

145 FERC ¶ 61,155
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

High Island Offshore System, L.L.C.

Docket No. RP09-487-004

ORDER ON REQUEST FOR REHEARING

(Issued November 21, 2013)

1. On March 19, 2012, ExxonMobil Gas & Power Marketing Company, a division of ExxonMobil Corporation (ExxonMobil), filed a request for rehearing of the Commission's February 16, 2012 order in the above-captioned proceeding, in which the Commission addressed the applicability of a storm event surcharge to certain Rate Schedule FT-2 shippers on High Island Offshore System, L.L.C.'s (HIOS) system.¹ For the reasons discussed below, the Commission denies ExxonMobil's request for rehearing.

I. Background

2. On April 30, 2009, the Commission accepted and suspended revised tariff sheets, which HIOS submitted with a general rate case proceeding pursuant to section 4 of the Natural Gas Act (NGA),² to be effective October 1, 2009, subject to refund, conditions, and the outcome of a hearing.³ On March 15, 2010, HIOS filed an offer of settlement, stating that the settlement agreement resolved all the issues set for hearing in the April 30, 2009 order. The Settlement reserved one issue related to the applicability of a storm event tracker surcharge (Storm Event Surcharge) to certain Rate Schedule FT-2 shippers for later resolution by the Commission.

¹ *High Island Offshore Sys., L.L.C.*, 138 FERC ¶ 61,114 (2012) (Order on Reserved Issue).

² 15 U.S.C. § 717c (2005).

³ *High Island Offshore Sys., L.L.C.*, 127 FERC ¶ 61,097 (2009).

3. Specifically, section 3.1 of the Settlement authorized HIOS to implement a new section 18 in the General Terms and Conditions (GT&C), providing for a new tracker mechanism, the Storm Event Surcharge, by which HIOS could establish a volumetric surcharge applicable to all services for the recovery of costs associated with certain future storm events.⁴ In addition, section 3.2(a) of the Settlement provided that any settling participant would be permitted to contend in its comments on the Settlement that the Storm Event Surcharge “should not apply to certain Rate Schedule FT-2 shippers” (Reserved Issue).⁵

4. On April 23, 2010, the Presiding Law Judge certified the Settlement to the Commission as uncontested.⁶ On March 28, 2011, HIOS filed a motion with the Commission requesting that it approve the uncontested Settlement. On April 29, 2011, the Commission approved the Settlement, as fair and reasonable and in the public interest, subject to modification of the applicable standard of review.⁷ In the April 29, 2011 order, the Commission stated that it was not ruling on the Reserved Issue and that, as requested by HIOS in HIOS’ March 28, 2011 motion, the Commission would defer action on the Reserved Issue to provide the pipeline and its customers all the other benefits of the Settlement.

II. Order on Reserved Issue

5. On February 16, 2012, the Commission issued the Order on Reserved Issue, finding that the Rate Schedule FT-2 shippers’ negotiated rate letter agreements permit HIOS to recover the Storm Event Surcharge from those shippers.⁸ The Commission stated that the FT-2 service agreements must be interpreted as a whole, giving meaning to all provisions if at all possible.⁹ The Commission found that HIOS’ transportation

⁴ Section 18.3 of HIOS’ GT&C provides that HIOS’ collection of eligible costs pursuant to the Storm Event Surcharge is subject to a \$0.02 per Dth cap.

⁵ Settlement section 3.2(b). In section 3.2(b) the settling participants requested that the Commission address the Reserved Issue in its order on the Settlement. Section 3.2(c) of the Settlement provides that settling participants may not withdraw their support or non-opposition from any other aspect of the Settlement in light of any Commission decision on the Reserved Issue.

⁶ *High Island Offshore Sys., L.L.C.*, 131 FERC ¶ 63,007 (2010).

⁷ *High Island Offshore Sys., L.L.C.*, 135 FERC ¶ 61,105, at P 15 (2011).

⁸ Order on Reserved Issue, 138 FERC ¶ 61,114 at P 17.

