

127 FERC ¶ 61,267  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Sabine Pipe Line LLC

Docket No. RP09-38-002

ORDER ON REHEARING

(Issued June 18, 2009)

1. On November 26, 2008, the Commission issued an order conditionally accepting, effective November 30, 2008, tariff sheets filed by Sabine Pipe Line LLC (Sabine) on October 30, 2008, revising section 27 of the General Terms and Conditions (GT&C) of its tariff provisions dealing with its Fuel Gas Reimbursement Percentage (FRP) and Unaccounted For Gas Reimbursement Percentage (UFRP).<sup>1</sup> Among other changes to its tariff, Sabine had sought to include new provisions in section 27 allowing adjustments to recover under-recoveries that occur in any prior period. The November 26, 2008 Order conditioned acceptance of this provision on Sabine filing to revise the provision to limit its application to under- and over-recoveries that occur subsequent to the new provision's effective date of November 30, 2008. Sabine filed a request for rehearing and/or clarification, urging the Commission to accept the provisions as filed. The request for rehearing is denied for the reasons set forth below.

**Background**

2. At the time Sabine made its October 30, 2008 filing, sections 27.3 through 27.6 of Sabine's GT&C required Sabine to file to adjust its FRP and UFRP each November to be effective the following January 1. The FRP and the UFRP each included (1) a component to recover estimated costs during the next calendar year (the "Estimated Revised" FRP or UFRP) and (2) a component to true-up for over- or under-recoveries during the preceding November through October twelve month period (the "True-up Adjustment").

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<sup>1</sup> *Sabine Pipe Line LLC*, 125 FERC ¶ 61,241 (2008) (November 26, 2008 Order).

3. Previously, on September 1, 2006, Sabine filed tariff sheets in Docket No. RP06-582-000 to implement its original FRP/UFRP tracker in section 27 of its GT&C and included initial fuel and UFRP reimbursement percentages, effective October 1, 2006. On September 29, 2006, the Commission accepted the filing, effective October 1, 2006, subject to Sabine filing to revise section 27 to provide a true-up tariff provision for fuel and unaccounted for volumes.<sup>2</sup> On October 27, 2006, Sabine filed a true-up provision, but only for the true-up of fuel, not for unaccounted for volumes. In an order issued December 7, 2006,<sup>3</sup> the Commission accepted its fuel true-up provision, effective October 1, 2006, subject to Sabine filing to establish a true-up for unaccounted for gas. On January 8, 2007, Sabine filed an unaccounted for gas true-up provision as directed, which was accepted, effective October 1, 2006, in an unreported letter order issued February 15, 2007. These true-up provisions only provided for trueing up over- and under-recoveries during the immediately preceding November through October period and contained no provisions for trueing up over- and under-recoveries during any earlier period.

4. In the meantime, on December 7, 2007, in Docket No. RP08-112-000, Sabine filed its first annual FRP/UFRP filing reflecting true-ups pursuant to the foregoing provisions based on actual data for the period November 2006 through October 2007, to be effective January 1, 2008. In an order issued January 4, 2008, the Commission accepted the filing, subject to refund and on condition that Sabine explain certain anomalous data for the July through October 2007 period. On February 4, 2008, Sabine filed additional information to comply with the January 4, 2008 Order, but also included a revised tariff sheet proposing to increase its UFRP rate from 0.26 to 0.38 percent effective March 1, 2008, to correct for inaccurately recorded unaccounted for gas volumes for September and October 2007. On August 5, 2008, the Commission issued an order on Sabine's compliance filing.<sup>4</sup> Although the Commission accepted the corrected UFRP rate as a way to avoid exacerbating any under-recovery for the current period covered by the filing in that docket, the Commission only accepted the increased rate to become prospectively effective September 1, 2008. The Commission stated: "Permitting the change to become retroactively effective March 1, 2008, as Sabine proposes, would create implementation problems as it reflects a retroactive increase in the UFRP." The Commission went on to state: "Because the corrected data relates to months falling in the November 2006 through October 2007 period, Sabine will need to file a separate request for a prior period

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<sup>2</sup> *Sabine Pipe Line LLC*, 116 FERC ¶ 61,309, at P 7 (2006) (September 29, 2006 Order).

<sup>3</sup> *Sabine Pipe Line LLC*, 117 FERC ¶ 61,277, at P 4 (2006).

