

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Virginia Natural Gas, Inc.

Docket No. RP04-139-001

v.

Columbia Gas Transmission Corporation

ORDER DENYING REQUESTS FOR REHEARING

(Issued October 28, 2004)

1. On July 29, 2004, the Commission issued an order in response to a complaint filed by Virginia Natural Gas, Inc. (VNG) against Columbia Gas Transmission Corporation (Columbia), pursuant to sections 5(a) and 16 of the Natural Gas Act (NGA) and Rule 206 of the Commission's Rules of Practice and Procedure.¹ The July 2004 Order determined that (1) Columbia failed to fulfill certain of its firm service obligations to VNG, (2) Columbia's service shortfalls were not the result of *force majeure* circumstances, and (3) a court of law, not the Commission, would be the appropriate arbiter for VNG's allegations of harm. VNG and Columbia seek rehearing of the July 2004 Order, which we will deny, for the reasons discussed below.²

Background

2. VNG is a local distribution company that transports and sells gas to over 250,000 end users in central and southeastern Virginia. Columbia is natural gas company that provides interstate transportation service, including storage service, subject to the

¹ *VNG v. Columbia*, 108 FERC ¶ 61,086 (2004).

² Columbia submitted an answer to VNG's request for rehearing, and VNG submitted a reply. Section 385.213(a)(2) of our Rules of Practice and Procedure does not permit answers to protests or answers to answers. However, we may waive this rule for good cause shown, and do so in this instance to help clarify the issues under consideration.

Commission's jurisdiction under the NGA. Columbia provides liquefied natural gas (LNG) service to VNG under Rate Schedule X-133, which consists of the liquefaction, storage, regassification, and delivery of gas. Columbia also provides VNG with firm transportation service under Rate Schedule FTS and firm storage service transportation under Rate Schedule SST.

3. VNG's complaint alleged that during the winter of 2002-2003, Columbia failed to meet certain of its firm service obligations. VNG urged the Commission to find Columbia's service shortcomings violated the conditions of Columbia's certificate and constituted an impermissible abandonment of service. VNG sought \$37,030,624 in damages.³

4. Columbia conceded that during the winter of 2002-2003, it did not meet all its firm service commitments. Columbia asserted that its interruption in Rate Schedule X-133 LNG service was attributable to a *force majeure* combination of harsh weather and unforeseeable equipment failure. Columbia states that it has refunded demand charges to VNG as required under the terms of its tariff. Columbia did not invoke *force majeure* with respect to firm service under Rate Schedule FTS and SST and insists it has made adequate compensation for faults in these services.

5. In our July 2004 Order, we found that during the winter of 2002-2003, Columbia violated its tariff by interrupting its Rate Schedule X-133 LNG service and by making deliveries at less than the minimum pressure specified in Rate Schedules SST and FTS. We stated our belief that VNG's requests for damages rested on breach of contract claims; consequently, the appropriate forum for determining damages would be a court of law.⁴ In addition, we found nothing inappropriate in Columbia's issuance of its first operational flow order (OFO) affecting transportation customers holding gas in storage

³ A description of each of VNG's several damage claims appears as Appendix A of VNG's Complaint, with Appendices B-P documenting dollar values for the items listed in Appendix A (January 13, 2004). Columbia's Answer in Opposition to VNG's Motion for Summary Disposition, Attachment A, specifies each of the several separate reasons Columbia relies on in urging the Commission to deny each of the several separate damage claims (March 3, 2004). Columbia insists it does not concede the validity or accuracy of VNG's damage claims. The term "damages" may be used to refer to payments clearly within the Commission's jurisdiction, *e.g.*, ordering refunds of overcharges, and also to payments only a court can order, *e.g.*, legal fees; herein it refers broadly to all aspects of VNG's requested remedy.