⁹ *Id.* P 21.

service agreements for Rate Schedule FT-2 with ExxonMobil and BP America Production Company and BP Energy Company (BP) specifically incorporate the GT&C and the applicable Rate Schedule. Specifically, section 4.1 of the transportation agreement for Rate Schedule FT-2 states:

Each month, Shipper shall pay Transporter for the service hereunder, an amount determined in accordance with Transporter's Rate Schedule FT-2 and the applicable provisions of the General Terms and Conditions of Transporter's F.E.R.C. Gas Tariff, Second Revised Volume No. 1, as filed with the F.E.R.C. Such Rate Schedule and General Terms and Conditions are incorporated herein by reference and are made a part thereof. Subject to Exhibit B hereto, for all gas delivered . . . Shipper shall pay the currently effective rates and charges under Rate Schedule FT-2 as the same may be amended or superseded in accordance with applicable provisions of the Natural Gas Act and the rules and regulations of the F.E.R.C. The rates and charges shall be billed and paid for in accordance with the General Terms and Conditions applicable to Rate Schedule FT-2.

The Commission found that the ExxonMobil and BP Rate Schedule FT-2 service agreements require ExxonMobil and BP to pay HIOS' just and reasonable maximum rates as approved by the Commission from time to time, subject only to any contrary provision in the Exhibit B negotiated rate letter agreements.¹⁰ Therefore, the Commission looked to the terms of the ExxonMobil and BP Rate Schedule FT-2 negotiated rate agreements and determined that the agreements require BP and ExxonMobil to pay the Storm Event Surcharge.¹¹

6. Specifically, the Commission found that Paragraph 1 of Exhibit B to each service agreement requires BP and ExxonMobil to pay certain agreed-upon negotiated rates "plus all applicable surcharges and Transporter's fuel and L&U."¹² The Commission interpreted the phrase "applicable surcharges" to mean those surcharges in effect and applicable to service under HIOS' Rate Schedule FT-2, as they may change from time to

¹⁰ *Id.* P 22.

¹¹ *Id.*

¹² *Id.* P 24 (citing the FT-2 Transportation Agreement).

time during the term of the BP and ExxonMobil service agreements.¹³ The Commission found that Exhibit B contained no language indicating that the referenced “applicable surcharges” are limited to only those surcharges that were applicable on the date of the agreement’s execution. Further, the Commission found that section 4.2 of the BP and ExxonMobil service agreements, which provides that “[i]t is agreed that Transporter may seek authorization from time to time from the F.E.R.C. for such rate adjustments as may be found necessary to assure Transporter just and reasonable rates,” constitutes a *Memphis* clause and makes clear that HIOS may file to change the rates and charges applicable to service under the agreement.¹⁴ The Commission stated that, if it were the intent of the parties to limit the “applicable surcharges” to those in effect on the date the BP and ExxonMobil service agreements were executed, they could have added language expressing such intent. But, they did not.

7. In response to ExxonMobil’s protest that it was the parties’ intent in entering into the negotiated rate agreements to establish a fixed rate that could not be increased through the addition of a Storm Event Surcharge, the Commission noted that section 11.1 of the two service agreements provides, “This Agreement, together with Exhibits A and B hereto, comprise the entire and complete form of transportation agreement between the undersigned parties.”¹⁵ Therefore, the Commission found the express terms of the agreements could not be modified based on statements of the parties not reflected in those agreements and reiterated that the BP and ExxonMobil FT-2 service agreements permit HIOS to collect the Storm Event Surcharge.¹⁶

¹³ *Id.*

¹⁴ *Id.* The Supreme Court approved and gave effect to so-called “*Memphis* clauses,” in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103, 110-15, 3 L. Ed. 2d 153, 79 S. Ct. 194 (1958). Under a *Memphis* clause, a pipeline by contract reserves the freedom to secure rate changes by standard filings with FERC such as those under section 4 of the NGA. See *Union Pacific Fuels, Inc. v. FERC*, 327 U.S. App. D.C. 74, 129 F.3d 157, 160 (D.C. Cir. 1997). With a *Memphis* clause, the contract contemplates and allows section 4 filings and any “just and reasonable” rates that result from such filings.

¹⁵ *Id.* P 25.

