143 FERC ¶ 61,129
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 516-A

Sea Robin Pipeline Company, LLC	**Docket Nos.**	**RP09-995-003**
		RP09-995-004
		RP10-422-001
		RP10-422-003
		RP12-313-003
		RP12-469-001

ORDER ON REQUESTS FOR REHEARING

(Issued May 16, 2013)

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

Sea Robin Pipeline Company, LLC — Docket Nos. RP09-995-003
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1. This order addresses requests for rehearing of several related Commission orders, including Opinion No. 516.[1] These orders all concern a mechanism to record and recover hurricane related expenses proposed by Sea Robin Pipeline Company, LLC (Sea Robin) on August 31, 2009. As discussed below, the Commission denies in part and grants in part the requests for rehearing.

I. Background and Procedural History

2. This case arises from the events of September 2008, when Hurricane Ike caused extensive damage to the natural gas pipeline network of Sea Robin. Sea Robin operates an approximately 457-mile natural gas pipeline system offshore of Louisiana in the Gulf of Mexico. Sea Robin's system is configured in the form of an inverted or upside-down "Y." The system transports a raw stream of natural gas and liquid hydrocarbons, including condensate, which have not been separated or processed. Collected gas and

[1] *Sea Robin Pipeline Co., LLC*, 130 FERC ¶ 61,261 (2010) (2010 Suspension Order) (listed in Docket Nos. RP10-422-000 and RP09-995-000); *Sea Robin Pipeline Co., LLC*, Opinion No. 516, 137 FERC ¶ 61,201 (2011) (listed in Docket Nos. RP09-995-000 and RP10-422-000); *Sea Robin Pipeline Co., LLC*, 138 FERC ¶ 61,242 (2012) (March 2012 Order) (listed in Docket Nos. RP12-313-001 and RP12-469-000).

liquids are moved to shore for liquids separation, dehydration, processing, and delivery. Six interconnected interstate pipelines, one intrastate pipeline, and one storage field take receipt of gas from Sea Robin.[2]

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

4. The hurricane caused significant damage to Sea Robin's offshore production infrastructure. In Sea Robin's initial filing in 2009, Sea Robin's best estimate of the total projected costs for repairs to its system in the wake of Hurricane Ike was $144.6 million. Sea Robin later stated that it anticipated $86.76 million in Oil Insurance Limited (OIL) insurance reimbursements and potentially, an additional amount from ENSCO, the owner of a drilling barge that Sea Robin has sued for particular damages to its pipeline during Hurricane Ike. Therefore, notwithstanding any money recovered from the ENSCO litigation,[3] Sea Robin anticipated a shortfall of approximately $57.84 million.[4]

5. On August 31, 2009, Sea Robin filed to establish a surcharge mechanism to record and recover its hurricane-related expenses, less any recoveries from third parties (Hurricane Surcharge) in Docket No. RP09-995-000. The proposed provisions of the Hurricane Surcharge are outlined in section 24 of the General Terms and Conditions (GT&C) of Sea Robin's FERC Gas Tariff. Under proposed section 24, Sea Robin would collect, through a surcharge applied to all transported dekatherms (Dth), the capital costs and related Operation and Maintenance (O&M) expenditures incurred to repair the damages to its facilities caused by Hurricane Ike, as well as capital costs and O&M

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

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

[4] *See* Exh. No. S-1 at 8:5-10.

expenses related to future named hurricanes, for a period beginning October 1, 2009 and continuing through September 30, 2013. Originally, Sea Robin proposed that the surcharge would include costs incurred to prevent damages from future storms; however, Sea Robin later agreed not to include prevention costs in the Hurricane Surcharge. Sea Robin proposed that these surcharge costs would be offset by insurance proceeds and any recoveries from third parties.

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

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

8. ExxonMobil and Hess filed a request for rehearing of the Suspension Order on October 30, 2009. On March 18, 2010, the Commission denied the request for rehearing, finding that "[n]othing in [Natural Gas Act] section 4 prohibits the Commission from allowing a pipeline to make a limited section 4 filing to recover a particular type of cost" and affirming Sea Robin's ability to collect the hurricane-related costs through a limited

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

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

section 4 filing rather than as part of a general section 4 rate case.[7] The Rehearing Order confirmed that current Commission policy permits a surcharge via a limited section 4 filing "to recover extraordinary, one-time losses resulting from events outside the pipeline's control" such as the hurricane damage suffered by Sea Robin.[8] The Commission found that such a surcharge mechanism provides the pipeline and its customers certainty as to what categories of costs may be recovered and how they will be allocated among shippers.[9] The Commission expressly found that Sea Robin's proposal to include previously incurred Hurricane Ike costs in the surcharge to be reasonable.[10] Finally, the Commission held that the Hurricane Surcharge does not violate the filed rate doctrine or the rule against retroactive ratemaking because the Hurricane Surcharge does not retroactively change rates provided for service before the effective date of the Hurricane Surcharge.[11]

9. On March 1, 2010, in Docket No. RP10-422-000, Sea Robin filed to increase the Hurricane Surcharge from $0.0401 per Dth to $0.0729 per Dth. On March 31, 2010, the Commission consolidated the proceeding in Docket No. RP10-422-000 with the proceeding in Docket No. RP09-995-000, accepted the revised tariff sheets for filing and suspended their effectiveness for the minimum period, subject to refund.[12] On April 30, 2010, ExxonMobil and Hess filed a request for rehearing of the Commission's March 31, 2010 suspension order raising substantially the same issues raised in their request for rehearing of the 2009 Suspension Order. On May 13, 2010, Sea Robin filed an answer to and a motion to reject ExxonMobil and Hess' request for rehearing. On May 25, 2010, ExxonMobil and Hess filed an answer to Sea Robin's answer and motion to reject request for rehearing. The Commission issued its standard tolling order on May 27, 2010, but has not yet issued a decision on the rehearing request of ExxonMobil and Hess.

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

[8] *Id.*

[9] *Id.* P 21.

[10] *Id.* P 18.

[11] *Id.* P 14.

[12] March 2010 Order, 130 FERC ¶ 61,261.

10. The ALJ conducted the evidentiary hearing in this case on July 20 and 21, 2010. On December 13, 2010, the ALJ issued the Initial Decision.[13] On January 12, 2011, Sea Robin, Apache, Arena and ExxonMobil and Hess filed Briefs on Exceptions. On February 1, 2011, Sea Robin, Apache and Chevron, Arena and Trial Staff filed Briefs Opposing Exceptions. On the same date, Apache also filed a separate Brief Opposing Exceptions.

11. On December 15, 2011, the Commission issued Opinion No. 516, which addressed the briefs on and opposing exceptions.[14] On January 17, 2012, ExxonMobil and Hess, Apache and Chevron, and Arena filed requests for rehearing of Opinion No. 516. On February 10, 2012, Sea Robin filed an answer to the requests for rehearing and on February 27, 2012, ExxonMobil and Hess filed a reply to Sea Robin's answer.

12. On January 13, 2012, in Docket No. RP12-313-000, Sea Robin filed revised tariff records in compliance with Opinion No. 516. On February 23, 2012, the Commission accepted the proposed tariff records, subject to refund and conditions, and to Sea Robin modifying the language in its tariff records as directed in the order.[15] On March 1, 2012, in Docket No. RP12-469-000, Sea Robin filed revised tariff records to comply with the Commission's February 23, 2012 order. On March 30, 2012, the Commission accepted the compliance tariff records to become effective on the dates shown in the appendices, subject to the pending rehearing requests in Docket Nos. RP09-995-004 and RP10-422-003.[16] On April 30, 2012, the Producer Coalition[17] and Apache and Chevron filed requests for rehearing of the March 2012 Order.

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[13] *Sea Robin Pipeline Co., LLC*, Initial Decision, 133 FERC ¶ 63,009 (2010) (ID). Two erratas were issued on the ID, one on December 15, 2010 and one on December 16, 2010. The erratas amended the captioned docket to include RP10-422-000 and the "Appearances" section of the ID.

[14] Opinion No. 516, 137 FERC ¶ 61,201.

[15] *Sea Robin Pipeline Co., LLC*, 138 FERC ¶ 61,131 (2012) (February 2012 Order).

[16] March 2012 Order, 138 FERC ¶ 61,242.

[17] The Producer Coalition includes Century Exploration New Orleans, LLC (Century), Dynamic Offshore Resources, LLC (Dynamic), Energy XXI (Bermuda) Ltd. (Energy XXI), Hilcorp Energy Company, (Hilcorp), McMoRan Oil & Gas LLC (McMoRan), Pisces Energy LLC (Pisces), and W&T Offshore, Inc. (W&T).

13. Since the hearing, and as required by GT&C section 24.4(a), Sea Robin has made six additional Hurricane Surcharge filings. With the exception of the last filing, these filings have gradually increased the surcharge from $0.0729 per Dth to $0.2915 per Dth. The increases in the Hurricane Surcharge in these filings were largely attributable to a continuing decline in projected throughput and under-recoveries in the prior period because of throughput being less than projected.[18] In Sea Robin's last semi-annual filing in March 2013, Sea Robin filed to decrease the Hurricane Surcharge from $0.2915 per Dth to $0.2836 per Dth. This was largely due to the fact that Sea Robin calculated the Hurricane Surcharge based on a projected annual throughput of 83,862,484 Dth, which reflected a slight increase from the projected annual throughput used to calculate the Hurricane Surcharge in Sea Robin's last semi-annual filing in August 2012. The Commission accepted and suspended all six filings, subject to refund and the outcome in Docket Nos. RP09-995-000 and RP10-422-000.[19]

14. The Commission rejects Sea Robin's answer to the requests for rehearing of Opinion No. 516. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.[20] Accordingly, we also reject ExxonMobil and Hess' reply to Sea Robin's answer.

II. Overview of the Commission's Holdings in Opinion No. 516

15. Given that no party filed exceptions to the ALJ's holdings that (1) Sea Robin should be permitted to include capital costs in the Hurricane Surcharge, (2) the actual costs Sea Robin has included in the surcharge are reasonable, and (3) Sea Robin's proposal concerning the volumes to be used to design the surcharge is reasonable, Opinion No. 516 affirmed the ALJ's holdings on those issues.

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[18] In Sea Robin's initial and March 2010 Hurricane Surcharge filings, Sea Robin calculated the surcharge based on annual projected throughput of 237,957,516 Dth. In its next semi-annual filing in September 2010, Sea Robin's annual projected throughput declined to 178,240,591 Dth and continued to decline through Sea Robin's August 2012 semi-annual filing, which reflected a projected annual throughput of 82,635,502 Dth.

[19] *See Sea Robin Pipeline Co., LLC*, 132 FERC ¶ 61,277 (2010); *Sea Robin Pipeline Co., LLC*, 134 FERC ¶ 61,262 (2011); *Sea Robin Pipeline Co., LLC*, 136 FERC ¶ 61,229 (2011); March 2012 Order, 138 FERC ¶ 61,242; *Sea Robin Pipeline Co., LLC*, 140 FERC ¶ 61,247 (2012); and *Sea Robin Pipeline Co., LLC*, 142 FERC ¶ 61,239 (2013).

[20] 18 C.F.R. § 385.713(d)(1) (2012).

16. Opinion No. 516 reversed the ALJ's finding that a 21.4-year recovery period is just and reasonable and found instead that Sea Robin's proposed four-year recovery period was just and reasonable. Opinion No. 516 reversed the ALJ's holding that carrying charges at the Commission-published interest rate should begin to accrue March 1, 2010, the date that the Commission authorized the Hurricane Surcharge to take effect, subject to refund. The Commission found instead that carrying charges should begin to accrue the later of August 1, 2009, the date Sea Robin filed to establish the Hurricane Surcharge, or the date the associated cost is incurred. Finally, Opinion No. 516 found that Sea Robin's discount agreements with certain shippers permit it to recover the Hurricane Surcharge from those shippers. Therefore, there was no need to modify those agreements, as the ALJ sought to do pursuant to an analysis under the *Mobile-Sierra* public interest standard.

III. Hurricane Surcharge Recovery Period

A. Opinion No. 516

17. In Opinion No. 516, the Commission reversed the ALJ's finding that a 21.4-year recovery period was just and reasonable.[21] The Commission chose from among four competing proposals: (1) Sea Robin's proposed four-year recovery period, (2) Trial Staff's suggested 12.5-year recovery period; 2) the ALJ's adopted 21.4-year recovery period; 3) the shippers' suggested 25-year recovery period. The Commission found that Sea Robin's proposal was just and reasonable and adopted its proposed four-year recovery period.[22] The Commission explained that under the NGA, the pipeline has the initiative to propose how it will recover its costs in a section 4 filing. The Commission further noted that when the pipeline satisfies its burden under section 4 to show the proposed rates are just and reasonable, the Commission should accept the proposal, even if other just and reasonable amortization periods exist.[23]

18. Several factors led to the Commission's determination that Sea Robin's proposed four-year recovery period was just and reasonable. The costs Sea Robin proposed to include in the Hurricane Surcharge were extraordinary costs outside its control.[24] The

[21] Opinion No. 516, 137 FERC ¶ 61,201 at P 42.

[22] *Id*.

[23] *Id*. P 43.

[24] Sea Robin's Hurricane Surcharge proposal included approximately $57.84 million in hurricane-related repair costs, including $55.8 million in capital costs and the remainder in O&M costs. *Id*. P 44.

Commission asserted that the costs shouldered by Sea Robin actually benefited its customers by allowing them to efficiently resume full service shortly following a catastrophic event.[25]

19. As further justification, the Commission relied on Sea Robin's limitation of its recovery to reimbursement of hurricane-related repair costs, plus carrying charges at the Commission-published interest rate of 3.25 percent.[26] The Commission found it significant that Sea Robin was voluntarily forgoing return on equity and income tax allowance—benefits it would have received had the capital costs been included in the rate base of the next general rate filing. The Commission noted that over the four-year amortization period, Sea Robin's ratepayers would only pay the principal amount of the repair costs plus 3.25 percent in carrying charges on the outstanding balance. The Commission found this would provide significant savings to ratepayers in the long term.

20. The Commission rejected both the ALJ's adopted 21.4-year amortization period and the shippers' 25-year amortization period because both would result in increased long-term charges for ratepayers. In Sea Robin's next section 4 rate filing, which must be filed by January 1, 2014, Sea Robin may add any remaining capital costs relating to the Hurricane Ike repairs into its proposed rate base. As the Commission noted, the longer amortization schedules would only allow Sea Robin to recover approximately 20 percent of the capital costs by the effective date of Sea Robin's next rate case. Therefore, if the longer amortization periods were adopted, Sea Robin would be entitled to include approximately 80 percent of the capital costs in its rate base in the next rate case. This would allow it to include in its cost of service used to calculate its maximum rates in that rate case a return on equity on the portion of the capital costs relating to the Hurricane Ike repairs financed with equity and an income tax allowance.[27] The Commission stated that it had recently approved returns on equity for natural gas pipelines several times more than the Commission-published interest rate of 3.25 percent.[28]

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[25] *Id.* P 49.

[26] *Id.* P 44.

[27] *Id.* P 47.

[28] *Id.*, (citing *Portland Natural Gas Transmission System*, 134 FERC ¶ 61,129, at P 225 (2011) (approving a return on equity of 12.99 percent) and *Kern River Natural Gas Transmission Co.*, 136 FERC ¶ 61,034 (2009) (approving a return on equity of 11.55 percent)).

21. The Commission stated that, by contrast, under Sea Robin's proposal, its customers pay only the principal amount of the repair costs plus 3.25 percent in carrying charge on the outstanding principal balance. While the Commission recognized that the increase in rates as a result of the Hurricane Surcharge is not insignificant, the Commission concluded that Sea Robin's proposal is reasonable, given that over the long term Sea Robin's maximum rate customers will pay significantly less for the hurricane repair costs, than they would have paid under the ALJ's 21.4 year amortization period or the longer 25-year period advocated by shippers.

22. The Commission rejected the shippers' argument that the four-year amortization schedule would result in intergenerational inequities. While recognizing the impact of the Hurricane Surcharge on Sea Robin's current shippers, the Commission found that the benefit of reducing long-term costs to shippers outweighed any speculative concern of future changes in Sea Robin's customer profile.[29]

23. Lastly, the Commission directed Sea Robin to modify its tariff such that any hurricane-repair cost not included in the previous Hurricane Surcharge filing would be calculated into a new four-year amortization period that will effectuate on the date of such new filing. The Commission explained that allowing Sea Robin to add additional hurricane-repair costs, past or future, into the current surcharge to be paid on the remaining four-year amortization schedule could create an unjust and unreasonable result. The Commission further explained that any remaining balance in the Hurricane Surcharge account may be included in the base rate of Sea Robin's next general rate case filing.

B. <u>Requests for Rehearing</u>

1. <u>Apache and Chevron</u>

24. Apache and Chevron filed a joint request for rehearing, challenging the Commission's decision that a four-year amortization period to recover capital costs was just and reasonable.[30] Apache and Chevron assert that the Commission's decision was unjust and unreasonable because it deviates from Commission precedent and places an undue burden on current shippers.[31]

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[29] *Id.* P 50.

[30] Apache and Chevron Rehearing Request at 4.

