement except that it included a Hurricane Recovery Surcharge. Apache contends the

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<sup>18</sup> Citing *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1171 (D.C. Cir. 2005), citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

<sup>19</sup> Citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

<sup>20</sup> Citing *Tennessee*, 65 FERC ¶ 61,224, at 62,125.

Commission should not interpret section 2.7(a) as permitting Sea Robin to unilaterally terminate a contract because it no longer wishes to abide by its terms.

28. Apache also requests the Commission use its authority pursuant to Natural Gas Act (NGA) section 5 to eliminate section 4.2 and the language in section 2.7(a) which permits termination for disuse. Apache asserts that its review of the pipeline tariffs affecting ITS service agreements in Sea Robin's service territory and of Sea Robin's affiliates found no forms of service agreement contain the language in section 4.2. Apache further asserts the two-month termination period in section 2.7(a) is unreasonably short and inconsistent with other pipeline tariffs except for Stingray Pipeline Company's tariff provision permitting termination on the basis twelve months of disuse. Apache argues that Sea Robin is misinterpreting the existing provisions to escape agreed upon contract terms, in an effort to coerce its shippers into agreeing to contract terms which are beneficial to Sea Robin. Apache contends that the Commission should not permit Sea Robin to exercise market power and abuse its tariff.

### **Arena's Answer**

29. Arena argues that Sea Robin ignores the express language of Exhibit C which clearly provides discounted transportation for a fixed, five-year term ending August 31, 2011. Arena contends Sea Robin's reliance on *pro forma*, general provisions over the specific negotiated discounted rate agreements is contrary to general principles of contract interpretation as followed by this Commission.<sup>21</sup> Arena further contends that Sea Robin's cherry picking of *pro forma* portions of its Tariff and ignoring the express terms of the discounted rate disregards the Commission's adherence to the generally accepted canons of contract interpretation. Arena asserts the Commission has consistently recognized the distinction between *pro forma*, general tariff and/or service agreement provisions and specifically negotiated discount or negotiated rate agreements or exhibits.<sup>22</sup> Arena argues the Commission would never approve such a provision if its intent was to permit a pipeline's *pro forma* tariff provisions to prevail over specifically negotiated transportation agreement discounts. Arena further argues the Commission's practice of giving weight to specific, rather than general, contract provisions is also consistent with Texas law.

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<sup>21</sup> Citing Restatement (Second) of Contracts Section 203(c) (1981); *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at 61,043 (*Southwest*) (2004); and *Southern Natural Gas Co.*, 64 FERC ¶ 61,274 (1993) (*Southern*).

<sup>22</sup> Citing *Texas Gas Transmission, LLC*, 127 FERC ¶ 61,313, at P 19 (2009) (*Texas Gas*).

30. Arena argues that Exhibit C accurately sets forth Arena and Sea Robin's mutual intent with respect to the term of the discounted transportation. Arena asserts the parties negotiated Service Agreement No. 1545 in conjunction with Service Agreement No. 1544, and it agreed to construct the necessary facilities to interconnect with Sea Robin's pipeline system in reliance on discounted transportation for a five-year fixed term. Arena further asserts the parties intended Arena to use Service Agreement No. 1545 specifically if and when Arena's gas needed processing during the full five-year term. Arena argues it is appropriate and necessary for it to present extrinsic or parole evidence on this issue. Arena further argues that upon examination of such evidence, it is clear the mutual intent of Arena and Sea Robin was to agree to a discounted transportation service rate for a term of five years and that Sea Robin may not terminate the agreement during this term.

31. Arena argues that the Commission adheres to traditional rules of contract interpretation and, if extrinsic evidence is appropriate to show intent, that evidence must show the mutual intent of the parties at the time of the negotiations. Arena attaches as Exhibit A to its Answer a series of emails between Ms. Bernice Norris and Mr. Robert Jernigan, a Sea Robin employee with whom Ms. Norris was negotiating the two contracts, exchanged during the negotiations of Service Agreement Nos. 1544 and 1545. Arena contends that, when reviewed in their entirety, it is clear from Mr. Jernigan's emails that Sea Robin was granting the agreed-upon discounted rates in exchange for Arena's commitment to Sea Robin for the five-year term. Arena further contends that, as set forth in the series of emails between Mr. Jernigan and Ms. Norris attached as Exhibit B to its Answer, when specifically asked whether section 6.2 in both service agreements, a boilerplate, *pro forma* provision in the ITS form of service agreement in Sea Robin's tariff, would prevail over the parties' agreed upon discounted rate as set forth in Exhibit C, Mr. Jernigan reassured Ms. Norris that "if there is a discount associated with the transport, it will not go up with an increase to the max rate via a rate case." Arena argues that from this series of emails, it is clear that the parties intended to establish a discounted rate for a five-year term and that would not be subject to revision or alteration during this five-year term.

