137 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 516

Sea Robin Pipeline Company, LLC **Docket Nos. RP09-995-000**
RP10-422-000

OPINION AND ORDER ON INITIAL DECISION

(Issued December 15, 2011)

Paragraph Numbers

137 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sea Robin Pipeline Company, LLC — Docket Nos. RP09-995-000, RP10-422-000

OPINION NO. 516

ORDER ON INITIAL DECISION

(Issued December 15, 2011)

1. This order addresses briefs on and opposing exceptions to an Initial Decision (ID) issued on December 13, 2010 by the Presiding Administrative Law Judge (ALJ) in the captioned proceeding.[1] The ID sets forth the ALJ's findings concerning a mechanism to record and recover hurricane related expenses proposed by Sea Robin Pipeline Company, LLC (Sea Robin) on August 31, 2009 pursuant to section 154.403 of the Commission's regulations.[2]

2. In this order, the Commission affirms the ALJ in part and reverses the ALJ in part. The Commission reverses the ALJ's findings regarding the Hurricane Surcharge recovery period, the date carrying charges should begin to accrue and applicability of the Hurricane Surcharge to certain discount agreements. The Commission affirms the remainder of the ID.

I. Background and Procedural History

3. This case arises from the events of September 2008, when Hurricane Ike caused extensive damage to the natural gas pipeline network of Sea Robin. Sea Robin operates an approximately 457-mile natural gas pipeline system offshore of Louisiana in the Gulf of Mexico. Sea Robin's system is configured in the form of an inverted or upside-down "Y." The system transports a raw stream of natural gas and liquid hydrocarbons,

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[1] *Sea Robin Pipeline Co., LLC*, Initial Decision, 133 FERC ¶ 63,009 (2010).

[2] 18 C.F.R. § 154.403 (2009).

including condensate, which have not been separated or processed. Collected gas and liquids are moved to shore for liquids separation, dehydration, processing and delivery. Six interconnected interstate pipelines, one intrastate pipeline, and one storage field take receipt of gas from Sea Robin.[3]

4. On September 10, 2008, Hurricane Ike entered the southeastern Gulf of Mexico and forced extensive evacuations of Sea Robin's oil and gas industry personnel. As a precautionary measure, 96 percent of oil production and 73 percent of natural gas production was shut. On September 11, 2008, the northeast quadrant of Hurricane Ike passed directly across Sea Robin's offshore facilities, before making landfall near Galveston, Texas on September 13, 2008. Hurricane force winds extended outward up to 115 miles from Ike's center and tropical storm force winds extended outward up to 255 miles from Hurricane Ike's center.

5. The hurricane caused significant damage to Sea Robin's offshore production infrastructure. Sea Robin's best estimate of the total projected costs for repairs to its system in the wake of Hurricane Ike is $144.6 million. Sea Robin notes that it currently anticipates $86.76 million in Oil Insurance Limited (OIL) insurance reimbursements and potentially, an additional amount from ENSCO, the owner of a drilling barge that Sea Robin has sued for particular damages to its pipeline during Hurricane Ike. Therefore, notwithstanding any money recovered from the ENSCO litigation,[4] there is a shortfall of approximately $57.84 million that Sea Robin is currently responsible for.

6. On August 31, 2009, Sea Robin filed to establish a surcharge mechanism to record and recover its hurricane-related expenses (Hurricane Surcharge) in Docket No. RP09-995-000. The proposed provisions of the Hurricane Surcharge are outlined in section 24 of the General Terms and Conditions (GT&C) of Sea Robin's FERC Gas Tariff. Under proposed section 24, Sea Robin would collect, through a surcharge applied to all transported dekatherms (Dth), the capital costs and related Operation and Maintenance (O&M) expenditures incurred to repair the damages to its facilities caused by Hurricane Ike, as well as capital costs and O&M expenses related to future named hurricanes, for a period beginning October 1, 2009 and continuing through September 30, 2013. Originally, Sea Robin proposed that the surcharge would include costs incurred to

[3] The six interstate pipelines are: (1) Columbia Gulf Transmission Company; (2) Gulf South Pipeline Company, LP; (3) Sabine Pipe Line, LLC; (4) Southern Natural Gas Company (Sonat); (5) Texas Gas Transmission, LLC; and (6) Trunkline Gas Company, LLC. The intrastate pipeline that takes receipt from Sea Robin is Bridgeline Holdings, L.P., and the storage field is Jefferson Island Storage & Hub, LLC.

[4] Sea Robin's estimated damages in the ENSCO litigation are approximately $20.5 million. Exh. No. S-1 at 7:19.

prevent damages from future storms; however, Sea Robin later agreed not to include prevention costs in the Hurricane Surcharge. Sea Robin proposed that these surcharge costs would be offset by insurance proceeds and any recoveries from third parties.

7. Several parties protested Sea Robin's Filing, including ExxonMobil Gas & Power Marketing Company, a Division of Exxon Mobil Corporation (ExxonMobil), Hess Corporation (Hess), Arena Energy, LLC (Arena), Apache Corporation (Apache), Chevron U.S.A. Inc. (Chevron), and Medco Energi US LLC (Medco).

8. On September 30, 2009, the Commission issued its order on Sea Robin's tariff filing.[5] In the order, the Commission accepted and suspended Sea Robin's proposed tariff sheets, to be effective March 1, 2010. The Commission ruled that Sea Robin could recover hurricane-related costs through a special tracking mechanism established in a limited section 4 filing without filing a general section 4 rate case, and that such recovery did not violate the filed rate doctrine. However, the Commission set all other issues raised by the protesters in the proceeding for hearing. These issues included, but were not limited to, "the proper design of the Hurricane Surcharge and the reasonableness of the costs initially included in the Hurricane Surcharge . . . the types of existing and future hurricane-related costs which should be eligible for inclusion in the Hurricane Surcharge tracking mechanism (e.g., capital costs, depreciation, costs related to prevention of hurricane damage, carrying costs), throughput to be used to calculate the surcharge, the role of insurance, and application of the Hurricane Surcharge with respect to discount and negotiated rate agreements."[6]

9. ExxonMobil and Hess filed a request for rehearing of the Suspension Order on October 30, 2009. On March 18, 2010, the Commission denied the request for rehearing, finding that "[n]othing in [Natural Gas Act] section 4 prohibits the Commission from allowing a pipeline to make a limited section 4 filing to recover a particular type of cost" and affirming Sea Robin's ability to collect the hurricane-related costs through a limited section 4 filing rather than as part of a general section 4 rate case.[7] The Rehearing Order confirmed that current Commission policy permits a surcharge via a limited section 4 filing "to recover extraordinary, one-time losses resulting from events outside the

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[5] *Sea Robin Pipeline Co., LLC*, 128 FERC ¶ 61,286, at P 38 (2009) (Suspension Order), *order on reh'g*, 130 FERC ¶ 61,191, at P 11 (2010) (Rehearing Order), *appeal dismissed*, *ExxonMobil Gas & Marketing Co., et al. v. FERC*, No. 10-1098 (D.C. Cir. Oct. 21, 2011) (collectively, *Sea Robin*).

[6] Suspension Order, 128 FERC ¶ 61,286 at P 44.

[7] *Rehearing Order*, 130 FERC ¶ 61,191 at P 11.

pipeline's control" such as the hurricane damage suffered by Sea Robin.[8] The Commission found that such a surcharge mechanism provides the pipeline and its customers certainty as to what categories of costs may be recovered and how they will be allocated among shippers.[9] The Commission expressly found that Sea Robin's proposal to include previously incurred Hurricane Ike costs in the surcharge to be reasonable.[10] Finally, the Commission held that the Hurricane Surcharge does not violate the filed rate doctrine or the rule against retroactive ratemaking because the Hurricane Surcharge does not retroactively change rates provided for service before the effective date of the Hurricane Surcharge.[11]

10. On March 1, 2010, in Docket No. RP10-422-000, Sea Robin filed to increase the Hurricane Surcharge from $0.0401 per Dth to $0.0729 per Dth. On March 31, 2010, the Commission consolidated the proceeding in Docket No. RP10-422-000 with the proceeding in Docket No. RP09-995-000, accepted the revised tariff sheets for filing and suspended their effectiveness for the minimum period, subject to refund.[12] On April 30, 2010, ExxonMobil and Hess filed a request for rehearing of the Commission's March 31, 2010 suspension order raising substantially the same issues raised in their request for rehearing of the 2009 Suspension Order. The Commission issued its standard tolling order on May 27, 2010, but has not yet issued a decision on the rehearing request of ExxonMobil and Hess.

11. The ALJ conducted the evidentiary hearing in this case on July 20 and 21, 2010.

12. On December 13, 2010, the ALJ issued the ID.[13] On January 12, 2011, Sea Robin, Apache, Arena and ExxonMobil and Hess filed Briefs on Exceptions. On February 1, 2011, Sea Robin, Apache and Chevron, Arena and Trial Staff filed Briefs Opposing Exceptions. On the same date, Apache also filed a separate Brief Opposing Exceptions.

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[8] *Id*.

[9] *Id*. P 21.

[10] *Id*. P 18.

[11] *Id*. P 14.

[12] *Sea Robin Pipeline Co., LLC*, 130 FERC ¶ 61,261 (2010).

[13] ID, 133 FERC ¶ 63,009. Two erratas were issued on the ID, one on December 15, 2010 and one on December 16, 2010. The erratas amended the captioned docket to include RP10-422-000 and the "Appearances" section of the ID.

13. Since the hearing, Sea Robin has made three additional hurricane tracker filings. Sea Robin filed to increase the Hurricane Surcharge from $0.0729 per Dth to $0.0853 per Dth in the first filing, from $0.0853 per Dth to $0.1288 per Dth in the second filing, and from $0.1288 per Dth to $0.1620 per Dth in the third filing. While the increases in the Hurricane Surcharge in these filings were similarly attributable to under-recoveries in the prior period and a continuing decline in projected throughput, the third filing also included $362,615.29 in new costs. This was the first new cost Sea Robin had incurred since 2009. The Commission accepted and suspended all three filings, subject to refund and the outcome of the ongoing hearing in Docket Nos. RP09-995-000 and RP10-422-000.[14]

II. Overview of the Commission's Holdings in this Order

14. No party has filed exceptions to the ALJ's holdings that (1) Sea Robin should be permitted to include capital costs in the Hurricane Surcharge, (2) the actual costs Sea Robin has included in the surcharge are reasonable, and (3) Sea Robin's proposal concerning the volumes to be used to design the surcharge is reasonable. Accordingly, the ALJ's holdings on those issues are affirmed.

15. Based on the Briefs on Exceptions, the parties generally take exception to the ALJ's decisions regarding the recovery period for the Hurricane Surcharge, from what date carrying costs should be included, and applicability of the Hurricane Surcharge to discount and negotiated rate contracts. For the reasons discussed below, the Commission reverses the ALJ's finding that a 21.4-year recovery period is just and reasonable and finds instead that Sea Robin's proposed four-year recovery period is just and reasonable. The Commission reverses the ALJ's holding that carrying charges at the Commission-published interest rate should begin to accrue March 1, 2010, the date that the Commission authorized the Hurricane Surcharge to take effect, subject to refund. The Commission finds instead that carrying charges should begin to accrue the later of August 1, 2009, the date Sea Robin filed to establish the Hurricane Surcharge, or the date the associated cost is incurred. Finally, the Commission finds that Sea Robin's discount agreements with certain shippers permit it to recover the Hurricane Surcharge from those shippers. Therefore, there is no need to modify those agreements, as the ALJ sought to do pursuant to an analysis under the *Mobile-Sierra* public interest standard.

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[14] *See Sea Robin Pipeline Co., LLC*, 132 FERC ¶ 61,277 (2010); *Sea Robin Pipeline Co., LLC*, 134 FERC ¶ 61,262 (2011); *Sea Robin Pipeline Co., LLC*, 136 FERC ¶ 61,229 (2011).

III. Hurricane Surcharge Recovery Period

16. In its August 31, 2009 Filing, Sea Robin proposed that the Hurricane Surcharge would be calculated on the balance of the Hurricane Surcharge account at December 31 and June 30 (to be effective April 1 and October 1, respectively) for each recovery period, until September 30, 2013, divided by the projected billing determinants.[15] Sea Robin also proposed that any balance in the Hurricane Surcharge account at September 30, 2013 shall be included in the Sea Robin rate proceeding proposing new base rates effective January 1, 2014.[16] Also under Sea Robin's proposal, carrying charges would accrue on the monthly balance of hurricane-related costs, calculated at the Commission prescribed interest rates in accordance with section 154.501(d) of the Commission's regulations[17] and any capital-related 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.[18]

17. Among the issues before the ALJ was what should be the recovery period for the costs included in the Hurricane Surcharge. As stated above, Sea Robin proposed a 48-month recovery period terminating September 30, 2013. Sea Robin argued that because the costs incurred in rebuilding its pipeline in the wake of Hurricane Ike were not normal and customary costs that are traditionally included in base rates and subject to normal depreciation periods, an accelerated recovery period was appropriate. Apache and Chevron, on the other hand, support a 25-year amortization period based on the useful life of the facilities. They contended that this would result in a just and reasonable level that does not result in rate shock to Sea Robin's shippers, competitive dislocations, or create intergenerational inequities.

18. In the hearing, ExxonMobil and Hess proposed two different amortization periods, depending on the nature of the cost: (1) O&M costs should be recovered over the period March 1, 2010 through the effective date of new rates in Sea Robin's next section 4 general rate case filing;[19] and (2) capital costs should recovered over the 25-year useful life of the system. Trial Staff proposed a 12.5-year recovery period, which reflected the 25-year useful life of the facilities cut in half. Trial Staff believed that this struck the

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[15] *See* GT&C section 24.6 of Sea Robin's FERC Gas Tariff.

[16] *See* GT&C section 24.6 of Sea Robin's FERC Gas Tariff.

[17] *See* GT&C section 24.5 of Sea Robin's FERC Gas Tariff.

[18] *See* GT&C section 24.7 of Sea Robin's FERC Gas Tariff.

[19] Sea Robin is required to make its next section 4 general rate case filing on or before January 1, 2014. *See Sea Robin Pipeline Co., LLC*, 125 FERC ¶ 61,185 (2008).

appropriate balance between incentivizing quick repairs and consideration of the life expectancy of those repairs.

A. Initial Decision

19. In the ID, the ALJ concluded that Sea Robin should be allowed to recover through the Hurricane Surcharge O&M costs, capital costs, and carrying costs,[20] reduced by insurance reimbursements, litigation awards, salvage values received, and any inappropriately recorded O&M costs.[21] However, the ALJ found that such costs should be recovered over a 21.4-year recovery period.

20. First, the ALJ found that Sea Robin's proposed four-year recovery period was unjust and unreasonable. Contrary to Sea Robin's assertions, the ALJ found that neither the Suspension Order nor Rehearing Order suggested that the Commission was in favor of a particular recovery period for the Hurricane Surcharge, evidenced, among other things, by the fact that the design of the Hurricane Surcharge was set for hearing. The ALJ also found that, given that the repairs following Hurricane Ike extended the useful life of the pipeline, future shippers would unfairly enjoy a free ride on the system at the expense of current shippers. The ALJ stated that a recovery period longer than four years would more fairly distribute collection of the repair costs between current and future customers. The ALJ also believed the 24.07 percent increase in Sea Robin's total gathering and transportation rate caused by the Hurricane Surcharge would result in rate shock. For these reasons, the ALJ rejected Sea Robin's proposal.