[31] *Id.*

25. According to Apache and Chevron, the Commission generally defers to ALJ fact-finding when a hearing involves contested issues of material fact. They assert that the Commission did not follow precedent when it did not defer to the ALJ's factual determination that a 21.4-year amortization period would minimize any significant rate shock. Apache and Chevron contend that the Commission erred when it adopted the ALJ's holding that capital costs could be included in Sea Robin's Hurricane Surcharge without also affirming the ALJ's determination that a 21.4-year amortization period was just and reasonable. According to Apache and Chevron, the 21.4-year amortization period "was part and parcel of the overall just and reasonable package the presiding ALJ approved."[32] In adopting one decision without the other, Apache and Chevron argue that the Commission upset the equitable balance struck by the ALJ's two-part decision.[33]

26. Apache and Chevron further assert that "Commission policy favors recovering capital costs over the service life of the asset."[34] They argue that the Commission created an unjust and unreasonable result by shortening the amortization period to four years instead of adopting the ALJ's determined 21.4-year recovery period. According to Apache and Chevron, the shortened recovery period allows Sea Robin to recover its capital costs in less than 20 percent of the remaining life of the system, a result that conflicts with the Commission's policy of recovering capital costs over the service life of the asset. [35]

27. Apache and Chevron further contend that a four-year amortization period does not equitably distribute the burden of the hurricane-repair costs. They claim the four-year amortization period imposes undue burden on current shippers while allowing Sea Robin to benefit from a shortened amortization period. Apache and Chevron contest the Commission's finding that the shippers benefit from paying significantly less in the long term. They argue instead that the four-year recovery period costs current shippers more on net-present-value basis than would a 21.4-year amortization period rolled into the balance of the Sea Robin's next rate case filing.[36] Additionally, Apache and Chevron argue that the four-year amortization period creates significant rate shock for current

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[32] *Id.*

[33] *Id.* at 5.

[34] *Id.* at 4 (citing *SFPP, L.P.*, 129 FERC ¶ 63,020, at PP 794-95 (2009)).

[35] *Id.* at 6.

[36] *Id.* at 8.

shippers, burdening them while Sea Robin benefits from quicker recovery of capital costs.[37]

28. Claiming that they will receive "no benefits . . . from the four-year amortization," Apache and Chevron argue that the most equitable and reasonable outcome is adopting the 21.4-year recovery period and allowing Sea Robin to include the remaining balance in its next rate filing.[38] In support, Apache and Chevron maintain that Sea Robin will benefit from quicker recovery of costs (as compared to the Commission's traditional model), and current shippers will enjoy a lower net-present-value cost and avoid significant rate shock.[39]

2. <u>ExxonMobil and Hess</u>

29. ExxonMobil along with Hess filed a joint rehearing request, arguing that the Commission's adoption of the four-year amortization period was not based on substantial evidence or reasoned decision-making and the outcome was arbitrary and capricious.[40] They argue that the Commission based its decision on insufficient evidence from Sea Robin, dismissed intergenerational inequities, gave Sea Robin double incentive to make repairs, and contradicted its rationale by requiring that the tariff be modified for future hurricane costs.[41]

30. In support of their argument, ExxonMobil and Hess refute Sea Robin's arguments made in favor of the four-year amortization period.[42] First, they submit there was no evidence in the record to support Sea Robin's claim that it "needed to recover all [hurricane] costs prior to the filing of its next rate case, to enable it to compete for available supplies without the burden of rates reflecting Hurricane Ike costs."[43] Next,

[37] *Id.*. Apache claims current customers will experience a rate shock of a 73.8 percent increase over the currently effective rate. *Id*.

[38] *Id*.

[39] *Id*. at 9.

[40] ExxonMobil and Hess Rehearing Request at 35.

[41] *Id*. at 43.

[42] *Id*. at 35-38.

[43] *Id*. at 35.

they question Sea Robin's proffered rationale that its incurrence of the catastrophic costs benefited its customers by allowing it to recover quickly after a natural disaster. ExxonMobil and Hess assert Sea Robin never discussed cost recovery or potential benefits with its customer shippers. Last, they contend that despite Sea Robin's opposition to a 25-year useful life span, Sea Robin provided no evidence to the contrary and actually acknowledged that useful life would be substantially longer than the proposed four-year recovery period.

31. According to ExxonMobil and Hess, the Commission's "blind acceptance of [Sea Robin's] assertion is unsupported by substantial evidence or reasoned decision-making."[44] They contend that the Commission completely ignored unrebutted evidence of the facility's 25-year useful lifespan, Trial Staff's 12.5 year recovery period recommendation, and the Presiding ALJ's findings that a four-year recovery period was unjust and unreasonable and a 21.4-year recovery period was just and reasonable. They further contend that the Commission "breezily" dismissed concerns of intergenerational inequities.

32. ExxonMobil and Hess submit that the Commission lacked substantial evidence and reasoned decision-making when it accepted Sea Robin's assertion that Sea Robin was forgoing a return on capital costs during the four-year amortization period. They argue that Sea Robin is recovering the equivalent of a substantial return through the time value benefit of recovering costs over a four-year period. ExxonMobil and Hess contend that weight is inappropriately placed on Sea Robin's willingness to forgo depreciation, when Sea Robin actually receives a substantial benefit from receiving complete return of capital in four years. As a result, they argue, Sea Robin is made to bear almost no financial burden. Lastly, ExxonMobil and Hess contend that Sea Robin has not forgone return on hurricane related costs because Sea Robin has not forgone the opportunity to recover a future "management fee."[45]

33. ExxonMobil and Hess take further issue with the Commission's policy determination that accelerated recovery of capital costs was necessary to provide Sea Robin adequate incentive to make prompt repairs. They claim that permitting Sea Robin to recover Hurricane related costs through a limited section 4 filing instead of burdening it with a general section 4 rate proceeding provides sufficient incentive for Sea Robin to make prompt repairs.[46] ExxonMobil and Hess contend that allowing Sea Robin to file a

[44] *Id.*

[45] *Id.* at 40.

[46] *Id.* at 40-41.

limited section 4 filing and recover costs in four years amounts to a double acceleration of recovering costs. They argue Sea Robin did not need any incentive to repair its damaged facility as it made the decision to do so unilaterally without contemporaneous discussions with shippers. They note that Sea Robin restored service on the West Leg within 15 months of Hurricane Ike's landfall.

34. Finally, ExxonMobil and Hess argue that the Commission's modification of Sea Robin's tariff, such that any additional hurricane-repair cost is calculated into a new four-year amortization period, undercuts the Commission's rationale for approving the four-year amortization period for the previous Hurricane Surcharge. In support, ExxonMobil and Hess note that the Commission's reasoning for accelerating the recovery of Hurricane Ike repair costs was to allow recovery before Sea Robin's next rate filing. They submit that the modification allows a significant amount of remaining Surcharge costs to be included in Sea Robin's rate base. This result, they claim, is exactly the outcome that the Commission attempted to avoid in justifying its approval of Sea Robin's four-year amortization period for Hurricane Ike-related costs.

C. Commission Determination

35. The Commission denies the requests for rehearing on the issue of Sea Robin's recovery period for Hurricane Ike related costs. As Opinion No. 516 stated, under the statutory scheme set forth in the NGA, the pipeline has the initiative through a section 4 filing to propose how it will recover its costs.[47] The courts have long recognized that there is no single just and reasonable rate but instead that various rates may be just and reasonable.[48] Therefore, if the pipeline satisfies its burden under section 4 to show that its proposed rates are just and reasonable, the Commission must accept those rates, regardless of whether other just and reasonable rates may exist.[49] It follows that, if Sea Robin's proposed four-year amortization period is just and reasonable, the Commission must accept that proposal, even if other amortization periods might also be just and reasonable.

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

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

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

36. In its initial hurricane surcharge filing, Sea Robin proposed that, for ratemaking purposes, all the costs of putting its pipeline back into service after Hurricane Ike, including its costs of replacing plant destroyed during the hurricane, should be treated as extraordinary one-time out-of-pocket expenses, rather than an investment on which it would be entitled to recover a profit. As such, Sea Robin proposed to amortize these costs over a four-year period, with carrying charges accruing on the monthly unrecovered balance calculated at the Commission prescribed interest rates in accordance with section 154.501(d) of the Commission's regulations.[50] That interest rate has been 3.25 percent throughout the period the Hurricane Surcharge has been in effect.

37. The Commission continues to find this proposal to be just and reasonable, and the Commission rejects the rehearing applicants' assertion that the only just and reasonable period over which to recover the plant replacement costs was the entire remaining depreciable life of Sea Robin's system. It is, of course, true that plant replacement costs are generally eligible for inclusion in a pipeline's rate base as part of its capital invested in providing jurisdictional service. When plant costs are included in a pipeline's rate base, the Commission requires the pipeline to recover those costs over the depreciable life of the plant in question. In addition, the pipeline is entitled to earn a return on equity on the undepreciated portion of those costs financed by equity, and an allowance for the income taxes it must pay on its return on equity, and the pipeline is entitled to recover the cost of the debt incurred to finance the remainder of its invested capital.

38. However, Sea Robin has not proposed to treat the plant replacement costs as part of its capital invested in providing jurisdictional service, but instead to amortize those costs as an extraordinary, one-time expense until it files its next rate case. The Commission finds that it is reasonable to treat these plant replacement costs as an expense, rather than a capital investment, for ratemaking purposes. These plant replacement costs do not constitute the ordinary type of capital investment which a pipeline makes in order to provide a new or improved jurisdictional service and which would normally be included in a pipeline's rate base and earn a return.[51] Rather, Sea Robin incurred these costs solely for the purpose of repairing catastrophic hurricane damage to its existing system in which it previously made a capital investment. That previous capital investment is already included in Sea Robin's rate base and its existing rates include a return on the undepreciated portion of that investment. The plant

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

[51] As Apache and Chevron state in their rehearing request (at page 6), "It is undisputed on this record that the capital costs Sea Robin incurred in repairing its system following damage caused by Hurricane Ike were both extraordinary, and unexpected."

replacement costs enabled Sea Robin to place its old system back in service at its existing certificated capacity levels. The plant replacement costs did not add any new capacity to the system or make any system improvements which would improve its reliability such as by rendering the system less susceptible to hurricane damage in the future.[52]

39. In these circumstances, treatment of the plant replacement costs as an expense rather than a rate base item, on which Sea Robin would be entitled to earn a return, is reasonable. Indeed, the rehearing applicants do not object to the expense treatment of the plant replacement. Rather, they contend that, despite treating the plant replacement costs as an expense, Sea Robin should be required to recover them over the remaining depreciable life of Sea Robin's system, consistent with the Commission's general policy of requiring capital costs to be recovered over a system's depreciable life. However, it is only rate base items which the Commission requires a pipeline to recover over its depreciable life. As Sea Robin has pointed out,[53] if the Commission were to require Sea Robin to recover the plant replacement costs over its full depreciable life similar to a rate base item, it would follow that the plant replacement costs should also be treated as a rate base item for other ratemaking purposes, including allowing Sea Robin to earn a return on those costs. That would enable Sea Robin to earn a return on the plant replacement costs including during the period the costs are included in the Hurricane Surcharge. In essence, the rehearing applicants are seeking the benefit of the extended recovery period required for rate base items, without incurring the corresponding cost of paying a return on the plant replacement costs, at least until Sea Robin's next rate case.[54]

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[52] Prepared Rebuttal Testimony of Sea Robin witness Michael Langston, Exh. No. SR-11 at 5-6. *See also* Sea Robin Initial Brief at 25. *Contrast SFPP, L.P*, 129 FERC ¶ 63,020, at PP 794-5 (2009), an initial decision cited by Apache and Chevron, in which the subject capital costs appear to have involved ordinary plant investments. In *SFPP, L.P.*, Opinion No. 511-A, 137 FERC ¶ 61,220, at P 229 (2011), the Commission affirmed the part of the initial decision relied on by Apache and Chevron.

[53] Sea Robin Brief on Exceptions at 31.

[54] Apache and Chevron and ExxonMobil and Hess contend that the Opinion No. 516 improperly reversed the factual findings of the ALJ who conducted the hearing concerning Sea Robin's depreciable life. However, we accept the ALJ's factual findings that the useful life of Sea Robin's pipeline is well over four years. No evidence to the contrary played into the Commission's reasoned decision-making. Our disagreement with the ALJ is not with her factual findings. Rather, our reversal of the ALJ is for the policy reasons discussed above. The Commission may reverse an ALJ finding so long as the Commission's decision is supported by substantial evidence and reasoned decision-

(continued…)

40. The Commission finds that, given the treatment of plant replacement costs as an expense rather than a rate base item, it is reasonable for the costs to be amortized over a four-year period from their inclusion in rates. An amortization period of that length is similar to the amortization periods the Commission has approved for the recovery of other one-time extraordinary costs. For example, the Commission approved amortization periods of between three and five years for the recovery of pipeline take-or-pay settlement costs incurred during the transition to open access transportation.[55] The Commission has also approved uncontested settlements including similar amortization periods for the hurricane cost recovery surcharges of other interstate pipelines.[56]

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making. *See Trunkline LNG Co. v. F.E.R.C.*, 921 F.2d 313, 324 (D.C. Cir. 1990) (holding that the Commission could reverse an ALJ's decision when the Commission's explanations were on their face reasonable). Moreover, as we noted in Opinion No. 516, the ALJ recognized,

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

ID, 133 FERC ¶ 63,009 at P 192.

[55] *See, e.g.*, *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,401 at 62,293 (1988); *Columbia Gas Transmission Corp.*, 44 FERC ¶ 61,177, at 61,596 (1988); and *Valero Interstate Transmission Co.*, 46 FERC ¶ 61,003, at 61,004-5 (1989).

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

(continued…)

41. As stated in Opinion No. 516, while a four-year amortization period produces a higher per-unit surcharge than either the ALJ's 21.4-year amortization period or the 25-year amortization period proposed by ExxonMobil and Hess, the four-year amortization period provides significant offsetting advantages for shippers. That period allows Sea Robin to recover most of its hurricane repair costs, including the plant replacement costs, before Sea Robin files its next general section 4 rate case in late 2013, as required by the settlement of its last section 4 rate case.[57] During the amortization period, the shippers pay only the principal amount of the repair costs, plus 3.25 percent in carrying charges on the outstanding balance during the four-year amortization period. As a result, Sea Robin's proposed rate base in its next section 4 rate case should not include any significant capital costs related to the Hurricane Ike repair costs.

42. However, under the alternate amortization period proposals, Sea Robin likely would have recovered only about 20 percent of the capital costs by the effective date of the next rate case.[58] Therefore, it would be entitled to include about 80 percent of the plant replacement costs in its rate base in the next rate case. This would allow it to include in its cost of service in that rate case an overall return on the capital costs included in the rate base. That overall return would include a return on equity on the portion of the rate base financed with equity, together with an income allowance; the overall return would also include Sea Robin's cost of the long-term debt to finance the remainder of the rate base. The Commission has recently approved returns on equity for natural gas pipelines several times more than the Commission-published interest rate of

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surcharge); *ExxonMobil Pipeline Co.*, FERC Tariff 255-273, Docket No. IS06-344-000 (May 31, 2006) (12-month recovery period for a hurricane surcharge).

[57] In light of our requirement that new costs included in later filings must be amortized over at least 4 years from the effective date of the later filing, we estimate that the balance remaining to be recovered as of September 30, 2013 will be approximately $6,812,768.

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

3.25 percent.[59] Sea Robin's overall return on its rate base is likely to be over 10 percent, taking into account both the income tax allowance based on the 35 percent Federal corporate income tax rate and Sea Robin's debt costs.

43. ExxonMobil and Hess assert that the Commission erred in relying on Sea Robin's assertion that it would forgo a return on the plant replacement costs to approve its four-year amortization proposal. They argue that, by allowing Sea Robin to recover the plant replacement costs, plus carrying charges, over four years, the Commission is allowing Sea Robin to recover "the equivalent of a substantial return (and tax component) through the time value benefit of recovering these costs so quickly."[60] This contention reflects a misunderstanding of the purpose of carrying charges. Carrying charges are simply a way of ensuring that a party receives full compensation for its actual costs, when its recovery of those costs is deferred.[61] As the D.C. Circuit has explained, "Compensation deferred is compensation reduced by the time value of money."[62] Thus, the 3.25 percent carrying charges Sea Robin collects during the four-year amortization period on the unrecovered balance of its hurricane repair costs, including its plant replacement costs, serve only to ensure that Sea Robin is compensated for the actual cost of the plant replacement costs, without any underrecovery due to delay in recovering the costs.

44. ExxonMobil and Hess assert that Sea Robin could earn a profit on the plant replacement costs, despite the fact the Hurricane Surcharge includes no return on equity, income tax allowance, or long-term debt costs, because Sea Robin might recover a management fee in lieu of the return on the rate base that would ordinarily be included in rates, after it has fully depreciated its transmission plant. ExxonMobil and Hess cite *Tarpon Transmission Co.*,[63] in which the Commission approved a management fee in

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[59] In *Portland Natural Gas Transmission System*, Opinion No. 524, 142 FERC ¶ 61,197, at P 322 (2013), issued on March 21, 2013, the Commission approved a Discounted Cash Flow (DCF) analysis resulting in a range of returns from 8.69 percent to 11.59 percent, with a median of 10.24 percent.

[60] ExxonMobil and Hess Rehearing Request at 38-39.

[61] See *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1267 (D.C. Cir. 1999), noting that compensation deferred is compensation reduced by the time value of money and that interest is simply a way of ensuring full compensation.

[62] *Id., quoting In re Milwaukee Cheese Wisconsin, Inc.*, 112 F.2d 845, 849 (7th Cir. 1997).

[63] 57 FERC ¶ 61,371 (1991) (Tarpon).

such a situation.[64] However, as ExxonMobil and Hess's own explanatory parenthetical indicates, *Tarpon* provides for a management fee to be calculated as a return and associated taxes on the pipeline's average rate base.[65] Sea Robin's tariff expressly provides that amounts collected through the Hurricane Surcharge will not be debited against its plant account and thus such costs will never be included rate base.[66] Therefore, Sea Robin will not recover a return on the plant replacement costs in the guise of a future management fee, because those capital costs will not be included in the rate base from which the management fee is calculated.

45. Apache and Chevron assert that Opinion No. 516 erred in finding that the four-year amortization period benefits shippers over the long-term by allowing Sea Robin to recover most of the plant replacement costs before its next rate case, so that the costs will not be included in rate base and earn a return. They argue instead that the four-year recovery period costs current shippers more on net-present-value basis, than requiring a 21.4-year amortization period for the plant replacement costs, with the balance rolled into Sea Robin's rate base in the next rate case. Without providing any details of their calculations, they assert that "based on a rough calculation," the four-year amortization period will cost shippers $46.8 million on a net present value basis, as compared to a cost of $39.58 million using a 21.4 year amortization for the plant replacement costs, with those costs included in rate base after four years.