¹⁶ *Id.*

III. Request for Rehearing

8. On March 19, 2012, ExxonMobil filed a request for rehearing of the Commission's holding that the Storm Event Surcharge applies to ExxonMobil and BP, as Rate Schedule FT-2 shippers. ExxonMobil asserts that the Commission's holding allows HIOS to circumvent the purpose of the negotiated rate letter agreements, by creating a new surcharge to recover costs historically recovered through HIOS' base rates. ExxonMobil argues that HIOS' "long-standing course of performance" of recovering hurricane-related costs in base rates "reflects the intent of the parties" when entering the negotiated rate letter agreements.¹⁷ Further, ExxonMobil argues that Rate Schedule FT-2 service differs from the services generally subject to the Storm Event Surcharge, specifically shippers subject to HIOS' maximum rates.¹⁸ ExxonMobil also asserts that the Commission's interpretation of the Rate Schedule FT-2 shippers' service contracts is contrary to the reasoning underlying the Commission's negotiated rate policy.¹⁹

9. ExxonMobil contends the Commission's determination that the plain language of the negotiated rate agreements authorizes HIOS to recover the Storm Event Surcharge was arbitrary and capricious and contrary to the evidence in the record, because the Commission failed to address the commercial context and the circumstances surrounding the negotiated rate letter agreement.²⁰ ExxonMobil claims that the Commission's determination allows HIOS to "frustrate the intent" of the negotiated rate letter agreement and impermissibly altered the deal to which the parties agreed.²¹ ExxonMobil argues that the Commission's interpretation of the contract language renders the term "applicable" meaningless and the Commission's reliance on the *Memphis* clause language in the negotiated rate letter agreement ignores the agreement's purpose.²²

¹⁷ ExxonMobil Request for Rehearing at 11.

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 20.

²¹ *Id.* at 19.

²² *Id.* at 21.

10. In addition, ExxonMobil contends that the Commission erred to the extent the Commission relied on the “purported validity” of the Storm Event Surcharge as an independent basis for authorizing HIOS to recover it from ExxonMobil in the Order on Reserved Issue.²³ ExxonMobil also claims that the Commission “disregarded the clear implication” of HIOS’ proposal to make the Storm Event Surcharge non-discountable, which ExxonMobil asserts demonstrates that HIOS “plainly sought to make these changes to bolster what HIOS itself saw as an inadequate basis on which to impose the Storm Event Surcharge under negotiated rate agreements.”²⁴

11. Finally, ExxonMobil argues the Commission’s holding is contrary to the Commission’s policy favoring settlements. ExxonMobil reasons that imposing the Storm Event Surcharge on ExxonMobil, “when ExxonMobil received no rate reduction or other benefit from the Settlement, would be inequitable and preferential” and serves as a disincentive to agree to settlements.²⁵ ExxonMobil concludes that the Commission’s holding “means in practical terms that ExxonMobil would have been better off contesting the Settlement, contrary to Commission policy favoring settlements.”²⁶

IV. Discussion

12. For the reasons discussed below, the Commission denies ExxonMobil’s rehearing request. Below, we first address ExxonMobil’s contentions that the Order on Reserved Issue erred in interpreting its negotiated rate agreement as requiring it to pay the Storm Event Surcharge. We then address ExxonMobil’s broader policy contentions opposing application of the Storm Event Surcharge to it.

A. Interpretation of Service Agreement

13. The Commission affirms its interpretation of the language of ExxonMobil’s service agreement and negotiated rate letter agreement as permitting HIOS to collect the Storm Event from ExxonMobil. ExxonMobil has provided nothing in its argument to compel us to change the determination in the Order on Reserved Issue that the language of the service agreements and negotiated rate letter agreements permits HIOS to collect the Storm Event Surcharge from the Rate Schedule FT-2 shippers, including ExxonMobil.

²³ *Id.* at 16.

²⁴ *Id.* at 24.

²⁵ *Id.* at 8-10.

²⁶ *Id.* at 8.

14. Section 4.1 of ExxonMobil's Rate Schedule FT-2 service agreement provides:

Subject to Exhibit B hereto, for all gas delivered . . . Shipper shall pay the currently effective rates and charges under Rate Schedule FT-2 as the same may be amended or superseded in accordance with applicable provisions of the Natural Gas Act and the rules and regulations of the F.E.R.C.