<sup>4</sup> *Sabine Pipe Line LLC*, 124 FERC ¶ 61,144 (2008).

adjustment in its next annual FRP adjustment filing if it seeks to be made whole for any resulting under-recoveries for the November 2006 through October 2007 period due to the delay in implementing the corrected UFRP.” Sabine did not seek rehearing of the August 5, 2008 Order.

5. On October 30, 2008, Sabine filed the subject revised tariff sheets<sup>5</sup> in the instant Docket No. RP09-38 to modify section 27, to be effective November 30, 2008, to permit Sabine to adjust the FRP or UFRP to recoup any amounts that it failed to recover in any of its previous true-up filings.<sup>6</sup> Specifically, Sabine proposed to incorporate the following language into section 27.4: “Add to these quantities any and all quantities of Unaccounted For Gas not supplied by Shippers pursuant to this or any predecessor Section 27.4 for any prior period(s).” Sabine proposed similar tariff language in section 27.5 for determining its revised Port Neches FRP, and in section 27.6 for determining its revised Henry Hub FRP.

6. Shell Energy North America (US), L.P. (Shell) protested this proposed language, arguing that it is overly broad and violates the prohibition on retroactive ratemaking. Shell argued that it is Sabine’s responsibility to properly calculate and then collect fuel and lost and unaccounted for gas through its annual fuel tracker, and Sabine should not be allowed to freely go back to prior periods outside its relevant annual tracker period to make an adjustment to its current tracker filing.

7. In the November 26, 2008 Order, the Commission accepted the tariff changes that changed the timing of its annual FRP/UFRP filings and, with regard to the subject tariff revisions authorizing prior period adjustments, found it generally reasonable for a pipeline to provide in its tariff the authority to file to make prior period adjustments in fuel in order to permit the pipeline to be made whole for its actual incurrence of fuel and lost and unaccounted for costs.<sup>7</sup> The Commission, however, rejected Sabine’s proposed language in GT&C sections 27.4, 27.5, and 27.6 on the basis that the language “would violate the prohibition against retroactive ratemaking as it would allow Sabine to include in any filing in the future prior period adjustments to recover past under-recoveries that occurred at any time in the past, even if they occurred before the effectiveness of this

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<sup>5</sup> Second Revised Sheet No. 317, Second Revised Sheet No. 317A, and Second Revised Sheet No. 318 to its FERC Gas Tariff, Original Volume No. 1.

<sup>6</sup> Sabine also proposed to change the timing of its tracker filings by changing the filing date to February and the effective date to April 1 each year covering the 12-month period beginning February 1 of the prior year.

<sup>7</sup> November 26, 2008 Order at P 10.

tariff provision.”<sup>8</sup> The Commission noted that it had previously determined that when implementing a new tracker and true-up mechanism, a pipeline may not include in the true-up any under-recoveries that occurred prior to the effective date of the tariff provision.<sup>9</sup> Further, the Commission found that the proposal was inconsistent with the purpose of a tracker, i.e., to true-up both under- and over-recoveries, as it only applied to adjustments for past under-recoveries and not to past over-recoveries. Accordingly, the Commission conditioned acceptance of Sabine’s proposed language in sections 27.4, 27.5, and 27.6 on Sabine amending it to limit its application to adjustments for under-recoveries and over-recoveries that occurred subsequent to November 30, 2008, the effective date of the instant tariff revisions.<sup>10</sup>

8. Finally, on March 3, 2009, Sabine made its next annual FRP/UFRP filing, to be effective April 1, 2009, under the revised section 27 procedures accepted by the November 26, 2008 Order. In that filing, consistent with the August 5, 2008 Order, Sabine’s proposed rates reflected the prior period adjustment relative to the remaining unrecovered unaccounted for volumes from the November 2006 to October 2007 period referenced in the August 5, 2008 Order.<sup>11</sup> On March 31, 2009, the Commission accepted the filing, effective April 1, 2009, as proposed.<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, citing *Crossroads Pipeline Co.*, 121 FERC ¶ 61,249, at P 34 (2007) (*Crossroads*); *High Island Offshore System, LLC*, 112 FERC ¶ 61,050, at P 145 (2005) (*HIOS*).