32. Arena argues that it appears that Sea Robin's termination of inactive ITS agreements is selective. Arena asserts that attached as Appendix B to Sea Robin's August 31, 2010 filing in Docket No. RP10-1133-000 to adjust upwards the Hurricane Recovery Surcharge is a list of firm and interruptible contracts and each contract's associated throughput during the period March 2010 through July 2010.<sup>23</sup> Arena further asserts that, as shown on this appendix, there were 31 ITS agreements under which shippers did not transport any gas for three or more consecutive months during that

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<sup>23</sup> A copy of this appendix is attached to Arena's Answer as Exhibit C.

period in question, one of which was Arena Contract No. 1545. Arena contends that, while it is unclear from Appendix B whether any of these ITS agreements were terminated due to inactivity pursuant to section 2.7 of Rate Schedule ITS, the presence of so many ITS agreements that were inactive during all or a major portion of that period appears to call into doubt Sea Robin's assertion that the termination of Service Agreement No. 1545 was not motivated by other reasons, namely, seeking to impose the Hurricane Recovery Surcharge. Arena asserts that Sea Robin employed the same tactic against Hess.

### **Sea Robin's Second Answer**

33. Sea Robin argues that Exhibit C does not stand alone, rather the provisions of Service Agreement No. 1545 and Rate Schedule ITS govern. Sea Robin asserts that, while Arena attempts to cast the terms of Service Agreement No. 1545 as "*pro forma*" and "general," the Commission should not overlook the fact that its rules require Service Agreement No. 1545 to reflect Sea Robin's *pro forma* service agreement.

34. Sea Robin agrees that the Commission must interpret a contract as a whole. However, Sea Robin contends that when looking at the entirety of Service Agreement No. 1545, the only plausible reading of the term of the discounted rate is that the discount would only be in effect as long as the underlying Service Agreement No. 1545 remained effective and the discount period cannot override the governing terms of Service Agreement No. 1545. Sea Robin further contends this is not a case of a *pro forma* provision being trumped by a specifically negotiated provision and accordingly, the cases cited by Arena are not instructive. Sea Robin asserts that the termination provisions in the Service Agreement No. 1545 and Rate Schedule ITS can be read harmoniously with Exhibit C.

35. Sea Robin further asserts that Commission policy requires that service agreement provisions be fully transparent and implemented in a non-discriminatory manner. Sea Robin contends that, therefore, the discount listed in Exhibit C cannot trump the termination provisions of Service Agreement No. 1545 and Rate Schedule ITS because the termination provisions are a requisite element of Service Agreement No. 1545. Sea Robin further contends that it could only seek to change the termination provisions in Service Agreement No. 1545 through a tariff filing which would make the provision applicable to all users of the service, which it has not done.

36. Sea Robin also argues that the Commission cannot permit Arena to introduce extrinsic evidence of alleged intent because the governing language is clear on its face. Sea Robin maintains that the Commission should reject the emails as hearsay evidence. Sea Robin further contends that, notwithstanding the inadmissibility of the material attached to Arena's Answer, if the parties intended for the term of the discount to modify the termination provisions contained in Rate Schedule ITS and Service Agreement

No. 1545, they would have reduced this intention to writing and they failed to do so. Sea Robin asserts that section 7.1 of Service Agreement No. 1545 provides that any representations or agreements shall not affect the subject matter of Service Agreement No. 1545 “unless and until such representation or agreement is reduced to writing and executed by authorized representatives of the parties.” Sea Robin contends that, in any case, the Commission should disregard the emails under the parole evidence rule as there is no ambiguity in the written documents. Sea Robin further contends that Service Agreement No. 1545 in conjunction with Rate Schedule ITS is clear and unambiguous in setting forth the right to terminate the agreement.