21. Next, the ALJ rejected Trial Staff's proposed 12.5-year recovery period, The ALJ found that Trial Staff's proposal, which was the mid-point between the various proposals, was arbitrary and not legally sound.

22. Then, the ALJ explained her reasoning for selecting a 21.4-year recovery period. The ALJ believed that the recovery period should be less than that of the useful life of the pipeline because of the fundamental difference in the nature of repairs Sea Robin undertook following Hurricane Ike and those that are normally part of maintaining or expanding a pipeline, as well as public policy concerns. However, the ALJ believed that there were equally valid arguments for making the recovery long enough so that it has a

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[20] ID, 133 FERC ¶ 63,009 at P 59-60. Sea Robin's estimated repair costs total $144.6 million. Sea Robin's projected insurance reimbursement total $86.76 million. Therefore, the ALJ found that $57.84 million in uninsured costs should be included in the Hurricane Surcharge. *Id.* P 128.

[21] *Id.* P 72 and P 98-100. Consistent with Sea Robin's revised proposal, the ALJ ruled that hurricane prevention costs and labor costs related to hurricane repairs should be excluded from the Hurricane Surcharge. *Id.* P 97.

viable connection to the traditional model in determining the useful life of the pipeline. In order to calculate the accelerated recovery period, the ALJ concluded that it was reasonable to exclude LNG reserves from the 25-year useful life calculation because it was uncertain when or if LNG will again be transported on Sea Robin's system and in what volumes. Removing the LNG reserves resulted in a recovery period 21.4 years, which, the ALJ reasoned, reflected the need to reimburse Sea Robin for its expenses in a timely fashion without exposing current customers to an excessive rate impact, while at the same time holding to a reasonable interpretation of the traditional useful life recovery evaluation.

B. Briefs on Exceptions

23. In its Brief on Exceptions, Sea Robin argues that the ALJ erred in concluding that 21.4 years is the appropriate recovery period for the Hurricane Surcharge. Sea Robin argues that the ALJ inappropriately uses a traditional section 4 rate case analysis to determine the Hurricane Surcharge recovery period. Sea Robin argues that the 21.4-year recovery period is effectively a depreciation term and, consequently, is contrary to the Suspension and Rehearing Orders providing that Sea Robin's hurricane costs are to be recovered through a surcharge and not through a general section 4 rate case.[22] Sea Robin contends that the ALJ's alternate rationale for those orders, that the Commission intended to provide a "more immediate method for Sea Robin to begin collecting these unforeseen expenses, rather than having Sea Robin wait for a general section 4 rate filing," is faulty.[23] Sea Robin states that it may file a general section 4 rate case at any time and therefore, the ALJ's logic does not follow. Sea Robin contends that the only logical conclusion to draw from the Suspension and Rehearing Orders is that the Commission intended the limited section 4 filing mechanism to provide an accelerated recovery for these unforeseen expenses.

24. Sea Robin also contends that the ALJ's rationale does not support a 21.4-year recovery period. Sea Robin states that, for all intents and purposes, the ALJ used a traditional useful life analysis of a section 4 rate case when deciding the recovery period for the surcharge. Sea Robin states that excluding the 3.6-year time period that was improperly included in the analysis leaves the recovery period at the full useful life of the facilities. This results in no acceleration for the timely recovery of the hurricane repair costs, which was the ALJ's stated rationale for the 21.4-year recovery period.

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[22] Sea Robin Brief on Exceptions at 29 (citing Suspension Order, 128 FERC ¶ 61,286 at P 39 and Rehearing Order, 130 FERC ¶ 61,191 at P 12).

[23] *Id.* at 29 (citing ID, 133 FERC ¶ 63,009 at P 181).

25. Further, Sea Robin states the ALJ's decision to require a 21.4-year recovery period is premised upon a basic misunderstanding of the Hurricane Surcharge and the rate-making process. Sea Robin states that the ALJ found that

> "Sea Robin's proposal benefits itself financially by allowing it to collect all of its costs in a four-year period even though it will continue to collect a return on its investment well past this recovery period since the useful life of its repairs are much greater than four years."[24]

However, Sea Robin states that this is not the case. Sea Robin states that once it has collected its costs of a repair through the Hurricane Surcharge, it will not earn a return on those costs. Under the Hurricane Surcharge, Sea Robin states, it will never earn a return, but will only be able to recover the cost of short-term debt. Sea Robin states the ALJ's extended recovery period creates intergenerational inequalities and a "free ride" for current shippers who benefitted from Sea Robin's incurrence of the costs to resume service quickly after Hurricane Ike.

26. Sea Robin also argues that the 21.4-year recovery period would unreasonably deny Sea Robin the opportunity to recover the costs of providing service.[25] Sea Robin contends the ALJ's recovery period does not take into account the cost of capital associated with a long-term recovery period. Sea Robin states that the level of carrying costs proposed by Sea Robin, the current Commission interest rate of 3.25 percent, is based on Sea Robin's proposed recovery period of four years and is substantially below a pipeline's cost of capital for a long-term investment. In a typical investment, Sea Robin claims that a pipeline is allowed a reasonable return and taxes, with a debt/equity component, with a total cost of capital at least in the range of 11 percent.[26] Sea Robin states that in this case it is not asking for a return on its investment. Moreover, such limitations on cost recovery are bad public policy because they do not provide an incentive to make the requisite and substantial investments necessary to restore service.

27. According to Sea Robin, the 21.4-year recovery period proposed by the ALJ also departs from all other hurricane surcharge recovery periods and from Sea Robin's

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[24] Sea Robin Brief on Exceptions at 27 (citing ID, 133 FERC ¶ 63,009 at P 192).

[25] *Id.* at 30 (citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (The Supreme Court noted the basic principle that a pipeline company must be permitted to collect enough revenue not only for operating expenses but also for the capital costs of the business)).

[26] *Id.* at 31 (citing *Kern River Gas Transmission Co.*, 126 FERC ¶ 61,034 (2009) (Commission established return on equity of 11.55 percent)).

proposal with no explanation or justification.[27] Sea Robin states that the 48-month proposed period is both consistent with Commission precedent and most closely matches cost incurrence with cost responsibility. Sea Robin states that the costs associated with this Hurricane Surcharge are not normal and customary costs that are traditionally included in base rates and subject to normal depreciation periods. Sea Robin states that these are extraordinary costs which have impacted both the pipeline and its shippers and should not burden system operations over the long term, but rather should be recovered in a prompt time period such as the proposed 48-month recovery period.

28. Sea Robin also argues that the ALJ's 21.4-year recovery period is at odds with the ALJ's rejection of the $0.02 rate cap proposed by the shippers.[28] Sea Robin states that without an accelerated recovery period, it can only recover short-term carrying costs, which hinders its ability to recover the cost of long-term capital. The lengthy 21.4-year recovery period has the same practical effect and an even greater detrimental effect[29] than the $0.02 rate cap. Having determined correctly that a rate cap is unlawful, Sea Robin states that the ALJ cannot simultaneously impose a recovery period of such extended duration that indirectly accomplishes what she would not allow to be done directly through a rate cap.

29. In its Brief on Exceptions, ExxonMobil and Hess except to the ALJ's reduction in the recovery period for LNG reserves. In particular, ExxonMobil and Hess take issue with these two findings in the ID regarding LNG reserves: (1) that the record did not contain any evidence that Sea Robin would transport imported LNG in the near future due to current economic factors between the domestic natural gas prices and imported

[27] *Chandeleur Pipe Line Co.*, 117 FERC ¶ 61,250 (2006) (Commission approved a 12-month hurricane surcharge recovery period that was subsequently extended to 24 months); *High Island Offshore System, LLC*, 131 FERC ¶ 63,007, at P 17 n.6 (2010) (Administrative Law Judge certified a settlement that provided for a 36-month storm damage recovery period); *Discovery Gas Transmission LLC*, 122 FERC ¶ 61,099 (2008) (Commission approved a 12-month recovery period for a hurricane surcharge with any uncollected amounts recovered in a subsequent period); *Stingray Pipeline Co., LLC*, 127 FERC ¶ 61,308 (2009) (Commission approved tariff provisions that allowed up to 36 months to amortize hurricane related costs); *Colonial Pipeline Co.*, Oil Tariff Filing, Docket No. IS02-313-008 (July 2, 2008) (24-month recovery period for a hurricane surcharge); *ExxonMobil Pipeline Co.*, FERC Tariff 255-273, Docket No. IS06-344-000 (May 31, 2006) (12-month recovery period for a hurricane surcharge).

[28] ID, 133 FERC ¶ 63,009 at P 229.

[29] Assuming a 21.4-year recovery period, Sea Robin states the Hurricane Surcharge would be well under the $0.02 rate cap rejected by the ALJ.

LNG markets; and (2) that the global marketplace for LNG has changed in such a way that the U.S. is now exporting more LNG than it is importing, explaining the lack of any LNG imports on the Sea Robin system since August of 2007.[30] ExxonMobil and Hess state that new LNG import terminals under construction are expected to commence service in the foreseeable future on the Gulf Coast,[31] and the Energy Information Agency data shows the United States imported considerably more LNG than it exported in October 2010, continuing a trend that has been the case for several years.[32] Therefore, they contend, the ID's findings regarding the availability of LNG imports and the likelihood of Sea Robin transporting LNG over the next 25 years are not supported.

30. ExxonMobil and Hess also argue that the ID's holding that Sea Robin should be permitted to recover the full costs of repair and replacement over a shortened period of time suffers from the same defects as Sea Robin's compressed timetable of 4 years and Trial Staff's compressed timetable of 12.5 years. ExxonMobil and Hess state that the Commission has allowed Sea Robin to promptly commence recovery of an extraordinary level of capital costs without burdening Sea Robin with having to file a general rate case. As a result, ExxonMobil and Hess contend, the Commission has allowed Sea Robin to have it both ways; it can defer filing its next general rate case and immediately commence recovery of its hurricane costs. Therefore, ExxonMobil and Hess state there is simply no reason on this record to allow Sea Robin an additional acceleration of its recovery of these costs by allowing the implementation of a Hurricane Surcharge.

C. Briefs Opposing Exceptions

31. In its Brief opposing Exceptions, Sea Robin argues that it is unjust and unreasonable for the Hurricane Surcharge recovery period to be 25 years, as argued by ExxonMobil and Hess. It contends that this would have same practical effect as the unjust, unreasonable and rejected $0.02 rate cap.

32. In their Briefs on Exceptions, Trial Staff, Apache, Chevron, ExxonMobil and Hess oppose Sea Robin's exception that the ALJ's 21.4-year recovery period is inconsistent with the Commission's previous orders in this case. They contend that the Suspension and Rehearing Orders did not require an accelerated recovery period and specifically contemplate that the recovery period would be at issue in the hearing. Apache and Chevron also note the ALJ's finding in the ID that "[t]here is no language in either the Suspension Order or Rehearing Order suggesting that the Commission was in favor of a

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[30] ExxonMobil and Hess Brief on Exceptions at 31.

[31] *Id.* at 32 (citing *Golden Pass LNG Terminal, LLC*, Docket No. CP04-386-000 (in-service request filed Jan. 11, 2011)).

[32] *Id.* at 32.

particular recovery period for the Hurricane Surcharge."[33] Further, Apache and Chevron state that the fact that the Commission permitted Sea Robin to implement a Hurricane Surcharge recovery mechanism outside the context of a general section 4 rate case proceeding does not mean that the statutory and regulatory guidelines for establishing an appropriate recovery period are no longer valid.

33. Trial Staff, Apache, Chevron, ExxonMobil and Hess also oppose Sea Robin's assertion that the 21.4-year recovery period proposed by the ALJ's ID departs from the Commission's precedent and policy. Trial Staff states that none of decisions Sea Robin relies on have any precedential value here. Trial Staff states that those cases involve settlements, unprotested filings, or suspension orders setting filings for hearing. None, they state, involved decisions on contested issues based on evidentiary records. Apache and Chevron also point out that in the case of *Chandeleur* the level of costs were less than those here, didn't include capital costs and the proposal was unopposed.

34. Apache, Chevron, ExxonMobil and Hess also oppose Sea Robin's exception that the ALJ's 21.4-year recovery period is not supported by the ALJ's rationale. They contend that Sea Robin's argument is directly contrary to the ALJ's rationale for reducing the Trial Staff's evidence supporting a 25-year useful life to 21.4 years, which was to accelerate Sea Robin's recovery of its capital costs. ExxonMobil and Hess contend that Sea Robin continues to ignore or downplay the considerable benefit it would receive under the ID, i.e., the accelerated recovery of substantial capital costs outside of a general section 4 rate case. Apache and Chevron also contend that the ALJ's 21.4-year recovery period was a reasonable time line for amortization of the hurricane damage costs and a compromise between Sea Robin and its shippers. It did not reflect, they contend, a depreciation rate for the pipeline.

35. ExxonMobil and Hess believe that it is also worth noting that Sea Robin's mechanism would apply to future hurricanes and named storms that occur between now and the expiration of the mechanism.[34] Thus, if another storm damaged Sea Robin's system in 2011, Sea Robin could file to recover all new capital costs over the two-year period remaining prior to termination of the mechanism. This would burden its current shippers with all capital costs associated with system repairs.

36. Trial Staff, Apache, Chevron, ExxonMobil and Hess also except to Sea Robin's claim that a 21.4-year recovery period will result in intergenerational inequities and a "free ride" for current shippers. They contend that present and future shippers alike will

[33] Apache and Chevron Brief Opposing Exceptions at 12 (citing ID, 133 FERC ¶ 63,009 at P 181).

[34] ExxonMobil and Hess Brief Opposing Exceptions at 20.

benefit from the repairs and replacement of physical plant over the useful life of these facilities. However, they argue that under Sea Robin's proposal the entire burden of the hurricane costs will be placed on current customers, which will result in intergenerational inequities because future shippers would not have to pay for any of the costs, even though the repairs extended the useful life of the pipeline. Trial Staff states that the longer recovery period adopted by the ALJ would more fairly distribute the repair costs among those current and future customers who will both benefit from the repaired facilities than would the four-year recovery period proposed by Sea Robin.

37. Regarding Sea Robin's argument that the interest rate for carrying costs is significantly below a typical return on equity allowance, Apache and Chevron point out that it was Sea Robin's decision to make a limited section 4 filing to include carrying costs rather than include the relevant capital costs in rate base subject to a return on equity allowance in a comprehensive section 4 rate case. They contend that Sea Robin cannot now claim the ID is unreasonable for adopting a structural component of its own proposal.

38. Trial Staff also argues that Sea Robin's objection that under the surcharge mechanism approved by the ALJ, it will not earn a return on investment – only carrying charges – is inconsistent with its filed case and therefore should be rejected. Trial Staff states that, when it filed for the Hurricane Surcharge, Sea Robin witness Langston testified that "Sea Robin is not seeking to recover a return on the necessary capital expenditures as would be typical in a rate case, but is only seeking to recover carrying cost at the Commission's authorized rate."[35] Therefore, Trial Staff states, Sea Robin is precluded from raising different arguments here.