⁴ Given our finding that the relief requested rests on an interpretation of the parties' contract provisions, we expect this matter can be best addressed in a state court with the authority to award civil penalties.

and nothing inappropriate in Columbia's providing interruptible park-and-loan service during the time its OFO was in effect. Finally, we found no deficiencies in Columbia's filings with the Commission.

VNG's Request for Rehearing

6. VNG contends that the Commission, after having determined that Columbia failed to provide firm service in accordance with the terms of its tariff, should have fashioned a remedy that (1) requires monetary payments to restore VNG to the position it would have been in absent the service shortfalls and (2) requires Columbia to take remedial action as necessary to be able to meet all its service obligations. VNG disagrees with our finding that Columbia's current facilities are sufficient to ensure that Columbia will not again experience the same service difficulties experienced during the winter of 2002-2003. VNG repeats its assertion that Columbia's service shortfalls constituted an unlawful abandonment of service under NGA section 7(b).

Commission Response

7. VNG states that the Commission erred if the decision not to enforce Columbia's compliance with the terms of its tariff and not to order Columbia to compensate VNG "is intended to suggest that Columbia's service failures do not constitute violations of the NGA because they were mere breaches of service agreements." Our decision was not intended to establish any gradation among violations of service agreements, contract provisions, rate schedules, tariff terms, and other items enumerated in NGA sections 4 and 5. We clarify that we view Columbia's inability to provide service consistent with its firm service agreements as a violation of its tariff requirements, our regulatory requirements, and the conditions of its certificate authorization.

8. VNG faults the Commission for failing to enact remedies after finding infirmities in Columbia's performance and maintains this is inconsistent with the Commission's past practice. Columbia, on the other hand, contends the Commission has already exercised the full extent of its remedial authority. We disagree with both positions.

9. We limited our findings in the July 2004 Order to resolving those issues necessary to frame the dispute over compensation. We reached the following conclusions. We found that Columbia violated its tariff by failing to fulfill firm service obligations to VNG on several separate occasions during the winter of 2002-2003; however, we rejected VNG's contention these incidents of imperfect service constituted an abandonment of service. We found Columbia was justified in issuing an OFO restricting transportation customers' storage withdrawals. We found Columbia was justified in providing an interruptible park-and-loan service during the period firm service was

curtailed. We rejected Columbia's claim that its Chesapeake LNG Plant's failure to perform was due to *force majeure* conditions. We found no other tariff violations on Columbia's part.

10. VNG argues the Commission should have ordered Columbia to pay damages and take action as requested. VNG is seeking monetary compensation that includes: the return of demand charges and contributions in aid of construction paid out over more than a decade (accounting for approximately \$30 million of the total \$37 million VNG seeks); the cost to replace gas that Columbia did not provide; income lost due to an inability to resell gas during a time of tight supply; operating costs for its own LNG, propane-air, and regulator station facilities; and legal fees.

11. VNG observes that our authority has been described as being at its "zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives."⁵ However, our NGA authority, exercised at its zenith, does not extend to imposing civil penalties or reparations.⁶

12. VNG seeks redress for business, commercial, economic, financial, and operational harm, lost opportunity costs, incidental and consequential damages, and legal fees. We noted in our July 2004 Order that VNG's request includes remedies that go beyond those typically contemplated by the Commission, and go beyond our authority by including remedies – although not described by VNG as such – that would reasonably be

⁵ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir 1967) (citations omitted).

⁶ *See, e.g., Coastal Oil & Gas Corp. v. FERC (Coastal)*, 782 F.2d 1249 (5th Cir. 1986). "It is well-settled that the Natural Gas Act does not give the Commission the authority to impose civil penalties." *Id.* at 1253, *citing, Southern Union Gas Co. v. FERC*, 725 F.2d 99, 102 (10th Cir. 1984) and *Mesa Petroleum Co. v. FPC*, 441 F.2d 182 (5th Cir. 1971). *See also FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). "This Court has repeatedly held that the Commission has no reparation power." *Id.* at 24, *citing, FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944) and *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951).

considered to constitute civil penalties or reparations.⁷ Accordingly, our July 2004 Order directed the parties to a forum competent to consider the full array of requested remedies, whether characterized as penalties, reparations, refunds, repayment of unjust gains, restitution, etc.