37. Sea Robin argues that, even if the Commission resorts to use of the email, it does not support Arena’s position. Sea Robin asserts the statement in Exhibit A of Arena’s Answer by Sea Robin representative Mr. Jernigan regarding the five-year commitment addresses a purported dedication of production to the Sea Robin system for interruptible service not a term for interruptible service. Sea Robin further asserts this dedication of reserves was never reduced to writing by the parties as required by section 7.1 of Service Agreement No. 1545. Sea Robin contends the five-year period listed on Exhibit C can, at most, be construed as an agreement to provide the stated discounted rate until August 31, 2011 as long as the underlying Service Agreement No. 1545 has not been terminated according to its provisions.

### **Arena’s Second Answer**

38. Arena argues the emails in question are not hearsay since they constitute an admission by a party-opponent and are, therefore, admissible as extrinsic evidence. Arena asserts that *El Paso Electric Co. v. Tuscon Electric Power Co.*,<sup>24</sup> *Vermont Electric Power Co., Inc.*,<sup>25</sup> and *Calpine Energy Services, L.P. v. Southern Natural Gas Co.*,<sup>26</sup> support its position that the Commission should consider the emails as extrinsic evidence.

### **Discussion**

39. For the reasons discussed below, the Commission dismisses the Complaint. Arena fails to demonstrate that Sea Robin improperly terminated Service Agreement No. 1545. That agreement provides interruptible service with a term of one month subject to termination after two consecutive months of non-use pursuant to Rate Schedule ITS and

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<sup>24</sup> 115 FERC ¶ 61,101 (2006), *order on reh’g and establishing hearing and settlement judge procedures*, 117 FERC ¶ 61,017, at P 14 (2006) (*El Paso Electric*).

<sup>25</sup> 132 FERC ¶ 61,068, at P 15 (2010) (*Vermont Electric*).

<sup>26</sup> 105 FERC ¶ 61,033, at 61,240 (2003) (*Calpine*).

on thirty days written notice. The essential issue presented by Arena's Complaint is whether Sea Robin's termination complied with its Tariff and the terms of Service Agreement No. 1545. We find that Sea Robin acted permissibly in terminating the interruptible Service Agreement on thirty days written notice after nearly four years of non-use.

40. Sea Robin terminated Service Agreement No. 1545 pursuant to the clear and unambiguous language in Rate Schedule ITS and the service agreement in accordance with the service authorized by the Tariff provisions. Section 2.7(a) of Rate Schedule ITS permits termination for non-use. Section 2.7(a) expressly provides that the pipeline may "terminate the ITS Agreement if Shipper fails to cause gas to be delivered during any two (2) consecutive months when capacity is available." Section 2.1 of Sea Robin's *pro forma* Rate Schedule ITS service agreement also provides in pertinent part:

It is recognized that service hereunder is provided pursuant to Rate Schedule ITS which is hereby incorporated by reference, including the General Terms and Conditions. In the event of any conflict between the body of this Service Agreement and Sea Robin's ITS, *Rate Schedule ITS shall govern as to the point of conflict.* [Emphasis added].

Arena's Service Agreement No. 1545 conforms with Sea Robin's *pro forma* service agreement, and thus section 2.1 of that service agreement expressly incorporates the terms of Rate Schedule ITS, including section 2.7(a) permitting termination for non-use during a two-month period.

41. In addition, section 4 of Service Agreement No. 1545, entitled "Term," provides, consistent with the *pro forma* service agreement, in section 4.1, that the agreement is in effect for successive terms of one month until "cancelled by either party giving 30 days written notice to the other party prior to the end of the primary term or any extension thereof." Section 4.2 permits Sea Robin to "to terminate [the] service agreement, and the transportation service hereunder, upon thirty (30) days written notice." Arena never used the interruptible Service Agreement for approximately four years prior to its termination.<sup>27</sup> Accordingly, section 2.7(a) of Rate Schedule ITS, incorporated into the service agreement by section 2.1, permitted Sea Robin to terminate the service agreement. Also, Sea Robin provided the 30 days written notice required by sections 4.1 and 4.2 by the April 23, 2010 letter.

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<sup>27</sup> Complaint, at P 11, 15.