39. Trial Staff, Apache and Chevron also contend that the ALJ's rejection of the $0.02 rate cap and approval of a 21.4-year recovery period are not inconsistent. Trial Staff states that the ALJ did not approve the rate cap because the ALJ found that Sea Robin might not be able to recover its full Hurricane Ike-related repair costs over the recovery period if the $0.02 cap were adopted. However, this reasoning does not apply to the 21.4-year recovery period without the rate cap.

40. Trial Staff also opposes ExxonMobil and Hess's argument that Sea Robin's recovery period for the damages caused by Hurricane Ike should be no fewer than 25 years. Trial Staff agrees with the ALJ that, with regard to the recovery period, an appropriate balance needs to be reached between providing an incentive to companies with damaged pipelines to make quick repairs and consideration of the life expectancy of the repairs. Moreover, Trial Staff states that the Rehearing Order provides that it is reasonable to permit Sea Robin to recover its hurricane damage repair costs outside of a

[35] Trial Staff Brief Opposing Exceptions at 16 (citing Exh. No. SR-1 at 11:18-21).

general section 4 rate case because the incurrence of these types of costs benefits Sea Robin's customers by permitting quick resumption of full service.[36] Trial Staff states that, from this, it is reasonable to infer that the Commission's intent as a policy matter is to provide incentives for pipelines to restore service quickly after a hurricane because quick service restoration is in the public's interest.[37]

41. Lastly, Apache and Chevron state the ALJ made a specific determination that Sea Robin's four-year recovery period "is not just and reasonable, and is rejected."[38] Apache and Chevron state this determination is found in a separate part of the ID from the determination that the 21.4-year recovery period was just and reasonable for Sea Robin's Hurricane Surcharge. Apache and Chevron state that the Commission's regulations specifically state that failure to raise an objection to a part of an initial decision in a brief on exceptions constitutes waiver of that objection.[39] Given that Sea Robin only raises an objection to the 21.4-year recovery period, and fails to take exception to the ALJ's separate rejection of its four-year recovery period, Apache and Chevron claim Sea Robin has waived the right to object to the ID's rejection of Sea Robin's four-year recovery period, and the Commission must therefore adopt the ALJ's finding.

D. <u>Commission Determination</u>

42. As discussed below, the Commission reverses the ALJ's finding that a 21.4-year recovery period is just and reasonable and finds instead that Sea Robin's proposed 4-year recovery period is just and reasonable. The ALJ was correct that neither the Suspension Order nor Rehearing Order suggested that the Commission was in favor of a particular recovery period for the Hurricane Surcharge, evidenced, among other things, by the fact that the design of the Hurricane Surcharge was set for hearing. However, upon review of the record in this case, the Commission finds that Sea Robin's proposed 4-year recovery period is just and reasonable given the extraordinary nature of the repair costs and that Sea Robin is foregoing any return on equity (and income tax allowance) on the substantial capital costs included in its overall repair costs.

43. Under the statutory scheme set forth in the NGA, the pipeline has the initiative through a section 4 filing to propose how it will recover its costs.[40] As the Commission

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[36] *Id.* at 11-12 (citing Rehearing Order, 130 FERC ¶ 61,191 at P 12).

[37] *Id.* at 12 (citing Exh. No. S-1 at 11:5 – 13:8).

[38] Apace and Chevron Brief Opposing Exceptions at 20 (citing ID, 133 FERC ¶ 63,009 at P 184).

[39] *Id.* at 20 (citing 18 C.F.R. § 385.711(2) and (3) (2010)).

[40] *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985).

has stated, "The courts have long recognized that there is no single just and reasonable rate but instead that various rates may be just and reasonable."[41] If the pipeline satisfies its burden under section 4 to show that its proposed rates are just and reasonable, the Commission must accept those rates, regardless of whether other just and reasonable rates may exist.[42] Therefore, if Sea Robin's proposed four-year amortization period is just and reasonable, the Commission will accept that proposal, even if other amortization periods might also be just and reasonable.

44. In its August 2009 Filing to establish the Hurricane Surcharge, Sea Robin proposed to recover during the four-year amortization period, eligible hurricane-related repair costs including capital costs, plus carrying charges at the Commission-published interest rate. That interest rate has been 3.25 percent since the beginning of the term of the Hurricane Surcharge. Sea Robin proposed to include approximately $57.84 million of eligible costs in the surcharge.[43] Approximately $55.8 million of this amount is capital costs and the remainder is primarily O&M costs. Sea Robin did not propose to include in the Hurricane Surcharge any return on equity with respect to the capital costs, or any associated income tax allowance. Finally, Sea Robin proposed that any balance remaining in its Hurricane Surcharge Account on September 30, 2013 would be included in its next section 4 general rate proceeding, which the settlement of its last case requires to be filed no later than January 1, 2014.[44]

45. As the parties seeking a longer amortization period point out, if Sea Robin sought to recover its hurricane-related repair costs in a NGA general section 4 rate case, Sea Robin would be required to recover the capital costs over the useful life of the facilities, which the parties agree is at least 25 years. However, in a NGA general section 4 rate case, Sea Robin would also be entitled to include the undepreciated capital repair costs in its rate base and earn a return on equity on the portion of those costs financed by equity,

[41] *Tennessee Gas Pipeline Co*., 80 FERC ¶ 61,070, at 61,223-4 (1997) (Opinion No. 406-A), *aff'd, Consolidated Edison Co. v. FERC*, 165 F.3d 992, (D.C. Cir. 1999). *See also Cities of Bethany v. FERC*, 727 F.2d 1131, 1138 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 917 (Cities); *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

[42] *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-1579 (D.C. Cir. 1993).

[43] Sea Robin did not propose to add any additional costs to its surcharge until its most recent Hurricane Surcharge Filing in Docket No. RP11-2494-000. In that filing, it stated that it had incurred additional costs of $362,615.29 to install a pipeline crossings. *Sea Robin*, 136 FERC ¶ 61,229 at P 16-17.

[44] *Sea Robin*, 125 FERC ¶ 61,185.

and an allowance for the income taxes it must pay on its return on equity. Sea Robin has expressly stated in its briefs and its proposal that it will not be entitled to earn a return on equity or income taxes with respect to costs recovered under the Hurricane Surcharge.[45]

46. Although Sea Robin's proposed 4-year amortization period produces a higher per-unit surcharge than either the ALJ's 21.4-year amortization period or the 25-year amortization period proposed by ExxonMobil and Hess, Sea Robin's proposal is significantly less costly to ratepayers over the long run than the alternative proposals. Under Sea Robin's proposal, its repair costs related to Hurricane Ike, including all the capital costs, should be mostly, if not entirely, recovered before Sea Robin files its next general section 4 rate case in late 2013, as required by the settlement of its last section 4 rate case. As a result, Sea Robin's proposed rate base in its next section 4 rate case should not include any significant capital costs related to the Hurricane Ike repair costs.

47. However, under the alternate amortization period proposals, Sea Robin likely would have recovered at most about 20 percent of the capital costs by the effective date of the next rate case.[46] Therefore, it would be entitled to include about 80 percent of the capital costs in its rate base in the next rate case. This would allow it to include in its cost of service used to calculate proposed maximum rates in that rate case an overall return on the capital costs included in the rate base. That overall return would include a return on equity on the portion of the rate base financed with equity, together with an income allowance. The Commission has recently approved returns on equity for natural gas pipelines several times more than the Commission-published interest rate of 3.25 percent.[47] By contrast, under Sea Robin's proposal, its customers pay only the principal amount of the repair costs plus 3.25 percent in carrying charges on the outstanding

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[45] *See, e.g.*, GT&C section 24.7(a) ("Any capital-related Eligible Costs (or portion thereof) for which Sea Robin is reimbursed through collection of the Hurricane Surcharge shall not be debited to Sea Robin's gross plant (Property, Plant and Equipment) accounts."); Sea Robin Brief on Exceptions at 27, 31.

[46] Sea Robin's proposed four year amortization period commenced on October 1, 2009. If the longer amortization periods sought by the other participants commenced on the same date, they would only have run 4 years and three months by January 1, 2014, which is the latest date Sea Robin can file its next section 4 rate case pursuant to the settlement of its last rate case. Four years and three months is only 17 percent of a 25-year amortization period and 20 percent of a 21.4 year amortization period.

[47] *See, e.g.*, *Portland Natural Gas Transmission System*, Opinion No. 510, 134 FERC ¶ 61,129, at P 225 (2011) (Commission established return on equity of 12.99 percent); *Kern River Gas Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034 (2009) (Commission established return on equity of 11.55 percent).

balance during the four-year amortization period. While we recognize that the increase in rates as a result of the Hurricane Surcharge is not insignificant, we think Sea Robin's recovery proposal is reasonable given that over the long term Sea Robin's maximum rate customers will pay significantly less for the hurricane repair costs, than they would have paid under the ALJ's 21.4 year amortization period or the longer period advocated by ExxonMobil and Hess.

48. Therefore, we reverse the ALJ's decision to use a 21.4-year recovery period. The ALJ's 21.4-year recovery period reflects Trial Staff's 25-year useful life calculation, minus LNG reserves that the ALJ concluded should be excluded based on the evidence produced at the hearing. We find that this outcome is unjust and unreasonable given the nature of the costs and that Sea Robin is foregoing any return on such costs other than carrying charges at the Commission-approved interest rate. As even the ALJ recognized,

> the "useful life" proposal does not appropriately take into account Sea Robin's efforts to return its system to operability quickly or adequately reflect the maxim that customers must shoulder the burden of paying for these emergency repair costs to a system that immediately benefits them. This is especially true given that Sea Robin … has voluntarily forgone its right to receive a return on these capital expenses necessary to get back into providing service on its pipeline.[48]

49. Instead, we find that, based on the extraordinary nature of the Hurricane Surcharge repair costs and Sea Robin's agreement to limit its recovery to reimbursement of those costs, plus carrying charges at the Commission-published interest rate, Sea Robin's proposed 4-year recovery period is just and reasonable. As we have stated previously, the costs Sea Robin proposes to include in the Hurricane Surcharge are extraordinary costs outside its control. Sea Robin's incurrence of these types of costs benefits its customers by allowing it to resume full service as quickly as possible following a catastrophic event.[49]

50. Also, we disagree with the shippers who argue that Sea Robin's proposal will result in intergenerational inequities because future shippers will not have to pay for any of the costs. While we recognize the impact the Hurricane Surcharge on Sea Robin's current shippers, we believe that, on balance, the benefit of a shorter amortization period in reducing long-term costs to shippers discussed above outweighs any speculative concern that there may be significant changes in Sea Robin's customer profile in the

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[48] ID, 133 FERC ¶ 63,009 at P 192.

[49] *See, e.g.*, Rehearing Order, 130 FERC ¶ 61,191 at P 12.

future. Moreover, as the ALJ found, current shippers primarily benefitted by Sea Robin's quick return to service.[50]

51. ExxonMobil and Hess were also concerned that, under Sea Robin's current proposal, the recovery period for costs resulting from future hurricanes and storms that occur between now and the expiration of the mechanism would be less than 4 years, depending upon the remaining term of the Hurricane Surcharge. For example, if Sea Robin filed to recover new hurricane repair costs in 2011, whether from a future or past hurricane, Sea Robin could file to recover those new capital costs over the two-year period remaining prior to termination of the mechanism. We find that such a result would be unjust and unreasonable. Accordingly, Sea Robin is directed to modify its tariff to provide that if it files to recover new hurricane repair costs (i.e., costs not included in a previous Hurricane Surcharge Filing), whether from a future or past hurricane, the surcharge to recover those costs must be calculated based on a 4-year amortization period from the effective date of such filing. However, as is the case with costs related to Hurricane Ike, Sea Robin may include any balance remaining in the Hurricane Surcharge Account on September 30, 2013 that is associated with such costs in the rate proceeding proposing new base rates required to be filed by January 1, 2014.

IV. Carrying Costs

52. Sea Robin proposed to recover carrying costs at the Commission-published interest rate on O&M expenditures from the date those costs were incurred and on capital expenditures from the date the associated facilities were placed into service and were providing a benefit to shippers. Based on the current record, Sea Robin appears to have booked O&M expenses commencing in October 2008 and capital repairs commencing in March 2009.[51] However, Sea Robin's damaged facilities do not appear to have been returned to full transportation service until January 2010.[52] Apache and Chevron and ExxonMobil and Hess argued that carrying costs should be allowed to take effect on March 1, 2010, which was the date that the Commission authorized the Hurricane Surcharge to take effect, subject to refund. Trial Staff proposed October 1, 2009, the date Sea Robin requested in its original filing that the rates become effective.

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[50] ID, 133 FERC ¶ 63,009 at P 196.

[51] *See* Exh. No. SR-9; Sea Robin Initial Filing, Appendix B, at 7.

[52] *See* Sea Robin Reply Brief at 26; Exh. No. SR-11 at 2:12-13.

A. Initial Decision

53. In the ID, the ALJ found that carrying costs should be effective as of March 1, 2010.[53] The ALJ stated that Sea Robin's proposal should not be followed for two reasons. First, the ALJ found that if carrying costs were to be adjusted each time a facility was placed into service, these costs will vary and would not facilitate rate certainty. Second, the ALJ found that Sea Robin's proposal was unfair to shippers because it would allow Sea Robin to collect carrying costs for repairs it made to facilities before shippers had notice that they would be charged for such repairs through the Hurricane Surcharge. In support of this finding, the ALJ cited to section 154.403(d)(4) of the Commission's regulations, which provides that a "natural gas company must not recover costs . . . which are applicable to the period pre-dating the effectiveness of the tariff language setting forth the periodic rate change mechanism."[54] Based on this section, the ALJ found that "[s]ince the Hurricane Surcharge is a periodic rate change mechanism and was not in effect for much of the time period in which Sea Robin argues should include carrying costs, Sea Robin's proposal must be rejected."[55]

B. Briefs on Exceptions and Briefs Opposing Exceptions

54. Sea Robin argues that the ALJ erred in finding that carrying costs should be effective only as of March 1, 2010. First, Sea Robin objects to the ALJ's finding that if carrying costs were to be adjusted each time a facility was placed into service, those costs would vary and would not facilitate rate certainty. Sea Robin argues that the ALJ's overall determination on the justness and reasonableness of Sea Robin's semi-annual filings, and the resulting adjustments and updates, negates the ALJ's claimed lack of rate certainty to support her finding opposing Sea Robin's carrying cost proposal. Further, Sea Robins argues that the ALJ pointed to no Commission orders in support of her finding.

55. Second, Sea Robin objects to the ALJ's finding that Sea Robin's proposal was unfair to shippers because it would allow Sea Robin to collect carrying costs for a time period prior to when shippers knew that they would have to pay for Sea Robin's costs through the Hurricane Surcharge. Sea Robin contends that it is unreasonable to conclude that any shipper was not on notice and already fully aware of Hurricane Ike and the extensive damage it caused to Sea Robin's system, as well as Sea Robin's efforts to repair its system. Sea Robin also argues that the ALJ's finding fails to recognize that the Commission previously rejected arguments raised in the originally-filed protests and on

[53] ID, 133 FERC ¶ 63,009 at P 116.