46. Given Apache and Chevron's failure to explain how they calculated their net present value numbers, it is difficult to evaluate the merits of their contention. A key component of any net present value calculation is the discount factor to be used to reduce future payments to their net present value. That is a factual issue on which Apache and Chevron provided no evidence at hearing, nor does their rehearing request even disclose the discount factor they used to arrive at the net present value figures in their rehearing request. In addition, in order to determine the net present value of payments the shippers would make after the net unrecovered plant replacement costs are included in Sea Robin's rate base in its next rate case, the overall return to be allowed in Sea Robin's rate

[64] ExxonMobil and Hess Rehearing Request at 40.

[65] ExxonMobil and Hess Rehearing Request at FN 83 (citing *Tarpon*, 57 FERC ¶ 61,371 (approving a management fee calculated as a return and associated taxes based on *average rate base*)).

[66] See also, 2012 Form 2, page 232, line 4, Column (b), which reflects the hurricane replacement costs charged to Account No. 182.3, Other Regulatory Asset, which is reduced by the surcharge recovery.

cases over its remaining life would have to be estimated, as well as the timing of such rate cases.

47. In these circumstances, all that can be safely said is that, if one applies a sufficiently high discount factor to reduce the future payments that would be made under a 21.4 year amortization period, the net present value of the payments to be made under that option would be less than the payments to be made under a four year amortization period. However, the reverse result would occur if a lower discount factor were used. Because Apache and Chevron have not provided any evidence upon which to determine a reasonable discount factor to be used, we find that a comparison of the net present value of the payments to be made under the two approaches does not provide a reliable basis for determining the relative reasonableness of the two approaches.

48. Even assuming that the net present value of the payments to be made under the two approaches turns out to be approximately in the same ball park, as Apache and Chevron's "rough calculation" suggests, that does not render Sea Robin's proposed four-year amortization proposal unreasonable. Recovery of the plant replacement costs over a four-year period as an extraordinary one-time expense, rather than a rate base item, permits these costs to be removed from Sea Robin's rates after four years. This enables both Sea Robin and its shippers to put the effects of Hurricane Ike behind them. Sea Robin recovers only its out-of-pocket costs of returning its system to service. The shippers are not faced with a long-term rate increase as a result of the inclusion of about 80 percent of these costs in Sea Robin's rate base in its next rate case, a rate increase which could be magnified if the significant decline in Sea Robin's throughput that has occurred while the surcharge has been in effect continues.

49. The requests for rehearing of Opinion No. 516 emphasize that the most recent semi-annual Hurricane Surcharge filing Sea Robin had made as of the date of the rehearing requests increased the surcharge to $0.162/Dth.[67] Apache and Chevron state that represents a 53.48 percent increase over Sea Robin's combined Rate Schedule ITS transportation and gathering rate of $0.3029. Furthermore, the subsequent three semi-annual Hurricane Surcharge filings in Docket Nos. RP12-469-000, RP12-482-000, and RP13-642-000 contained rates of $0.199/Dth, $0.2915 and $0.2836/Dth.[68] In protests of

[67] *Sea Robin*, 136 FERC ¶ 61,229.

[68] The increases in the Hurricane Surcharge in these filings were largely attributable to a decline in Sea Robin's throughput and under-recoveries of the hurricane repair costs in prior periods because of throughput being less than projected. In Sea Robin's first two Hurricane Surcharge filings, Sea Robin calculated the surcharge based on annual projected throughput of 237,957,516 Dth. However, in its next semi-annual filing in September 2010, Sea Robin's annual projected throughput declined to 178,240,591 Dth and continued to decline through Sea

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those filings, which were accepted subject to the outcome of rehearing of Opinion No. 516, the rehearing applicants contended that those rates, approaching 100 percent rate increases in the two most recent semi-annual filings, produce unjust and unreasonable rate shock.

50. As discussed above, because the pipeline replacement costs have been treated as extraordinary one-time expenses, rather than rate base items, there is no basis to require an amortization period equal to the depreciable life of the pipeline. However, we recognize that, in determining the appropriate amortization period for a one-time extraordinary expense, various equitable factors should be considered, including the minimization of a rate shock that would cause shippers significant financial hardship. In the circumstances of this case, we do not find that Sea Robin's Hurricane Surcharge has caused such financial hardship as to require Sea Robin to offer a longer amortization period.

51. ExxonMobil, Hess, Apache, and Chevron are all major producers of natural gas. In their rehearing requests, they do not point to any concrete financial hardship caused by the level of the surcharges at issue, aside from a comparison of the level of the surcharge to the existing level of Sea Robin's applicable maximum rates. However, as Sea Robin's witness, Mr. Langston testified, in considering financial effects of the surcharge, the level of the surcharge should be compared not only to Sea Robin's existing transportation rate, but also to the shippers' sale price for the gas they produce and transport over Sea Robin's offshore facilities. He stated that, in 2010, producers were selling gas at the Henry Hub at about $4.10 per MMBtu.[69] While the increased cost of transportation on Sea Robin affects the producers' net back, the rehearing applicants have not alleged that the Hurricane Surcharge rendered their production activities unprofitable or prevented them from selling natural gas produced from wells attached to the Sea Robin system.

52. Hurricane Ike rendered Sea Robin unable to provide service for 15 months from the September 10, 2008 date of the hurricane until January 8, 2010, when it resumed transportation service on its West Leg.[70] During that period, the producers were unable to

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Robin's August 2012 semi-annual filing, which reflected a projected annual throughput of 82,635,502 Dth. Other offshore pipelines experienced similar declines in throughput during this period. *See Stingray Pipeline Co., L.L.C.*, 135 FERC ¶ 61,099 (2011); *Enbridge Offshore Pipelines (Utos) LLC*, 133 FERC ¶ 61,106 (2010); *High Island Offshore Sys., L.L.C.*, 127 FERC ¶ 61,097 (2009).

[69] Tr. at 38.

[70] Exh. No. SR-11 at 2.

ship their gas to market. At the same time, Sea Robin had almost no revenues, because virtually all its service is provided at volumetric rates. Therefore, Sea Robin's plant replacement costs directly benefitted ExxonMobil, Hess, Apache, and Chevron by enabling them once again to commence producing natural gas from the wells attached to Sea Robin and selling that gas. As the Commission noted in Opinion No. 516, the ALJ even recognized that Sea Robin's efforts to return its system to operability immediately benefited its shippers.[71] A temporary surcharge of less than $0.30 per MMbtu, to be removed after four years is a reasonable method of compensating Sea Robin for its incurrence of extraordinary one-time costs to return its system to service so that the producers could recommence producing and selling natural gas from wells connected to Sea Robin.

53. ExxonMobil and Hess complain that the four-year amortization period would impose only minimal financial risk on Sea Robin. However, the NGA requires that the Commission give Sea Robin an opportunity to recover costs the pipeline prudently incurred to provide jurisdictional service. Sea Robin incurred these costs for the purpose of resuming jurisdictional service, and no party claims that Sea Robin's incurrence of these costs was imprudent. Moreover, Sea Robin suffered the loss of collecting only minimal revenues to cover its fixed costs during the period it was out of service, and as discussed above, it has foregone the opportunity to earn a profit on its plant replacement costs.

54. ExxonMobil and Hess also contend that requiring Sea Robin to use a 21.4 year amortization period, with the costs not collected as of the end of four years required to be included in Sea Robin's base rates in its next rate case, would require Sea Robin to absorb a portion of the costs because of its agreements with some shippers discounting its base rates. ExxonMobil and Hess see this as accomplishing an "equitable sharing" of the costs incurred because of a hurricane for which no one was at fault.

55. However, Sea Robin having proposed a reasonable method to recover these prudently incurred costs, we do not believe the fact its discount agreements might require it to absorb a portion of the costs if a longer amortization period is used is a reasonable ground on which to reject Sea Robin's four-year amortization proposal. In any event, it does not appear that the "sharing" of costs that would result from that approach would be "equitable." In any general section 4 rate case, a pipeline may reduce its rate design volumes so that, taking into account discounting, its maximum rates will be designed to

[71] Opinion No. 516, 137 FERC ¶ 61,201 at P 48.

recover 100 percent of its cost of service.[72] Thus, while a 21.4 year amortization period might benefit shippers with base rate discount agreements, such as ExxonMobil and Hess, for the period those discount agreements remain in effect after the rates in the new rate case take effect, any such discount agreements would also serve to reduce Sea Robin's rate design volumes in its next rate case, thereby increasing Sea Robin's maximum rates. This would have the effect of requiring any maximum rate shippers to bear a greater percentage of the hurricane repair costs, than they do under the four-year amortization period, because the Hurricane Surcharge is designed based on Sea Robin's full throughput without any discount adjustment. It would also magnify the adverse effect on maximum rate shippers of including 80 percent of the plant replacement costs in Sea Robin's rate base in its next rate case. By contrast, Sea Robin's four-year amortization proposal will spread most of the hurricane replacement costs evenly over all its throughput and will minimize any increase in rate base in the next rate case.

56. For all of the above reasons, the Commission concludes that treatment of the plant replacement costs as an expense to be recovered from all current customers on Sea Robin's system during the four-year amortization period, who have benefitted directly from Sea Robin's resumption of service, is a reasonable method of recovering these costs. The Commission recognizes that Sea Robin's resumption of service will also benefit any new shippers who obtain service after the conclusion of the four-year amortization period. However, the Commission finds that the benefits amortizing these extraordinary costs as an expense outweigh any concerns that not requiring most or all of the costs to be included in rate base and recovered over the life of the system allows such future shippers to escape any responsibility for these costs.

57. ExxonMobil and Hess contend that, having allowed Sea Robin to promptly commence recovery of its plant replacement costs without filing a general section 4 rate case, there is no need to also allow accelerated recovery of those costs in order to provide Sea Robin an incentive to make prompt repairs to its system. As discussed above, the Commission has found a four-year amortization period to be just and reasonable, because the plant replacement costs are being treated as a one-time extraordinary expense rather than a rate base item and because the Sea Robin's incurrence of those costs has benefitted its shippers by enabling it to return to service. We have not approved the four-year amortization period as an incentive for prompt repairs.

58. Finally, we reject ExxonMobil and Hess's assertion that Opinion No. 516's requirement that Sea Robin initiate a new four-year amortization period for any new

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[72] *Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309, *reh'g denied*, 113 FERC ¶ 61,173 (2005).

hurricane repair costs included in a subsequent semi-annual filing undercuts our rationale for approving the four-year amortization period. As pointed out in Opinion No. 516, Sea Robin's Hurricane Surcharge mechanism permitted recovery not only of any Hurricane Ike repair costs, but also repair costs associated with any additional hurricanes that might occur before the expiration of the surcharge. Accordingly, the Commission was particularly concerned that if a new hurricane occurred with, for example, only two years remaining in the original four-year amortization period, Sea Robin's original proposal would permit the new repair costs to be amortized over only two years, instead of the four-year period required for the Hurricane Ike costs included in Sea Robin's initial filing. Having found a four-year amortization period to be reasonable for the Hurricane Ike costs included in the initial filing, it is consistent to require that any costs incurred as a result of a subsequent hurricane[73] or new costs related to Hurricane Ike be recovered over a similar amortization period, to the extent they are treated as an expense.

59. ExxonMobil and Hess appear to suggest that, if Sea Robin has started to recover new plant replacement costs as expenses in the Hurricane Surcharge pursuant to a new four-year amortization period which extends beyond the effective date of the rates in the new rate case, it may be inconsistent to then permit Sea Robin to include the unrecovered plant replacement costs in its rate base in the next rate case. The Commission will permit parties in the next rate case to raise the issue whether any such plant replacement costs should continue to be treated as an expense in the next rate case, for example by allowing the Hurricane Surcharge to remain in effect to complete the recovery of those costs as an expense.

IV. Carrying Costs

A. Background

60. In its August 1, 2009 filing proposing the Hurricane Surcharge mechanism, Sea Robin proposed to recover carrying costs at the Commission-published interest rate on O&M expenditures from the date those costs were incurred and on capital expenditures from the date the associated facilities were placed into service and were providing a benefit to shippers. Apache and Chevron and ExxonMobil and Hess argued that carrying costs should not be allowed to take effect until March 1, 2010, which was the date that the Commission authorized the Hurricane Surcharge mechanism to take effect, following a five-month suspension of the August 1, 2009 filing, subject to refund. Trial Staff

[73] As it has turned out, Sea Robin has not, as yet, incurred any new hurricane repair costs since Hurricane Ike.

proposed October 1, 2009, the date which Sea Robin requested in its original filing that the rates become effective.

61. The ID permitted Sea Robin to collect carrying charges as of March 1, 2010, the effective date of the company's initial surcharge filing.[74] In Opinion No. 516, the Commission reversed the ID and found that carrying charges at the Commission-published interest rate should begin to accrue as of the later of August 1, 2009, the date Sea Robin filed to establish the Hurricane Surcharge in Docket No. RP09-995-000, or the date the associated cost is incurred. The Commission found that allowing carrying charges to accrue beginning on the date of the initial filing would avoid imposing on a pipeline's customers any costs resulting from the pipeline's delay in making its filing to recover hurricane-related costs and encourage a pipeline to file to recover hurricane-related costs promptly. Further, because the Commission's goal is to ensure timely filing, the Commission determined that it is reasonable to allow carrying charges to accrue as of the date a pipeline files to recover such costs, as opposed to the effective date of such a filing.[75]

62. Opinion No. 516 rejected Sea Robin's request that carrying charges begin to accrue from the date that repair costs are incurred. The Commission noted with approval a scenario set forth in the ID where a natural gas company that sustains damage to its pipeline system might make repairs to its system but let carrying costs accrue before seeking to file an action to recoup those losses in a hurricane surcharge or similar mechanism. By limiting carrying charges to the filing date, the Commission intended to encourage pipelines to file to recover hurricane-related costs promptly and thereby minimize the accrual of carrying charges.[76]

63. As explained in Opinion No. 516, these policy objectives are consistent with those the Commission expressed in Order No. 528,[77] which addressed pipeline filings to recover take-or pay settlement costs. That order stated that it is Commission policy to disallow pipelines to recover any carrying charges accruing prior to the date of the pipeline's filing for recovery of the settlement costs. In an order on a pipeline filing to

[74] ID, 133 FERC ¶ 63,009 at P 120.

[75] Opinion No. 516, 137 FERC ¶ 61,201 at P 61.

[76] Opinion No. 516, 137 FERC ¶ 61,201 at P 63.

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

recover take-or-pay settlement costs pursuant to Order No. 528, the Commission reasoned that denial of carrying charges prior to the actual filing was appropriate to avoid imposing on the pipeline's customers any costs resulting from the pipeline's delay in making an Order No. 528 filing and to encourage pipelines to file to recover take-or-pay settlement costs promptly.[78] The Commission explained that it is only necessary to deny carrying charges accruing before a pipeline files to recover its take-or-pay costs since carrying charges accruing thereafter do not arise as a result of any delay in the pipeline's filing to recover its costs.[79] Opinion No. 516 stated that, similarly, the Commission's goal is to ensure the timely filing of an action to recoup hurricane-related losses in a hurricane surcharge or similar mechanism and therefore the Commission would limit the recovery of carrying charges to the filing date of such action.[80]

B. Request for rehearing

64. ExxonMobil and Hess filed for rehearing of Opinion No. 516's determination that carrying charges may start to accrue as of the later of either August 1, 2009, the date Sea Robin filed to establish the Hurricane Surcharge in Docket No. RP09-995-000, or the date the associated cost is incurred.[81]

65. ExxonMobil and Hess state that the Commission's reversal of the ID is not supported by reasoned decision making. They note the Commission's findings that limiting carrying charges to the date of the initial filing would avoid imposing carrying charges on shippers resulting from a pipeline's delay in making such a filing, provide pipelines with an incentive to file promptly, and further the goal of ensuring timely filing.

66. ExxonMobil and Hess disagree that the Commission's decision to use the date of filing supports the Commission's stated objectives. They argue that if the Commission's objective is to protect shippers from a pipeline's delay in making an initial filing, it should have affirmed the approach taken by the ALJ, which would defer accrual of the carrying costs until the March 1, 2010 effective date of the Hurricane Surcharge mechanism, after the five-month suspension of Sea Robin's August 1, 2009 filing. ExxonMobil and Hess argue that using the effective date of the filing would better ensure

[78] *Transwestern Pipeline Co.*, 60 FERC ¶ 61,062, at 61,214-15 (1992).

[79] *Id.* at 61,214.

[80] Opinion No. 516, 137 FERC ¶ 61,201 at P 64.

[81] No other party sought rehearing on this issue.

against delay by the pipeline in filing and also better ensure that the filing was in order, thereby allowing for a minimum suspension.[82]

67. ExxonMobil and Hess state that the Commission agreed with them and other participants that the initial Suspension and Rehearing orders did not provide Sea Robin with permission to collect carrying charges for the period prior to the filing or the effective date of the Hurricane surcharge."[83]

68. ExxonMobil and Hess argue that the Commission's comparison of the mechanism approved in Opinion No. 516 to the pipeline take-or-pay cost recovery filings under Order No. 528 is unavailing because the Order No. 528 principles regarding a pipeline's delay in filing, in their view, support instead the ID's holding. Further, they allege that fundamental differences exist between Order No. 528 and Opinion No. 516. These differences relate to the nature of the proceedings underlying Order No. 528 and Opinion No. 516 and the degree of notice given to interested parties in the proceedings.