42. Arena mistakenly argues that Exhibit C, Discount Information, incorporated under section 7.2 of Service Agreement No. 1545, must be read independently from those provisions in the Tariff and service agreement and effectively overrides sections 2.1, 4.1, and 4.2 of the service agreement, as well as section 2.7(a) of Rate Schedule ITS and requires that the service agreement remain in effect until August 31, 2011. Arena relies on the following statement in Exhibit C: “Discounted Rate Effective From September 1, 2006 to August 31, 2011.” However, Service Agreement No. 1545 must be interpreted as a whole, giving meaning to all provisions if at all possible. Arena’s interpretation of the service agreement renders sections 4.1 and 4.2 of the service agreement a nullity. Despite the fact those sections expressly provide that the service agreement will be in effect only for successive monthly terms until terminated by either party on 30 days notice, Arena’s interpretation requires that the service agreement remain in effect for five years. Arena’s interpretation is also directly contrary to section 2.1 of Service Agreement No. 1545 which (1) incorporates all the provisions of the ITS rate schedule, including Sea Robin’s right to terminate the agreement if Arena does not use it for two successive months and (2) provides that the Rate Schedule will govern over any conflicting provision of the service agreement. In order to give all provisions of Service Agreement No. 1545 effect, we interpret Exhibit C as providing that the discounted rate set forth in that Exhibit will remain in effect until August 31, 2011, subject to the condition that the underlying Service Agreement No. 1545 itself remains in effect. The inclusion of a specified time period in the discount rate information does not override the term provisions expressly set forth in the Tariff and Service Agreement No. 1545.

43. In fact, Arena’s interpretation of Service Agreement No. 1545 would render it a non-conforming agreement which sections 154.1(d) and 154.112(b) require Sea Robin to be file for Commission approval.<sup>28</sup> Because the *pro forma* service agreement for Rate Schedule ITS service permits either party to terminate the agreement upon 30 days notice, including when the shipper has not used the agreement for a two-month period, any provision that required an ITS service agreement to remain in effect for five years would deviate materially from the *pro forma* service agreement. However, Sea Robin did not file Service Agreement No. 1545 as a non-conforming agreement, and Arena also has not suggested that the agreement is a non-conforming agreement which should have been filed.

44. Rather, Arena (at 9) and Hess (at 8) argue that GT&C section 20.1(d) of Sea Robin’s Tariff authorized the parties to negotiate a provision concerning the term of the service agreement that was different from the ordinary term provision in section 4 of the *pro forma* service agreement and include that provision in Exhibit C to the service

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<sup>28</sup> *Columbia Gas Transmission Co.*, 97 FERC ¶ 61,221, at 62,001-003 (2001).

agreement. The Commission disagrees. Section 20 of Sea Robin's GT&C is entitled "Discount Terms." As permitted by Commission policy,<sup>29</sup> section 20.1 states that, if Sea Robin agrees to discount its rate to a shipper, "the following discount terms may apply without the discount constituting a material deviation from Sea Robin's *pro forma* Service Agreement(s)." Section 20.1(d) provides that such discounted rate may apply, "[o]nly during specified periods of the year or over specifically-defined periods of time." Thus, section 20.1 of the GT&C is limited to authorizing particular types of rate discounts to be agreed upon and included in the rate provisions of a service agreement, without the discount constituting a material deviation from Sea Robin's *pro forma* service agreement.

45. Section 20 of the GT&C is inapplicable to the issue of the length of a service agreement, and contains no language permitting Sea Robin and shippers to negotiate provisions concerning the length of the contract which would vary from the contract term provisions of Rate Schedule ITS and the *pro forma* service agreement. Section 20.1(d) merely allows the agreement to set forth the period of time during the term of the service agreement which the discount rate will be in effect. In fact, section 6.1 of the Service Agreement and the *pro forma* ITS service agreement provide that, "Sea Robin may agree from time to time to discount the rate charged Shipper for services provided hereunder *in accordance with the provisions of Rate Schedule ITS*" (emphasis added). Accordingly, Sea Robin, consistent with section 20.1, only agreed to apply the discount rate for a time period when interruptible service is provided consistent with the contract term provisions of Rate Schedule ITS and the Service Agreement.

46. Therefore, Arena's interruptible service was properly terminated and the time period set forth for a discounted rate in Exhibit C is ineffective since Service Agreement No. 1545 is no longer in effect.

47. Arena and the intervenors in their supporting comments refer to the Hurricane Recovery Surcharge proceedings and Arena's motivation for the termination in relation to those proceedings. However, those issues concerning the Hurricane Recovery Surcharge are outside the scope of this Complaint.<sup>30</sup> This proceeding concerns whether an

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<sup>29</sup> *Id.*, at 62,002, n.23.