[54] *Id.* P 117 (citing 18 C.F.R. § 154.403(d)(4) (2011)).

[55] *Id.* P 117.

rehearing that the Hurricane Surcharge violated section 154.403(d)(4) of the Commission's regulations. Sea Robin contends that, in both the Suspension Order and the Rehearing Order, the Commission found that the Hurricane Surcharge was consistent with section 154.403(d)(4) and accordingly, permitted Sea Robin to recover such costs.[56] Because the Hurricane Surcharge included Sea Robin's proposal on carrying costs, Sea Robin contends, the Commission's ruling stands for the finding that Sea Robin's carrying costs proposal did not violate the filed rate doctrine or the rule against retroactive ratemaking.

56. Sea Robin contends that its proposal for recovery of carrying costs complies with the Commission's well-established precedent on carrying costs. Sea Robin states that its tiered approach for both carrying costs related to O&M and capital costs was designed to reflect the time at which the funds were committed by Sea Robin and when shippers benefitted from the availability of system capacity. Citing *Virginia Elec. and Power Co.* and *Williams Natural Gas Co.*, Sea Robin states that the Commission has held that it is appropriate to accrue carrying costs from the date those costs are incurred.[57] Sea Robin states that the Commission has explained that recovery of carrying costs from the time the costs were incurred is appropriate to ensure that the pipeline "receives compensation for the costs that it has incurred and the time value of not recovering these costs earlier."[58] Sea Robin states that the D.C. Circuit has also explained that compensation deferred is compensation reduced by the time value of money and that interest is simply a way of ensuring full compensation.[59]

57. In their Briefs Opposing Exceptions, Trial Staff, ExxonMobil and Hess, and Apache and Chevron disagree with Sea Robin's contention that the Suspension Order and the Rehearing Order provided the permission required by Section 154.403(d)(4) to collect carrying charges associated with the period prior to the effective date of the Hurricane

[56] Sea Robin Brief on Exceptions at 19-20 (citing Suspension Order, 128 FERC ¶ 61,286 at P 43 and Rehearing Order, 130 FERC ¶ 61,191 at P 18).

[57] *Id.* at 23 (citing *Virginia Elec. and Power Co.*, 125 FERC ¶ 61,391 (2008), *order denying reh'g*, 128 FERC ¶ 61,026, at P 43 (2009) (*VEPCO*) ("Carrying charges reflect the time value of money, i.e., the interest on the deferred costs from the time of incurrence until the time at which those funds are recovered."); *Williams Natural Gas Co.*, 53 FERC ¶ 61,178, 61,641 (1990) ("It is Commission policy to allow recovery of carrying charges as of the date of payment of the costs.")).

[58] *Id.* at 23 (citing *VEPCO*, 128 FERC ¶ 61,026 at P 43).

[59] *Id.* at 23 (citing *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999).

Surcharge. They argue that the Suspension and Rehearing Orders addressed only the collection of the hurricane repair costs and not the question of carrying charges on those costs. ExxonMobil and Hess and Apache and Chevron point out that, in the Suspension Order, the Commission stated that the eligibility of carrying costs under the Hurricane Surcharge was an issued to be decided in this proceeding.[60] ExxonMobil and Hess also point out that the Joint Statement of Issues, which was filed after the Rehearing Order on behalf of all parties, including Sea Robin, listed as an issue "[f]rom what date should carrying costs be included."

58. Trial Staff, ExxonMobil and Hess, and Apache and Chevron also disagree with Sea Robin's assertion that Commission precedent supports Sea Robin's carrying cost proposal. Apache and Chevron contend that the Commission has stated that carrying costs should not accrue prior to the effective date of tariff sheets[61] and therefore, the ALJ's decision is consistent with Commission precedent, including *VEPCO* and *Williams.* They contend that the carrying costs that were included in *VEPCO* and *Williams* were part of mechanisms that were already in effect and had been in effect when the carrying costs accrued. Unlike in *VEPCO*, ExxonMobil and Hess argue, the Commission has no policy supporting the accrual of carrying costs on such capital costs. Rather, they argue, Commission policy supports recovery of return on capital costs filed as part of a general rate case. ExxonMobil and Hess contend that the Commission's policy encouraging Regional Transmission Organization (RTO) membership, and an allowance for carrying charges on costs associated with RTO membership, as illustrated in *VEPCO*, has no relevance to Sea Robin's proposal to recover carrying costs on expenses it seeks to recover through a rate mechanism that did not exist at the time the costs were incurred.

59. ExxonMobil, Hess, Apache and Chevron also challenge Sea Robin's assertion that its shippers had sufficient notice. They assert that, while shippers were on notice that the Sea Robin system had extensive damage and that repairs to the system were underway, shippers were not on notice that Sea Robin would seek to recover all of its Hurricane Ike costs, including capital costs, through a surcharge mechanism.[62] They state that, because

[60] *See, e.g.*, Apache and Chevron Brief Opposing Exceptions at 8 (citing Suspension Order, 128 FERC ¶ 61,286 at P 44) (hearing established to explore "the types of existing and future hurricane-related costs which should be eligible for inclusion in the Hurricane Surcharge tracking mechanism (e.g., … carrying costs)").

[61] Apache and Chevron at 5 (citing *Northwest Pipeline Corp.*, 60 FERC ¶ 61,286 (1992); *Natural Gas Pipeline Co. of America*, 45 FERC ¶ 61,343 (1988)).

[62] *See, e.g.*, ExxonMobil Brief Opposing Exceptions at 22-23 (citing Tr. 86:11-87:4).

shippers were not on notice of the surcharge mechanism, they could not have reasonably expected carrying costs to accrue before the filing became effective.

60. Trial Staff also argues that Sea Robin's assertion that its carrying charge proposal was designed to reflect the time at which the funds were committed by Sea Robin and when shippers benefitted from the availability of system capacity is not supported by the record.[63] Trial Staff states that the evidence does not demonstrate a close correlation between the time repair expenditures were made and the receipt of benefits by shippers. Trial Staff also notes the testimony of Sea Robin's witness Mohn which, they claim, suggests that many repairs were initially inadequate and had to be redone and that many major repairs remained to be completed in 2010.[64] Apache and Chevron also state that the varying levels of costs associated with differing in-service dates will not facilitate rate certainty because the total level of costs to be recovered under the Hurricane Surcharge mechanism for repair costs related to Hurricane Ike is still unknown.

C. <u>Commission Determination</u>

61. The Commission finds that carrying charges at the Commission-published interest rate should begin to accrue the later of August 1, 2009, the date Sea Robin filed to establish the Hurricane Surcharge, or the date the associated cost is incurred, which ever is later. The Commission finds that allowing carrying charges to accrue beginning on the date of the initial filing will avoid imposing on a pipeline's customers any costs resulting from the pipeline's delay in making its filing to recover hurricane-related costs and encourages a pipeline to file to recover hurricane-related costs promptly. Further, because our goal is to ensure timely filing, we believe that it is reasonable to allow carrying charges to accrue as of the date a pipeline files to recover such costs, as opposed to the effective date of the filing.

62. We agree with Trial Staff, ExxonMobil, Hess, Apache and Chevron that the Suspension Order and Rehearing Order did not provide the permission required by section 154.403(d)(4) to collect carrying charges associated with the period prior to the filing or effective date of the Hurricane Surcharge. The Suspension and Rehearing Orders addressed only the collection of hurricane-related repair costs generally and not the carrying charges on those costs. As shippers pointed out, the Commission stated in the Suspension Order that the eligibility of carrying costs for inclusion in the Hurricane Surcharge was an issue to be examined at the hearing in this proceeding.[65] As was also

[63] Trial Staff Brief Opposing Exceptions at 20.

[64] *Id.* at 21.

[65] *See, e.g.*, Apache and Chevron Brief Opposing Exceptions at 8 (citing Suspension Order, 128 FERC ¶ 61,286 at P 44) (hearing established to explore "the types

(continued…)

pointed out, the Joint Statement of Issues, which was filed after the Rehearing Order on behalf of all parties, listed as an issue "[f]rom what date should carrying costs be included."[66] Accordingly, we find that the date carrying charges should begin to accrue was an issue appropriately before the ALJ and now the Commission.

63. The Commission also finds that carrying charges should begin to accrue no earlier than the date on which Sea Robin filed to recover such costs or the date it incurred the associated cost, whichever is later. As the ALJ pointed out, one can envision a scenario where a natural gas company that sustains damage to its pipeline system could make repairs to its system and let carrying costs accrue before seeking to file an action to recoup those losses in a hurricane surcharge or similar mechanism. As stated above, limiting carrying charges to the filing date will help encourage pipelines to file to recover hurricane-related costs promptly and thereby minimize the accrual of carrying charges.

64. These policy objectives are consistent with those articulated by the Commission with respect to pipeline filings made pursuant to Order No. 528.[67] Order No. 528 concerned pipeline recovery of take-or-pay settlement costs, including carrying charges on those costs. That order stated that it is Commission policy to disallow pipelines to recover any carrying charges accruing prior to the date of the pipeline's filing for recovery of the settlement costs. The Commission reasoned that "denial of such carrying charges is appropriate to avoid imposing on the pipeline's customers any costs resulting from the pipeline's delay in making an Order No. 528 Filing and to encourage pipelines to file to recover take-or-pay settlement costs promptly."[68] The Commission also stated

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of existing and future hurricane-related costs which should be eligible for inclusion in the Hurricane Surcharge tracking mechanism (e.g., … carrying costs)").

[66] *Sea Robin Pipeline Co., LLC,* Docket No. RP09-995-000 and RP10-422-000, at 4 (July 16, 2010) (Joint Statement of Issues).

[67] *Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs*, Order No. 528, 53 FERC ¶ 61,163 (1990), *order on reh'g*, 54 FERC ¶ 61,095, *reh'g denied*, 55 FERC ¶ 61,372 (1991).

[68] *Transwestern Pipeline Co.*, 60 FERC ¶ 61,062, at 61,214-15 (1992). The Commission's policy regarding carrying charges on take-or-pay settlements under Order No. 528 differed in one respect from the Commission's policy on such settlements under Order No. 500, which denied recovery of carrying charges prior to the effective date of the pipeline's filing. Under Order No. 500, the Commission routinely granted waivers of the 30-day notice requirement to allow a pipeline filing to become effective on the first day of the month following the month the filing was made. The waivers had the effect of reducing the carrying costs a pipeline had to absorb by allowing the pipeline to begin recovering carrying costs less than 30 days after the filing. However, in Order No. 528,

(continued…)

that "it is only necessary to deny carrying charges accruing before a pipeline files to recover its take-or-pay costs" as "[c]arrying charges accruing thereafter do not arise as a result of any delay in the pipeline's filing to recover its costs."[69] Here, similarly, the Commission wants to ensure timely filing of an action to recoup hurricane-related losses in a hurricane surcharge or similar mechanism and therefore, is limiting the recovery of carrying charges to the filing date of such action. Therefore, we find that carrying charges on the hurricane related costs included in Sea Robin's August 31, 2009 Filing to establish its Hurricane Surcharge may start accruing on August 31, 2009.

65. The cases cited by Sea Robin in seeking carrying charges for the period before its filing are unpersuasive. In *VEPCO*, the Commission permitted the recovery of carrying costs on a regulatory asset designed to recover VEPCO's RTO formation costs because of a long-standing Commission policy permitting recovery of RTO formation costs and requiring deferral of recovery until after membership in the RTO is established. In this case, there is no such long-standing Commission policy. The Commission set all cost and surcharge design issues, including carrying charges, for hearing. Similarly, *Williams* involved carrying costs on settlement payments that Williams had made to resolve pricing disputes concerning gas it had purchased from producers. In that case, the pipeline originally proposed to recover those costs as take-or-pay settlement costs pursuant to the Commission's Order No. 500[70] policy requiring that it agree to absorb a portion of the costs. However, after the Commission clarified that the pipeline could recover costs of settling pricing disputes concerning gas actually taken as purchased gas costs, the pipeline sought to recover the settlement costs under a quarterly purchased gas adjustment (PGA) Filing. Williams' approved PGA tariff mechanism, which was in effect at the time the costs were incurred, permitted recovery of carrying costs from the date the costs were incurred. By contrast, Sea Robin's Hurricane Surcharge was not in effect when it made the payments for which it seeks to recover carrying charges.[71] *Anadarko* is also unpersuasive. We don't disagree that compensation deferred is compensation reduced by the time value of money, as the D.C. Circuit notes. Rather, we find that it is reasonable to require pipelines to file an action to recoup hurricane-related

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the Commission put pipelines on notice that it did not intend to waive the 30-day notice requirement. Thus, the Commission believed it was appropriate to allow recovery of carrying charges as of the filing date. *See also Northwest*, 60 FERC at 61,973 & n.42.

[69] *Transwestern*, 60 FERC at 61,214.

[70] *Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 500, 52 Fed. Reg. 30,344 (1987).

[71] *See, e.g., Northwest*, 60 FERC ¶ 61,286; *Natural*, 45 FERC ¶ 61,343.

losses, including carrying charges, before carrying charges can accrue in an effort to ensure timely filing.

V. Applicability of the Hurricane Surcharge to Discount and Negotiated Rate Agreements

66. Under Sea Robin's proposal and throughout the hearing, Sea Robin contended that under the terms and conditions of the applicable transportation service agreements and discount documents, the Rate Schedules, and the GT&C, it has the authority to invoice and collect the Hurricane Surcharge under its firm and interruptible contracts, including under its discounted and negotiated rate agreements.[72] Apache, Arena, ExxonMobil and Hess, on the other hand, argued that the terms of certain of their discount agreements prohibit the imposition of the Hurricane Surcharge.

A. Initial Decision

67. In the ID, the ALJ found that whether the discount agreements prohibit or permit the imposition of the Hurricane Surcharge is a question of contract interpretation. While the ALJ found that it was "at best ambiguous whether the discount agreements prohibit or permit the imposition of the Hurricane Surcharge," she found that, on balance, the shippers' arguments on how to best interpret the discount agreements were stronger than Sea Robin's.[73] However, the ALJ found that if Sea Robin is not allowed to collect the Hurricane Surcharge from its customers, Sea Robin would be required to pay a disproportionate share of the repair costs. This result, the ALJ stated, would not only be unduly discriminatory, but would also set a precedent that would harm the public's interest and therefore, would not be just and reasonable.[74] Therefore, the ALJ held that the discount agreements should be modified to permit Sea Robin to recover the Hurricane Surcharge from all shippers.

68. The ALJ stated that the *Mobile-Sierra* doctrine controls when the Commission can abrogate or modify a contract between two parties that has been validly executed. The ALJ stated that the first step in a *Mobile-Sierra* analysis is to determine whether a contract between two parties is "just and reasonable." There is a presumption, the ALJ stated, that a freely negotiated contract, like the discount arrangements at issue in this proceeding are "just and reasonable."[75] This presumption may be overcome, however, if

[72] Sea Robin noted that currently it does not have any negotiated rate agreements.

[73] ID, 133 FERC ¶ 63,009 at P 320.

[74] *Id.* P 320.