69. ExxonMobil and Hess claim that Order No. 528 was a generic rulemaking order that established regulations permitting pipelines to file new tariff provisions for the recovery of take-or-pay costs.[84] They argue that Order No. 528 can be distinguished on two bases. First, they state that Order No. 528 was a generic rulemaking order that established regulations permitting pipelines to file new tariff provisions for the recovery of take-or-pay costs. They argue, that, in contrast, Sea Robin's proposal to recover hurricane costs through a limited section 4 periodic rate adjustment was not filed under regulations established for that purpose.[85]

70. Second, ExxonMobil and Hess point out that Order No. 528 directed pipelines to meet and negotiate with their customers and other affected parties concerning a reasonable new allocation method for recovery of take-or-pay settlement costs. ExxonMobil and Hess also state that the Commission directed that the costs were to be spread as broadly as possible throughout the industry. Thus, ExxonMobil and Hess

[82] ExxonMobil and Hess Rehearing Request at 65.

[83] *Id.*

[84] *Id.* at 66.

[85] *Id.*

argue, shippers had notice of take-or-pay cost recovery filings since there had been an opportunity for negotiation prior to the filings.[86]

71. ExxonMobil and Hess reject Sea Robin's contentions that it would be unreasonable to conclude that any producer was not on notice and fully aware of both the hurricane damage and the repairs that would be required.[87] They aver that the relevant issue is, instead, whether producers and shipper had notice of Sea Robin's intent to file a limited section 4 surcharge to recover nearly $60 million in costs through a cost-tracker mechanism and to leave that mechanism in place for future hurricanes until its next rate case. They argue that Sea Robin's assertions that shippers were aware of the damage to Sea Robin's system and repair activity does not address that issue. ExxonMobil and Hess concede nonetheless that extensive segments of Sea Robin's system were out of service for approximately 18 months and that producer-shippers with reserves committed to Sea Robin's system sustained considerable damage themselves.[88]

72. ExxonMobil and Hess claim that Sea Robin had previously recovered Hurricane Katrina and Rita costs through a section 4 rate case and that shippers would have reasonably expected Sea Robin to seek recovery of Hurricane Ike costs in the same manner. ExxonMobil and Hess assert that Sea Robin did not provide notice to producers that it would seek to fully recover all Hurricane Ike costs, including capital costs, through a surcharge over a four-year period.[89]

C. <u>Commission Determination</u>

73. ExxonMobil and Hess argue that allowing charges to accrue as of the effective date of the filing would better accomplish the goal of encouraging pipelines to file promptly to recovery costs. We disagree. As discussed in the preceding section, the purpose of carrying charges is to enable a pipeline to recover full compensation for its actual costs, so that it doesn't lose the time value of money as a result of the deferral of

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[86] ExxonMobil and Hess also note, however, that the Commission recognized that pipelines may file before they have an opportunity to meet with affected parties. ExxonMobil and Hess Rehearing Request at 67.

[87] *Id.* at 68 (citing Sea Robin Brief on Exceptions at 18).

[88] *Id.* at 68-69.

[89] *Id.* at 69-70. ExxonMobil and Hess cite the hearing testimony of a Sea Robin executive to the effect that the company did not discuss any specific mechanism with its customers. Tr. 86:11-87:4.

cost recovery during an amortization period. In holding that Sea Robin may not recover carrying charges for the period before it filed to establish the Hurricane Surcharge mechanism, the Commission sought to achieve a reasonable balance between encouraging pipelines to make timely filings while still enabling Sea Robin to recover the costs of its hurricane repairs. Denying recovery of carrying charges accruing before the date of the filing is sufficient to provide pipelines an incentive to file to recover hurricane related costs promptly, without further penalizing the pipeline by disallowing recovery of carrying charges until the actual effective date of the filing which in this case did not occur until seven months later on March 1, 2010.

74. We reject ExxonMobil and Hess' arguments that Commission language in the Suspension and Rehearing orders supports their position on carrying charges. As noted in Opinion No. 516, we agreed with Trial Staff, ExxonMobil, Hess, Apache and Chevron that these orders did not provide the permission required under section 154.403(d)(4) to collect carrying charges associated with the period prior to the filing or effective date of the Hurricane Surcharge. The Suspension and Rehearing Orders addressed only the collection of hurricane-related repair costs generally and not the carrying charges on those costs.[90] The Commission's determination to allow accrual of carrying charges as of the date of filing does not rest on any findings in the orders cited by ExxonMobil and Hess. Indeed, the Commission acknowledged in Opinion No. 516 that the carrying charges issues was one of several issues for decision before the ALJ,[91] and therefore, no prior determination concerning any aspect of the carrying charges was made in those orders. Consequently, ExxonMobil and Hess's attempt to rely on this statement in Opinion No. 516 to bolster the contention that the Commission previously determined that accrual of carrying charges prior to the filing or its effective date would not be permitted is misplaced.

75. We are not persuaded by ExxonMobil and Hess' arguments that the Commission's reliance on Order No. 528 to support its decision to allow carrying charges as of the date of filing is misplaced because Order No. 528 can be distinguished from the situation underlying Opinion No. 516. The various distinctions ExxonMobil and Hess raise between the policies established in Order No. 528 concerning recovery of take-or-pay settlement costs and the present case are not relevant to the issue of when carrying charges should begin to accrue. In this proceeding, the Commission made its determination in the first instance on its independent assessment that allowing carrying charges to accrue as of the date of Sea Robin's filing would

[90] Opinion No. 516, 137 FERC ¶ 61,201 at P 62.

[91] *Id.*

> avoid imposing on a pipeline's customers any costs resulting from the pipeline's delay in making its filing to recover hurricane-related costs and encourages a pipeline to file to recover hurricane-related costs promptly. Further, because our goal is to ensure timely filing, we believe that it is reasonable to allow carrying charges to accrue as of the date a pipeline files to recover such costs, as opposed to the effective date of the filing.[92]

76. The Commission's determination in Opinion No. 516 reflected its policy concern that pipelines make prompt filings to recover hurricane costs. The Commission drew parallels to its previous actions in Order No. 528 proceedings simply to demonstrate that it had acted in a similar way in situations where pipelines also sought to recover significant costs and where the Commission also wished to encourage prompt filing of cost recovery proposals.

77. As for the differences identified by ExxonMobil and Hess, they do not affect or alter the Commission's policy objective of ensuring prompt filings. ExxonMobil and Hess attempt to distinguish Order No. 528 contending that it resulted from a generic rulemaking procedure which established regulations for recovery of costs, unlike Sea Robin's proposal for a limited section 4 tracker. ExxonMobil and Hess's characterization of Order No. 528 is incorrect. Order No. 528 was not a generic rulemaking, but more in the nature of a policy statement offering guidance to pipelines and customers for the recovery of take-or-pay costs. In any event, this is a distinction which makes no difference. Whether the underlying proceeding is a rulemaking, a rate surcharge filing, or some other type of filing does not dictate the nature or degree of the Commission's policy concern which is to encourage prompt filings by pipelines, in part by allowing accrual of carrying charges to commence only as of the date of filing.

78. ExxonMobil and Hess emphasize that Sea Robin provided no specific notice to producers and shippers that it intended to file a rate surcharge tracker, rather than a section 4 rate case, to recover Hurricane Ike costs and that shippers and producers had no opportunity to negotiate with Sea Robin beforehand, unlike in the Order No. 528 take-or-pay proceedings.

79. The fact that Order No. 528 provided for additional opportunities for negotiation procedures in connection with take-or-pay filings does not govern our policy conclusions regarding delay in making filings. Furthermore, the availability of specific prior notice or negotiations may or may not have affected Sea Robin's eventual filing to recover these

[92] Opinion No. 516, 137 FERC ¶ 61,201 at P 61.

costs and is thus a matter of speculation.[93] Thus, the degree of notice does not affect our determination in Opinion No. 516 that carrying charges should be allowed to accrue commencing with the date of filing in order to encourage prompt filings.

80. ExxonMobil and Hess' request for rehearing on the accrual date for carrying charges is denied.

V. Applicability of the Hurricane Surcharge to Certain Discount Agreements

81. In its initial Hurricane Surcharge proposal, Sea Robin proposed to make the Hurricane Surcharge not discountable. Specifically, proposed GT&C section 15.5 stated that the "Hurricane Surcharge shall not be subject to discount" and GT&C section 24.7(b) stated that "[a]ny rate discount agreed to by Sea Robin shall not be considered a discount of the Hurricane Surcharge." Rate Schedules FTS, FTS-2 and ITS also provided that, in accordance with section 24 of the GT&C, the Hurricane Surcharge shall be charged.[94] Sea Robin's form of service agreements for Rate Schedule FTS, FTS-2 and ITS specifically incorporated the GT&C and the applicable Rate Schedule.

82. Sea Robin contended that under the revised tariff and the terms and conditions of the applicable transportation service agreements and discount documents, it had the authority to invoice and collect the Hurricane Surcharge under its firm and interruptible contracts, including under its discounted and negotiated rate agreements.[95] Apache, Arena, ExxonMobil and Hess, on the other hand, argued that the terms of certain of their discount agreements prohibited the imposition of the Hurricane Surcharge.

83. In the ID, the ALJ found that whether the discount agreements prohibit or permit the imposition of the Hurricane Surcharge is a question of contract interpretation. While the ALJ found that it was "at best ambiguous whether the discount agreements prohibit or permit the imposition of the Hurricane Surcharge," she found that, on balance, the shippers' arguments on how to best interpret the discount agreements were stronger than Sea Robin's.[96] However, the ALJ found that if Sea Robin is not allowed to collect the

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[93] We note that in the course of the litigated proceeding, after Sea Robin filed its initial testimony, three settlement conferences were noticed at the Commission. Nonetheless, the participants proceeded to litigation.

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

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

[96] ID, 133 FERC ¶ 63,009 at P 320.

Hurricane Surcharge from its customers, Sea Robin would be required to pay a disproportionate share of the repair costs. This result, the ALJ stated, would not only be unduly discriminatory, but would also set a precedent that would harm the public's interest and therefore, would not be just and reasonable.[97] Therefore, the ALJ held that, under the *Mobile-Sierra* doctrine, the discount agreements should be modified to permit Sea Robin to recover the Hurricane Surcharge from all shippers.[98]

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

A. <u>Opinion No. 516</u>

85. In Opinion No. 516, the Commission found that Sea Robin's proposal to add language to its tariff making the Hurricane Surcharge not discountable was contrary to Commission regulations.[99] Therefore, the Commission required Sea Robin to file revised tariff records removing the Hurricane Surcharge from its minimum rates and any language from its tariff records indicating that the Hurricane Surcharge was not discountable. The Commission stated that while "Sea Robin may elect not to discount the Hurricane Surcharge with respect to future discount and negotiated rate agreements…to the extent a shipper has contracted for a discounted rate…such shipper would be entitled to continue to pay such rate."[100]

86. The Commission also reversed the ALJ. The Commission found that Sea Robin is permitted to charge the Hurricane Surcharge under the terms of each of the discount agreements at issue.[101] Because the Commission found that all of the discount

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[97] *Id.* P 320.

[98] *Id.* PP 321-337.

[99] Opinion No. 516, 137 FERC ¶ 61,201 at PP 91-96.

[100] *Id.* P 94.

[101] *Id.* P 79.

agreements at issue permit collection of the Hurricane Surcharge, the issue of whether *Mobile-Sierra* requires modification of the discount agreements to permit collection of the Hurricane Surcharge was moot.

B. Individual Discount Agreements

87. ExxonMobil and Hess, Apache and Chevron and Arena filed requests for rehearing of Opinion No. 516's finding that Sea Robin is permitted to charge the Hurricane Surcharge under the terms of each of the discount agreements at issue. Raising generally the same arguments they raised in their Briefs on and Opposing Exceptions, the parties contend that the express terms of their discount agreements prohibit the imposition of the Hurricane Surcharge. Each request for rehearing is discussed below.

88. Before discussing the specifics of each discount agreement at issue, it is worth noting some commonalities across the agreements. Sea Robin's form of service agreements for Rate Schedules FTS,[102] FTS-2, and ITS specifically incorporate the GT&C and the applicable Rate Schedule. For example, section 2.1 of the form of service agreement for Rate Schedule ITS states, "It is recognized that service hereunder is provided pursuant to Rate Schedule ITS which is hereby incorporated by reference, including the General Terms and Conditions. Similarly, section 2.1 of the form of service agreement for Rate Schedule FTS-2, states "It is recognized that the transportation service hereunder is provided on a firm basis pursuant to, in accordance with and subject to the provisions of Sea Robin's Rate Schedule FTS-2, and the General Terms and Conditions thereto, which are contained in Sea Robin's FERC Gas Tariff, as in effect from time to time, and which are hereby incorporated by reference."

89. Sea Robin's form of service agreements for Rate Schedules FTS, FTS-2 and ITS also include a *Memphis* clause, named after *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). A *Memphis* clause generally authorizes a pipeline to file to make a change to the rates, charges, rate schedules, or the GT&C of the pipeline's tariff, while providing the shipper the right to protest or contest any such filing. For example, section 6.3 of Sea Robin's ITS service agreement provides that:

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

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

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

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

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

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

1. GOM Shelf Agreements

91. GOM Shelf LLC (GOM Shelf), an Apache affiliate, and Sea Robin entered into Service Agreement Nos. 1815 and 1816 (collectively, GOM Shelf Service Agreements). These agreements are for interruptible service under Rate Schedule ITS and are subject to the discount agreement dated August 5, 2009 (GOM Shelf Discount Agreement) attached to the service agreements.[103]

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

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[103] Exh. No. APC-3.

[104] While the GOM Shelf Service Agreements do not appear in the record, neither Apache nor Sea Robin disputed that such agreements are consistent with the form of service agreement for Rate Schedule ITS.

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

agreement. Section 3.5 of that rate schedule provides that the shipper must pay the maximum rate unless Sea Robin offers to discount its rates:

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

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

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

94. Apache claimed that, given that the Hurricane Surcharge was not proposed, or in effect, at the time the GOM Shelf Discount Agreement was executed, it could not be considered an "applicable surcharge" under paragraph 2 of the agreement because the Hurricane Surcharge was not "applicable" at the time paragraph 2 took effect.

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[106] *See* section 3.5 of Rate Schedule ITS. In the event Sea Robin agrees to discount its rates, section 20 establishes the discount terms that may apply without the discount constituting a material deviation from Sea Robin's form of service agreement.

[107] Exh. No. APC-3.

95. Moreover, Apache argued, paragraph 12 of the discount agreement provided that any future tariff filings, such as the Hurricane Surcharge, would not control over what was set forth in the agreement. Paragraph 12 provides:

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

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

a. <u>Opinion No. 516</u>

97. Opinion No. 516 found that GOM Shelf is responsible for the Hurricane Surcharge under the GOM Shelf Service Agreements. The Commission stated that the GOM Shelf Service Agreements must be interpreted as a whole, giving meaning to all provisions if at all possible. Section 6.1 of the GOM Shelf Service Agreements provides that GOM Shelf shall pay the charges for service specified in Rate Schedule ITS, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged the shipper for services provided under the agreement.[108] Similarly, Rate Schedule ITS, which is incorporated by reference in section 2.1 of the GOM Shelf Service Agreements, provides that GOM Shelf must pay the maximum rate for Rate Schedule ITS service, unless Sea Robin offers to discount its rates:

> Shipper shall pay the maximum rate for service under this Rate Schedule unless Sea Robin, in its reasonable judgment, offers to discount its rate to Shipper under this Rate Schedule…. Any discount agreed to by Sea Robin shall be

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

> consistent with the provisions of Section 20 of the General Terms and Conditions.[109]

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

98. The Commission found that this language established a presumption that a shipper must pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agrees to discount such rates. Therefore, the Commission must look to the specific terms of the GOM Shelf Discount Agreement to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, the Commission must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for the applicable Rate Schedule.

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

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

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

intent of the parties to limit the "applicable surcharges" to those in effect on the date the GOM Shelf Discount Agreement was executed, they could have added language expressing such intent. But, they did not.

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

b. <u>Request for Rehearing</u>

101. Apache argues that the Commission's reading of the GOM Shelf Discount Agreement ignores the plain language of paragraph 12 of the agreement, in which Sea Robin agreed to maintain the Discounted Transportation Rates, regardless of any changes that Sea Robin voluntarily makes in the future to its tariff following the execution of the GOM Shelf Discount Agreement.[111] Apache states that the Commission's reading of the agreement eviscerates paragraph 12, rendering it without any meaning, in violation of the contract maxim the Commission acknowledges – an agreement must be interpreted as a whole, giving meaning to all provisions.[112]

102. Apache states that paragraph 11 of the GOM Shelf Agreement defines "Discounted Transportation Rates" in part as the gas and liquefiables discounts set forth in paragraph 2 of the GOM Shelf Discount Agreement. Apache states that since paragraph 2 of the GOM Shelf Agreement includes "applicable surcharges," it is clear that the term "Discounted Transportation Rates" in paragraph 12 includes "applicable surcharges."

103. Next, Apache states that the first phrase of the first sentence of paragraph 12 sets forth Sea Robin's agreement to forgo any right it would have to change the Discounted Transportation Rates under any part of its tariff, even section 6.3 of the Rate Schedule ITS Service Agreement. Apache states that, in other words, Sea Robin expressly agreed

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[111] Apache and Chevron Rehearing Request at 9-10.

[112] *Id.* at 11 (citing Opinion No. 516, 137 FERC ¶ 61,201 at P 105).

not only to the Discounted Transportation Rates, but also to forgo any modifications to those rates and "applicable surcharges" under the *Memphis* clause at section 6.3 of the Rate Schedule ITS Service Agreement. Thus, Apache states, the Commission's citation to section 6.3 of the Rate Schedule ITS Service Agreement is in error in the context of the plain meaning of this first phrase of the first sentence of paragraph 12.