<sup>30</sup> Rule 206(b)(4)23 requires complainants to make a good faith effort to quantify the financial impact or burden on complainants. Arena asserts that, if the Commission does not rescind Sea Robin's termination, Arena will be required to pay a Hurricane Recovery Surcharge if gas must be processed. However, as discussed above, issue of the recovery of the Hurricane Recovery Surcharge is pending in the Hurricane Recovery Surcharge proceedings and Arena never used Service Agreement No. 1545 prior to its termination.

interruptible service agreement was properly terminated. The Hurricane Recovery Surcharge proceedings address the issue of the recovery of the Hurricane Recovery Surcharge.

48. Arena claims that Sea Robin did not terminate the contract to ease its administrative burden, citing *Sea Robin*. However, while the Commission stated in *Sea Robin* that Sea Robin's then existing automatic termination provision in Rate Schedule ITS was approved due to potential undue administrative burden, Sea Robin does not rely on the automatic termination provision in section 5.1 of Service Agreement No. 1545 as a basis for terminating that service agreement.

49. The Commission's decision herein is consistent with upholding the sanctity of contracts and permitting selective discounting to further the goal of developing a competitive national natural gas transportation market. As discussed above, the Commission's interpretation gives effect to the express provisions of Service Agreement No. 1545 and Rate Schedule ITS and Sea Robin's Tariff concerning the term of that agreement and gives effect to the applicable discount rate for the agreed-upon time period if such interruptible service is provided as authorized. Sea Robin did not, as Arena, Hess, and Apache<sup>31</sup> allege, impermissibly unilaterally<sup>32</sup> terminate a discount rate in conflict with a specified term or as Apache asserts<sup>33</sup> render the discount rate time period meaningless or controlled by a more general provision. The discount rate information did include a specified period of time. However, that period of time in the discount rate information is subject to the condition that the service agreement itself remains in effect. There is no indication in the discount rate information that the period of time for the discount rate establishes an independent term of service in direct conflict with the express provisions of the Tariff and Service Agreement No. 1545 concerning when the parties

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<sup>31</sup> Apache cites *Kern River Gas Co.*, 129 FERC ¶ 61,262, at P 13 (2009) (*Kern River*) and *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at 62,109 P 228 (2006) (*El Paso*). However, those cases concerned proposals by pipelines, to allow unilateral modification of non-conforming provisions in *Kern River* and termination of existing service rights in *El Paso* which were rejected as unsupported. In contrast, in this case, Sea Robin has properly terminated the contract pursuant to its existing Tariff and Service Agreement No. 1545.

<sup>32</sup> In fact, section 4.1 of Service Agreement No. 1545 allows either party to cancel the agreement on 30 days written notice.

<sup>33</sup> Apache asserts (at 6) that, if the Commission determines that section 4.2 is ambiguous, it must be construed against the party that drafted that section. However, the Commission finds that the express provision in section 4.2 concerning termination of the interruptible service is not ambiguous.

may terminate the service agreement. Therefore, while the time period is specific, it is a time period for the applicability of the discount rate and not the term of the interruptible service.

50. The Commission's interpretation of this contract is consistent with the generally accepted rules of contract interpretation. The Commission has interpreted the contract as an integrated whole, the provisions of the contract as not in conflict, and a specific clause does not prevail over a more general clause.<sup>34</sup> The express provisions of the ITS Rate Schedule in the Tariff and the executed Service Agreement No. 1545 operate together to govern the term of this interruptible service.<sup>35</sup> Further, under the Commission's interpretation, there is no conflict between the terms of Service Agreement No. 1545 and the Tariff.

51. In its Answer (at 4-6), Arena argues that Sea Robin mistakenly relies on the "general, *pro forma*" provisions of its tariff over the specific negotiated discount rate agreements. Sea Robin did not improperly cherry pick *pro forma* provisions of its tariff in order to terminate Service Agreement No. 1545. Rather, the provisions of Service Agreement No. 1545 and authorized service in the Tariff must be read together. If the parties intended the discounted rate provision to override the term provisions of the *pro forma* agreement they should have removed those provisions from Service Agreement No. 1545 and filed it as a non-conforming contract. Arena, in its Answer (at 5), cites *Texas Gas* (at P 19) in regard to a distinction between "*pro forma*, general tariff and/or service agreement provisions and specifically negotiated rate agreements or exhibits." However, in the portion of *Texas Gas* cited by Arena, the Commission explained its requirement that pipelines file *pro forma* service agreements in their tariffs and file agreements with the Commission which do not conform to the *pro forma* service agreement. The provisions of the executed ITS service agreement must conform to the form of service agreement in the tariff to avoid the filing requirement of section 4(c) of the NGA. Further, the Commission requires that service agreement provisions "must be

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<sup>34</sup> Consistent with the portion of the *Southwest* decision cited by Arena.