[75] *Id.* P 321 (citing *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527 (2008)).

the contract seriously harms the public interest.[76] The ALJ stated that, under *Mobile-Sierra*, "a contract harms the public interest if the rate of return on a contract impairs the financial ability of the company to continue service, excessively burdens other customers, or would be unduly discriminatory."[77] The ALJ found that the discount agreements in this case harms the public interest and thus, can be modified under the *Mobile-Sierra* doctrine.

69. The ALJ found that the need to modify the discount agreements so that they allow for the Hurricane Surcharge was very similar to what the Commission was confronted with in *El Paso Natural Gas Co.*, 132 FERC ¶ 61,155 (2010).[78] The ALJ found that, if Sea Robin was not allowed to collect a Hurricane Surcharge from shippers with discount agreements, it would be responsible for up to 86 percent of the repair costs.[79] The ALJ

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[76] *Id.* P 321 (citing *Morgan Stanley*, 554 U.S. at 612).

[77] *Id.* P 322 (citing *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-55 (1956) (*Sierra*)).

[78] Although the ALJ described this case as being a recent example of Commission action, the portion of the order that the ALJ relies on in the ID is actually a discussion of an earlier 2002 Commission order in which it invoked the *Mobile-Sierra* doctrine to modify full requirement (FR) contracts shippers had with El Paso by directing that they be converted to contract demand (CD) contracts. *See El Paso Natural Gas Co.* 99 FERC ¶ 61,244 (2002); 100 FERC ¶ 61,285 (2002), *reh'g*, 104 FERC ¶ 61,045 (2003), *reh'g*, 106 FERC ¶ 61,233 (2004), *aff'd*, *Arizona Corporation Comm. v. FERC*, 397 F.3d 952, 365 U.S. App. D.C. 1 (D.C. Cir. 2005) (collectively, *El Paso*).

[79] Using Sea Robin's FERC Form No. 2 (Annual Report of Major Natural Gas Companies) (Sea Robin Form 2), the ALJ estimated the amount of transportation transactions that are discounted by the company. ID, 133 FERC ¶ 63,009 at P 319 & n.53. The ALJ stated that for calendar year 2009, the Sea Robin Form 2 states that it delivered 132,577,925 Dth of Natural Gas for others. *Id.* (citing Sea Robin Form 2 at 305, line 3, column (j); 520, line 19, column (c)). The ALJ stated that Sea Robin's Form 2 also states that that 113,755,692 Dth were transacted under discounted arrangements. *Id.* (citing Sea Robin Form 2 at 313, line 2, column (c)). The ALJ stated that a simple arithmetical calculation shows that approximately 85.8 percent of Sea Robin's services are offered at a discount to its maximum tariff rates. The ALJ also stated that Witnesses Langston and Sosnick also discussed the fact that a significant portion of Sea Robin's transportation services were subject to discount agreement. *Id.* (citing Exhibit No. SR-1 at 17:6-7 ("The majority of the agreements for transportation on Sea Robin provide for interruptible service under Rate Schedule ITS, and are also discounted."); Exhibit No. S-1 at 18:7-11).

believed that such an outcome would not only be unduly discriminatory towards Sea Robin, but would also set a precedent that would harm the public's interest on the whole.

70. The ALJ stated that, while it was likely that Sea Robin could afford this cost without shutting down its system, and was in fact able to continue its operations and return its system to full operational capacity in a relatively short amount of time following Hurricane Ike, this would not necessarily be the case every time a pipeline is forced to make emergency repairs following natural disasters. The ALJ stated that, if pipelines elect to reduce service or shut down entirely because they can not fully recover the costs necessary to return its system to operability, the nation's natural gas transportation system would be negatively affected.[80]

71. The ALJ also believed that if companies involved in building pipelines knew that they could not fully recover their costs through a Hurricane Surcharge, it could dissuade them from improving or expanding their pipeline infrastructure. She also believed that pipelines would be wary of entering into discount agreements, which would negatively affect the natural gas industry as a whole, including the current financing structure for constructing and using natural gas offshore pipelines.[81]

72. The only remedy for this situation, the ALJ found, was to make shippers with discount agreements pay the Hurricane Surcharge. The ALJ stated that this ensured that Sea Robin would not be excessively burdened by the damage caused by Hurricane Ike, and would promote a more reliable regulatory regime to protect the natural gas industry against sudden and catastrophic damage caused by hurricanes.[82]

B. *Mobile-Sierra* Analysis

1. Briefs on Exceptions and Briefs Opposing Exceptions

73. Each of the parties filing Briefs on Exceptions believed that the ALJ erred in finding, through a *Mobile-Sierra* analysis, that the Commission should modify Sea Robin's discount agreements. Sea Robin believes that it was unnecessary for the ALJ to engage in a *Mobile-Sierra* analysis because it believes that all of the discount agreements provide for collection of the Hurricane Surcharge. ExxonMobil, Hess, Arena and Apache, on the other hand, believe that their discount agreements do not provide for the collection of the Hurricane Surcharge and that the ALJ misapplied the *Mobile-Sierra* doctrine.

[80] ID, 133 FERC ¶ 63,009 at P 329.

[81] *Id.* P 330-331.

[82] *Id.* P 333.

74. Sea Robin states that instead of engaging in a reasoned, supported analysis of the service agreements at issue, the ALJ unnecessarily attempted to navigate the intricacies of *Mobile-Sierra* precedent. Sea Robin argues that the clear and unambiguous language of the service agreements at issue require all Sea Robin shippers to pay the Hurricane Surcharge obviating the need to examine public policy as part of a Mobile-Sierra analysis and modify the service agreements.[83]

75. Arena and Apache contend that the ID relies on generalized statements of policy, improper facts and speculative events, to bolster a finding of harm to the public interest. Apache contends that the Commission's *Mobile-Sierra* analysis "is not based on generalized statements of policy goals, but is based on a detailed analysis" of the contract's "harm to the public interest" and how modification of the contract will "further the public interest."[84] Apache contends that the ALJ violates this precedent by speculating over what might happen on any pipeline (not just Sea Robin) if the discounted rate contracts at issue are left unmodified and relying on "generalized statements of policy goals" to establish potential harm to the public interest. Apache also contends that the analysis in the ID fails to consider the potential harm to the public interest if discounted rate contracts are permitted to be modified to relieve a pipeline of an improvident bargain.

76. Similarly, ExxonMobil and Hess state that the ID has not shown that modification of the discount agreements is justified under the *Mobile-Sierra* standard that "if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under section 5 authorize the natural gas company to file a schedule increasing the rate."[85] ExxonMobil and Hess state that the ID acknowledges that there has been no showing that the discounted rates provided for in Sea Robin's contracts, without the addition of the Hurricane Surcharge, are "so low as to conflict with the public interest." They also state the ID's concern regarding other pipelines is not relevant to Sea Robin's recovery of hurricane costs through the surcharge mechanism.

77. ExxonMobil and Hess also contend that the Mobile-Sierra "public interest" standard should not apply to a limited section 4 filing. ExxonMobil and Hess state that Sea Robin chose voluntarily not to file a general section 4 rate case in which its cost of service could be examined comprehensively. Consequently, they contend, Sea Robin has

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[83] Sea Robin Brief on Exceptions at 38.

[84] Apache Brief on Exceptions at 13 (citing *El Paso*, 99 FERC ¶ 61,244, at 62,005-06).

[85] ExxonMobil and Hess Brief on Exceptions at 18 (citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp. et al.,* 350 U.S. 332, 345 (1956) (Mobile)).

not provided the information necessary to demonstrate that incurrence of Hurricane Ike repair costs will threaten its viability. Therefore, they contend, the record provides no basis for the ID's finding that Sea Robin's inability to recover the Hurricane Surcharge under discounted agreements that preclude the surcharge would result in rates "so low as to conflict with the public interest."

78. ExxonMobil, Hess, and Apache also contend that the ALJ's statement that Sea Robin would be responsible for up to 86 percent of the repair costs if it could not collect a Hurricane Surcharge from shippers with discount agreements is not supported by the record. They contend that this statement misstates the total throughput of the discounted rate agreements at issue in this proceeding. Apache states that using Sea Robin's most recent Hurricane Surcharge throughput data, set forth in its Hurricane Surcharge Filing at Docket No. RP10-1133-000, it is apparent that the discounted rate contracts that are at issue in this proceeding account for only 29 percent of the total throughput of the system (when computed on an annualized basis), rather than 86 percent the ID's analysis is premised upon. ExxonMobil and Hess state that the throughput attributable to the contracts at issue ranges between 21.44 percent and 27.06 percent of the total throughput.[86]

2. Commission Determination

79. As discussed below, the Commission finds that Sea Robin is permitted to charge the Hurricane Surcharge under the terms of each of the discount agreements at issue. Because we find that all of the discount agreements at issue permit collection of the Hurricane Surcharge, the issue of whether *Mobile-Sierra* requires modification of the discount agreements to permit collection of the Hurricane Surcharge is moot. Therefore, the Commission need not address the ID's *Mobile-Sierra* analysis.

C. Discount Agreements

80. As stated above, the ALJ believed that "on balance, the shippers' argument on how to best interpret the discount agreements are stronger than Sea Robin's."[87] We disagree. For the reasons discussed below, we find that Sea Robin is permitted to collect the Hurricane Surcharge under the discount agreements at issue.

81. Sea Robin makes two general arguments. First, it points out that, in its section 4 filing proposing the Hurricane Surcharge mechanism, it proposed tariff language providing that the Hurricane Surcharge would not be subject to discounting and included the surcharge in its minimum rate. It argues that this prohibition overrides anything to

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[86] ExxonMobil and Hess Brief on Exceptions at 16 (citing Exh. No. SR-34).

[87] ID, 133 FERC ¶ 63,009 at P 320.

the contrary in a discount agreement because of the *Memphis* clause contained in each such agreement. Second, it argues that, in any event, the language of each discount agreement permits the Hurricane Surcharge. We reject the first argument, but agree with the second argument.

1. **Tariff Arguments**

82. In its initial Hurricane Surcharge proposal, Sea Robin proposed to make the Hurricane Surcharge not discountable. Specifically, GT&C section 15.5 states that the "Hurricane Surcharge shall not be subject to discount" and GT&C section 24.7(b) states that "[a]ny rate discount agreed to by Sea Robin shall not be considered a discount of the Hurricane Surcharge." Rate Schedules FTS, FTS-2 and ITS also provide that, in accordance with section 24 of the GT&C, the Hurricane Surcharge shall be charged.[88]

83. Sea Robin's form of service agreements for Rate Schedules FTS,[89] FTS-2, and ITS specifically incorporate the GT&C and the applicable Rate Schedule. For example, section 2.1 of the form of service agreement for Rate Schedule ITS states, "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. Similarly, section 2.1 of the form of service agreement for Rate Schedule FTS-2, states "It is recognized that the transportation service hereunder is provided on a firm basis pursuant to, in accordance with and subject to the provisions of Sea Robin's Rate Schedule FTS-2, and the General Terms and Conditions thereto, which are contained in Sea Robin's FERC Gas Tariff, as in effect from time to time, and which are hereby incorporated by reference."

84. Sea Robin's form of service agreements for Rate Schedules FTS, FTS-2 and ITS also include a *Memphis* clause, named after *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). For example, section 6.3 of Sea Robin's ITS service agreement provides that:

> Sea Robin shall have the unilateral right to file with any appropriate regulatory authority and make changes effective in (i) the rates and charges applicable to service provided under this Service Agreement, including both the level and

[88] *See* sections 3.5(b), 3.2(b), and 3.3(b) of Rate Schedule FTS, FTS-2 and ITS, respectively.

[89] The discounted rate contracts at issue here are solely for service under Rate Schedules ITS or FTS-2. Therefore, there is no issue in this proceeding as to the applicability of the Hurricane Surcharge to discounted FTS contracts.

> design of such rates and charges; (ii) the terms and conditions applicable to Rate Schedule ITS and (iii) the General Terms and Conditions. Sea Robin agrees that Shipper may protest or contest the aforementioned filings.[90]

Similarly, section 6.2 of Rate Schedule FTS-2 provides, in relevant part, the following:

> Shipper agrees that Sea Robin shall, without any further agreement by Shipper, have the right to change from time to time, all or any part of this Service Agreement, as well as all or any part of Rate Schedule FTS-2, or the General Terms and Conditions thereto, including without limitation, the right to change the rates and charges in effect hereunder and/or the design thereof, pursuant to Section 4(d) of the Natural Gas Act.[91]

85. The service agreements at issue in this proceeding are generally the same as the form of service agreements for Rate Schedules FTS-2 and ITS.

a. <u>Briefs On Exceptions and Briefs Opposing Exceptions</u>

86. Sea Robin contends that the provisions of the discount agreements must be considered in conjunction with the applicable service agreement, rate schedule, and the GT&C, which allow Sea Robin to collect the Hurricane Surcharge from all shippers. Sea Robin contends that the GT&C and Rate Schedules provide that the Hurricane Surcharge shall be charged and shall not be subject to discount. Sea Robin contends that the service agreements at issue specifically incorporate the GT&C and applicable Rate Schedule. Sea Robin contends that under section 6.3 of the ITS service agreements and section 6.2 of the FTS-2 service agreements,[92] which constitutes a *Memphis* clause, it is authorized to file to make a change to the rates, charges, rate schedules, or the GT&C, including adding a Hurricane Surcharge, while providing the shipper the right to protest or contest any such filing. Additionally, Sea Robin contends, section 2.1 of both the ITS and FTS-2 service agreements recognize that in the event of a conflict between the service agreement and the rate schedule, the rate schedule governs. Therefore, for the Rate Schedule ITS and FTS-2 service agreements at issue, regardless of whether service has

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[90] *See* section 6.3 of Rate Schedule ITS.

[91] *See* section 6.2 of Rate Schedule FTS-2.

[92] *See, e.g.*, section 6.3 of Exh. No. SR-16 through Exh. No. SR-26, which represents the Rate Schedule ITS service agreements at issue, and section 6.2 of Exh. No. SR-27, which represents the Rate Schedule FTS-2 service agreement at issue.

been discounted, Sea Robin contends that the shipper is required to pay for transportation service according to the GT&C and Rate Schedules, including the Hurricane Surcharge.

87. Sea Robin also contends that the contract terms at issue in this proceeding are the same contract terms that were at issue in *Arena*.[93] Sea Robin contends that any arguments raised by shippers that the terms of their discount agreements prohibit Sea Robin from collecting the Hurricane Surcharge are in direct conflict with the Commission's ruling in *Arena* as it pertains to "generally accepted rules of contract interpretation." Those rules, as Sea Robin interprets them, require that the Commission consider any discount agreement "in the context of (and subordinate to) the overarching terms of the service agreement, the applicable Rate Schedule and the GT&C."[94]

88. In their Briefs Opposing Exceptions, the parties contend that the terms of their discount agreements expressly prohibit the collection of the Hurricane Surcharge. Apache contends that, under Commission precedent, "when a pipeline increases its maximum rates to reflect cost increases, it must continue to abide by any contractual agreements to provide service at fixed, discounted rates."[95] Similarly, Arena states the Commission has consistently recognized the distinction between *pro forma*, general tariff and service agreement provisions and specifically negotiated discount or negotiated rate agreements or exhibits.[96]

89. Apache also contends that Sea Robin's tariff does not allow it to unilaterally modify its agreements. Apache contends that section 7.1 of Sea Robin's *pro forma* service agreement for Rate Schedule ITS specifically states that agreements that are reduced in writing and executed by authorized representatives of the parties can expand the rights and obligations of the signatory parties under the *pro forma* service agreement. Apache states that the Apache Discount Agreement and the GOM Shelf Discount Agreement (defined infra P 128 and 97, respectively) constitute such an additional agreement because they were executed by a representative from Apache. Apache argues further that, the Apache Discount Agreement and the GOM Shelf Discount Agreement reduced in writing the additional rate terms and rate obligations the signatory parties agreed would be applicable to the Apache and GOM Shelf service agreements.