104. Apache states that the second phrase of the first sentence of Paragraph 12 clearly sets forth that the Discounted Transportation Rates will remain in effect, and will control over any tariffs currently filed or voluntarily filed by Sea Robin in the future. Apache states that here, Sea Robin expressly agreed to retain the Discounted Transportation Rates, even if, in the future, Sea Robin has voluntarily filed to implement changes to its rates, or to implement an additional surcharge following the execution of the GOM Shelf Discount Agreement. Thus, Apache argues, the plain language of paragraph 12 of the GOM Shelf Discount Agreement expresses the clear intent of Sea Robin and GOM Shelf to spell out their intentions that the "applicable surcharges" are those that were in effect on the date the GOM Shelf Discount Agreement was executed.

c. <u>Commission Determination</u>

105. Apache generally raises the same arguments it raised in Briefs On and Opposing Exceptions. As discussed below, Apache's request for rehearing is denied.

106. As stated in Opinion No. 516, the language in the GOM Shelf Service Agreements, as well as Rate Schedule ITS, establish a presumption that a shipper must pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agrees to discount such rates. Therefore, the Commission must look to the specific terms of the GOM Shelf Discount Agreement to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, the Commission must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for the applicable Rate Schedule.

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

intent of the parties to limit the "applicable surcharges" to those in effect on the date the GOM Shelf Discount Agreement was executed, they could have added language expressing such intent. But, they did not.

108. Further, as stated in Opinion No. 516, paragraph 12 is only applicable in the event of a conflict between the Discounted Transportation Rate and Sea Robin's tariff, which we find does not exist. Paragraph 2 of the GOM Shelf Discount Agreement provides that GOM Shelf shall pay all applicable surcharges. Likewise, Sea Robin's tariff provides that absent a discount agreement stating otherwise, GOM Shelf is liable for the maximum just and reasonable rates approved by the Commission. The Commission approved the Hurricane Surcharge in Sea Robin's tariff as just and reasonable thereby making the Hurricane Surcharge an "applicable surcharge" under the GOM Shelf Discount Agreement. Apache's request for rehearing is denied.

2. Hess Service Agreement No. 1643

109. Hess and Sea Robin are parties to Service Agreement No. 1643. Service Agreement No. 1643 is a firm transportation agreement under Rate Schedule FTS-2.[113] The discount information for Service Agreement No. 1643 is specified in Exhibit C to the agreement, which is dated March 29, 2007.[114]

110. Consistent with the form of service agreement for Rate Schedule FTS-2 service, Section 6.1 of Hess' Service Agreement No. 1643 provides that Hess shall pay the charges for service specified in Rate Schedule FTS-2, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[115] Similarly, section 2.1 of Service Agreement No. 1643 incorporates Rate Schedule FTS-2 into the service agreement, and section 3.3 of Rate Schedule FTS-2 requires the shipper to pay the maximum FTS-2 rate unless Sea Robin offers to discount that rate.[116] Further, the *Memphis* clause in section 6.2 of Sea Robin's form of service agreement for Rate Schedule FTS-2 makes clear that Sea Robin may file to change the rates and charges applicable to service under the agreement.

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[113] Service Agreement No. 1643 is Exh. No. SR-27.

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

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

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

111. The first paragraph of Exhibit C to Service Agreement No. 1643 provides that Sea Robin shall:

> discount its firm transportation rate at the following charges as Applicable pursuant to the terms of Sea Robin's Rate Schedule FTS-2, during the corresponding periods set forth below for all gas produced by Hess Corporation and delivered to Sea Robin at the Sea Robin/Garden Banks Interconnect. In addition, Sea Robin shall charge those applicable surcharges and fuel set forth in its tariff.[117]

The fourth paragraph of Exhibit states: "Discounted Rate(s) on a 100% load factor basis shall be $.0875/Dth for the life of Hess Corporation's reserves for gas delivered to SMI 128 into Sea Robin."[118]

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

a. <u>Opinion No. 516</u>

113. In Opinion No. 516, the Commission found that Hess Service Agreement No. 1643 provides for collection of the Hurricane Surcharge. The Commission stated that, like the GOM Shelf Service Agreements, Hess' Service Agreement No. 1643 requires Hess to pay the maximum just and reasonable FTS-2 rates, as they may change from time to time, unless Sea Robin offers to discount those rates.[119] Specifically, section 6.1 of Service Agreement No. 1643 provides that Hess shall pay the charges for service specified in Rate Schedule FTS-2, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the

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

[118] Id.

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

agreement.[120] Similarly, section 3.3 of Rate Schedule FTS-2, which is incorporated into Hess's Service Agreement No. 1643 by section 2.1 of that agreement, provides that shippers must pay the maximum rate absent a discount.[121] Further, the *Memphis* clause in section 6.2 of Sea Robin's form of service agreement for Rate Schedule FTS-2 makes clear that Sea Robin may file to change the rates and charges applicable to service under the agreement.

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

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

b. Request for Rehearing

116. With the exception of the arguments discussed in the following paragraphs, Hess raises virtually identical arguments as it raised in its Brief on Exception to show that the

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

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

discounted rate provided for in Service Agreement No. 1643 is not subject to the Hurricane Surcharge.[122]

117. Hess and ExxonMobil also argue that the Commission disregards certain evidence of intent submitted by Hess and ExxonMobil. First, Hess and ExxonMobil argue that the Commission ignores the "obvious implication" of Sea Robin's proposal to amend its GT&C to preclude discounting of the Hurricane Surcharge. Hess and ExxonMobil claims that Sea Robin's proposal evidence Sea Robin's concern that its discount agreements did not authorize the addition of the surcharge. The Commission's failure to connect and explain why its rejection of those tariff sheets did not require more rigorous examination of the intent underlying the discount agreements does not constitute reasoned decision-making.

118. Second, Hess and ExxonMobil state that the Commission disregarded the wording of another discount agreement between Hess and Sea Robin, wherein the discounted rate is expressly made subject to "future surcharges," a term not found in the Hess and ExxonMobil agreements. Hess and ExxonMobil state that Hess and Sea Robin entered into the discount agreement to Contract No. 1271 by letter agreement dated November 19, 2009.[123] Hess and ExxonMobil state that Sea Robin clearly was aware of wording that would clearly state its intent to provide for new surcharges it sought to impose after discount agreements had been entered into, yet did not include the "future surcharge" in the discount agreements being challenged by Hess and ExxonMobil.

119. Hess and ExxonMobil also argue that the Commission's reliance on the *Memphis* clause to find that the Hurricane Surcharge applies to Service Agreement No. 1643 is misplaced and contrary to the Commission's discount policies.[124] Hess and ExxonMobil state that the Commission's reliance on the Memphis clause ignores the purpose of discount provisions. Hess and ExxonMobil state that the evidence showed that in exchange for the discounted rate, Hess agreed to commit specified reserves to Sea Robin. Hess and ExxonMobil state that Sea Robin presumably entered into the discount agreement to meet competition. Despite that intent, Hess and ExxonMobil state, the Commission held that Hess and ExxonMobil agreed to a discount that could be in

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[122] Compare ExxonMobil and Hess Rehearing Request at 53-55 to ExxonMobil and Hess Brief on Exceptions at 24-26.

[123] ExxonMobil and Hess Rehearing Request at 52 (citing Exh. No. HC-3)

[124] *Id.* at 59-60 (citing *Interstate Natural Gas Pipeline Rate Design*, 47 FERC ¶ 61,295, *reh'g granted*, 48 FERC ¶61,122 (1989); *Selective Discounting by Natural Gas Pipelines*, 113 FERC ¶ 61,173, at P 4 (2005)).

practical effect nullified after the fact (and after commitment of reserves to Sea Robin's system) by an open-ended surcharge to recover hurricane damage, even though Sea Robin previously had filed to recover hurricane damage and costs associated with hurricane risk through base rates. Hess and ExxonMobil argue that the Commission's failure to consider this evidence shows that the Commission's conclusion that Sea Robin may impose the Hurricane Surcharge in addition to the discounted rate under Hess' agreement is not supported by substantial evidence or reasoned decision making.

120. Hess and ExxonMobil contend that the Commission's finding that the *Memphis* clause overrides every discount Sea Robin has agreed to would render the long-term discounted rate meaningless.[125] Hess and ExxonMobil state that specific contract provisions prevail over more general clauses. Hess and ExxonMobil state that the discount provision spells out the discount rate precisely, while the *Memphis* clause is a standard clause that allows the pipeline to make filings of many different types to amend the tariff. Hess and ExxonMobil state that if pipelines can unilaterally rescind or modify discounts by designing new surcharges to recover costs ordinarily recovered through base rates by invoking the *Memphis* clause, then the discount policy is called into question. Accordingly, Hess and ExxonMobil state, the Commission's reliance on the *Memphis* clause to authorize Sea Robin to unilaterally impose the Hurricane Surcharge in addition to a discount rate is misplaced.[126]

121. Hess and ExxonMobil state that the selective discounting policy, and the orders applying the policy,[127] reflect the Commission's understanding that pipelines grant discounts only out of commercial necessity. Hess and ExxonMobil state that allowing Sea Robin to override its discount agreements unilaterally through the Hurricane Surcharge contravenes the principles underlying the policy.

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[125] Hess states that the Commission appears to have based its holding that the Hurricane Surcharge applies to all of the contested discount agreements on a finding that the contract language is clear, although the Commission does not explicitly make such a finding. Therefore, the Commission would not have considered extrinsic evidence.

[126] *Id.* at 62 (citing *Bay Gas Storage Company, Ltd.*, 131 FERC ¶ 61,034, at P 45 (2010) (finding that Bay Gas may collect a new in-kind LAUF charge from FGT under a discount agreement, to ensure that Bay Gas recovers its variable costs consistent with Commission policy, but further requiring Bay Gas to credit the monetary value of the LAUF charge to FGT so that FGT would retain the economic value of its bargain).

[127] *Id.* at 63 (citing *Iroquois Gas Transmission System*, 90 FERC ¶ 61,017, at 61,092-95 (2000); *Trunkline Gas Co.*, 84 FERC ¶ 61,086, at 61,476-78 (1998)).

c. **Commission Determination**

122. Hess' request for rehearing is denied.

123. In Opinion No. 516, the Commission found that Service Agreement No. 1643 and terms of Sea Robin's tariff, establish a presumption that a shipper will pay Sea Robin's just and reasonable maximum rates, as approved by the Commission from time to time, unless Sea Robin has expressly agreed to discount such rates. Therefore, the Commission must look to Exhibit C to Service Agreement No. 1643 (the discount document) to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, the Commission must defer to the Sea Robin's generally applicable tariff and what the rates and charges the Commission has found to be just and reasonable for the applicable Rate Schedule.

124. As stated in Opinion No. 516, we interpret the sentence in the first paragraph of Exhibit C providing that "[in] addition, Sea Robin shall charge those applicable surcharges and fuel set forth in its tariff": to mean that Sea Robin will charge all surcharges in its tariff and applicable to service under Rate Schedule FTS-2, as they may change from time to time during the term of Service Agreement No. 1643. We do not find, and Hess has not pointed to, any language in Exhibit C to Service Agreement No. 1643 indicating that "applicable surcharges" were limited to only those surcharges which the Commission requires pipelines to impose. The *Memphis* clause in section 6.2 of Service Agreement No. 1643 made clear that new charges could be added. If it were the parties' intent to limit the applicable surcharges to those mandated by the Commission, they could have added language expressing such intent. But, they did not. Accordingly, the Commission must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from FTS-2 shippers.

125. The arguments raised by Hess in its request for rehearing that are virtually identical to the arguments it raised in its Brief on Exceptions are denied for the same reasons they were denied in Opinion No. 516.[128]

126. The Commission also finds the evidence of intent proffered by Hess without merit. First, Hess points out that after Sea Robin and Hess entered into the subject Service Agreement No. 1643, they entered into Contract No. 1271 containing a discount agreement in which the discounted rate is expressly made subject to "future surcharges." Hess contends that the fact Contract No. 1271 more clearly provides for it to pay all future charges indicates that the reference to "applicable" surcharges in Service Agreement No. 1643 was only intended to apply to surcharge existing at the time Service

[128] Opinion No. 516, 137 FERC ¶ 61,201 at PP 114-117.

Agreement No. 1643 was entered into. However, the discount agreement to Contract No. 1271 was entered into more than two and a half years after Hess and Sea Robin entered into Service Agreement No. 1643 and unlike that agreement, Contract No. 1271 was entered into after Sea Robin had proposed the Hurricane Surcharge and after parties with existing discount agreements had raised the issue of whether their agreements should be interpreted as preventing the surcharge form being applied to them.

127. Putting aside that the wording and structure of these two agreements are materially different, the parties' attempt in the later agreement to be clearer regarding Hess' liability for future surcharges in Contract No. 1271 does not mean that the term "applicable surcharges" in Exhibit C to Service Agreement No. 1643 should be interpreted as not encompassing the Hurricane Surcharge. We would expect parties that are aware of a dispute regarding particular contract language in earlier agreements, which Hess and Sea Robin were at the time of Contract No. 1271, would be more precise in a new agreement so as to avoid just such a dispute. Because the parties used clearer contract language, does not mean that "applicable surcharges" now means other than its natural reading, i.e., Hess is liable for surcharges applicable to service under Rate Schedule FTS-2, without restriction. One could as easily interpret the parties' agreement in Contract No. 1271 that Hess would be responsible for all future surcharges as evidence of their intent in the earlier agreement to provide the same thing.

128. Second, we do not find that Sea Robin's filing to make the Hurricane Surcharge non-discountable is evidence of Sea Robin and Hess' intent two years earlier to limit Hess liability with respect to other or future surcharges not required by the Commission. Sea Robin's proposal was one of general applicability and not limited to Hess' Service Agreement No. 1643. As stated above, the parties' use of the term "applicable surcharges" plainly suggests that it was the parties' intent to make Hess responsible for surcharges applicable to service under Rate Schedule FTS-2.

129. For the same reason, Hess' arguments related to the *Memphis* clause and the Commission's discount policies are unpersuasive. We generally agree with Hess that a discount provision spelled out precisely would prevail over a more general clause like the *Memphis* clause. However, we disagree with Hess that the sentence "In addition, Sea Robin shall charge those applicable surcharges and fuel set forth in its tariff" is a discount provision. We believe the sentence "Discounted Rate(s) on a 100% load factor basis shall be $.0875/Dth for the life of Hess Corporation's reserves for gas delivered to SMI 128 into Sea Robin" is the discount provision in the agreement, which Sea Robin is not proposing to change. Because there is no evidence inside or outside of the four corners of the agreement of an intent to discount charges other than the discounted base rate and because Sea Robin is not proposing to change Hess' discounted base rate, it is not inconsistent with the Commission's discounting policies to find that the Hurricane Surcharge is an "applicable surcharge" for which Hess is responsible under the general terms of Service Agreement No. 1643 and Sea Robin's tariff, including the Memphis

clause. This is also consistent with Hess' contention that "[e]ach contract, including the Discount Letter Agreements, must be interpreted as an integrated whole, giving meaning to each provision."[129]

130. The fact that Sea Robin previously filed to recover hurricane damage and costs associated with hurricane risk through base rates is also unpersuasive. As stated earlier in this order, it is true that plant replacement costs are generally eligible for inclusion in a pipeline's rate base as part of its capital invested in providing jurisdictional service. When plant costs are included in a pipeline's rate base, the Commission requires the pipeline to recover those costs over the depreciable life of the plant in question, but the pipeline is then entitled to earn a return on equity on the undepreciated portion of those costs financed by equity an allowance for the income taxes it must pay on its return on equity, and the pipeline is entitled to recover the cost of the debt incurred to finance the remainder of its invested capital. However, Sea Robin has not proposed to treat the plant replacement costs incurred as a result of Hurricane Ike as part of its capital invested in providing jurisdictional service, but instead to amortize those costs in a separate surcharge as an extraordinary, one-time expense during a four-year amortization period. The fact Sea Robin used a different recovery method for earlier, less significant hurricane repair costs does not foreclose Sea Robin from proposing a different rate treatment of the Hurricane Ike costs incurred solely for the purpose of repairing catastrophic hurricane damage to its existing system.

3. Arena Agreements

131. Arena and Sea Robin entered into Service Agreement No. 1544 on September 1, 2006. The agreement is for interruptible service under Rate Schedule ITS. Exhibit C of the service agreement contains discount language.[130] As with the GOM Shelf Service Agreements discussed above, section 6.1 of the agreement requires Arena to pay the maximum Rate Schedule ITS rates, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[131] Section 2.1 of the agreement also incorporates Sea Robin's Rate Schedule

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[129] ExxonMobil and Hess Rehearing Request at 61.