<sup>35</sup> Arena cites the *Southern* decision for the proposition that the service agreement and rate schedule and rate terms must be reviewed simultaneously. In *Southern*, the Commission stated that since the service agreement incorporated the rate schedule and terms and conditions of service, all three documents must be reviewed simultaneously. *Southern*, 64 FERC ¶ 61,274, at 62,927. Such analysis, in this case, finds that the rate is discounted for a period of time subject to the provisions regarding the interruptible service obligation in the Tariff and Service Agreement No. 1545 which permit termination.

fully transparent and implemented in a non-discriminatory manner.”<sup>36</sup> In this case, Arena’s interpretation of Exhibit C conflicts with the requirement of transparency and non-discrimination since Sea Robin has not made a filing to change the termination provisions in the Tariff to make the provisions as interpreted by Arena available to all of Sea Robin’s interruptible customers. The obligation to provide interruptible service is expressly set forth in Sea Robin’s Tariff and the conforming provisions of the executed interruptible Service Agreement No. 1545. In view of those provisions, the discount rate is applicable until August 31, 2011, only if service is provided consistent with that obligation. Therefore, there is no conflict between the Tariff and the negotiated discount transportation rate agreement.<sup>37</sup>

52. With respect to the superiority of individually negotiated terms and conditions, Arena’s reliance on the *Tennessee* decision is misplaced. *Tennessee* involved a tariff provision which provided an automatic rollover provision in conflict with the individual negotiation of the applicable contract term and renewal provisions allowed by the tariff. In contrast, in this case, there is no such conflict between the provisions in the Tariff and the negotiations for interruptible service allowed by the Tariff. As discussed above, Sea Robin’s Tariff does not allow an individually negotiated term of service which conflicts with the period permitted by section 7(a) of Rate Schedule ITS and sections 4.1 and 4.2 of the *pro forma* service agreement.

53. With regard to Arena’s attempt to present extrinsic or parole evidence, the clear and unambiguous express language of the Rate Schedule ITS and the Service Agreement

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<sup>36</sup> *Northern Natural Gas Co.*, 102 FERC ¶ 61,171, at P 18 (2003).

<sup>37</sup> Arena asserts that the Commission has approved provisions in a pipeline’s *pro forma* service agreement stating that, in the event of a conflict between a master agreement and a rate agreement, the provisions of the rate agreement will govern, citing, e.g., *Gulf South Pipeline Co., LP*, 121 FERC ¶ 61,047, at 61,181 (2007) (*Gulf South*). However, *Gulf South*, in contrast with this case, involved the resolution of a solely rate-related conflict between a *pro forma* negotiated rate letter agreement and a *pro forma* master service agreement. In that case, the Commission stated that “in light of the fact that the *pro forma* negotiated rate letter agreements only address rate-related matters,” “language to choose a controlling document between the *pro forma* negotiated rate letter agreement and the *pro forma* master service agreement was required.” *Gulf South*, 121 FERC ¶ 61,047 at P 13. In fact, the Commission pointed out the reasons discount rate agreements may not provide different terms and conditions of the service than those provided by the tariff without being required to be filed as non-conforming agreements, consistent with the discussion above. *Gulf South*, 121 FERC ¶ 61,047 at P 11.

provide the controlling termination provisions for interruptible service, as discussed above.<sup>38</sup> When there is no ambiguity as here, the Commission determines the intent of the meaning of the agreement without resort to extrinsic or parole evidence. Arena, in its Second Answer, contends that that the Commission permits such extrinsic evidence, citing *El Paso Electric*, *Vermont Electric*, and *Calpine*. However, those cases concern the need to consider extrinsic evidence when the contract or tariff contains ambiguous language. As noted by Arena, the Commission stated in *Vermont Electric* that “[a] tariff or contract is ambiguous when it is ‘reasonably susceptible [to] different constructions or interpretation.’” [Citations omitted.] The language in this case is not reasonably susceptible to Arena’s interpretation.<sup>39</sup> Therefore, the extrinsic or parole evidence offered by Arena can be disregarded due to the lack of ambiguity in language of the Service Agreement read in conjunction with the Tariff. Further, section 7.1 of the Service Agreement provides that such evidence should not be considered stating that:

This Service Agreement constitutes the entire agreement between the parties and no representation or agreement, oral or otherwise, shall affect the subject matter hereof unless and until such representation or agreement is reduced to writing and executed by authorized representatives of the parties.