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[93] *Arena Energy, LP*, 133 FERC 61,140, at P 61 (2010).

[94] Sea Robin Brief on Exceptions at 37.

[95] Apache Brief on Exceptions at 11 (citing *Bay Gas Storage, Ltd.*, 131 FERC ¶ 61,034, at P 48 (2010)).

[96] Arena Brief Opposing Exceptions at 15 (citing *Texas Gas Transmission, LLC*, 127 FERC ¶ 61,047, at 61,181 (2007)).

90. In their Briefs Opposing Exceptions, several parties also challenge Sea Robin's reliance on *Arena*. First, they contend that the issue in *Arena*, which was the lawfulness of Sea Robin's termination of Arena's Service Agreement No. 1545, is irrelevant to the contractual authorization for the Hurricane Surcharge, which is at issue here. Second, they contend that in *Arena* the Commission clearly stated that all provisions of a contract must be read as a whole, without giving greater weight to one provision over another.

b. <u>Commission Determination</u>

91. The Commission finds that Sea Robin's proposal to add language to its tariff making the Hurricane Surcharge not discountable is contrary to Commission regulations and therefore, unjust and unreasonable.

92. Section 284.10(c)(5) of the Commission's regulations requires pipelines to file maximum and minimum transportation rates for both firm and interruptible service.[97] Section 284.10(c)(4) of the Commission's regulations requires that the pipeline's minimum rate reflect only variable costs (i.e., costs that vary with the volume of throughput) and the maximum rate reflect both fixed (i.e., costs that remain constant regardless of the volume of throughput and are predominantly associated with capital investment in the pipeline system) and variable costs.[98] For discounting purposes, the pipeline is permitted to charge "an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate."[99]

93. Based on our review, it appears that all of the costs Sea Robin seeks to recover under the Hurricane Surcharge are fixed costs (i.e., costs that remain constant regardless of the volume of throughput), as opposed to variable costs (i.e., costs that vary with the volume of throughput). In its Hurricane Surcharge proposal, however, Sea Robin proposes to increase both its maximum and minimum transmission and gathering rates for Rate Schedules FTS, FTS-2 and ITS by the amount of its proposed Hurricane Surcharge, which at the time of its original proposal was $0.0401 per Dth. So, for example, Sea Robin's proposed tariff records in its original proposal show increases in the overall maximum and minimum volumetric rates for Rate Schedule ITS by the amount of the proposed Hurricane Surcharge. As a result, the maximum volumetric rate for Rate Schedule ITS was increased from $0.2207 per Dth to $0.2608 per Dth and the minimum volumetric rate was increased from $0.0154 per Dth to $0.0555 per Dth.

[97] 18 C.F.R. § 284.10(c)(5)(i) (2011).

[98] 18 C.F.R. § 284.10(c)(4) (2011).

[99] 18 C.F.R. § 284.10(c)(5)(ii) (2011).

94. As pointed out above, this is contrary to Commission regulations. Therefore, Sea Robin must file revised tariff records removing the Hurricane Surcharge from its minimum rates and any language from its tariff records indicating that the Hurricane Surcharge is not discountable. Of course, Sea Robin may elect not to discount the Hurricane Surcharge with respect to future discount and negotiated rate agreements, provided it does so on a non-discriminatory basis. However, to the extent a shipper has contracted for a discounted rate that is within the revised maximum and minimum rates, such shipper would be entitled to continue to pay such rate.[100]

95. In addition, contrary to Sea Robin's assertion, *Arena* is unpersuasive with respect to whether Arena, or any other shipper, is liable for the Hurricane Surcharge under its discounted service agreements. First, as the Commission has stated, and Sea Robin acknowledges, *Arena* concerned whether Arena's interruptible Service Agreement No. 1545 was properly terminated. Further, issues concerning the Hurricane Surcharge were outside the scope of the *Arena* complaint proceeding.[101] Second, in *Arena*, the Commission stated that the relevant service agreement must be interpreted as a whole, giving meaning to all provisions if at all possible.[102] Contrary to Sea Robin's assertion, the Commission never stated or even intimated that a discount document should be interpreted subordinate to the terms of the service agreement, the applicable rate schedule or the GT&C.

96. With Sea Robin's proposal to include the Hurricane Surcharge in its minimum rates rejected, we now turn to the terms of the service agreements at issue, including the discount agreements related thereto, to determine whether such agreements actually provide for a discount of the Hurricane Surcharge.

2. <u>Individual Discount Agreements</u>

a. <u>GOM Shelf Agreements</u>

97. GOM Shelf LLC (GOM Shelf), an Apache affiliate, and Sea Robin entered into Service Agreement Nos. 1815 and 1816 (collectively, GOM Shelf Service Agreements). These agreements are for interruptible service under Rate Schedule ITS and are subject to

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[100] *Bay Gas*, 131 FERC ¶ 61,034 at P 45 ("a *Memphis* clause does not ordinarily authorize a pipeline to unilaterally modify a contractually agreed-upon discounted rate, so long as the discounted rate remains within the pipeline's maximum and minimum rates.").

[101] *See Arena*, 133 FERC ¶ 61,140 at P 47.

[102] *See Id.* P 42.

the discount agreement dated August 5, 2009 (GOM Shelf Discount Agreement) attached to the service agreements.[103]

98. The GOM Shelf Service Agreements are consistent with the form of service agreement for Rate Schedule ITS.[104] Accordingly, section 6.1 of those agreements provides that GOM Shelf shall pay the charges for service specified in Rate Schedule ITS, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[105] Section 2.1 of the GOM Shelf Service Agreements incorporates Sea Robin's Rate Schedule ITS into the service agreement. Section 3.5 of that rate schedule provides that the shipper must pay the maximum rate unless Sea Robin offers to discount its rates:

> Shipper shall pay the maximum rate for service under this Rate Schedule unless Sea Robin, in its reasonable judgment, offers to discount its rate to Shipper under this Rate Schedule…. Any discount agreed to by Sea Robin shall be consistent with the provisions of Section 20 of the General Terms and Conditions.[106]

99. Paragraph 11 of the GOM Shelf Discount Agreement defines the term "Discounted Transportation Rates" to include the hydrocarbons transportation rate set forth in paragraph 6 of the agreement and the gas and liquefiables transportation discounts set forth in paragraph 2 of the agreement. Paragraph 2 of the GOM Shelf Discount Agreement provides as follows:

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[103] Exh. No. APC-3.

[104] While the GOM Shelf Service Agreements do not appear in the record, neither Apache nor Sea Robin dispute that such agreements are consistent with the form of service agreement for Rate Schedule ITS. Moreover, their arguments rely on the GOM Shelf Service Agreements' consistency with Sea Robin's form of service agreement for Rate Schedule ITS. *See, e.g.*, Apache Brief on Exceptions at 10-11; Sea Robin, Brief Opposing Exceptions at 24.

[105] *See* section 6.1 of Rate Schedule ITS Interruptible Transportation Service Form of Service Agreement.

[106] *See* section 3.5 of Rate Schedule ITS. In the event Sea Robin agrees to discount its rates, section 20 establishes the discount terms that may apply without the discount constituting a material deviation from Sea Robin's form of service agreement. For example, only to specified quantities under shipper's service agreement or to production reserves dedicated by the shipper.

> 2. GOM Shelf and Sea Robin agree that the transportation rate for the volumes of gas and liquefiables dedicated by GOM Shelf hereunder for each calendar month during the term of the Agreement under any of GOM Shelf's interruptible and liquefiable transportation agreements shall be equal to the following rates, plus fuel and applicable surcharges.
>
> Primary Discount Period: $0.08 per Dth
> Secondary Discount Period: $0.10 per Dth
> Tertiary Discount Period: $0.11 per Dth[107]

i. **<u>Briefs On Exceptions and Briefs Opposing Exceptions</u>**

100. Apache argues that the GOM Shelf Discount Agreement prohibits Sea Robin from assessing the Hurricane Surcharge. Apache claims that, given that the Hurricane Surcharge was not proposed, or in effect, at the time the GOM Shelf Discount Agreement was executed, it can not be considered an "applicable surcharge" under paragraph 2 of the agreement because the Hurricane Surcharge was not "applicable" at the time paragraph 2 took effect.

101. Moreover, Apache argues, paragraph 12 of the discount agreement provides that any future tariff filings, such as the Hurricane Surcharge, will not control over what is set forth in the agreement. Paragraph 12 provides:

> Sea Robin agrees that, notwithstanding any language in any existing or future tariff to the contrary, the Discounted Transportation Rates set forth in this Agreement shall control over any tariffs currently filed or voluntarily filed by Sea Robin in the future with the Federal Energy Regulatory Commission. In the event that Sea Robin ceases to file a tariff for any reason, Sea Robin agrees that GOM Shelf shall continue to receive the Discounted Transportation Rates of this Agreement as if the tariff or tariffs in existence as of the effective date were still in full force and effect.

102. Thus, Apache argues, the fact that the Hurricane Surcharge was not in effect at the time the GOM Shelf Discount Agreement was executed renders the Hurricane Surcharge inapplicable to the GOM Shelf Agreement, pursuant to paragraph 12.

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[107] Exh. No. APC-3.

103. Sea Robin contends that the Hurricane Surcharge is a surcharge applicable to the service to be received by GOM Shelf and as such, it may be collected by Sea Robin. Sea Robin states that the phrase "applicable surcharges" is not frozen as of the moment the GOM Shelf Discount Agreement was signed, but instead refers to the effective surcharges contained within Sea Robin's tariff.

ii. <u>Commission Determination</u>

104. The Commission finds that GOM Shelf is responsible for the Hurricane Surcharge under the GOM Shelf Service Agreements.

105. The GOM Shelf Service Agreements, as well as the other agreements at issue here, must be interpreted as a whole, giving meaning to all provisions if at all possible. Section 6.1 of the GOM Shelf Service Agreements provides that GOM Shelf shall pay the charges for service specified in Rate Schedule ITS, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged the shipper for services provided under the agreement.[108] Similarly, Rate Schedule ITS, which is incorporated by reference in section 2.1 of the GOM Shelf Service Agreements, provides that GOM Shelf must pay the maximum rate for Rate Schedule ITS service, unless Sea Robin offers to discount its rates:

> Shipper shall pay the maximum rate for service under this Rate Schedule unless Sea Robin, in its reasonable judgment, offers to discount its rate to Shipper under this Rate Schedule…. Any discount agreed to by Sea Robin shall be consistent with the provisions of Section 20 of the General Terms and Conditions.[109]

Further, section 6.3 of the GOM Shelf Service Agreements, which constitutes a *Memphis* clause, makes clear that Sea Robin may file to change the rates and charges applicable to service under the agreement.

106. This language establishes a presumption that a shipper must pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agrees to discount such rates. Therefore, we must look to the specific terms of the GOM Shelf Discount Agreement to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, we must defer to the Sea Robin's

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[108] *See* section 6.1 of Rate Schedule ITS Interruptible Transportation Service Form of Service Agreement.

[109] *See* section 3.5 of Rate Schedule ITS.

generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for the applicable Rate Schedule.

107. Based on our review of the agreement, we interpret "applicable surcharges" to mean those surcharges in effect and applicable to service under Rate Schedule ITS, as they may change from time to time during the term of the GOM Shelf Service Agreements. Contrary to Apache's assertion, there is nothing in the GOM Shelf Discount Agreement indicating that "applicable surcharges" were limited to only those surcharges that were applicable on the date of the agreement's execution. While the Hurricane Surcharge didn't exist at the time of the GOM Shelf Discount Agreement, the *Memphis* Clause in section 6.3 of the GOM Shelf Service Agreements made clear that new charges could be added. Moreover, as the courts have indicated, the Commission has every right to expect contracting parties to express clearly their intentions and not require the Commission to read into their agreements what is not spelled out there.[110] If it were the intent of the parties to limit the "applicable surcharges" to those in effect on the date the GOM Shelf Discount Agreement was executed, they could have added language expressing such intent. But, they did not.

108. In addition, paragraph 12 is only applicable in the event of a conflict between the Discounted Transportation Rate and Sea Robin's tariff, which we find does not exist. Paragraph 2 of the GOM Shelf Discount Agreement provides that GOM Shelf shall pay all applicable surcharges. Similarly, Sea Robin's tariff provides that absent a discount agreement stating otherwise, GOM Shelf is liable for the maximum just and reasonable rates approved by the Commission. The Commission has approved the Hurricane Surcharge in Sea Robin's tariff as just and reasonable and thus, it is an "applicable surcharge" under the GOM Shelf Discount Agreement. Accordingly, GOM Shelf is required to pay the Hurricane Surcharge under the GOM Shelf Service Agreements.

[110] *See Florida Power & Light Co.*, 67 FERC ¶ 61,141, at 61,396 (1994) (citing *Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347-48 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963); *accord*, *Boston Edison Co. v. FERC,* 856 F.2d 361, 367 (1st Cir. 1988); *Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1190 (D.C. Cir. 1985); *Mitchell Energy Corp. v. FPC*, 519 F.2d 36, 40-41 (5th Cir. 1975); *City of Chicago v. FPC*, 385 F.2d 629, 640 (D.C. Cir. 1967); *see also Ohio Power Co. v. FERC,* 744 F.2d 162, 167 n.5 (D.C. Cir. 1984) (major public utility experienced in making rate filings can properly be held to the letter of the language it drafted, i.e., is fairly chargeable with ability to state what it means); *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914, 929 (D.C. Cir. 1979) (major public utility is fairly chargeable with ability to state what it means)).

b. <u>Hess Service Agreement No. 1643</u>

109. Hess and Sea Robin are parties to Service Agreement No. 1643.[111] Service Agreement No. 1643 is a firm transportation agreement under Rate Schedule FTS-2.[112] The discount information for Service Agreement No. 1643 is specified in Exhibit C to the agreement, which is dated March 29, 2007.[113]

110. Consistent with the form of service agreement for Rate Schedule FTS-2 service, Section 6.1 of Hess' Service Agreement No. 1643 provides that Hess shall pay the charges for service specified in Rate Schedule FTS-2, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[114] Similarly, section 2.1 of Service Agreement No. 1643 incorporates Rate Schedule FTS-2 into the service agreement, and section 3.3 of Rate Schedule FTS-2 requires the shipper to pay the maximum FTS-2 rate unless Sea Robin offers to discount that rate.[115] Further, the *Memphis* clause in section 6.2 of Sea Robin's form of service agreement for Rate Schedule FTS-2 makes clear that Sea Robin may file to change the rates and charges applicable to service under the agreement.