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

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

ITS and its requirement that the shipper must pay the maximum rate unless Sea Robin offers to discount its rates.[132]

132. Exhibit C of Service Agreement No. 1544 provides as follows:

> Discounted Transportation Rate: $0.02 per Dt (Dekatherm) plus ACA and fuel.
>
> The Discount Rate applies to production from the Vermilion 71, Vermilion 72, Vermilion 52 and South Marsh Island 233 leases received by Sea Robin via the sales meter 94120.
>
> Discounted Rate Effective From September 1, 2006 to August 31, 2011.[133]

133. Arena argued that Exhibit C of Service Agreement No. 1544 contains discounted rate language limiting the rate Arena pays to $0.02 per Dth, plus ACA and fuel. Arena stated that there was no reference to "other surcharges," "Hurricane Surcharges," or any other rate or surcharge component.

a. <u>Opinion No. 516</u>

134. In Opinion No. 516, the Commission found that Arena's Service Agreement No. 1544 permits collection of the Hurricane Surcharge. Like the GOM Shelf Service Agreements, the Commission stated, Arena Service Agreement No. 1544 is generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of Arena Service Agreement No. 1544, as well as Rate Schedule ITS, which is incorporated by reference in the agreement, establishes a presumption that Arena will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, the Commission looked to Exhibit C of Service Agreement No. 1544 to determine if it provided for a discount of the Hurricane Surcharge. Otherwise, the Commission was required to defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

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

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

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

136. The Commission found that Exhibit C is silent with respect to the applicability of the Hurricane Surcharge. With the exception of the ACA and fuel rates, which were in Sea Robin's tariff at the time the parties entered into Service Agreement No. 1544, Exhibit C makes no mention of other or future surcharges, including the Hurricane Surcharge, and whether Arena is liable for such charges. The Commission stated that, in all likelihood, the parties did not address the applicability of the Hurricane Surcharge in Exhibit C because the Hurricane Surcharge did not exist at the time that Service Agreement No. 1544 was executed. Nevertheless, the *Memphis* clause in section 6.3 of Arena Service Agreement No. 1544 made clear that new charges could be added. The Commission stated that Sea Robin and Arena are sophisticated parties and if it were their intent to limit or preclude Arena's liability for all other and future surcharges they would have included language so stating. As the Commission has stated, "[i]t is a reasonable interpretation device to conclude that what someone has not said, someone has not meant."[134] Accordingly, the Commission deferred to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

b. <u>Request for Rehearing</u>

137. Arena contends that Opinion No. 516 erred in determining that Sea Robin's Hurricane Surcharge could be applied to Arena Service Agreement No. 1544. Arena contends that the Commission's reliance on the *pro forma* or boilerplate contract provisions is contrary to the express language set forth in Exhibit C of Arena Service Agreement No. 1544, generally accepted rules of contract interpretation, and the

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

Commission's own precedent with respect to interpreting such provisions vis-à-vis individually-negotiated discounted rate agreements.[135]

138. Arena cites several cases wherein, it contends, the Commission held that specific discounted rate terms govern over general, pro forma terms in the event of a conflict. Arena states that, for example, in *Tennessee Gas Pipeline Co. v. Columbia Gulf Transmission Co.*, the Commission rejected an argument by Columbia Gulf Transmission Corporation that a general provision in an operating agreement should prevail over a specific provision with respect to whether a delivery point could also act as a receipt point.[136] Arena states that, similarly, in *Tennessee Gas Pipeline Co*.,[137] the Commission rejected an argument by the pipeline that the general automatic rollover provisions in a service agreement would prevail over an individually-negotiated contract extension agreed to by the parties to the agreement.

139. Arena states that Exhibit C clearly and unambiguously limits the rate Arena pays under Service Agreement No. 1544 to $0.02 per Dth, plus ACA and fuel. Arena states that there is no reference to "other surcharges," "Hurricane Surcharges," or any other rate or surcharge component, as the Commission concluded in Opinion No. 516.[138] Arena states that Mr. Langston testified at hearing that his review of the Exhibit C language was the basis for his conclusion that the language prohibited Sea Robin from assessing the Hurricane Surcharge on Arena under Service Agreement No. 1544.[139] Arena states that, in fact, Mr. Langston testified that Arena's discounted rate under Service Agreement No. 1544 "is in effect for the term specified in Exhibit 'C'," thus contradicting his (and later the Commission's) contention that the general, *pro forma* terms and conditions set forth in Sea Robin's tariff should prevail over the negotiated discount.[140] Arena states

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[135] Arena Rehearing Request at 10 (citing *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at 61,043 (2004)).

[136] *Id.* (citing *Tennessee Gas Pipeline Co. v. Columbia Gulf Transmission Co.,* 113 FERC ¶ 61,200, at 61,820 (2005) (*Tennessee v. Columbia*); *Southern Natural Gas Co.,* 64 FERC ¶ 61,274, at 61,927 (1993) (inconsistency between service agreement and rate schedule and general terms and conditions must be simultaneously reviewed for guidance on resolving dispute on the basis of general rules of contract construction).

[137] *Id.* (citing *Tennessee Gas Pipeline Co*., 65 FERC ¶ 61,224, at 61,125 (1993) (*Tennessee II*).

[138] *Id.* at 12 (citing Opinion No. 516, 137 FERC ¶ 61,201 at P 127).

[139] *Id.* at 12-13 (citing Langston, Tr. 104:7-16).

that this is clear and compelling evidence that the "four corners" of Exhibit C absolutely preclude Sea Robin from assessing the Hurricane Surcharge on Arena.

140. Arena states that the common practice of giving weight to specific, rather than general contract provisions is also consistent with Texas law. Arena states that section 23.2 of the GT&C of Sea Robin's tariff provides that the laws of the State of Texas "shall govern the validity, construction, interpretation and effect of any Service Agreement hereunder." Arena states that under Texas law:

> [w]hen a contract provision makes a general statement of coverage, and another provision specifically states the time limit for such coverage, the more specific provision will control. This is but an application of our long-established rule that "<u>[n]o one phrase, sentence, or section [of a contract] should be isolated from its setting and considered apart from other provisions</u>."[141] (emphasis added)

Accordingly, Arena states, the Commission's conclusion that the express language Exhibit C of Service Agreement No. 1544 should be disregarded in favor of the general, *pro forma* provisions of the ITS agreement, Rate Schedule ITS, and Sea Robin's GT&C is contrary to Commission precedent, Texas law, and generally established rules of contract interpretation.

141. Further, Arena states that the Commission's conclusion that Arena and Sea Robin, as "sophisticated parties," would have inserted language excluding the Hurricane Surcharge and other future surcharges had that been their intent at the time blurs the issue at hand. Arena states that not only is this unreasonable, it is inconsistent with the cases relied upon by the Commission to support this assertion.[142] Arena states that Opinion No. 516 wrongly reads into Exhibit C Arena and Sea Robin's mutual intention that the express discounted rate language, by not specifically excluding future, unknown surcharges, nevertheless permitted them. Arena states that to read into Exhibit C any right of Sea Robin to abrogate the discounted rate agreement and unilaterally assess the Hurricane Surcharge on Arena provides Sea Robin with a right that simply does not exist. Arena states that while Opinion No. 516 stated that "[n]othing in Exhibit "C" prevents

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[140] *Id.* at 13 (citing Langston, Tr. at 116:3-6).

[141] *Id.* at 11-12 (citing *Forbau v. Aetna Life Insurance Co.*, 876 S.W.2d 132, 134 (Texas 1993)).

[142] *Id.* at 14 (citing Opinion No. 516, 137 FERC ¶ 61,201 at P 127 & n.126).

Sea Robin from requiring Arena to pay the just and reasonable Hurricane Surcharge approved by the Commission,"[143] more importantly nothing in Exhibit C permits Sea Robin to assess the Hurricane Surcharge.

142. Next, Arena states that the Commission's interpretation and reliance on the *Memphis* Clause in section 6.3 of Service Agreement No. 1544 conflicts with Commission precedent expressly limiting the scope of such clauses to preclude a pipeline from unilaterally revising an agreed upon discounted rate.[144] Arena states that the Memphis clause in section 6.3 of Arena's Service Agreement No. 1544 neither states nor authorizes Sea Robin to unilaterally increase Arena's agreed upon discounted rate. Once Sea Robin and Arena executed Exhibit C, Sea Robin lacked the contractual authority to charge Arena a rate any different than that set forth on Exhibit C (plus ACA and fuel) for the five-year term set forth therein, absent clear evidence to the contrary set forth in Exhibit C.

143. Arena states that in *Tennessee Gas Pipeline Co.*,[145] the Commission declined to broadly interpret a *Memphis* clause in a transportation contract to permit Tennessee to unilaterally increase a transportation rate two shippers were paying, finding the rate formula expressly set forth in the contracts did not permit such unilateral increase. Arena states that the identical situation is presented here. Arena and Sea Robin agreed to and executed Exhibit C, which, similar to the rate formula that was at issue in *Tennessee I*, set forth the specific discounted rate to be paid by Arena for a firm five-year period. Arena states that Exhibit C does not contain any language indicating that the five-year discounted rate could be unilaterally abrogated by Sea Robin. Arena states that just because Service Agreement No. 1544 contained a *Memphis* clause does not mean that Sea Robin can ignore the contractual discount agreed upon in Exhibit C and nevertheless proceed with unilaterally increasing Arena's discounted rate.[146] Arena states that Opinion No. 516's conclusion that section 6.3 outweighs an individually negotiated contract provision is the exact conclusion that the Commission rejected in *Tennessee*

[143] *Id.* at 15 (citing Opinion No. 516, 137 FERC ¶ 61,201 at P 126).

[144] *Id.* at 17 (citing *Bay Gas Storage Co., Ltd.,* 131 FERC ¶ 61,034, at 61,218 (2010) (*Bay Gas*)).

[145] *Id.* at 18 (citing *Tennessee Gas Pipeline Co.,* 60 FERC ¶ 61,261 (1992) (*Tennessee I*)).

[146] 481 F.2d 490, 493 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 1068 (1973)).

II.[147] Moreover, the Commission has addressed and rejected an identical argument in *South Georgia Natural Gas Co.*[148]

144. Arena states that Opinion No. 516's holding is based on its mistaken contention that the terms and conditions of Exhibit C setting forth the terms and conditions of Arena's discounted rate are subject to modification by the tariff and rate schedules. However, just the opposite is true – the terms and conditions of the discount are separately set forth in Exhibit C to ensure that the discount prevails over the maximum tariff rate.[149] Arena states, moreover, the Commission has stated that the provisions set forth in a pipeline's *pro forma* service agreements or tariffs may not be utilized to limit or remove rights negotiated by the pipeline and a shipper as set forth in the individually negotiated service contract.[150]

145. Lastly, Arena argues that if the Commission declines to grant rehearing, all discounted rate agreements throughout the industry will be affected. Arena states that if Exhibit C can be abrogated in favor of general provisions set forth in Sea Robins' tariff, then the Commission will have relinquished its duty under the Natural Gas Act to uphold the sanctity of contracts and opened the door to the future abrogation of any written discount agreement. However, Arena states, this is not what the Commission's longstanding policy permits.[151]

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[147] Arena Rehearing Request at 19 (citing *Tennessee*, 65 FERC at 61,225 ("individually negotiated contract extension terms will prevail over the GT&C's automatic extension period").

[148] *Id.* (citing *South Georgia Natural Gas Co.*, 64 FERC ¶ 61,251, at 62,772 (1993) (*South Georgia*)).

[149] *Id.* at 20 (citing *Gulf South Pipeline Co., LP*, 121 FERC ¶ 61,047, at P 11 (2007) (*Gulf South*)).

[150] *Id.* (citing *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at 61,527 (2002)).

[151] *Id.* at 21-22 (citing *Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Marketing, L.L.C. et al.*, 99 FERC ¶ 61,047, at 61,190 (2002)).

c. **Commission Determination**

146. Arena's request for rehearing is denied. As stated in Opinion No. 516, the language of Arena Service Agreement No. 1544, as well as Rate Schedule ITS, which is incorporated by reference in the agreement, establishes a presumption that Arena will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, we must look to Exhibit C of Service Agreement No. 1544 to determine if it provided for a discount of the Hurricane Surcharge. Otherwise, the Commission is required to defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

147. Contrary to Arena's assertion, nothing in Exhibit C expressly precludes Sea Robin from requiring Arena to pay the just and reasonable Hurricane Surcharge approved by the Commission. As found by the Commission in Opinion No. 516, Exhibit C is silent with respect to the applicability of the Hurricane Surcharge. Even Arena acknowledges that there is no reference to "other surcharges," "Hurricane Surcharges," or any other rate or surcharge in Exhibit C. Arena is also incorrect that, because Exhibit C does not permit Sea Robin to assess the Hurricane Surcharge, Sea Robin is therefore prohibited from charging Arena the surcharge. As stated above, section 6.1 of Service Agreement No. 1544 and section 2.1 of Rate Schedule ITS, establish a presumption that Arena will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time (e.g., the Hurricane Surcharge), unless Sea Robin expressly agreed to discount such rates. There is no expression of an intent to discount or waive all other charges, including the Hurricane Surcharge, in Exhibit C.

148. The Arena Service Agreement No. 1544 was entered into before Sea Robin filed to add the Hurricane Surcharge to its tariff. At that time, Sea Robin's tariff included only its base rates, plus two surcharges: the ACA and Sea Robin's fuel rate. Exhibit C addressed all three of those rate components, and provided for Arena to pay discounted base rate of $0.02 per Dth, plus the ACA and fuel charges in its tariff. Thus, Exhibit C only contains an agreement by Sea Robin to discount its base ITS rate to $0.02 per Dth. In all likelihood, the parties did not address the applicability of the Hurricane Surcharge in Exhibit C because the Hurricane Surcharge did not exist at the time that Service Agreement No. 1544 was executed.

149. Nevertheless, the *Memphis* clause in section 6.3 of Arena Service Agreement No. 1544 made clear that new charges could be added. Sea Robin and Arena are sophisticated parties and if it were their intent to limit or preclude Arena's liability for all other and future surcharges they would have included language so stating. Accordingly, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

150. This case presents a similar situation as we addressed in *Natural Gas Pipeline Co. of America*[152] 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 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.[153]

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

151. Similarly here, Sea Robin's *Memphis* clause provides that its rates are subject to change, and we have approved Sea Robin's limited section 4 proposal to recover its extraordinary Hurricane Ike repair costs through a surcharge, rather than in its base rates. Arena's Exhibit C discount agreement contains no provision precluding Sea Robin from collecting such a surcharge from Arena. Therefore, as in *Natural*, we find no basis to offer relief to Arena.

152. The cases relied on by Arena to contend that the *Memphis* clause should be treated as "*pro forma* or boiler plate"[154] which cannot justify Sea Robin recovering the Hurricane Surcharge under the instant contract are unpersuasive. First, Arena cites *Tennessee I*,[155]

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[152] 70 FERC ¶ 61,317 at 61,967-8 (1995).

[153] *Id.* at 61,968.

[154] *Id.* at 10.

[155] *Tennessee I*, 60 FERC ¶ 61,261.

which it contends involved a rate formula similar to the rate formula in this case. Arena states that the Commission declined to broadly interpret a *Memphis* clause to permit the pipeline to unilaterally increase a transportation rate two shippers were paying, finding the rate formula expressly set forth in the contracts did not permit such unilateral increase. However, the Commission's decision in that case was appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the Commission.[156] The court stated that, as in this case, the parties had agreed that the Texas rules of contract interpretation would control and that "a cardinal rule of contract interpretation in Texas requires courts to review the entire contract in order to determine its meaning; courts should not consider any single provision in isolation."[157] The court then held that the Commission's interpretation of the contract violated this rule of contract interpretation by effectively deleting the *Memphis* clause from the contract. Thus, the Commission must interpret the Arena contract as a whole, giving weight to all provisions, including the *Memphis* clause in section 6.3 of the Arena service agreement.

153. We recognize that, as we held in cases such as *Bay Gas*,[158] pipelines cannot rely on a *Memphis* clause to modify rates specifically agreed to in a discount agreement. Here, however, the relevant part of the Exhibit C discount agreement provides only: "Discounted Transportation Rate: $0.02 per Dt (Dekatherm) plus ACA and fuel." The only discount provided by this language is a discount of Sea Robin's base transportation rate from the maximum rate to $0.02 per Dt. Clearly, the *Memphis* clause does not permit Sea Robin to increase the base transportation rate above $0.02 per Dt. However, Exhibit C does not provide for any other discounts. It simply references the other two surcharges then in existence, requiring Arena to pay those charges in full. We do not read into Exhibit C's listing of the only two surcharges then in existence as an agreement by Sea Robin not to add any other surcharges to the discounted $0.02 per Dt base transportation rate.

154. 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, Sea Robin has incurred new, extraordinary one-time costs to repair catastrophic damage to its pipeline caused by Hurricane Ike. It has proposed a new rate mechanism to amortize these new one-time

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[156] *Tennessee Gas Pipeline Co. v. FERC*, 17 F.3d 98, 103-105 (5th Cir. 1994).

[157] *Id.* at 102.

[158] 131 FERC ¶ 61,034 at P 45.

costs in a temporary surcharge. Absent any indication that the parties intended to prohibit Sea Robin from adding a new just and reasonable surcharge to recover a newly incurred cost to the existing surcharges Arena had already agreed to pay, we do not interpret Exhibit C as prohibiting Sea Robin from exercising its rights under the *Memphis* clause to add the Hurricane Surcharge to Arena's discounted base transportation rate. Exhibit C contains no express agreement to discount the Hurricane Surcharge, or any surcharge for that matter. Exhibit C only contains an agreement by Sea Robin to discount its base ITS rate to $0.02 per Dth, which Sea Robin is not proposing to unilaterally change.

155. The other cases cited by Arena are unpersuasive for the same reason that there are no specific discounted rate terms in Exhibit C with respect to the Hurricane Surcharge. For example, in *Tennessee II*,[159] the Commission made clear that, in order to overcome the general rule that subsequent tariff changes are automatically incorporated into a service agreement, the parties must "s*pecifically* negotiate an exception." Exhibit C is silent with respect to the applicability of the Hurricane Surcharge and thus the addition of that surcharge to Arena's rate does not violate any specific provision in the discount agreement. *Tennessee v. Columbia*[160] is distinguishable on similar grounds. In that case, a joint operating agreement between two pipelines specifically provided that each pipeline could select additional receipt points, and the Commission held that provision permitted one of the pipelines to obtain a new receipt point despite the contention of the other pipeline that the addition of the receipt point violated the "overall purpose" of the joint operating agreement. Thus, in *Tennessee*, unlike this case, there was a specific provision in the contract providing one party the right it sought. *Gulf South*, also cited by Arena, simply states that "*in the event of a conflict between the provisions of a shipper's master service agreement and its negotiated rate letter agreement*, the provisions of the negotiated rate letter agreement will control."[161] Here, Sea Robin's imposition of the Hurricane Surcharge on Arena does not conflict with Arena's Exhibit C discount agreement, because there is no provision in Exhibit C exempting Arena from the surcharge.

156. Also, in *South Georgia*, contrary to Arena's assertion, the Commission found that the pipeline's proposed *Memphis* clause was just and reasonable.[162] The Commission in

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[159] 65 FERC at 61,126 (emphasis supplied).

[160] 113 FERC at 61,821-2.

[161] *Gulf South*, 121 FERC ¶ 61,047 at P 11 (emphasis supplied).