No such executed agreement to modify the termination provisions in the Service Agreement consistent with Arena’s interpretation has been presented in this case.

54. In any case, the extrinsic or parole evidence presented by Arena does not support its position that a five-year term for interruptible service was established in Exhibit C in direct conflict with the express termination provisions of the Tariff and Service Agreement. In its Complaint, Arena contends that Service Agreements Nos. 1544 and 1545 were negotiated together<sup>40</sup> and it would have made no sense for Arena to commit to

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<sup>38</sup> Arena (Arena’s Answer at 8) states that the language of Exhibit C is clear and unambiguous and is consistent with its position.

<sup>39</sup> *Vermont Electric*, 132 FERC ¶ 61,068 at P 15.

<sup>40</sup> Arena also asserts (Arena’s Answer at 3) that there can be no question that Arena and Sea Robin expressly agreed that the discounted rate would be in effect for the five-year period underscored by the fact that Arena and Sea Robin executed Exhibit C in addition to executing the base contract. However, Exhibit C, was part of the ITS form of service agreement when Service Agreement No. 1545 was executed and removed later from the Tariff as duplicative of the automated email form generated when a requested discount is granted. Unpublished Letter Order issued September 27, 2007 and Sea Robin’s August 31, 2007 Transmittal Letter to the filing in Docket No. RP07-683-000.

delivering gas to Sea Robin and constructing facilities if the parties intent was not to provide the terminated interruptible service for the full period of the discount (at P 12). Further, Arena provides as Complaint Exhibit J, the affidavit of Bernice A. Norris, Arena's Marketing Manager stating that Arena would not have constructed the facilities to interconnect with Sea Robin if Service Agreements Nos. 1544 and 1545 were capable of being unilaterally terminated by Sea Robin. Arena also asserts (at 9) that shippers may be lured to construct the facilities to interconnect and dedicate gas reserves and production to Sea Robin's pipeline and to forego other, competitive transportation opportunities due to Sea Robin's offer to provide an agreed discount for a stated term. However, Arena's service was interruptible not firm. As discussed above, the terms of Service Agreement No. 1545 and Rate Schedule ITS expressly stated that Sea Robin may terminate the Service Agreement due to non-use and upon thirty days notice. The discount information specified the discount the rate and the time period for that discount when and if gas was received and service provided. In fact, section 4.2 of Service Agreement No. 1545 provides that agreement shall remain in effect "unless canceled by *either party* giving 30 days written notice [emphasis added]." As Sea Robin argues, in its Answer (at 7), Arena's argument assumes that shippers entering such agreements are incapable of reading the terms of Service Agreement No. 1545 and the ITS Rate Schedule.

55. Arena also argues that, if the interruptible service was subject to termination prior to the end of the five-year period, there would have been no reason to enter the January 25, 2008 Letter Agreement with Sea Robin, Complaint Exhibit I. However, that Letter Agreement refers to the rate for "volumes transported" and gas "received" by Sea Robin pursuant to its interruptible service if the rates were changed by a rate case and the service had not been terminated. In other words, there was a reason to clarify the impact of Sea Robin's then pending rate case on the discounted rates due to the uncertainty regarding Sea Robin's rates even with the possibility of termination of the service. Similarly, Arena relies on Mr. Robert Jernigan's, a Sea Robin employee, statement in an August 14, 2006 email attached as Exhibit B to Arena's Answer that "if there is a discount associated with the transport, it will not go up with the max rate via a rate case."<sup>41</sup> That statement also concerns the effect on the discount rate of a potential change in Sea Robin's rates if gas were transported pursuant to the interruptible service. In addition, Mr. Jernigan responded in that email with respect to the relationship of the service agreement provisions to the Tariff with respect to section 6.2 that "we can not modify the 'base' [agreement] as it is part of the tariff and would require a tariff waiver."