111. Exhibit C to Service Agreement No. 1643 provides that Sea Robin shall:

> discount its firm transportation rate at the following charges as Applicable pursuant to the terms of Sea Robin's Rate Schedule FTS-2, during the corresponding periods set forth below for all gas produced by Hess Corporation and delivered to Sea Robin at the Sea Robin/Garden Banks Interconnect. In addition, Sea Robin shall charge those applicable surcharges and fuel set forth in its tariff.[116]

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[111] *See* Exh. No. SR-27.

[112] Service Agreement No. 1643 is Exhibit No. SR-27.

[113] *See* Exh. No. HC-2.

[114] *See* section 6.1 of Rate Schedule FTS-2 Firm Transportation Service Form of Service Agreement.

[115] *See* section 3.3 of Rate Schedule FTS-2.

[116] *See* Exh. No. HC-2.

i. Briefs On Exceptions and Briefs Opposing Exceptions

112. Hess contends that this Service Agreement No. 1643 does not provide for imposition of the Hurricane Surcharge. Hess contends that the Hurricane Surcharge is different from the "applicable surcharges" contemplated under Exhibit C to Service Agreement No. 1643. Hess contends that it and Sea Robin would have understood at the time they entered into this contract that "applicable surcharges" were surcharges the Commission required the pipeline to impose, such as the Annual Charge Adjustment (ACA). Hess argues that, given that the Hurricane Surcharge is not being required by the Commission, it is not an "applicable surcharge" under Service Agreement No. 1643.

113. Sea Robin states that there is no language in Exhibit C limiting "applicable surcharges" to only Commission-imposed surcharges. Therefore, Exhibit C does not support Hess's claim that "applicable surcharges" means Commission-imposed surcharges." Rather, Sea Robin states that the discount language in Exhibit C specifically cites the tariff, not the Commission's requirements, as the source of such charges.

ii. Commission Determination

114. As discussed below, the Commission finds that Hess Service Agreement No. 1643 provides for collection of the Hurricane Surcharge.

115. Like the GOM Shelf Service Agreements, Hess' Service Agreement No. 1643 requires Hess to pay the maximum just and reasonable FTS-2 rates, as they may change from time to time, unless Sea Robin offers to discount those rates.[117] Specifically, section 6.1 of Service Agreement No. 1643 provides that Hess shall pay the charges for service specified in Rate Schedule FTS-2, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[118] Similarly, section 3.3 of Rate Schedule FTS-2, which is incorporated into Hess's Service Agreement No. 1643 by section 2.1 of that agreement, provides that shippers must pay the maximum rate absent a discount.[119] Further, the *Memphis* clause in section 6.2 of Sea Robin's form of service agreement for Rate Schedule FTS-2 makes clear that Sea Robin may file to change the rates and charges applicable to service under the agreement.

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[117] *See* sections 6.1 and 6.2 of Rate Schedule FTS-2 Firm Transportation Service Form of Service Agreement.

[118] *See* section 6.1 of Rate Schedule FTS-2 Firm Transportation Service Form of Service Agreement.

[119] *See* section 3.3 of Rate Schedule FTS-2.

116. As stated above, this language establishes a presumption that a shipper will pay Sea Robin's just and reasonable maximum rates, as approved by the Commission from time to time, unless Sea Robin has expressly agreed to discount such rates. Therefore, we must look to Exhibit C to Service Agreement No. 1643 (the discount document) to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, we must defer to the Sea Robin's generally applicable tariff and what the rates and charges the Commission has found to be just and reasonable for the applicable Rate Schedule.

117. As with the GOM Shelf Discount Agreement, we interpret "applicable surcharges" to mean those surcharges in effect and applicable to service under Rate Schedule FTS-2, as they may change from time to time during the term of Service Agreement No. 1643. Contrary to Hess' assertion, there is nothing in Exhibit C to Service Agreement No. 1643 indicating that "applicable surcharges" were limited to only those surcharges which the Commission requires pipelines to impose. The *Memphis* clause in section 6.2 of Service Agreement No. 1643 made clear that new charges could be added. If it were the parties' intent to limit the applicable surcharges to those mandated by the Commission, they could have added language expressing such intent. But, they did not. Accordingly, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from FTS-2 shippers.

c. <u>Arena Agreements</u>

118. Arena and Sea Robin entered into Service Agreement Nos. 1544 and 1545. These agreements are for interruptible service under Rate Schedule ITS. Exhibit C of both service agreements contains identical discount language.[120] As with the GOM Shelf Service Agreements discussed above, section 6.1 of these agreements require Arena to pay the maximum Rate Schedule ITS rates, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[121] Section 2.1 of these agreements also incorporates Sea Robin's Rate Schedule ITS and its requirement that the shipper must pay the maximum rate unless Sea Robin offers to discount its rates.[122]

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[120] *See* Exh. Nos. AE-5 and AE-6.

[121] *See* section 6.1 of Rate Schedule ITS Interruptible Transportation Service Form of Service Agreement.

[122] *See* section 3.5 of Rate Schedule ITS. In the event Sea Robin agrees to discount its rates, section 20 establishes the discount terms that may apply without the discount constituting a material deviation from Sea Robin's form of service agreement. For example, only to specified quantities under shipper's service agreement or to production reserves dedicated by the shipper.

119. Exhibit C of Service Agreement Nos. 1544 and 1545 provides as follows:

> Discounted Transportation Rate: $0.02 per Dt (Dekatherm) plus ACA and fuel.
>
> The Discount Rate applies to production from the Vermilion 71, Vermilion 72, Vermilion 52 and South Marsh Island 233 leases received by Sea Robin via the sales meter 94120.
>
> Discounted Rate Effective From September 1, 2006 to August 31, 2011.[123]

i. Briefs On Exceptions and Briefs Opposing Exceptions

120. Arena excepts to the ID's failure to find that Sea Robin is prohibited from assessing the Hurricane Surcharge on Arena's two discounted Rate Schedule ITS agreements. Arena states that Exhibit C of both Service Agreement Nos. 1544 and 1545 contain identical discounted rate language limiting the rate Arena pays under Service Agreement Nos. 1544 and 1545 to $0.02 per Dth, plus ACA and fuel. Arena states that there is no reference to "other surcharges," "Hurricane Surcharges," or any other rate or surcharge component.

121. In its Brief Opposing Exceptions, Sea Robin states that Service Agreement No. 1545 was terminated pursuant to section 2.7(a) of Rate Schedule ITS. Sea Robin states that, as a result of a complaint filed by Arena, the Commission found in *Arena* that Sea Robin's termination of Service Agreement No. 1545 was proper.[124] Sea Robin states that the fact that the agreement was in effect at the time the Hurricane Surcharge was proposed is of no consequence, since the Hurricane Surcharge is volumetric and no volumes shipped under the agreement. Thus, no Hurricane Surcharge has been or will assessed under this agreement.

122. In support of its contention that Service Agreement No. 1544 permits collection of the Hurricane Surcharge, Sea Robin relies on the tariff arguments discussed above (supra P 86-87).

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[123] *See* Exh. No. AE-5.

[124] Sea Robin Brief Opposing Exceptions at 16 (citing *Arena Energy, LP*, 133 FERC ¶ 61,140, at P 61 (2010)).

ii. Commission Determination

123. The Commission finds that Arena's Service Agreement No. 1544 permits collection of the Hurricane Surcharge. The Commission finds that whether the Hurricane Surcharge is prohibited under Service Agreement No. 1545 is moot.

124. In *Arena*, the Commission found that Sea Robin properly terminated Arena's Service Agreement No. 1545.[125] No party sought rehearing of the Commission's order. Given that the agreement is no longer in effect and, as Sea Robin states, no Hurricane Surcharge has been or will be assessed under that agreement, the Commission finds that whether the Hurricane Surcharge is prohibited under Service Agreement No. 1545 is moot.

125. Unlike Service Agreement No. 1545, Arena's Service Agreement No. 1544 is still in effect, and therefore the issue of whether Sea Robin can collect the Hurricane surcharge under that agreement is not moot. We find that Arena Service Agreement No. 1544 permits collection of the Hurricane Surcharge. Like the GOM Shelf Service Agreements discussed above, Arena Service Agreement No. 1544 is generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of Arena Service Agreement No. 1544, as well as Rate Schedule ITS, which is incorporated by reference in the agreement, establishes a presumption that Arena will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, we must look to the Exhibit C of Service Agreement No. 1544 to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, we must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

126. Nothing in Exhibit C prevents Sea Robin from requiring Arena to pay the just and reasonable Hurricane Surcharge approved by the Commission. The Arena Service Agreement No. 1544 was entered into on September 1, 2006, before Sea Robin filed to add the Hurricane Surcharge to its tariff. At that time, Sea Robin's tariff included only its base rates, plus two surcharges: the ACA and Sea Robin's fuel rate. Exhibit C addressed all three of those rate components, and provided for Arena to pay discounted base rate of $0.02 per Dt, plus the ACA and fuel charges in its tariff. Thus, Exhibit C only contains an agreement by Sea Robin to discount its base ITS rate to $0.02 per Dt.

127. We find that Exhibit C is silent with respect to the applicability of the Hurricane Surcharge. With the exception of the ACA and fuel rates, which were in Sea Robin's tariff at the time the parties entered into Service Agreement No. 1544, Exhibit C makes

[125] *Arena*, 133 FERC ¶ 61,140.

no mention of other or future surcharges, including the Hurricane Surcharge, and whether Arena is liable for such charges. In all likelihood, the parties did not address the applicability of the Hurricane Surcharge in Exhibit C because the Hurricane Surcharge did not exist at the time that Service Agreement No. 1544 was executed. Nevertheless, the *Memphis* Clause in section 6.3 of Arena Service Agreement No. 1544 made clear that new charges could be added. Sea Robin and Arena are sophisticated parties and we would expect that, if it were their intent to limit or preclude Arena's liability for all other and future surcharges they would have included language so stating. As the Commission has stated, "[i]t is a reasonable interpretation device to conclude that what someone has not said, someone has not meant."[126] Accordingly, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

d. <u>Apache Service Agreements</u>

128. Apache and Sea Robin are parties to Service Agreement Nos. 1281, 1284, 1330 (terminated) and 1747 (collectively, Apache Service Agreements).[127] These agreements are for interruptible service under Rate Schedule ITS and subject to the discount agreement dated February 12, 2008 (Apache Discount Agreement).[128]

129. The Apache Service Agreements contain the same provisions requiring the shipper to pay the maximum rate unless Sea Robin agrees to provide a discount, as the GOM Shelf and Hess Rate Schedule ITS service agreements described above. The Apache Discount Agreement provides, in relevant part:

> 1. [T]he rates applicable to all gas owned and/or controlled by Shipper from time to time that flows through the receipt point(s) listed on Exhibit A shall be at those discounted rates as stated on Exhibit A ("Discounted Rate"), with the rate for Gathering and the rate for Transmission to be proportionately allocated as per the applicable maximum tariff rate split between gathering and transmission.
>
> 4. Rates or surcharges included in the Discount Rate(s): Usage Charge.

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[126] *See Florida Power & Light Co.*, 67 FERC ¶ 61,141, at 61,396 (1994) (quoting *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)).

[127] *See* Exh. Nos. SR-21 through SR-24.

[128] *See* Exh. No. APC-2.

> 5. Rates or surcharges excluded from Discounted Rate(s) shall be the responsibility of the Shipper in accordance with Sea Robin's tariff: ACA, Fuel Reimbursement, penalty charges, scheduling charges and cash-out charges.[129]

i. Briefs On Exceptions and Briefs Opposing Exceptions

130. Apache states that, under the contract maxim of *exclusio unius est exclusio alterius*, where certain items are spelled out in a contract an intent to exclude all other items is inferred. Apache states that, under this contract principle, the terms set forth in the Apache Discount Agreement are not meant as mere examples of surcharges. Instead, Apache states, the list sets forth only those additional charges that were meant to be included in the agreement and all other items, including any future surcharges, are excluded from Apache's responsibility.

131. Apache also contends that the testimony of Mr. Gilbert provides first-hand evidentiary support that the purpose of the list of rates or surcharges excluded from the discounted rate in paragraph 5 of the Apache Agreement "was to be specific with regard to surcharges and that is precisely why such surcharges were expressly stated."[130] Apache states that Mr. Gilbert personally negotiated both the Apache Discount Agreement and the GOM Shelf Discount Agreement. Apache states that Sea Robin offered no witness who participated in those negotiations, nor did it cross-examine Mr. Gilbert.

132. In its Brief Opposing Exceptions, Sea Robin contends that, under the Apache Service Agreements, Sea Robin has the right to collect the Hurricane Surcharge. Sea Robin states that paragraph 4 of the Apache Discount Agreement, listing the "Rates or Surcharges included in the Discount Rate," specifically identifies only the usage charge as included in the discounted rate. Sea Robin states that Apache's Discount Agreement defines "Discounted Rates" as those rates set forth in Exhibit A and the only rate set forth in Exhibit A is the usage charge. Therefore, it contends, the usage charge is the only rate that is discounted and no surcharges are discounted. Regarding Apache's contention that, because certain items were spelled out in the Apache Discount Agreement, an intent to exclude all other future items must be inferred, Sea Robin contends that Apache fails to apply this principle to paragraph 4 of the Apache Discount Agreement, which explicitly states that only the usage charge is included in the discounted rate and no other items (including a Hurricane Surcharge) would be subject to discounting.

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[129] Apache Brief on Exceptions at 5 (citing Exh. No. APC-2 at 1).

[130] Apache Brief on Exceptions at 6 (citing Exh. No. APC-1 at 4).

133. Sea Robin states that Apache would have the Commission rewrite paragraph 5 of the Apache Discount Agreement and add the words "are limited to" prior to the listing of rates and surcharges excluded from the discount in order to transform the non-limiting list into an exhaustive list and preclude the collection of the Hurricane Surcharge. Sea Robin states that such words of limitation simply are not present and, if inserted, would render paragraph 4 of the Apache Discount Agreement meaningless because it provides that only the usage charge is included in the discounted rate. Because an agreement must be interpreted to give reasonable meaning to all of its provisions, Sea Robin states, Apache's proposed interpretation must be rejected.[131]

134. Sea Robin also states that the surcharges listed in paragraph 5 were those charges in effect at the time that the Apache Discount Agreement was executed and were only examples. Sea Robin states that, because the list of rates and charges in paragraph 5 included all of the applicable rates and surcharges in effect at the time other than the usage charge, the implication is that all of the rates and charges other than the usage charge will be applicable with respect to paragraph 5.

135. Lastly, Sea Robin argues that Apache's alleged evidentiary support of purported parole evidence, which the ALJ did not hear, is outside the four corners of the contractual documents and is improper. Sea Robin argues that, in the absence of an ambiguity and section 7.1 of the Apache Service Agreements, which requires that any representation or agreement to be reduced to writing and executed by the parties, forays into extrinsic statements are improper.[132]

ii. <u>Commission Determination</u>

136. As discussed below, the Commission finds that the Apache Service Agreements provide for collection of the Hurricane Surcharge.

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[131] Sea Robin Brief Opposing Exceptions at 21 (citing *Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop.*, 86 FERC ¶ 61,174, 61,598 (1999) ("It is well established in contract law that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision meaningless"); *DeNovo Oil & Gas Inc.*, 71 FERC ¶ 61,057, 61,209 (1995) (The rules of contract construction "require that contracts be construed in a manner which gives meaning to each of its provisions"); *Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003)).