<sup>10</sup> November 26, 2008 Order at P 10. On December 16, 2008, in Docket No. RP09-38-001, Sabine filed revised tariff sheets complying with the November 26, 2008 Order which the Commission accepted in an unpublished letter order issued on March 30, 2009.

<sup>11</sup> Consistent with the August 5, 2008 Order in Docket No. RP08-112, Sabine included recovery of the difference in UFRP recovery between the lower UFRP rate actually in effect between March 1 and September 1, 2008, (0.26 percent) and the increased rate (0.38 percent) it proposed in its February 4, 2008 filing in Docket No. RP08-112 for that period.

<sup>12</sup> Sabine Pipe Line LLC, Docket No. RP09-434-000 (unpublished letter order issued March 31, 2009).

### **Request for Rehearing**

9. Sabine seeks rehearing and/or clarification solely regarding the November 26, 2008 Order's condition that Sabine must limit its new prior period adjustment provisions in sections 27.4, 27.5, and 27.6 to under- and over-recoveries that occurred subsequent to November 30, 2008, the effective date of the tariff sheets filed by Sabine. Sabine submits that the Commission erred in requiring this condition, and requests that the Commission grant rehearing/clarification to provide that Sabine may include in any FRP/UFRP filing any prior period adjustments that may have occurred subsequent to October 1, 2006, the date Sabine's FRP/UFRP tracking mechanism originally became effective.

10. First, Sabine asserts that its intent with respect to the proposed language was and is to include only over-and under-recoveries of compressor fuel and lost and unaccounted for quantities that "(1) have not been disallowed by the Commission in any previous proceeding FRP/UFRP filing by Sabine, and (2) have transpired subsequent to October 1, 2006, the date on which Sabine's FRP and UFRP mechanisms first became effective."<sup>13</sup> Sabine asserts that the Commission has recognized that Sabine's FRP and UFRP mechanisms are intended to be true-up mechanisms and, indeed, the Commission conditioned its acceptance of the currently effective FRP/UFRP mechanisms upon the inclusion of a true-up feature.<sup>14</sup> Sabine asserts: "Under such a mechanism, as dictated by the Commission in that proceeding, both the company and its shippers are expected to be kept whole with respect to compressor fuel usage and lost and unaccounted for quantities on the system."<sup>15</sup> However, Sabine asserts that the Commission recognized in its letter order on Sabine's compliance filing in Sabine's previous FRP/UFRP filing that the mechanisms as they currently exist do not operate as expected. Sabine recounts how, in Sabine's previous FRP/UFRP filing for 2007 in Docket No. RP08-112-001, Sabine alerted the Commission that it had identified an anomaly in its data for the period from July 2007 through October 2007 that had caused it to under-recover UFRP, and it submitted corrected data and a revised UFRP. Quoting extensively from the August 5, 2008 Order, Sabine observes that the Commission permitted the revised UFRP to become

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<sup>13</sup> Sabine request for Rehearing at 7.

<sup>14</sup> Sabine Request for Rehearing at 8, citing *Sabine Pipe Line LLC*, 116 FERC ¶ 61,309, at P 7 (2006).

<sup>15</sup> Sabine Request for Rehearing at 8, citing *Sabine Pipe Line LLC*, 117 FERC ¶ 61,277, at P 4 (2006) ("... Sabine must provide a tariff mechanism to true-up both its fuel (FRP) and unaccounted for (UFRP) gas volumes. The true-up must be designed to eliminate all over and under recoveries and thereby will help insure that all parties are kept whole.").

effective prospectively, September 1, 2008, but, as to Sabine's request for a March 1, 2008 effective date, stated that "Sabine will need to file a separate request for a prior period adjustment in its next annual FRP adjustment filing if it seeks to be made whole for any resulting under-recoveries for the November 2006 through October 2007 period due to the delay in implementing the corrected UFRP."<sup>16</sup> However, Sabine argues that, stated another way, but for asking for (and being granted) a separate request for a prior period adjustment, if and to the extent Sabine does not recover prior period fuel and/or lost and unaccounted for quantities and the Commission finds no other reason to disallow them, Sabine would not be kept whole. Hence, it asserts, the tracking mechanism as it currently exists is flawed. It asserts that this is the reason for having included the proposed language in its October 29, 2008 filing and the reason remains valid.