As we explained in the Order on Reserved Issue, this language requires ExxonMobil to pay HIOS' just and reasonable Rate Schedule FT-2 maximum rates, as approved by the Commission from time to time, subject only to any contrary provision in its negotiated rate letter agreement set forth in Exhibit B to ExxonMobil's service agreement. Therefore, the Commission must look to the specific terms of the Exhibit B negotiated rate letter agreement to determine if it exempts ExxonMobil from paying a future surcharge approved by the Commission. Otherwise, the Commission must defer to HIOS' generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for the applicable rate schedule.

15. The language of ExxonMobil's negotiated rate letter agreement provides that ExxonMobil is liable for the "lesser of Transporter's applicable Maximum Rate or \$0.15 per Dth plus *all applicable surcharges and Transporter's fuel and L&U.*"²⁷ We continue to find that the most reasonable reading of this language is that "all applicable surcharges" means all those surcharges in effect and applicable to service under Rate Schedule FT-2, as they may change from time to time during the term of the negotiated rate letter agreements. The natural reading of the broad language "all applicable surcharges" is that it encompasses every surcharge that is applicable to the maximum rates for service under Rate Schedule FT-2, without limitation.

16. ExxonMobil emphasizes that in 2000, when the parties entered into the negotiated rate agreement, the Storm Event Surcharge did not exist and HIOS recovered any costs associated with the repair of its system after a significant storm event through its base rates.²⁸ However, we do not find, and ExxonMobil has not pointed to, any language in the negotiated rate letter agreements indicating that "all applicable surcharges" were limited to only those surcharges that were applicable on the date of the agreement's execution. To the contrary, section 4.1 of ExxonMobil's service agreement expressly requires ExxonMobil to pay "the currently effective rates and charges under Rate Schedule FT-2 *as the same may be amended or superseded in accordance with*

²⁷ Paragraph 1 of Exhibit B to ExxonMobil FT-2 Transportation Agreement (emphasis supplied).

²⁸ ExxonMobil Request for Rehearing at 19-20.

applicable provisions of the Natural Gas Act and the rules and regulations of the F.E.R.C. [emphasis supplied],” and section 4.2 provides that HIOS “may seek authorization from time to time from the F.E.R.C. for such rate adjustments as may be found necessary to assure Transporter just and reasonable rates.”

17. HIOS and ExxonMobil are sophisticated parties and if it were their intent to limit or preclude ExxonMobil’s liability for future surcharges they would have included language so stating. 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.²⁹ If it were the intent of the parties to limit the “applicable surcharges” to those in effect on the date the negotiated rate letter agreement was executed, they could have added language expressing such intent. But, they did not. Accordingly, we must defer to the specific terms of the ExxonMobil negotiated rate letter agreement and HIOS’ generally applicable tariff, which provides for the collection of the Storm Event Surcharge from Rate Schedule FT-2 shippers.

18. This case presents a similar situation as we addressed in *Natural Gas Pipeline Co. of America (Natural)*.³⁰ In that case, the pipeline’s costs of holding capacity on upstream pipelines to provide bundled sales service (Account No. 858 costs) had become stranded as a result of the pipeline’s termination of its sales service pursuant to Order No. 636. The Commission approved the pipeline’s proposal to recover the stranded costs through a special surcharge implemented in a limited section 4 filing. A customer with a discount of the pipeline’s base rates complained that the pipeline was taking the position that the discount did not apply to the surcharge, despite the fact the Account No. 858 costs had previously been included in the pipeline’s base rates. The Commission rejected that complaint, explaining that:

²⁹ 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)).

³⁰ 70 FERC ¶ 61,317, at 61,967-8 (1995).

the customer's complaint is based, if anything, upon its dissatisfaction with the terms of its discount agreement with Natural in light of the Commission's policy that Account No. 858 costs must be recovered through a surcharge. The Commission does not involve itself in the drafting of discount agreements, and the parties to such agreements must be mindful that rates are subject to change. Accordingly, we find no basis on which to offer relief to parties now finding themselves disadvantaged by the terms they negotiated.³¹

The Commission also noted that the pipeline had stated that some of its other shippers had entered into discount agreements which precluded the collection of such a surcharge.