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<sup>41</sup> The emails in Exhibit B of Arena's Answer expressly refer only to Service Agreement No. 1544 as the subject of the emails.

56. Arena also attaches, as Exhibit A to its Answer, emails between Ms. Norris and Mr. Jernigan. Arena asserts that a commitment to a five-year term of service is clear from Mr. Jernigan's statement in those emails that, "In reviewing the correspondence between you and Allen, the 5 [year] commitment during *the term of the discount* was agreed to you and Allen [emphasis added]." <sup>42</sup> However, as Sea Robin points out in its Second Answer (at 7), Mr. Jernigan's reference to a five-year period was directed to a five-year commitment of the dedication of production for interruptible service which Sea Robin asserts was never reduced to writing. Therefore, Mr. Jernigan's statements in Exhibit A refer to a term for dedication of production not a term for the interruptible service. Further, Mr. Jernigan refers to the "term of the discount" and Ms. Norris in her August 2, 2006 email in Exhibit B similarly refers to the "discount term." Therefore, the emails refer to the discount rate term not the term of the interruptible service pursuant to Service Agreement No. 1545.

57. Apache argues that, pursuant to section 5 of the NGA, section 2.7(a) of Rate Schedule ITS and section 4.2 of the *pro forma* ITS Service Agreement should be removed from Sea Robin's tariff since Sea Robin is attempting to exercise market power and abuse its tariff and the provisions are unjust and unreasonable. Apache asserts that its review of the pipeline tariffs affecting ITS service agreements in Sea Robin's service territory and Sea Robin's affiliates found no forms of service agreement contain the language in section 4.2 which Apache characterizes as a right of unilateral termination and that the two-month termination period for non-use in section 2.7(a) is unreasonably short since only one of these pipelines has a provision permitting termination on the basis of one year of non-use. Apache does not address section 4.1 of Sea Robin's *pro forma* ITS service agreement which allows cancellation of the agreement by either party by giving 30 days notice. This termination provision in Sea Robin's tariff is consistent with monthly terms and automatic termination provisions for interruptible service in other pipelines' tariffs. In fact, several of the pipelines cited by Apache in support of its position (at 6-7, n. 13) have tariff provisions providing for monthly terms for interruptible service after the initial term. As Apache itself points out, Tennessee Gas Pipeline Company (Tennessee) has a monthly term for interruptible service. <sup>43</sup> Other pipelines have similar provisions. <sup>44</sup>

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<sup>42</sup> Arena has not presented the original correspondence to which this email refers.

<sup>43</sup> See section 11.1 of Tennessee's *pro forma* Interruptible Transportation (IT) service agreement.

<sup>44</sup> See, e.g., section 5.1 of Texas Gas Transmission Corporation's *pro forma* IT service agreement providing a monthly evergreen provision after the initial term until cancelled by either party on 30 days written notice.

58. Further, Apache's comparison of the two-month period for termination for non-use in Sea Robin's Tariff with one year in another pipeline's Tariff does support elimination of an existing tariff provision as unjust and unreasonable. Particularly, in view of the monthly term provisions in other pipeline tariffs discussed above.

59. Apache's assertions regarding Sea Robin's misuse of these provisions are speculative and unsupported. Apache has not shown that these provisions are unjust and unreasonable. Therefore, Apache's request to remove these provisions from Sea Robin's tariff is denied.

60. Finally, Arena's argument that Sea Robin's termination of ITS service agreements appears to be selective and motivated by Sea Robin's attempt to collect the Hurricane Recovery Surcharge is without merit.<sup>45</sup> The provisions relied upon by Sea Robin permit termination but do not require it. Further, as discussed above the issues regarding the Hurricane Recovery Surcharge are outside the scope of this proceeding. In this case, Sea Robin properly terminated Arena's interruptible service pursuant to its Tariff and Service Agreement.

61. For the reasons discussed above, we find that Sea Robin's termination of Service Agreement No. 1545 is proper pursuant to Sea Robin's Tariff and Service Agreement No. 1545. Accordingly, we dismiss the Complaint.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>45</sup> Similarly, Apache asserts (at 8) that Sea Robin should be deemed to have waived its right to terminate its contract pursuant to section 2.7(a) since it has not been used since 2006. However, this provision only allows and does not require that Sea Robin cancel the agreement. Therefore, Apache's assertion of non-use of section 2.7(a) does not support the requested waiver of that provision. Accordingly, Apache's request for waiver is rejected.