11. Sabine next argues that both *Crossroads* and *HIOS*, the two precedents that the Commission cited in its November 30, 2008 Order, are inapposite to the instant proceeding. Sabine asserts that "[b]oth *Crossroads* and *HIOS* dealt with *new* FRP/LUAF tracking mechanisms," while Sabine's mechanisms "have been in place since October 2006, and [] have been intended by all affected parties and for all intents and purposes, to reflect an absolute true-up whereby both Sabine and its shippers are kept whole."<sup>17</sup> The disputed tariff proposal, Sabine concludes, "merely memorializes this intent"<sup>18</sup> and, as so clarified, should be approved.

### Discussion

12. We deny rehearing. At the outset, we disagree with Sabine that, by ordering Sabine to file a UFRP true-up mechanism, the Commission's September 29 and December 7, 2006 Orders in Docket No. RP06-582 intended to authorize Sabine to make prior period adjustments as it later proposed in the subject October 30, 2008 filing. Consistent with *HIOS*,<sup>19</sup> the Commission only permitted and required Sabine to

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<sup>16</sup> Sabine Request for Rehearing at 8, citing *Sabine Pipe Line LLC*, 124 FERC ¶ 61,144, at P 19 (2008).

<sup>17</sup> Sabine December 23, 2008 Rehearing Request at 9 (emphasis in original).

<sup>18</sup> *Id.*

<sup>19</sup> See *HIOS*, at P 145 ("While we recognize that the January 24 Order required *HIOS* to add a true-up mechanism to a modified annual fuel and LAUF recovery mechanism, we agree with the protestors that *HIOS*' proposed initial true-up percentage constitutes retroactive ratemaking, because the true-up percentage has been calculated to collect past under-recovered fuel costs before the new fuel tracker including the true-up mechanism becomes effective.").

prospectively implement true-up provisions. Thus, Sabine reads too much into the following excerpt from the December 7, 2006 Order: “Sabine must provide a tariff mechanism to true-up both its fuel (FRP) and unaccounted for (UFRP) gas volumes. The true-up must be designed to eliminate all over and under recoveries and thereby will help insure that all parties are kept whole.” The reference there to “all over and under-recoveries” only was in recognition that Sabine only proposed to include a fuel true-up and not an unaccounted for gas true-up and, therefore, had to be directed to re-file to include a true-up for unaccounted for volumes. Importantly, that statement was not intended to suggest that Sabine had been directed to implement a true-up applicable to “all” under- or over-recoveries regardless of in what period such under- or over-recoveries actually occurred. Thus, although the true-up provision subsequently accepted in compliance with the Commission’s directive would “help” to insure that all parties are kept whole, contrary to Sabine’s assertion, such provision would not necessarily operate as an “absolute” guarantee that “all” prior under-recoveries would be trued-up because, by its terms, the provision only permits one opportunity, in the next annual tracker filing following a 12-month period, in which to true-up (and, therefore, make whole) shippers for under- or over-recoveries that occur during that single 12-month period.

13. Moreover, in its compliance filing to include the true-up provision, Sabine did not indicate that the true-up provision would operate to permit such prior period adjustments. Sabine concedes that the existing tariff tracker/true-up provisions of section 27 in effect on October 30, 2008, at the time of the subject filing, did not permit it to file for such adjustments relative to service provided prior to that date in periods prior to the 12-month period immediately preceding an annual FRP/UFRP filing.

14. Further, the fact that the Commission permitted Sabine to carry forward into its next FRP/UFRP filing in Docket No. RP09-434 a portion of the unrecovered amounts from Docket No. RP08-112 does not support its current proposal. The corrected rates reflected adjustments to correct UFRP volumes for two months (September and October 2007) in the proper period covered by the rates that were being corrected and, therefore, were not prior period adjustments vis-à-vis that Docket No. RP08-112 tracker proceeding. The Commission permitted the corrections Sabine proposed to ensure that the tariff was being followed; that is, the Commission permitted Sabine to prospectively correct its current UFRP rate for the remainder of that rate period to reflect the correct lost and unaccounted volumes from the immediately preceding 12-month period. It was only because of the timing of acceptance of the corrected rate that a rate re-calculation complication resulted which prompted the Commission to permit the deferral of the remaining un-recovered UFRP amounts to Sabine’s next annual tracker filing.<sup>20</sup>