13. We believe both parties misstate the range of our remedial authority. Columbia contends that “the only relief requested by VNG that the Commission is empowered to provide is demand charge credits for Rate Schedule X-133 service, because that rate schedule includes a provision requiring such credits for service interruptions.”⁸ Therefore, Columbia rejects all other requests for relief as being outside the Commission’s jurisdictional reach. This understates the extent of our remedial authority.⁹

⁷ In *Coastal*, for example, the Commission found that a pipeline, by diverting interstate gas to the intrastate market, had improperly abandoned its interstate gas service. Remedies considered included a monetary payment (1) for the injury to pipeline customers, or (2) for the pipeline’s unjust enrichment, or (3) equal to all the revenues received by the pipeline for gas it improperly diverted from the interstate to the intrastate market. The court found the Commission might adopt either of the first two options, to restore the *status quo ante* or to prevent unjust enrichment of the wrongdoer, as acceptable means of fashioning a remedy under its NGA authority. However, the court found that the third option, disgorging all revenues from intrastate sales, would exceed both the injury to customers and the unjust enrichment of the offending pipeline, since the pipeline would forfeit not only the profit from its improper intrastate sales, but also be denied any of its gas costs. The court deemed this a penalty, and cautioned “that a penalty, as such, is neither appropriate nor permissible.” 782 F.2d 1249, 1253 (5th Cir. 1986).

⁸ Columbia’s Answer to VNG’s Complaint at 17 (February 2, 2004). Columbia declares the Commission could not require demand charge credits for interruptions of Rate Schedule SST and FTS firm services because those rate schedules do not include any provision for such credits, and “[i]n the absence of a tariff provision authorizing such a remedy, the filed rate doctrine and the rule against retroactive ratemaking preclude an award of reservation charge credits for past services.” Columbia’s Answer in Opposition to Motion for Summary Judgment at 4 (March 3, 2004).

⁹ See, e.g., *Columbia Gas Transmission v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984), stating that “the principle fairly drawn from prior cases is that the Commission has broad authority to fashion remedies so as to do equity consistent with the public interest.”

14. Clearly, when a company fails to provide service in conformity with its certificate, and its tariff specifies compensation for the failure to provide such service, we can enforce compliance with the terms of the tariff. But that is not the situation before us. Columbia argues that its failure to provide service under Rate Schedule X-133 was attributable to *force majeure* conditions, and consequently compensation for service due but not delivered under Rate Schedule X-133 is to be determined pursuant to section 9.2 of Columbia's Rate Schedule X-133.¹⁰ However, in our July 2004 Order, we rejected Columbia's assertion that its failure to meet its Rate Schedule X-133 service requirements was attributable to *force majeure*. Therefore, section 9.2 of Rate Schedule X-133 of Columbia's tariff is inapplicable.

15. After rejecting Columbia's assertion that its Chesapeake LNG Plant's failure to perform constituted a *force majeure* event, we commented that "it follows that VNG cannot seek compensation under the *force majeure* provisions of Columbia's tariff."¹¹ This observation simply stated the obvious, and did not indicate, as VNG misunderstands in its request for rehearing, that we "misconstrued the basis for VNG's claims for relief."¹² Our remark was intended to highlight the fact that if we had instead agreed with Columbia, and attributed Columbia's inability to regasify LNG to an authentic *force majeure* event, then VNG's potential damages would have been limited to the compensation specified in Columbia's tariff, a remedy far more modest than the damages VNG seeks.

¹⁰ Section 9.2 of Rate Schedule X-133 requires a demand charge and capacity charge adjustment for any service interruption. VNG contends Columbia owes VNG an additional \$547,143 under the terms of its tariff, a calculation Columbia disputes. *See* VNG's Complaint, at 44, Appendix C (January 13, 2004) and Columbia's Answer to VNG's Complaint, at 21, n. 18 (February 4, 2004).