[162] *See South Georgia*, 64 FERC at 62,772.

that case rejected the shipper's request to revise the *Memphis* clause to prohibit a unilateral rate increase.[163]

157. Arena's reliance on Sea Robin witness Mr. Langston's direct testimony is also unpersuasive. As Arena itself points out, in his rebuttal testimony and at the hearing, Mr. Langston testified that, upon further review of Service Agreement No. 1544 and Sea Robin's tariff, Sea Robin could charge Arena for the Hurricane Surcharge.[164]

4. Apache Service Agreements

158. Apache and Sea Robin are parties to Service Agreement Nos. 1281, 1284, 1330 (terminated) and 1747 (collectively, Apache Service Agreements).[165] These agreements are for interruptible service under Rate Schedule ITS and subject to the discount agreement dated February 12, 2008 (Apache Discount Agreement).[166]

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

> 1. [T]he rates applicable to all gas owned and/or controlled by Shipper from time to time that flows through the receipt point(s) listed on Exhibit A shall be at those discounted rates as stated on Exhibit A ("Discounted Rate"), with the rate for Gathering and the rate for Transmission to be proportionately allocated as per the applicable maximum tariff rate split between gathering and transmission.
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> 4. Rates or surcharges included in the Discount Rate(s): Usage Charge.
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> 5. Rates or surcharges excluded from Discounted Rate(s) shall be the responsibility of the Shipper in accordance with

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[163] *See Id.*

[164] See SR-11 at 25:5-11.

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

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

> Sea Robin's tariff: ACA, Fuel Reimbursement, penalty charges, scheduling charges and cash-out charges.[167]

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

a. Opinion No. 516

161. In Opinion No. 516, the Commission found that the Apache Service Agreements provide for collection of the Hurricane Surcharge. The Commission stated that, like the GOM Shelf and Hess Service Agreements discussed above, the Apache Service Agreements are generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of the Apache Service Agreements, as well as section 3.5 of Rate Schedule ITS, which is incorporated into the service agreement by reference, establishes a presumption that Apache will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, the Commission was required to look to the specific terms of the Apache Discount Agreement to determine if it provides for a discount of the Hurricane Surcharge. Otherwise, the Commission must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

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

163. However, this interpretation of paragraph 5 would fail to give a reasonable meaning to paragraph 4 of the Apache Discount Agreement. That paragraph lists the

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

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

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

165. Nevertheless, the *Memphis* Clause in section 6.3 of the Apache Service Agreements made clear that new charges could be added. Furthermore, Section 6.1 of the Apache Service Agreements provides that Apache shall pay the charges for service specified in Rate Schedule ITS, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[168] Similarly, Rate Schedule ITS, which is incorporated by reference in section 2.1 of the Apache Service Agreements, provides that Apache must pay the maximum rate for Rate Schedule ITS service, unless Sea Robin offers to discount its rates. Sea Robin and Apache are sophisticated parties and the Commission expected that, if it were their intent to limit or preclude Apache's liability for all other and future surcharges they would have included language so stating. In the absence of such language, the Commission defered

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

to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers and the provisions of Apache's Service Agreements requiring it to pay Sea Robin's maximum rates, unless Sea Robin agrees to discount those rates.

b. Request for Rehearing

166. Apache contends that Opinion No. 516 was in error because paragraph 5 of the Apache Discount Agreement sets forth the surcharges that Sea Robin and Apache agreed would be Apache's responsibility. Apache states that under the contract maxim of *exclusio unius est exclusio alterius*, where certain items are spelled out in a contract, an intent to exclude all other items is inferred. Apache states that given that the Hurricane Surcharge does not appear in the list of surcharges set forth in paragraph 5 of the Apache Discount Agreement, Sea Robin has agreed that the Hurricane Surcharge will not apply to transportation under the Apache Discount Agreement.

167. Apache argues that Opinion No. 516's finding that only the usage charge is included in the Discounted Rate under the Apache Discount renders paragraph 5 superfluous, and completely meaningless. Apache states that the Commission must interpret a contract to give meaning to each of its parts and in doing so, the Commission must give meaning to the exclusive list that sets forth the only surcharges that Apache is required to pay for transportation under the Apache Discount Agreement.

168. Apache states it is not arguing that the Hurricane Surcharge is "included" in the discounted rate under paragraph 4. Apache agrees that the Usage Charge is the only rate that is included in the "Discounted Rate(s)." Instead, Apache states, it is arguing that Sea Robin agreed in paragraph 5 of the Apache Discount Agreement to limit what surcharges are applicable to transportation under the Apache Discount Agreement. Apache states that given that the Hurricane Surcharge is not included in the list of surcharges Apache is required to pay, Sea Robin may not assess that surcharge for transportation under the Apache Discount Agreement, following execution of that agreement.

169. Apache states that this plain reading of paragraph 5 of the Apache Discount Agreement is further supported by paragraph 7 of the Apache Discount Agreement, which states, in part, "Shipper shall continue to be eligible for any refunds given by Sea Robin including but not limited to cash-out charges, fuel reimbursements, penalty charges, scheduling charges, etc."[169] Thus, Apache states, where Sea Robin and Apache intended to expand a list beyond the items listed, the parties added language to evince that intent (i.e., "not limited to" and "etc.") and no such list-expanding language appears

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[169] Apache Rehearing Request at 15 (citing Exh. No. APC-2)

in paragraph 5. Apache states, thus, neither Sea Robin, nor Apache, intended for the list of surcharges to expand beyond those that were listed in paragraph 5.

c. **Commission Determination**

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

171. The Commission continues to find that the most reasonable reading of the Apache Discount Agreement is that it is silent with respect to whether the Hurricane Surcharge is to be discounted. Apache continues to argue that, under the contract interpretation maxim of *exclusio unius est exclusio alterius*, the list in paragraph 5 of rates or surcharges excluded from the discounted rates sets forth the specific additional charges that were meant to be Apache's responsibility and all other items, including any future surcharges, are therefore excluded from Apache's responsibility. However, Apache fails to come to grips with the fact that paragraph 4 sets forth a list of all the "Rates *or surcharges* included in the Discounted Rate [emphasis added]," and identifies only the usage charge as being included in the discounted rate. As we found in Opinion No. 516, if the same *exclusio unius est exclusio alterius* contract interpretation maxim relied on by Apache to interpret paragraph 5 were used to interpret paragraph 4, it would follow from the fact that the list of all rates and surcharges included in the discounted rate in paragraph 4 includes only the usage charge that no other item, including the Hurricane Surcharge, is discounted. In short, consistent use of the contract interpretation maxim relied on by Apache would render paragraphs 4 and 5 in conflict with one another. Apache provides no reason why, if that contract interpretation maxim is used, it should only be used to interpret paragraph 5, and not paragraph 4.

172. We are also not persuaded by Apache's reliance on the list set forth in paragraph 7.[170] Apache states that, where Sea Robin and Apache intended to expand a list beyond

[170] It is worth noting that, with exception of ACA, the charges listed in paragraph 7 are the same charges listed in paragraph 5. Under Apache's interpretation then, if

(continued…)

the items listed, the parties added language to evince that intent (i.e., "not limited to" and "etc.") and no such list-expanding language appears in paragraph 5. But neither does such list-expanding language appear in paragraph 4. Because Apache's proposed interpretation of the Apache Discount Agreement fail to give a reasonable and consistent meaning to all of its provisions, the Commission continues to reject Apache's proposed interpretation.

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

174. Nevertheless, the *Memphis* Clause in section 6.3 of the Apache Service Agreements made clear that new charges could be added. Furthermore, Section 6.1 of the Apache Service Agreements provides that Apache shall pay the charges for service specified in Rate Schedule ITS, unless Sea Robin agrees on a not unduly discriminatory basis to discount the rates charged shipper for services provided under the agreement.[171] Similarly, Rate Schedule ITS, which is incorporated by reference in section 2.1 of the Apache Service Agreements, provides that Apache must pay the maximum rate for Rate Schedule ITS service, unless Sea Robin offers to discount its rates. Sea Robin and Apache are sophisticated parties and we would expect that, if it were their intent to limit or preclude Apache's liability for all other and future surcharges they would have included language so stating. In the absence of such language, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers and the provisions of Apache's Service Agreements requiring it to pay Sea Robin's maximum rates, unless Sea Robin agrees to discount those rates.

Apache is only responsible for the charges in paragraph 5, it is unclear what other refunds Apache would be entitled to besides those related to the charges in paragraph 5.

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

5. **ExxonMobil Agreements**

175. ExxonMobil has three Rate Schedule ITS transportation service contracts with Sea Robin that it currently uses to transport Gulf of Mexico production (ExxonMobil Service Agreements).[172] ExxonMobil entered into two discount agreements with Sea Robin covering all ExxonMobil's transportation (ExxonMobil Discount Agreements). The ExxonMobil Discount Agreements were entered into on February 1, 2008 and February 15, 2008.[173]

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

> 4. The following rates or surcharges are included in the Discounted Rate: Usage Charge.
>
> 5. The following rates or surcharges excluded from the Discount Rate shall be the responsibility of the Shipper in accordance with Sea Robin's tariff: ACA, Fuel Reimbursement, penalty charges, scheduling charges and cash-out charges.[174]

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

178. ExxonMobil noted the testimony of Witness Seal, who was a manager for ExxonMobil at the time these agreements were entered into. ExxonMobil stated that Witness Seal testified that

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

[173] *See* Exh. Nos. EM-2 and EM-3.

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

> [d]edication of these reserves to Sea Robin was a significant concession by ExxonMobil and was a condition precedent set by Sea Robin during the negotiations. In exchange for the reserve dedication by ExxonMobil, Sea Robin offered long-term rate stability at discounted rates. Now, by seeking to impose the Hurricane Surcharge in addition to the discounted rates it agreed to with ExxonMobil, Sea Robin would be reneging on agreed contract terms.[175]

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

a. <u>Opinion No. 516</u>

180. In Opinion No. 516, the Commission found that the ExxonMobil Service Agreements provide for collection of the Hurricane Surcharge. Like several of the agreements discussed above, the ExxonMobil Service Agreements are generally identical to Sea Robin's form of service agreement for Rate Schedule ITS. Accordingly, the language of the ExxonMobil Service Agreements, as well as Rate Schedule ITS, which is incorporated by reference, establishes a presumption that ExxonMobil will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, the Commission looked to the specific terms of the ExxonMobil Discount Agreements to determine if they provides for a discount of the Hurricane Surcharge. Otherwise, the Commission had to defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

181. Opinion No. 516 found that paragraphs 4 and 5 of the ExxonMobil Discount Agreements were generally the same as paragraphs 4 and 5 of the Apache Discount Agreement. The arguments of ExxonMobil and Apache regarding the interpretation of those paragraphs were also generally the same. Accordingly, for the same reasons discussed in Opinion No. 516 regarding the Apache Discount Agreement,[176] the

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

[176] *See, e.g.*, Opinion No. 516, 137 FERC ¶ 61,201 at PP 136-140.

Commission found that the ExxonMobil Discount Agreements are silent with respect to the applicability of the Hurricane Surcharge and thus, deferred to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

b. <u>Request for Rehearing</u>

182. With the exception of the arguments discussed in the following paragraphs, ExxonMobil raises virtually identical arguments as it raised in its Brief on Exception to show that the discounted rate provided for in the ExxonMobil Service Agreements are not subject to the Hurricane Surcharge.[177]

183. Hess and ExxonMobil also argue that the Commission disregards certain evidence of intent submitted by Hess and ExxonMobil. First, Hess and ExxonMobil argue that the Commission ignores the "obvious implication" of Sea Robin's proposal, as part of its Hurricane Surcharge filing, to amend its GT&C to preclude discounting of the Hurricane Surcharge. Hess and ExxonMobil claim that Sea Robin's proposal evidences Sea Robin's concern that its discount agreements did not authorize the addition of the surcharge. The Commission's failure to connect and explain why its rejection of those tariff sheets did not require more rigorous examination of the intent underlying the discount agreements does not constitute reasoned decision-making.

184. Second, Hess and ExxonMobil state that the Commission disregarded the wording of another discount agreement between Hess and Sea Robin, wherein the discounted rate is expressly made subject to "future surcharges," a term not found in the Hess and ExxonMobil agreements. Hess and ExxonMobil state that Hess and Sea Robin entered into the discount agreement to Contract No. 1271 by letter agreement dated November 19, 2009.[178] Hess and ExxonMobil state that Sea Robin clearly was aware of wording that would clearly state its intent to provide for new surcharges it sought to impose after discount agreements had been entered into, yet did not include the "future surcharge" in the discount agreements being challenged by Hess and ExxonMobil.

185. Hess and ExxonMobil also argue that the Commission's reliance on the *Memphis* clause to find that the Hurricane Surcharge applies to Service Agreement No. 1643 is

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[177] Compare ExxonMobil and Hess Rehearing Request at 48-51 to ExxonMobil and Hess Brief on Exceptions at 20-23..

[178] ExxonMobil and Hess Rehearing Request at 52 (citing Exh. No. HC-3)

misplaced and contrary to the Commission's discount policies.[179] Hess and ExxonMobil state that the Commission's reliance on the Memphis clause ignores the purpose of discount provisions. Hess and ExxonMobil state that the evidence showed that in exchange for the discounted rate, ExxonMobil agreed to commit specified reserves to Sea Robin. Hess and ExxonMobil state that Sea Robin presumably entered into the discount agreement to meet competition. Despite that intent, Hess and ExxonMobil state, the Commission held that Hess and ExxonMobil agreed to a discount that could be in practical effect nullified after the fact (and after commitment of reserves to Sea Robin's system) by an open-ended surcharge to recover hurricane damage, even though Sea Robin previously had filed to recover hurricane damage and costs associated with hurricane risk through base rates. Hess and ExxonMobil argue that the Commission's failure to consider this evidence shows that the Commission's conclusion that Sea Robin may impose the Hurricane Surcharge in addition to the discounted rate under Hess' agreement is not supported by substantial evidence or reasoned decision making.

186. Hess and ExxonMobil contend that the Commission's finding that the *Memphis* clause overrides every discount Sea Robin has agreed to would render the long-term discounted rate meaningless.[180] Hess and ExxonMobil state that specific contract provisions prevail over more general clauses. Hess and ExxonMobil state that the discount provision spells out the discount rate precisely, while the *Memphis* clause is a standard clause that allows the pipeline to make filings of many different types to amend the tariff. Hess and ExxonMobil state that if pipelines can unilaterally rescind or modify discounts by designing new surcharges to recover costs ordinarily recovered through base rates by invoking the *Memphis* clause, then the discount policy is called into question. Accordingly, Hess and ExxonMobil state, the Commission's reliance on the *Memphis* clause to authorize Sea Robin to unilaterally impose the Hurricane Surcharge in addition to a discount rate is misplaced.[181]

[179] *Id.* at 59-60 (citing *Interstate Natural Gas Pipeline Rate Design*, 47 FERC ¶ 61,295, *reh'g granted*, 48 FERC ¶ 61,122; *Selective Discounting by Natural Gas Pipelines*, 113 FERC ¶ 61,173 at P 4).

[180] Hess states that the Commission appears to have based its holding that the Hurricane Surcharge applies to all of the contested discount agreements on a finding that the contract language is clear, although the Commission does not explicitly make such a finding. Therefore, the Commission would not have considered extrinsic evidence.

[181] ExxonMobil/Hess at 62 (citing *Bay Gas Storage Company, Ltd.*, 131 FERC ¶ 61,034 at P 45 (finding that Bay Gas may collect a new in-kind LAUF charge from FGT under a discount agreement, to ensure that Bay Gas recovers its variable costs

(continued…)

187. Hess and ExxonMobil state that the selective discounting policy, and the orders applying the policy,[182] reflect the Commission's understanding that pipelines grant discounts only out of commercial necessity. Hess and ExxonMobil state that allowing Sea Robin to override its discount agreements unilaterally through the Hurricane Surcharge contravenes the principles underlying the policy.

c. <u>Commission Determination</u>

188. ExxonMobil's request for rehearing is denied.

189. The language of the ExxonMobil Service Agreements, as well as Rate Schedule ITS, which is incorporated by reference, establishes a presumption that ExxonMobil will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, the Commission looks to the specific terms of the ExxonMobil Discount Agreements to determine if they provides for a discount of the Hurricane Surcharge. Otherwise, the Commission must defer to Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

190. Opinion No. 516 found that paragraphs 4 and 5 of the ExxonMobil Discount Agreements were generally the same as paragraphs 4 and 5 of the Apache Discount Agreement. The arguments of ExxonMobil and Apache regarding the interpretation of those paragraphs were also generally the same. Accordingly, for the same reasons discussed in Opinion No. 516 regarding the Apache Discount Agreement,[183] the Commission found that the ExxonMobil Discount Agreements are silent with respect to the applicability of the Hurricane Surcharge and thus, must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

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consistent with Commission policy, but further requiring Bay Gas to credit the monetary value of the LAUF charge to FGT so that FGT would retain the economic value of its bargain).

[182] *Id.* at 63 (citing *Iroquois Gas Transmission System*, 90 FERC at 61,092-95; *Trunkline Gas Co.*, 84 FERC, at 61,476-78).

[183] *See, e.g.*, Opinion No. 516, 137 FERC ¶ 61,201 at PP 136-140.

191. The arguments raised by ExxonMobil in its request for rehearing that are virtually identical to the arguments it raised in its Brief on Exceptions are denied for the same reasons they were denied in Opinion No. 516.[184]

192. The Commission also finds the evidence of intent proffered by ExxonMobil without merit. First, ExxonMobil points out that after Sea Robin and ExxonMobil entered into the subject ExxonMobil Discount Agreements, Sea Robin and Hess entered into Contract No. 1271 containing a discount agreement in which the discounted rate is expressly made subject to "future surcharges," a term not found in the ExxonMobil Discount Agreements. ExxonMobil states that Sea Robin was clearly aware of wording that would clearly state its intent to provide for new surcharges it sought to impose after discount agreements had been entered into, yet did not include the "future surcharges" provision in the discount agreement being challenged here. However, the discount agreement to Contract No. 1271 was entered into more than a year and a half after ExxonMobil and Sea Robin entered into their discount agreements and, unlike those agreements, Contract No. 1271 was entered into after Sea Robin had proposed the Hurricane Surcharge and after parties with existing discount agreements had raised the issue of whether their agreements should be interpreted as preventing the surcharge form being applied to them.