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<sup>20</sup> Because the Commission did not act on Sabine’s February 4, 2008 rate

15. The fact that Sabine is modifying an existing fuel and unaccounted for tracker true-up provision instead of implementing a new tracker provision, as in *Crossroads* and *HIOS*, does not distinguish those cases. The instant proposed tariff provision permitting true-up of over- and under-recoveries during periods before the immediately preceding 12-month period is, nonetheless, new and, as in *Crossroads* and *HIOS*, would operate retroactively to permit the recovery of past under-recovered (or over-recovered) unaccounted for volumes. The point of those orders is that, even though true-up tracker mechanisms permit later recovery of under- or over-collections that occur in a prior period, such provisions may only apply prospectively to under- and over-recoveries occurring in periods of service after the effective date of the tariff provisions.<sup>21</sup>

16. What makes Sabine's newly-proposed prior period adjustment mechanism acceptable prospectively, but unacceptable retroactively, is notice. Under the retroactive ratemaking doctrine, "the Commission is prohibited from adjusting current rates to make up for previous over- or under-collections of costs in prior periods."<sup>22</sup> However, the court has held that the "filed rate doctrine and bar on retroactive ratemaking are satisfied ... 'when parties have notice that a rate is tentative and may be later adjusted with retroactive effect.'"<sup>23</sup> Recently, in *City of Anaheim v. FERC*, the court stated: "[T]he

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correction proposal until August 5, 2008, for the Commission to have accepted the revised rate effective March 1, 2008, as Sabine proposed, the Commission would have had to permit Sabine to calculate a surcharge to be added to the proposed 0.38 percent rate to be prospectively effective September 1, 2008, to reflect the difference in UFRP recovery between the lower UFRP rate actually in effect between March 1 and September 1, 2008, (0.26 percent) and the increased rate it proposed in its February 4, 2008 filing for that period (0.38 percent). To avoid such a further interim rate adjustment, which would have further delayed the rate change and further exacerbated the recovery process, the Commission allowed the proposed 0.38 percent rate increase to go into effect prospectively, September 1, 2008, and directed Sabine to wait until its next annual tracker filing to seek an adjustment to recoup the remaining portion of the under-recovery that would have been recovered in the March 1- August 31, 2008 period had the 0.38 percent rate been effective during that period.

<sup>21</sup> See *HIOS*, at P 145 ("[W]e agree with the protestors that HIOS' proposed initial true-up percentage constitutes retroactive ratemaking, because the true-up percentage has been calculated to collect past under-recovered fuel costs before the new fuel tracker including the true-up mechanism becomes effective.").

<sup>22</sup> *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (J. Williams, *concurring*).

<sup>23</sup> *Id.* (quoting *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 969

(continued...)

rule against retroactive ratemaking has been interpreted to prohibit FERC from setting rates retroactively before the date that purchasers had sufficient notice of a possible change.”<sup>24</sup> A true-up tariff mechanism provides notice of what would otherwise be unlawful retroactive ratemaking insofar as it permits over- or under-collections of costs occurring after its effective date to be carried forward for inclusion in future rates. While we agree that a tariff true-up mechanism can be designed to make parties whole by correcting for past inaccurate data through prior period adjustments in current rates, the implementation of such mechanisms still must be on a prospectively effective basis. That is, such a provision may only permit adjustments in current rates for under- or over-recoveries that occurred in a past period at a time when customers were on notice that such an adjustment could be made in any future tracker filing, not just in the next subsequent tracker filing. Nothing in the tariff in effect at the time of the instant tariff proposal or in previous orders Sabine cites suggests that such notice occurred prior to the November 30, 2008, effective date of the subject tariff proposal. The absence of such notice is fatal to Sabine’s request to approve the retroactive feature of the proposed changes to section 27 of its tariff.

The Commission orders:

The request for rehearing is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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(D.C. Cir. 2003)). *See also CPUC v. FERC*, 988 F.2d 154, 164 n.9 (D.C. Cir. 1993) (“Although our prior cases have addressed the issue of notice primarily in relation to the filed rate doctrine, we find it similarly applicable in relation to the prohibition against retroactive ratemaking, which serves the same purposes.”).

<sup>24</sup> *City of Anaheim v. FERC*, 558 F.3d 521, 524-525 (D.C. Cir. 2009).