¹¹ 108 FERC ¶ 61,086 at P 31, n. 20 (2004).

¹² VNG's Request for Rehearing at 9 (August 30, 2004).

16. As a result of our decision, compensation for Columbia's LNG service shortfalls may be awarded by the Commission pursuant to NGA section 16¹³ or by a court of law in a breach of contract proceeding. Both parties cite *Arkansas Louisiana Gas Co. v. Hall (Arkla)*¹⁴ as guidance for whether the Commission or a court should act to resolve a contract claim arising from a regulated entity's performance of certificated service. We find that regardless of the outcome of an *Arkla* analysis of the issues raised in this case, the range of remedies VNG requests extends beyond the bounds of those that this Commission can provide. In effect, we are dismissing these requests. In the July 2004 Order we concluded that as a procedural matter, the interests of efficiency and consistency would be best served by having all of VNG's various claims heard and decided in one place and at one time, namely, before a court competent to award or reject each of the proposed the remedies. Having made a determination as to which actions by Columbia were inconsistent with its certificated service obligations, we believe a court is now the appropriate setting to debate and adjudicate damages.

17. With respect to VNG's request that we order Columbia to take remedial action to ensure it is able to meet all its existing service obligations going forward, our assessment of Columbia's existing system's facilities found no current deficiencies likely to compromise its capability to do so. This finding is supported by there being no complaints of service failures subsequent to VNG's covering the winter of 2002-2003. In our July 2004 Order we determined that Columbia's system – with the recent modifications to its LNG plant – is adequate to reliably meet all its service commitments.¹⁵ We affirm this finding.

¹³ NGA section 16 grants the Commission the “power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate.” Columbia and VNG contest the scope of section 16, an argument we do not join, given our decision, as discussed herein, not to exercise our section 16 authority in this case.

¹⁴ 7 FERC ¶ 61,175 (1979).

¹⁵ To verify that Columbia will not again experience difficulties at its Chesapeake LNG Plant, particularly late in the heating season when LNG levels are more likely to be low, we are requiring Columbia to test and confirm the capabilities of its LNG facilities, as specified in our July 2004 Order. 108 FERC 61,086 at P 29, n. 18 (2004). We remain attentive to the performance of the Chesapeake LNG Plant in view of the fact that although Columbia has not had any difficulties since the winter of 2002-2003, its LNG tank inventory has yet to drop to the level at which it was unable meet service demands on February 19, 2003.

18. Although VNG appears satisfied that actions taken by Columbia and by the Commission with respect to the Chesapeake LNG Plant since the 2003 service outage should prevent a repetition of an interruption in LNG services, VNG asserts the Commission “completely ignored” its duty to provide a prospective remedy to ensure Columbia’s deliveries to VNG will meet the minimum pressure standard of 250 psig. In the July 2004 Order, we considered each of the five occasions on which Columbia failed to meet the minimum delivery pressure.¹⁶ We concluded that the five instances when delivery pressure fell to between 200 and 246 psig did not demonstrate a need for Columbia to construct additional facilities, as VNG infers, but reflected unusual stresses on Columbia’s system.¹⁷ We believe the circumstances that led to the pressure dips do not represent conditions likely to reoccur. We note Columbia has subsequently shown no indication of being unable to meet its minimum delivery pressure requirement.

19. VNG argues this outcome is inconsistent with *Consolidated Edison Co. of New York*,¹⁸ in which the court questioned why a Commission remedy for a tariff violation was limited to prospective relief, but neglected retrospective refunds. In the July 2004 Order, we found no prospective remedy was indicated because we did not attribute the pressure violations to inadequate facilities or to inept or illegal operations.¹⁹

¹⁶ A table summarizing the pressure drops appears on page eight of the Crews Affidavit in Columbia’s Answer to VNG’s Complaint (February 2, 2004).