19. Similarly, here, the *Memphis* Clause in section 4.2 of the service agreement makes clear that HIOS' rates are subject to change and new charges may be added. The Commission has approved HIOS' proposal to add to its tariff a mechanism to recover extraordinary costs resulting from a future hurricane, tropical storm, or depression named or numbered by the U.S. National Weather Service through a surcharge, rather than in its base rates.³² ExxonMobil's Exhibit B contains no provision precluding HIOS from collecting such a surcharge from ExxonMobil. Therefore, as in *Natural*, we find no basis to offer relief to ExxonMobil.

20. We recognize that, as we held in cases such as *Bay Gas Storage Co.*,³³ pipelines cannot rely on a *Memphis* clause to modify rates specifically agreed to in a negotiated rate agreement. Here, however, the relevant part of the negotiated rate letter agreement provides that ExxonMobil is liable for "all applicable surcharges and Transporter's fuel and L & U" in addition to the lesser of the applicable maximum rate or \$0.15 per Dth.³⁴ The only discount provided by this language is the discount of HIOS' base transportation

³¹ *Id.* at 61,968.

³² *Sea Robin Pipeline Co.*, 128 FERC ¶ 61,286, at PP 38-42 (2009), *order on reh'g*, 130 FERC ¶ 61,191, at PP 11-13 (2010). Section 18 of HIOS' GT&C generally provides that the costs eligible for recovery in the Storm Event Surcharge are actual costs resulting from a hurricane, tropical storm, or depression named or numbered by the U.S. National Weather Service, plus carrying costs at the Commission prescribed rate. The collection of eligible costs will generally be based on an amortization period of 36 months, subject to the \$0.02 per Dth cap.

³³ 131 FERC ¶ 61,034, at P 45 (2010).

³⁴ FT-2 Transportation Agreement.

rate to \$0.15 per Dth. Clearly, the *Memphis* clause does not permit HIOS to increase the base transportation rate for ExxonMobil under this negotiated rate letter agreement above \$0.15 per Dth. However, the Exhibit B negotiated rate letter agreement does not provide for any other discounts. It simply references “all applicable surcharges and Transporter’s fuel and L & U,” requiring ExxonMobil to pay those charges in full. We do not read the negotiated rate letter agreement as an agreement by HIOS not to add any other surcharges to the two existing in 2000 when the parties entered into the negotiated rate agreement, the Annual Charge Adjustment (ACA) and the fuel and L & U charge. Contrary to ExxonMobil’s assertion, our interpretation does not render the negotiated rate letter agreement meaningless. The negotiated rate continues to prevent HIOS from charging ExxonMobil a base transportation rate greater than \$0.15 per Dth.

21. Unlike *Bay Gas*, this is not a situation where the pipeline is shifting an ordinary, recurring cost formerly included in the base rate, such as the lost and unaccounted for gas at issue in *Bay Gas*, to a separate surcharge and trying to add that recurring cost to the previously agreed-upon discounted base rate. Here, HIOS has proposed a new rate mechanism which it will use solely to recover new, extraordinary one-time costs it may incur in the future to repair damage to its pipeline caused by future significant storm events. Absent any indication that the parties intended to prohibit HIOS from implementing a new just and reasonable surcharge to recover newly incurred costs, we do not interpret Exhibit B as prohibiting HIOS from exercising its rights under the *Memphis* clause to add the Storm Event Surcharge to ExxonMobil’s negotiated base transportation rate. Exhibit B contains no express agreement to discount the Storm Event Surcharge, or any surcharge for that matter. Exhibit B only contains an agreement by HIOS to discount its base FT-2 rate to \$0.15 per Dth, which HIOS is not proposing to change unilaterally.

22. Moreover, to the extent that HIOS previously filed to recover costs associated with hurricanes, tropical storms, or depressions through base rates, its costs of replacing pipeline plant damaged by those storms would have been included in its rate base as part of its capital invested in jurisdictional service. As a result, its cost of service would have included a return on equity on the undepreciated portion of the plant replacement costs financed by equity, an allowance for the income taxes on the return on equity, and the cost of the debt incurred to finance the remainder of its invested capital. By contrast, HIOS’ Storm Event Surcharge treats any new plant replacement costs it may incur as a result of future storms as a one-time extraordinary expense to be amortized over a three-year period, subject to \$0.02 per Dth cap. During the amortization period, HIOS would recover carrying charges on the outstanding balance in order to compensate it for the time value of money.³⁵ Thus, the Storm Event Surcharge does not simply shift costs

³⁵ See *Sea Robin Pipeline Co., LLC*, Opinion No. 516-A, 143 FERC ¶ 61,129, at PP 37-43 (2013).

previously included in HIOS' base rates to a surcharge. It provides for a different rate treatment of plant replacement costs incurred as a result of future storms, under which HIOS will not earn any profit and will be limited solely to recovering its actual plant replacement costs.