[132] Sea Robin Brief Opposing Exceptions at 21 (citing *Arena*, 133 FERC at P 53; *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290, at 62,027 (2006); and *Seattle v. FERC*, 923 F.2d 713, 716 (9th Cir. 1991) ("In the absence of an ambiguity, the Commission determines the meaning of the agreement from the language of that agreement without resort to extrinsic or parole evidence.")).

137. Like the GOM Shelf and Hess Service Agreements discussed above, the Apache Service Agreements are generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of the Apache Service Agreements, as well as section 3.5 of Rate Schedule ITS, which is incorporated into the service agreement by reference, establishes a presumption that Apache will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, we must look to the specific terms of the Apache Discount Agreement to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, we must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

138. Similar to Exhibit C of Arena Service Agreement No. 1544, we find that the Apache Discount Agreement is silent with respect to the applicability of the Hurricane Surcharge. Apache contends that, under the contract interpretation maxim of *exclusio unius est exclusio alterius*, where certain items are spelled out in a contract, an intent to exclude all other items is inferred. Accordingly, Apache contends that the list in paragraph 5 of rates or surcharges excluded from the discounted rates sets forth the specific additional charges that were meant to be Apache's responsibility and all other items, including any future surcharges, are therefore excluded from Apache's responsibility.

139. However, as Sea Robin points out, this interpretation of paragraph 5 would fail to give a reasonable meaning to paragraph 4 of the Apache Discount Agreement. That paragraph lists the "Rates or surcharges included in the Discounted Rate," and identifies only the usage charge as being included in the discounted rate. If the same *exclusio unius est exclusio alterius* contract interpretation maxim relied on by Apache to interpret paragraph 5 were used to interpret paragraph 4, it would follow from the fact paragraph 4 spells out only the usage charge as being included in the discount that all other items not expressly included in the list, including the Hurricane Surcharge, are excluded from the discount and must be Apache's responsibility. In short, consistent use of the contract interpretation maxim relied on by Apache would render paragraphs 4 and 5 in conflict with one another, and Apache provides no reason why, if that contract interpretation maxim is used, it should only be used to interpret paragraph 5, and not paragraph 4. Because Apache's proposed interpretation of the Apache Discount Agreement fails to give a reasonable and consistent meaning to all of its provisions, Apache's proposed interpretation must be rejected.

140. We find that a more reasonable interpretation of the Apache Discount Agreement is that it does not address the question of whether the Hurricane Surcharge is to be discounted. The charges listed in paragraph 5 of the agreement reflect all of the various charges in effect at the time that the Apache Discount Agreement was executed, except for the usage charge, which is the only charge identified in paragraph 4 as being included in the discounted rate. The Apache Discount Agreement was entered into on February 12, 2008, before Sea Robin filed to add the Hurricane Surcharge to its tariff. So, in all

likelihood, the parties did not address the applicability of the Hurricane Surcharge in the discount agreement because the Hurricane Surcharge did not exist at the time that the Apache Discount Agreement was executed.

141. Nevertheless, the *Memphis* Clause in section 6.3 of the Apache Service Agreements made clear that new charges could be added. Furthermore, section 6.1 of the Apache Service Agreements provides that Apache shall pay the charges for service specified in Rate Schedule ITS, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[133] Similarly, Rate Schedule ITS, which is incorporated by reference in section 2.1 of the Apache Service Agreements, provides that Apache must pay the maximum rate for Rate Schedule ITS service, unless Sea Robin offers to discount its rates. Sea Robin and Apache are sophisticated parties and we would expect that, if it were their intent to limit or preclude Apache's liability for all other and future surcharges they would have included language so stating. In the absence of such language, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers and the provisions of Apache's Service Agreements requiring it to pay Sea Robin's maximum rates, unless Sea Robin agrees to discount those rates.

e. <u>ExxonMobil Agreements</u>

142. ExxonMobil has three Rate Schedule ITS transportation service contracts with Sea Robin that it currently uses to transport Gulf of Mexico production (ExxonMobil Service Agreements).[134] ExxonMobil entered into two discount agreements with Sea Robin covering all ExxonMobil's transportation (ExxonMobil Discount Agreements).[135] The ExxonMobil Discount Agreements were entered into on February 1, 2008 and February 15, 2008.

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[133] *See* section 6.1 of Rate Schedule ITS Interruptible Transportation Service Form of Service Agreement.

[134] Specifically, the ExxonMobil Service Agreements include Contract Nos. 1096, 1111 and 1263. *See* Exh. Nos. SR-16, SR-17 and SR-19, respectively.

[135] The ExxonMobil Discount Agreements were entered into on February 1, 2008 and February 15, 2008, respectively. *See* Exh. Nos. EM-2 and EM-3.

143. The ExxonMobil Service Agreements contain the same provisions requiring the shipper to pay the maximum rate unless Sea Robin agrees to provide a discount, as the other Rate Schedule ITS service agreements described above, Paragraphs 4 and 5 of the ExxonMobil Discount Agreements provide as follows:

> 4. The following rates or surcharges are included in the Discounted Rate: Usage Charge.
>
> 5. The following rates or surcharges excluded from the Discount Rate shall be the responsibility of the Shipper in accordance with Sea Robin's tariff: ACA, Fuel Reimbursement, penalty charges, scheduling charges and cash-out charges.[136]

i. <u>Briefs On Exceptions and Briefs Opposing Exceptions</u>

144. ExxonMobil argues that its service agreements with Sea Robin do not authorize collection of the Hurricane Surcharge. Similar to Apache, ExxonMobil claims that paragraph 5 of both discount agreements allows for only five specifically identified and described surcharges. ExxonMobil argues that, in the absence of a specific reference to a Hurricane Surcharge or any other surcharge, paragraph 5 is intended to state all of the charges Sea Robin could impose in addition to the discounted total rate and it does not provide for the Hurricane Surcharge.

145. ExxonMobil also notes the testimony of Witness Seal, who was a manager for ExxonMobil at the time these agreements were entered into. ExxonMobil states that Witness Seal testified that:

> [d]edication of these reserves to Sea Robin was a significant concession by ExxonMobil and was a condition precedent set by Sea Robin during the negotiations. In exchange for the reserve dedication by ExxonMobil, Sea Robin offered long-term rate stability at discounted rates. Now, by seeking to impose the Hurricane Surcharge in addition to the discounted rates it agreed to with ExxonMobil, Sea Robin would be reneging on agreed contract terms.[137]

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[136] Exh. No. EM-2; Exh. No. EM-3.

[137] ExxonMobil and Hess Brief on Exceptions at 22 (citing Exh. No EM-1 at 9:3-8).

ExxonMobil states that it entered into a long-term discount agreement to avoid the uncertainty inherent in the pipeline's ability to file to amend its tariff at any time. Similarly, it states that it agreed to specifically list five surcharges as "excluded" from the discounted rate (i.e., surcharges that could be added to that rate) precisely to ensure against new, future surcharges that would undermine the commercial basis for the agreement.

146. Similar to its interpretation of the Apache Discount Agreements, Sea Robin argues that paragraph 4 of the ExxonMobil Discount Agreements provides that only the usage charge is included in the discounted rate. Sea Robin contends that the rates and surcharges specifically listed in paragraph 5 are illustrative. Sea Robin contends agreements must be interpreted to give meaning to all of their terms and that, due to the fact that ExxonMobil's interpretation of paragraph 5 would render paragraph 4 meaningless, it cannot be correct.

147. Furthermore, Sea Robin argues, resorting to extrinsic evidence of the parties' intent is improper given that the language is clear and unambiguous on its face.

ii. Commission Determination

148. As discussed below, the Commission finds that the ExxonMobil Service Agreements provide for collection of the Hurricane Surcharge.

149. Like several of the agreements discussed above, the ExxonMobil Service Agreements are generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of the ExxonMobil Service Agreements, as well as Rate Schedule ITS, which is incorporated by reference, establishes a presumption that ExxonMobil will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, we must look to the specific terms of the ExxonMobil Discount Agreements to determine if they provides for a discount of the Hurricane Surcharge. Otherwise, we must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

150. Paragraphs 4 and 5 of the ExxonMobil Discount Agreements are generally the same as paragraphs 4 and 5 of the Apache Discount Agreement. The arguments of ExxonMobil and Sea Robin regarding the interpretation of those paragraphs are also generally the same. Accordingly, for the reasons discussed above,[138] we find that the ExxonMobil Discount Agreements are silent with respect to the applicability of the Hurricane Surcharge and thus, we must defer to Sea Robin's generally applicable tariff

[138] *See, e.g.*, discussion supra at P 136-140.

which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

f. Hess Service Agreement No. 1364

151. Hess and Sea Robin were parties to Service Agreement No. 1364,[139] which was an interruptible transportation agreement under Rate Schedule ITS. The discount information for Service Agreement No. 1364 was specified in a Transaction Confirmation subject to the agreement, dated March 12, 2010.

152. The Transaction Confirmation to Service Agreement No. 1364 contains the following table:

Eff Begin Dt	Eff End Dt	From Loc Code	From Loc Name	To Loc Code	TO Loc Name	Single Rt	PathMdO Vol	TierTyp	Comm Rt	ACA	GathComm	Flat Charge	Period
01/01/2010	12/31/2010	RG950	SEAROBIN RETROGRADE RECEIPT	95038	SMI 128S RETROGRADE-GARDEN BANKS PIPELINE	.10	0-999999			9999			D

i. Briefs On Exceptions and Briefs Opposing Exceptions

153. Hess argues that Service Agreement No. 1364 does not allow imposition of the Hurricane Surcharge.[140] First, Hess contends that Sea Robin wrongfully and unlawfully terminated Service Agreement No. 1364 for non-utilization.[141] Hess states that contrary

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[139] *See* Exh. No. SR-26. Hess claims that Service Agreement No. 1364 was wrongfully terminated by Sea Robin.

[140] Hess states that Service Agreement No. 1364 is a necessary part of the firm service Hess receives from Sea Robin under Service Agreement No. 1643. Hess states that when liquids (retrograde) fall out of the gas stream transported under FTS-2 Service Agreement No. 1643, they are (or were) transported as interruptible service under Service Agreement No. 1364.

[141] ExxonMobil and Hess Brief on Exceptions at 26-27 (citing Tr. at 92:4-17, 93:22-94:1; Tr. at 92:10-17).

to Sea Robin's assertions, Hess did receive service under Service Agreement No. 1364 in March and April 2010. Hess states that Exhibit No. SR-34, the exhibit presented by Sea Robin to show throughput by contract, indicates activity under Service Agreement No. 1364 in both of these months, contrary to Sea Robin's assertions. Furthermore, Hess states, Appendix B, p. 8 of Sea Robin's August 31 Filing in Docket No. RP10-1133-000 also contradicts the assertion that Hess did not utilize Contract No. 1364 in the months preceding Sea Robin's unilateral termination on May 31, 2010. Hess states that Sea Robin recorded transportation quantities for Hess in March and April, 2010.[142] Moreover, Hess states, Sea Robin imposed the surcharge in addition to the discounted rate during these months, contrary to its position that it had terminated the agreement. Accordingly, Hess states that the Commission should direct Sea Robin to reinstate Service Agreement No. 1364.

154. Second, Hess states that the transaction confirmation to Service Agreement No. 1364[143] provides for a discounted rate of $0.10 per Dth, but it does not provide for addition of a Hurricane Surcharge or any other future surcharges. Hess states that the Transaction Confirmation provides only for the exclusion of ACA from the discounted rate of $0.10 per Dth. Hess asserts that it sought a fixed discounted transportation rate to avoid the uncertainty of future rate cases.

155. Sea Robin contends that Hess' claim that Sea Robin wrongfully terminated Service Agreement No. 1364 is not the proper subject of a brief on exceptions. Sea Robin states that the proper forum for raising issues of improper termination is in a separate complaint proceeding. Moreover, Sea Robin states, even if Service Agreement No. 1364 were the proper subject of this proceeding, its terms permit the collection of the Hurricane Surcharge. Sea Robin states that the Transaction Confirmation does nothing to change the terms of the Service Agreement which provide for the Hurricane Surcharge.

ii. Commission Determination

156. As discussed below, the Commission finds that the Hess Service Agreement No. 1364 provides for collection of the Hurricane Surcharge.

157. Based on our review of the ID, whether Hess Service Agreement No. 1364 was wrongfully terminated appears to be an issue that the ALJ neither considered nor decided. This issue also does not appear in the Joint Statement of Issues filed by the parties prior to the hearing. Accordingly, we believe the proper forum for raising the issue of improper termination is in a separate complaint proceeding.

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[142] *Id.* at 27 (citing Appendix B, p. 8, line 53 showing that Sea Robin transported 41,944 MMBtu and 28,808 MMBtu in March and April, 2010, respectively).

[143] Exh. No. HC-4.

158. Regarding whether Service Agreement No. 1364, including the Transaction Confirmation thereto, prohibited the collection of the surcharge, we find that it does not. Like the agreements discussed above, Hess Service Agreement No. 1364 is generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of Hess Service Agreement No. 1364, as well as Rate Schedule ITS, which is incorporated by reference, establishes a presumption that Hess will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, we must look to the specific terms of the Transaction Confirmation to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, we must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

159. We find that the Transaction Confirmation to Service Agreement No. 1364, similar to several of the agreements discussed above, is silent with respect to the applicability of Hurricane Surcharge. The Transaction Confirmation makes no mention of other or future surcharges. It is not even clear from the Transaction Confirmation that, as Hess asserts, ACA is excluded from the discounted rate or for that matter, that $0.10 per Dth is a discounted rate. The Transaction Confirmation is terse, to say the least. Based on the limited information in the Transaction Confirmation, we are unable to conclude that the parties' intent was to include the Hurricane Surcharge or otherwise prohibit its application to Hess under this agreement. Sea Robin and Hess are sophisticated parties and we would expect that, if it were their intent to limit or preclude Hess' liability for all other and future surcharges they would have included language so stating. In the absence of such of such language, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

VI. <u>Compliance Filing</u>

160. In the final paragraph of the ID, the ALJ directs Sea Robin to file tariff sheets for Commission review within 30 days, including workpapers detailing the calculations for the Hurricane Surcharge.[144] In its Brief on Exceptions, Sea Robin argues that the ALJ erred in directing Sea Robin to file tariff sheets for Commission review within 30 days without specifying that such filing is to take place within 30 days after the Commission issues its decision. Sea Robin cites several prior initial decisions wherein the Administrative Law Judges have directed pipeline to make compliance filing 30 days after the Commission issues its final order in a proceeding. Sea Robin contends that this approach ensures that the pipeline's filing is consistent with the Commission's directives

[144] ID, 133 FERC ¶ 63,009 at P 341.

in the final order and avoids the need to generate and review hypothetical data that is based solely on an initial decision that is not a final order.

161. The Commission requires that, within 30 days of the date of this order, Sea Robin must file revised tariff sheets and rates, including workpapers, reflecting the Commission's ruling in this order.

The Commission orders:

A. The Initial Decision is affirmed in part and reversed in part as discussed in the body of this order

B. Within 30 days of the date of this order, Sea Robin is directed to file revised tariff sheets and rates, including workpapers, consistent with this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.