¹⁷ Columbia identified an atypical set of circumstances that included severe and prolonged cold weather, a rupture on the SM-80 pipeline in conjunction with a labor strike that delayed repair of the ruptured pipe, problems with a unit at the Lanham Compressor Station, and spot gas prices that encouraged shippers to make use of less expensive gas in storage. *See* Columbia’s Answer to VNG’s Complaint, Marple Affidavit at 4-5, Crews Affidavit at 15 (February 2, 2004) and Data Response, Response No. 10 at 17 (May 5, 2004).

¹⁸ 347 F.3d 964 (D.C. Cir. 2003).

¹⁹ Although Columbia’s tariff does not require a minimum delivery pressure, Rate Schedules SST and FTS incorporate by reference section 13 of the General Terms and Conditions of Columbia’s tariff, which permits parties to “mutually agree to a specific minimum delivery pressure.” The 250 psig minimum appears is a negotiated term of the parties’ contractual service agreement. Thus, we view the violation of the minimum delivery pressure stated in the service agreement as a tariff violation subject to our authority under section 16. However, we do not view Columbia’s transitory pressure drops as constituting an unapproved NGA section 7(b) abandonment of service. Consequently, VNG is not entitled to compensation on this basis.

With respect to retrospective relief, we have not, as VNG suggests, “allowed [Columbia] to escape making monetary payments,” nor have we found that there is no wrong to be righted. While we take tariff violations seriously and admonish Columbia for its failure to meet its required minimum delivery pressure, in this instance, rather than pursue enforcement, we have acted within our discretion to direct VNG to seek damages for Columbia’s service shortcomings as a breach of contract action in a court of law.²⁰

20. In the July 2004 Order, we repeated Columbia’s observation that it might have been able to avoid a drop in delivery pressure had it initiated an OFO.²¹ We acknowledge, as VNG points out, that we did not introduce evidence into the record, such as an engineering analysis, as a basis for this observation. However, this observation did not alter our reasons for concluding that Columbia’s several deliveries at less than 250 psig were attributable to an unusual combination of adverse circumstances, and therefore did not represent a systemic flaw in Columbia’s facilities or operations necessitating further action. We stand ready to reconsider this interpretation of events if Columbia again experiences difficulties in meeting minimum delivery pressures.

21. VNG renews its charge that Columbia’s failure to meet all its firm service commitments constitutes an unapproved NGA section 7(b) abandonment of service. We reaffirm our conclusion that none of the service shortfalls identified by VNG, including the curtailment of service under Rate Schedule X-133, constitute an abandonment of service. As explained in *Reynolds Metals Company v. FPC*, “[a]n ‘abandonment’ within the meaning of section 7(b) occurs whenever a natural gas company permanently reduces

²⁰ See, e.g., *Baltimore Gas and Electric Co. v. FERC*, 252 F.3d 456, 460 (D.C. Cir. 2001), finding that “[a]t every turn, the NGA confirms that FERC’s discretion how, or whether, to enforce that statute is entirely discretionary. Nowhere does the act place an affirmative obligation on FERC to initiate an enforcement action.”

²¹ Columbia explained that on the days it experienced difficulties maintaining minimum delivery pressures at the Norfolk Gate Station, it could have issued an OFO to pursuant to section 17.2(a) of the General Terms and Conditions of its tariff to preserve pressure at 250 psig by restricting the rate at which gas could be received at that point. Columbia notes that on two of the five days at issue, VNG was receiving gas at the Norfolk Gate Station at an hourly rate in excess of 1/24th of its total firm entitlements.

a significant portion of a particular service.”²² We have found no indication that Columbia was unable or unwilling to meet its firm service commitments, given that its service interruptions were not sustained and have not been repeated before or since the winter of 2002-2003. To construe infrequent and isolated lapses in service as unlawful abandonments would be unwarranted, particularly when there is no showing of additional service interruptions.²³

²² 534 F.2d 379, 384 (D.C. Cir. 1976), *citing*, *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 86-88 (1966), in which the Court found that abandonment does not require the physical alteration of facilities, but can be accomplished by allowing them to become operationally dormant for an indefinite time. *See also Michigan Power Co. v. FPC*, 494 F.2d 1140, 1144 (D.C. Cir. 1974) and *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942, 947 (6th Cir. 1949).