23. In the Order on Reserved Issue, the Commission specifically rejected ExxonMobil's argument in its comments that the Storm Event Surcharge does not apply to the Rate Schedule FT-2 shippers because testimony provided by a HIOS witness in HIOS's Docket No. RP03-221-000 general section 4 rate case shows the parties' intent was to establish a fixed rate to which no new surcharges could be added.³⁶ In the Order on Reserved Issue, the Commission found that the cited testimony does not address the express language of the negotiated rate letter agreements, which requires the Rate Schedule FT-2 shippers to pay "*all applicable surcharges* and Transporter's fuel and L&U,"³⁷ without any limitation. The Commission also pointed out that section 11.1 of the ExxonMobil service agreement states, "[t]his Agreement, together with Exhibits A and B hereto, comprise the entire and complete form of transportation agreement between the undersigned parties."³⁸ Accordingly, the Order on Reserved Issue held that the express terms of the agreements cannot be modified based on statements of the parties not reflected in those agreements, such as the testimony cited by ExxonMobil.

24. The Commission continues to find that testimony from the HIOS witness does not address the parties' intent with respect to surcharges. Rather, in the course of cross-examining HIOS witness concerning its proposal to include a management fee in its cost of service in that rate case, ExxonMobil's attorney asked the HIOS' witness whether the negotiated rates paid by ExxonMobil and BP could be decreased if the maximum FT-2 recourse rates were decreased.³⁹ In response, the HIOS witness stated that the rate could change. The HIOS witness further explained that "the rate is structured on HIOS for these services, so that it's either the lesser or[sic] 15 cents or the currently-effective

³⁶ ExxonMobil April 5, 2010 Comments at 9-10 (citing HIOS, Hearing Transcript, Docket No. RP03-221-000, at 177: 6-9 (Richard A. Porter) (filed Nov. 17, 2003)).

³⁷ FT-2 Transportation Agreement (emphasis added).

³⁸ See Order on Reserved Issue, 138 FERC ¶ 61,114 at P 25.

³⁹ HIOS Hearing Transcript, Docket No. RP03-221-000, at 162:13-16, 19-20 (Richard A. Porter) (Nov. 17, 2003).

maximum rate on HIOS, so if the maximum rate is lower than the 15 cents, HIOS will receive a lesser rate, depending on wherever that maximum rate is set.”⁴⁰

25. ExxonMobil’s reliance on the HIOS witness’ direct testimony is unpersuasive. Rather than addressing the applicability of “all applicable surcharges” to ExxonMobil’s Rate Schedule FT-2 service, this testimony describes the parties’ decisions with respect to the structure of the base transportation rate in the Rate Schedule FT-2 shippers’ negotiated rate letter agreements, and the fact a decrease in the FT-2 recourse rate to below 15 cents could decrease the negotiated rate paid by ExxonMobil. The testimony does not address or interpret the provision of the negotiated rate requiring ExxonMobil to pay “all applicable surcharge.” Here, HIOS’ imposition of the Storm Event Surcharge on ExxonMobil is consistent with the language of ExxonMobil’s negotiated rate letter agreement.