²³ VNG complains that our July 2004 Order did not directly address several abandonment cases it had cited. In the order we observed that the circumstances in the cases VNG cited (which include cases referenced in the preceding footnote) involved instances in which service was terminated, either because a gas company could not or would not meet its certificated obligations. The facts here are markedly different in that prior to and subsequent to the winter of 2003-2004, there is a history of Columbia’s reliably satisfying its contractual and certificated service obligations to VNG. Coincidentally, the case VNG cites that comes closest to the circumstances at issue here concerned Columbia. 64 FERC ¶ 65,389 (1993). That Columbia case considered whether a Columbia affiliate that had compromised its capability to provide certificated service by deferring replacement of aging compressor units, then limiting their use to avoid their failure, had in fact abandoned certificated service – even though it could still meet all requests for firm service for short periods (but not for sustained periods) of peak demand. This is similar to VNG’s charge that even though Columbia fulfilled its customers’ firm service requests before and after the winter of 2002-2003, its system’s facilities are not capable of meeting sustained maximum firm service demands. However, in the cited case, Columbia’s affiliate conceded that the state of its compressor units rendered it incapable of reliably meeting firm service requests on a sustained basis. In contrast, in this proceeding, based on Columbia’s demonstrated ability to fulfill its Rate Schedule X-133, SST, and FTS firm service requests, and based on the record, we find no evidence that Columbia will be unable to meet maximum certificated firm service demands over a sustained period.

Columbia's Request for Rehearing

22. Columbia objects to our finding that its Chesapeake LNG Plant's failure to perform in 2003 was not attributable to *force majeure* circumstances. Columbia asks that we reverse this finding or, alternatively, revoke it in order to allow a court of law to make its own determination.

Commission Response

23. In the July 2004 Order, we determined that Columbia had long been aware of difficulties with its Chesapeake LNG Plant's pump and vent system facilities. In 1993, Columbia experienced problems with these facilities' performance and, in response, made modifications pursuant to engineering consultants' advice. In the July 2004 Order, we commented that Columbia had adopted, "in part, the advice and recommendations received."²⁴ Columbia insists that it put in place all the recommendations presented by the LNG engineering consultants.

24. We clarify that Columbia adopted in full the advice and recommendations received following the pump failure experienced in 1993. Our comment in the July 2004 Order referred to the engineering consultants' advice and recommendations received after the pump and vent failure in 2003. Despite this corrected chronology, we continue to believe that past problems with the pump and vent facilities served to put Columbia on notice that these facilities were a weak link. There is no question that Columbia's Chesapeake LNG Plant is capable of meeting customer demand when the tank inventory is high. Columbia has a long record of reliability as evidence of this. However, prior to 2003, Columbia's ability to continue to extract LNG as the inventory level in its tank declined had been tested and found wanting.

25. In 1993, when Columbia experienced a cavitation in its pumps, the LNG in its tank stood at around 30 feet. In 2003, when Columbia again experienced a similar cavitation in its pumps, the LNG in its tank stood at its lowest ever level, about 23 feet. Considering this, we stated that to be confident that Chesapeake LNG Plant's facilities were adequate to fulfill its existing service commitments, Columbia would have needed to test the plant's ability to send out maximum entitlements when LNG in the tank was at a low level. However, despite previous difficulties with its pump and venting facilities, "there is no indication in the record that Columbia ever actually tested these facilities by subjecting them to a full draw-down test to verify the plant's performance capabilities, either before or after modification."²⁵ Columbia disagrees with our conclusion that it

²⁴ 108 FERC ¶ 61,086 at P 28 (2004).

²⁵ 108 FERC ¶ 61,086 at P 29 (2004).

should have verified its plant's send-out capabilities by conducting a draw-down test of the plant's facilities, contending that "prudent operation of the LNG facility does not call for the performance of such a test."²⁶

26. Columbia stresses that because the LNG stored in its tank is the property of its customers, it needs customer approval to undertake a draw-down test, and that this test would impose economic and operational burdens on customers. We do not diminish these difficulties. Nevertheless, in view of the questionable reliability of Columbia's facilities' performance when the LNG tank level is low, we expect customers' self interest in confirming Columbia's capability to retrieve their gas would encourage their cooperation in conducting a test. Given the previous difficulties, we continue to believe it would be prudent for Columbia to conduct a draw-down test to confirm the physical capacity of its system's facilities²⁷ or to devise another means to confirm that its Chesapeake LNG Plant can provide service as certificated.

27. Columbia goes into this winter heating season with a newly installed wet/dry vent system intended to rectify the deficiencies identified during the winter of 2002-2003. This new hybrid system is not a typical installation, and considering that it was the pump and vent system that previously failed, we have required that Columbia verify its new system will function as anticipated.²⁸ Columbia should be able to demonstrate that its Chesapeake LNG Plant can provide certificated withdrawal, regasification, and send out levels of service until the elevation in the tank is drawn down to only several feet of

²⁶ Columbia's Request for Rehearing at 9 (August 30, 2004).

²⁷ We note that variables other than the tank inventory level have an impact on pump venting performance. To the extent all such variables can be controlled, a draw-down test's results will be that much more reliable.

²⁸ See 108 FERC ¶ 61,086 at P 29, n. 18 (2004). Columbia interprets the Commission's direction to test its system as limited to verifying that it can switch smoothly from wet to dry pump operation. Columbia's Request for Rehearing at 11, n. 15 (August 30, 2004). We clarify that we expect Columbia to verify that its Chesapeake LNG Plant can function at its certificated capacity. As discussed herein, we offer Columbia alternatives to document this capability, and testing wet to dry pump operation can be part of one method of demonstrating that the plant can meet all its certificate obligations.

liquid in the tank.²⁹ While we believe that it would be prudent for Columbia to conduct an actual draw-down test as discussed above, Columbia may be able to develop an alternative physical test to demonstrate that it will be able to provide its certificated service levels until it reaches a known level of head in the tank. Columbia may also verify that its modified wet/dry vent system will perform as predicted by identifying other LNG facilities that use a similar type of system.

28. In 1993, after Columbia experienced a cavitation in its pumps at a tank inventory level of about 30 feet, it upgraded its pump and vent facilities. We affirm our finding, however, that in 2003, as the LNG level in its tank dropped towards 23 feet – the lowest level Columbia had ever experienced – “Columbia should not have relied on its theoretical capability to be able to continue to draw down and vaporize LNG. Rather than shut down its pumps as it did, Columbia should have maintained its pumps in continuous-run mode.”³⁰ Since Columbia had never verified its ability to maintain service at such a low LNG level, prudence would seem to dictate that Columbia hold its pumps in continuous-run mode.

29. Columbia asks that we clarify that the above conclusion from the July 29 Order is unrelated to our finding rejecting Columbia’s claim of *force majeure*. Columbia insists that it “cannot possibly have been expected to have known that maintaining the pumps in continuous-run mode might make a difference in the continued performance of the LNG pumps.”³¹ We agree that Columbia could not have known in advance that maintaining the pumps in continuous-run mode *would* make a difference.