26. We also do not find that HIOS’ filing to make the Storm Event Surcharge non-discountable is evidence of HIOS’ and ExxonMobil’s intent over seven years earlier to limit ExxonMobil’s liability with respect to other or future surcharges not required by the Commission. HIOS’ proposal was one of general applicability and not limited to ExxonMobil’s Rate Schedule FT-2 service agreement. As stated above, the parties’ use of the phrase “plus all applicable surcharges” in ExxonMobil’s negotiated rate letter

⁴⁰ *Id.* at 174: 23-25, 175: 1-3 (Richard A. Porter) (Nov. 17, 2003) (emphasis added). The HIOS witness goes on to explain that:

When the partners of [HIOS] arranged with [ExxonMobil] and BP for this transportation, they had to build about 80 miles of pipe at a cost of about \$80 million to connect this to the existing HIOS capacity. They were faced with the choice of either rolling that into the HIOS System or in order to meet the short timeframe that the producers had, connecting it to gas, building it as a nonjurisdictional facility, the producers had a price they were willing to pay to move the gas to the shore where it would connect with the long-haul interstate pipeline. And how the partnership split that up between the nonjurisdictional and the jurisdictional pipe, the producers really didn't care. HIOS wanted to charge its maximum rate and the nonjurisdictional pipe was willing to take whatever was left over. HIOS could have given a discount and let the nonjurisdictional make the rate and taken a jurisdictional discount in the trade, but HIOS chose not to do that. *Id.* at 175: 20-25, 176: 1-8, 177: 1-5 (Richard A. Porter) (Nov. 17, 2003)).

agreement plainly suggests that it was the parties' intent to make ExxonMobil responsible for surcharges applicable to service under Rate Schedule FT-2. In addition, the *Memphis* Clause in section 4.2 of the service agreement makes clear that HIOS' rates are subject to change and new just and reasonable charges may be added, similarly suggesting that the parties intended ExxonMobil to be responsible for new surcharges applicable to Rate Schedule FT-2 service.

B. Policy Contentions

27. ExxonMobil devotes a substantial portion of its rehearing request to arguing that the Commission's imposition of the Storm Event Surcharge on the Rate Schedule FT-2 shippers is "inequitable and preferential," is contrary to the Commission's negotiated rate policy, and conflicts with the Commission's policy and precedent encouraging settlements. ExxonMobil contends that, because its negotiated rate agreement caps its rates at a level below the settlement rates, it derives no benefit from the settlement's rate reductions. It asserts that, by agreeing not to contest the settlement, it facilitated prompt certification of the settlement, benefitting HIOS and its other shippers. ExxonMobil states that it requested only that it be provided an opportunity to seek to have its FT-2 service agreement excluded from the imposition of the Storm Event Surcharge. It concludes that imposing this surcharge on its agreement, when it received no benefit from the settlement, would be inequitable and preferential and will discourage other parties from entering into settlements in similar circumstances.

28. The Commission disagrees. The Settlement specifically provided that the applicability of the Storm Event Surcharge to "certain Rate Schedule FT-2 shippers" was a Reserved Issue for the Commission to determine on the merits.⁴¹ The Commission has considered ExxonMobil's contentions and determined on the merits that applying the Storm Event Surcharge to ExxonMobil is just and reasonable.

29. In addition, even assuming section 3.2(a) permits ExxonMobil to contend that the Storm Event Surcharge should not be imposed on it because the imposition of any such surcharge outside of a general section 4 rate case is unjust and unreasonable, we would reject such a contention. The Commission has addressed the appropriateness of recovering hurricane-related costs through a surcharge mechanism in *Sea Robin Pipeline Co.*, finding it reasonable to permit a pipeline to recover hurricane-related costs, including similar costs a pipeline may incur as a result of future hurricanes, through a

⁴¹ Settlement section 3.2(a).

special tracking mechanism.⁴² As the Commission explained there, not only are such extraordinary costs outside the pipeline's control, both the incurrence and level of such costs are not sufficiently predictable that an allowance for such costs can be included in a pipeline's annual cost of service. However, a pipeline's incurrence of such costs benefits its customers by allowing it to resume full service as quickly as possible after a catastrophic event. Moreover, including in the pipeline's tariff a mechanism to recover future such costs will provide the pipeline's shippers notice of how such costs will be recovered. ExxonMobil has not provided any basis to distinguish the Storm Event Surcharge in this case from the surcharge found just and reasonable in *Sea Robin Pipeline Co.*

30. As ExxonMobil points out, in *Discovery Gas Transmission LLC*,⁴³ the Commission severed ExxonMobil from a settlement filed in lieu of a general section 4 rate case which also included a hurricane cost surcharge mechanism. In that case, however, ExxonMobil contested not only the hurricane cost surcharge, but also the base rates provided by the settlement, arguing among other things that the pipeline had not supplied the cost of service underlying the base rate.⁴⁴ The Commission held that because Discovery had not filed the information ordinarily included in a general section 4 rate case filing, there was no record that would permit the Commission to find, based on substantial record evidence, that the settlement rates were just and reasonable. Here, by contrast, ExxonMobil has not contested the settlement's base rates, which in any event it concedes do not apply to it. Nor does it contend that the record lacks substantial evidence upon which to decide any aspect of the Reserved Issue concerning the applicability of the Storm Event Surcharge. In this regard, the Commission observes that the issue of whether it is just and reasonable for a pipeline to include such a recovery mechanism in its tariff is a policy issue, which the Commission decided in *Sea Robin*.

⁴² *Sea Robin Pipeline Co.*, 128 FERC ¶ 61,286, at PP 38-42 (2009), *order on reh'g*, 130 FERC ¶ 61,191, at PP 11-13 (2010) (explaining that "current Commission policy permits pipelines to establish a surcharge via a limited section 4 filing to recover extraordinary, one-time losses resulting from events outside the pipeline's control"); *Sea Robin Pipeline Co., LLC*, Opinion No. 516, 137 FERC ¶ 61,201 (2011), *order on reh'g*, Opinion No. 516-A, 143 FERC ¶ 61,129; *see also ANR Pipeline Co.*, 128 FERC ¶ 61,128 (2009); *CenterPoint Energy Gas Transmission Co.*, 127 FERC ¶ 61,096, at P 23 (2009); and *Columbia Gulf Transmission Co.*, 123 FERC ¶ 61,216 (2008).

⁴³ 122 FERC ¶ 61,099 (2008).

⁴⁴ *Id.* PP 18, 26.

31. Contrary to ExxonMobil's assertion, the Commission's resolution of the Reserved Issue upholds the Commission's policies regarding negotiated rates and encouraging settlements by implementing the provisions of the Settlement and the negotiated rate letter agreement. As ExxonMobil points out, our negotiated rate policy is premised on the ability of a shipper to elect to take service at the just and reasonable recourse rate in the pipeline's tariff, rather than enter into a negotiated rate agreement. ExxonMobil asserts that "by allowing HIOS to subsequently revise the fixed negotiated rate it agreed to with ExxonMobil by implementing a surcharge to recover costs that had been reflected in recourse rates, the Commission is allowing HIOS to frustrate the intent of the negotiated rate agreement, and thereby diminishing the check against the exercise of market power that is the basis of the negotiated rate policy."⁴⁵ However, as found in the preceding section, HIOS is not revising the base transportation rate included in its negotiated rate agreement with ExxonMobil. It is only adding a just and reasonable surcharge, as permitted by the negotiated rate agreement. This does not violate our negotiated rate policy.

32. Finally, as a settling participant, ExxonMobil agreed to the Settlement, including both the new Storm Event Surcharge and the Reserved Issue. The fact that, at a later date, ExxonMobil believes it "would have been better off contesting the Settlement" is not a valid reason to alter the merits determination the Commission made pursuant to the Settlement. As the United States Court of Appeals for the District of Columbia Circuit has held, the circumstance that a party "would have fared better by fighting than by settling . . . is not a sufficient basis upon which to conclude that approving the settlement would be unfair, unreasonable, or contrary to the public interest."⁴⁶ The Court's reasoning applies equally to the Commission's determination on the merits in the Order on Reserved Issue. That ExxonMobil believes it would have been better off contesting the Settlement is an insufficient basis upon which to conclude that pursuant to ExxonMobil's FT-2 service agreement ExxonMobil is not liable for the Storm Event Surcharge.

⁴⁵ ExxonMobil Request for Rehearing at 19.

⁴⁶ *Panhandle v. FERC*, 95 F.3d 62, 74 (D.C. Cir. 1996) ("Parties settle in order to avoid the risk that they might do worse by litigating, both because they might lose and because winning might come at a high cost; both parties to a settlement accept the risk that they might have done better by fighting."); *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 250 (D.C. Cir. 2008).

The Commission orders:

The request for rehearing is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.