30. Columbia, however, had previously had difficulties with its pumps when LNG was drawn down to a low level. The day before its pumps failed the LNG level was at an all time low, a level that could be expected to fall still further as weather and market conditions at the time prompted customers to request additional withdrawals. In light of these conditions, Columbia should have taken every action it could to ensure that its LNG facilities would continue to function. In considering the actions available to Columbia,

²⁹ In its August 11, 2003 Semi-Annual LNG Operational Report, Columbia states it anticipates that the newly installed vent and recycle piping and controls should be able to vaporize 120 MDth/d down to the 11- to 12-foot level, and at least 30 MDth/d down to the 6-foot level. If experience suggests that, notwithstanding these modifications, Columbia is unable to actually provide certificated LNG services, this would be cause for us to reconsider our conclusions.

³⁰ *Id.* at P 30.

³¹ Columbia’s Request for Rehearing at 12 (August 30, 2004).

we take into account its own observation “that if the pumps had been in continuous-run mode (rather than start-up mode), it may have been possible to continue to pump LNG from the storage tank down to a level well below 23 feet.”³² Although Columbia’s observation is both retrospective and speculative, we nevertheless find that in light of the circumstances that existed on February 18, 2003, it would have been prudent to maintain the pumps in continuous-run mode. The fact that this operational option was not employed weighs against Columbia in assessing its claim of *force majeure*. Accordingly, we affirm our conclusion that the pump failure on February 19, 2003 was not an event that could not be prevented or overcome by due diligence.³³

31. Columbia asks that if we do not reverse our finding on *force majeure*, that we then “defer all aspects of VNG’s breach of contract claims to a court.” As discussed herein, we are deferring all aspects of VNG’s breach of contract claims relating to alleged damages associated the failure to provide service consistent with Rate Schedule X-133, FTS, and SST to a court.

32. VNG argues on rehearing that Columbia, by not specifically refuting each VNG claim, has conceded liability on each claim. Thus, VNG maintains its calculations should stand as the parties’ agreed upon basis for determining damages in future proceedings. Columbia rejects this, pointing out that in its initial answer to VNG’s complaint it took issue with both VNG’s allegations of fact and its requests for relief.

³² Columbia’s Answer to VNG’s Complaint at 25 (February 2, 2004).

³³ We note that none of the pumps, or any other equipment at the Chesapeake LNG Plant, suffered a sudden and unexpected mechanical or physical failure. As Columbia’s LNG plant operator reports, on February 19, 2003, after cavitation in the pumps occurred, “[u]pon examination, I determined that the LNG Pumps appeared to be intact and undamaged, and that the vent system itself was not damaged or failing. Rather, I determined that the Vent System was not sufficiently venting the vapor.” Columbia’s Answer to VNG’s Complaint, Shivley Affidavit at P 17 (February 2, 2004). Given this assessment that no facilities were damaged or broken, we attribute the pump and vent failure to either the manner in which facilities were operated or design limitations that rendered the system unstable or ineffective at low tank levels.

33. We concur with Columbia. It does not require a close reading of Columbia's answer to conclude that Columbia's clear intent was to vigorously dispute VNG's claims. Columbia responded to VNG's allegations of injury specifically and in detail.³⁴ Columbia responded to VNG's requests for relief more generally, arguing that the Commission is without authority to award the payment of any of VNG's requested compensation.³⁵ We conclude that Columbia need not have set forth a point-by-point refutation of the each of VNG requests for compensation, or posited an alternative methodology to calculate monetary impacts, in order to be understood to be opposing, and not conceding, its liability for the alleged damages and the calculated monetary value of those damages.

The Commission orders:

VNG's and Columbia's requests for rehearing are denied, as discussed herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³⁴ We note that although the Federal Rules of Civil Procedure contain an arguably more precise standard for responsive pleadings, the Commission is not bound to that standard. We find Columbia's answer was sufficiently precise to meet our section 385.213(c)(2)(i) standard to "[a]dmit or deny, specifically and in detail, each material allegation of the pleading."

³⁵ *See, e.g.*, Attachment A to Columbia's Answer in Opposition to VNG's Motion for Summary Disposition (March 3, 2004), in which Columbia's refutes, in summary format, the basis for each of VNG's damage claims.