193. Putting aside that the parties to the ExxonMobil Discount Agreements are different than the parties to Hess Contract No. 1271, Hess and Sea Robin's attempt in the later agreement to be clearer regarding Hess' liability for future surcharges in Contract No. 1271 does not mean that the ExxonMobil Discount Agreements should be interpreted as not encompassing the Hurricane Surcharge. We would expect parties that are aware of a dispute regarding particular contract language in earlier agreements, which Hess and Sea Robin were at the time of Contract No. 1271, would be more precise in a new agreement so as to avoid just such a dispute. Because the parties used clearer contract language, does not indicate that ExxonMobil Discount Agreements must now be interpreted as providing that ExxonMobil is not responsible for future surcharges. The fact remains that paragraph 4 of the ExxonMobil Discount Agreements only includes Sea Robin's usage charge in the list of "rates or surcharges" that are included in the Discounted Rate, while paragraph 5 includes only then effective charges in the list of "rates or surcharges" excluded from the discount agreement. The absence of the Hurricane Surcharge or any general reference to future surcharges from either list indicates the parties simply did not reach any agreement concerning the treatment of such future surcharges. As discussed above, the fact Hess and Sea Robin subsequently agreed in Contract No. 1271, after the issue of whether future surcharges would be discounted

[184] *Id.* PP 148-150.

was clearly presented, that Hess would be responsible for all future surcharges could be treated as evidence of their intent in the earlier agreements to provide the same thing. At the very least, this fact undercut the presumption asserted by ExxonMobil and Hess that a producer would not agree to such a thing.

194. Second, we do not find that Sea Robin's proposal to include in its GT&C a provision that the Hurricane Surcharge would be non-discountable is evidence of Sea Robin and ExxonMobil's intent one and a half years earlier to limit ExxonMobil's liability with respect to future surcharges. Sea Robin's proposal was one of general applicability and not limited to ExxonMobil's Service Agreements.

195. For the same reason, ExxonMobil's arguments related to the *Memphis* clause and the Commission's discount policies are unpersuasive. We generally agree with ExxonMobil that a discount provision spelled out precisely would prevail over a more general clause like the *Memphis* clause. However, we disagree with ExxonMobil that paragraph 5 in the ExxonMobil Discount Agreement is a discount provision. As we stated previously, the charges listed in paragraph 5 of the agreement reflect all of the various charges in effect at the time that the ExxonMobil discount Agreements were executed, except for the usage charge, which is the only charge identified in paragraph 4 as being included in the discounted rate. We believe that in all likelihood the parties did not address the applicability of the Hurricane Surcharge in the discount agreements because it did not exist at the time the agreement was executed. Sea Robin is not proposing to change the usage charge. Because there is no evidence inside or outside of the four corners of the agreement of an intent to discount charges other than the discounted usage rate and because Sea Robin is not proposing to change ExxonMobil's discounted usage rate, it is not inconsistent with the Commission's discounting policies to find that the Hurricane Surcharge is a surcharge for which ExxonMobil is responsible under the general terms of ExxonMobil's Service Agreements and Sea Robin's tariff, including the *Memphis* clause. This is also consistent with ExxonMobil's contention that "[e]ach contract, including the Discount Letter Agreements, must be interpreted as an integrated whole, giving meaning to each provision."[185]

196. The fact that Sea Robin previously filed to recover hurricane damage and costs associated with hurricane risk through base rates, with plant replacement costs included in rate base and earning a return, is also unpersuasive. As stated earlier in this order, it is true that plant replacement costs are generally eligible for inclusion in a pipeline's rate base as part of its capital invested in providing jurisdictional service. When plant costs are included in a pipeline's rate base, the Commission requires the pipeline to recover

[185] ExxonMobil/Hess Rehearing Request at 61.

those costs over the depreciable life of the plant in question, but the pipeline is then entitled to earn a return on equity on the undepreciated portion of those costs financed by equity an allowance for the income taxes it must pay on its return on equity, and the pipeline is entitled to recover the cost of the debt incurred to finance the remainder of its invested capital. However, Sea Robin has not proposed to treat the plant replacement costs incurred as a result of Hurricane Ike as part of its capital invested in providing jurisdictional service, but instead to amortize those costs in a separate surcharge as an extraordinary, one-time expense during a four-year amortization period. The fact Sea Robin used a different recovery method for earlier, less significant hurricane repair costs does not foreclose Sea Robin from proposing a different rate treatment of the Hurricane Ike costs incurred solely for the purpose of repairing catastrophic hurricane damage to its existing system.

197. We do not interpret the parties' failure in their discount agreements to anticipate such a surcharge, and the resulting silence of those agreements as to whether such a surcharge would be discounted, as an agreement by Sea Robin to discount the yet to be proposed surcharge. Rather, the service agreements contained *Memphis* clauses permitting Sea Robin to propose new charges, and nothing in the discount agreements required new just and reasonable surcharges approved by the Commission to be discounted.

6. **Hess Service Agreement No. 1364**

198. Hess and Sea Robin were parties to Service Agreement No. 1364,[186] which was an interruptible transportation agreement under Rate Schedule ITS. The discount information for Service Agreement No. 1364 was specified in a Transaction Confirmation subject to the agreement, dated March 12, 2010.

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

Eff Begin Dt	Eff End Dt	From Loc Code	From Loc Name	To Loc Code	TO Loc Name	SingleRt	PathMdOVol	TierTyp	ComRt	ACA	Gath Comm	Flat Charge	Period

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

01/01/2010	12/31/2010	RG 950	SEAROBIN RETROGRADE RECEIPT	95038	SMI 128S RETROGRADE-GARDEN BANKS PIPELINE	.10	0-999999			9999			D

200. Hess argued that Service Agreement No. 1364 does not allow imposition of the Hurricane Surcharge.[187] First, Hess contended that Sea Robin wrongfully and unlawfully terminated Service Agreement No. 1364 for non-utilization.[188] Hess stated that contrary to Sea Robin's assertions, Hess did receive service under Service Agreement No. 1364 in March and April 2010. Hess stated that Exhibit No. SR-34, the exhibit presented by Sea Robin to show throughput by contract, indicates activity under Service Agreement No. 1364 in both of these months, contrary to Sea Robin's assertions. Furthermore, Hess stated, Appendix B, p. 8 of Sea Robin's August 31 filing in Docket No. RP10-1133-000 also contradicts the assertion that Hess did not utilize Contract No. 1364 in the months preceding Sea Robin's unilateral termination on May 31, 2010. Hess stated that Sea Robin recorded transportation quantities for Hess in March and April, 2010.[189] Moreover, Hess stated, Sea Robin imposed the surcharge in addition to the discounted rate during these months, contrary to its position that it had terminated the agreement.

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

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

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

Accordingly, Hess stated that the Commission should direct Sea Robin to reinstate Service Agreement No. 1364.

201. Second, Hess stated that the transaction confirmation to Service Agreement No. 1364[190] provides for a discounted rate of $0.10 per Dth, but it does not provide for addition of a hurricane surcharge or any other future surcharges. Hess stated that the Transaction Confirmation provides only for the exclusion of ACA from the discounted rate of $0.10 per Dth. Hess asserted that it sought a fixed discounted transportation rate to avoid the uncertainty of future rate cases.

a. <u>Opinion No. 516</u>

202. In Opinion No. 516, the Commission found that Hess Service Agreement No. 1364 provides for collection of the Hurricane Surcharge. The Commission stated that, whether Hess Service Agreement No. 1364 was wrongfully terminated, was an issue that the ALJ neither considered nor decided. This issue also does not appear in the Joint Statement of Issues filed by the parties prior to the hearing. Accordingly, the Commission believed the proper forum for raising the issue of improper termination is in a separate complaint proceeding.

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

204. Upon review of the Transaction Confirmation to Service Agreement No. 1364, the Commission found that, similar to several of the agreements discussed above, it is silent with respect to the applicability of Hurricane Surcharge. The Transaction Confirmation makes no mention of other or future surcharges. It is not even clear from the Transaction Confirmation that, as Hess asserts, ACA is excluded from the discounted rate or for that

[190] Exh. No. HC-4.

matter, that the $0.10 per Dth is a discounted rate. The Transaction Confirmation is terse, to say the least. Based on the limited information in the Transaction Confirmation, the Commission was unable to conclude that the parties' intent was to include the Hurricane Surcharge or otherwise prohibit its application to Hess under this agreement. Sea Robin and Hess are sophisticated parties and if it were their intent to limit or preclude Hess' liability for all other and future surcharges they would have included language so stating. In the absence of such of such language, the Commission had to defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

b. Request for Rehearing

205. With the exception of the arguments already discussed in PP 117-121 of this order, Hess raises virtually identical arguments as it raised in its Brief on Exceptions to show that the discounted rate provided for in the Transaction Confirmation is not subject to the Hurricane Surcharge.[191]

c. Commission Determination

206. Hess' request for rehearing is denied. In Opinion No. 516, the Commission found that Hess Service Agreement No. 1364 provides for collection of the Hurricane Surcharge. The Commission stated that the language of Hess Service Agreement No. 1364, as well as Rate Schedule ITS, which is incorporated by reference, establishes a presumption that Hess will pay Sea Robin's just and reasonable maximum rates as approved by the Commission from time to time, unless Sea Robin expressly agreed to discount such rates. Therefore, unless the specific terms of the Transaction Confirmation provides for a discount of the Hurricane Surcharge, the Commission must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS.

207. Similar to several of the agreements discussed above, Service Agreement No. 1364 is silent with respect to the applicability of Hurricane Surcharge. The Transaction Confirmation makes no mention of other or future surcharges. The only surcharge mentioned in the Transaction Confirmation is the ACA, and the column for the ACA simply includes the following: "9999." Without further explanation from Hess, we cannot be sure whether that means Hess will not be charged the ACA or must pay the ACA as it may change from time to time. The Transaction Confirmation is also silent with respect to fuel charges, but we must assume Hess will be responsible for those

[191] Compare ExxonMobil and Hess Rehearing Request at 55-57 to ExxonMobil and Hess Brief on Exceptions at 26-28.

charges, since fuel is generally non-discountable although there is no express reference to Hess's responsibility for those charges. Again, this contract is terse to say the least. Based on the limited information in the Transaction Confirmation, the Commission is unwilling to draw the inference, asserted by Hess, that a transaction confirmation making no reference one way or another to the Hurricane Surcharge should be interpreted as prohibiting the application of the Hurricane Surcharge to Hess under this agreement. Sea Robin and Hess are sophisticated parties and if it were their intent to limit or preclude Hess' liability for all other and future surcharges they would have included language so stating. In the absence of such language, we must defer to Sea Robin's generally applicable tariff which provides for the collection of the Hurricane Surcharge from Rate Schedule ITS shippers.

208. The arguments raised by Hess in its request for rehearing that are virtually identical to the arguments it raised in its Brief on Exceptions are denied for the same reasons they were denied in Opinion No. 516.[192]

209. The Commission also finds the evidence of intent proffered by ExxonMobil without merit. First, Hess points out that before Sea Robin and Hess entered into the subject Transaction Confirmation, Sea Robin and Hess entered into Contract No. 1271 containing a discount agreement in which the discounted rate is expressly made subject to "future surcharges," a term not found in the Transaction Confirmation. Hess states that Sea Robin was clearly aware of wording that would clearly state its intent to provide for new surcharges it sought to impose after discount agreements had been entered into, yet did not include the "future surcharges" provision in the discount agreement being challenged here. However, the discount agreement to Contract No. 1271 cannot be compared to the Transaction Confirmation.

210. Hess and Sea Robin's attempt in Contract No. 1271 to be clearer regarding Hess' liability for future surcharges does not mean that the Transaction Confirmation should be interpreted as not encompassing the Hurricane Surcharge. There is a total lack of specificity in this agreement not only with respect to future surcharges, but to all charges including ACA and Fuel. However, just because a charge is not listed in this Transaction Confirmation does not mean Hess is not responsible for, i.e., fuel. As stated above, unless the specific terms of the Transaction Confirmation provides for a discount of the Hurricane Surcharge, the Commission must defer to the Sea Robin's generally applicable tariff and the rates and charges the Commission has found to be just and reasonable for Rate Schedule ITS. We find no evidence of an intent to discount future surcharges in the Transaction.

[192] Opinion No. 516, 137 FERC ¶ 61,201 at PP 156-159.

211. Second, we do not find that Sea Robin's filing to make the Hurricane Surcharge non-discountable is evidence of Sea Robin and Hess' intent several months later to limit Hess' liability with respect to future surcharges. This is a nonsensical argument with respect the Transaction Confirmation.

212. For the same reason, Hess' arguments related to the *Memphis* clause and the Commission's discount policies are unpersuasive. We generally agree with Hess that a discount provision spelled out precisely would prevail over a more general clause like the *Memphis* clause. However, as shown above, there is almost a complete lack of preciseness in the Transaction Confirmation, including whether the parties agreed that future surcharges would be included in the supposed discounted rate of $0.10 per Dth. Because there is no evidence inside or outside of the four corners of the agreement of an intent to discount future surcharges, including the Hurricane Surcharge, it is not inconsistent with the Commission's discounting policies to find that the Hurricane Surcharge is a surcharge for which Hess is responsible under the general terms of Hess service agreements and Sea Robin's tariff, including the *Memphis* clause. This is also consistent with Hess' contention that "[e]ach contract, including the Discount Letter Agreements, must be interpreted as an integrated whole, giving meaning to each provision."[193]

213. The fact that Sea Robin previously filed to recover hurricane damage and costs associated with hurricane risk through base rates is also unpersuasive. As stated earlier in this order, it is true that plant replacement costs are generally eligible for inclusion in a pipeline's rate base as part of its capital invested in providing jurisdictional service. When plant costs are included in a pipeline's rate base, the Commission requires the pipeline to recover those costs over the depreciable life of the plant in question, but the pipeline is then entitled to earn a return on equity on the undepreciated portion of those costs financed by equity an allowance for the income taxes it must pay on its return on equity, and the pipeline is entitled to recover the cost of the debt incurred to finance the remainder of its invested capital. However, Sea Robin has not proposed to treat the plant replacement costs incurred as a result of Hurricane Ike as part of its capital invested in providing jurisdictional service, but instead to amortize those costs in a separate surcharge as an extraordinary, one-time expense during a four-year amortization period. The fact Sea Robin used a different recovery method for earlier, less significant hurricane repair costs does not foreclose Sea Robin from proposing a different rate treatment of the Hurricane Ike costs incurred solely for the purpose of repairing catastrophic hurricane damage to its existing system.

[193] ExxonMobil and Hess, Rehearing Request, RP09-995-003, RP10-422-001 at 61 (Apr. 30, 2010).

VI. Request for Rehearing of March 2010 Suspension Order

A. Background

214. On April 30, 2010, ExxonMobil and Hess filed a request for rehearing of the Commission's March 31, 2010 suspension order[194] raising substantially the same arguments raised in their request for rehearing of the 2009 Suspension Order. Those arguments included the following: (i) the Hurricane Surcharge is contrary to the Natural Gas Act (NGA) and violates the filed rate doctrine and the rule against retroactive ratemaking, by allowing Sea Robin to impose a surcharge to recover costs incurred in the past; (ii) the Commission's acceptance of the Hurricane Surcharge mechanism violated the periodic rate adjustment (PRA) regulations by allowing Sea Robin to recover costs incurred before the Hurricane Surcharge became effective; (iii) the Commission violated the PRA regulations by allowing Sea Robin to include numerous different categories of costs and expenses, instead of limiting PRA recovery to a "single cost or revenue item;" and (iv) the Commission failed to engage in reasoned decision making. In ExxonMobil and Hess' joint request for rehearing of the March 31, 2010 suspension order, they raise nearly identical arguments.

215. On May 13, 2010, Sea Robin filed an answer to and a motion to reject ExxonMobil and Hess' request for rehearing of the March 31, 2010 suspension order. On May 25, 2010, ExxonMobil and Hess filed an answer to Sea Robin's answer and motion to reject the rehearing request. The Commission issued its standard tolling order on May 27, 2010, but has not yet issued a decision on the rehearing request of ExxonMobil and Hess.

216. In its request for rehearing of Opinion No. 516, in addition to the arguments already addressed in this order, ExxonMobil and Hess raise generally the same arguments they raised in their requests for rehearing of the 2009 Suspension Order and the March 31, 2010 suspension order.

B. Commission Determination

217. First, the Commission rejects Sea Robin's answer to ExxonMobil and Hess' request for rehearing of March 31, 2010 suspension order. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for

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[194] *Sea Robin*, 130 FERC ¶ 61,261.

rehearing.[195] Accordingly, we also reject ExxonMobil and Hess' reply to Sea Robin's answer.

218. Second, the Commission denies ExxonMobil and Hess' request for rehearing of the March 31, 2010 suspension order and Opinion No. 516, as it relates to the arguments already raised in its earlier rehearing requests, for the same reasons articulated in the Rehearing Order. On March 18, 2010, the Commission denied ExxonMobil and Hess' request for rehearing of the 2009 Suspension Order, finding that "[n]othing in [Natural Gas Act] section 4 prohibits the Commission from allowing a pipeline to make a limited section 4 filing to recover a particular type of cost" and affirming Sea Robin's ability to collect the hurricane-related costs through a limited section 4 filing rather than as part of a general section 4 rate case.[196] The Rehearing Order confirmed that current Commission policy permits a surcharge via a limited section 4 filing "to recover extraordinary, one-time losses resulting from events outside the pipeline's control" such as the hurricane damage suffered by Sea Robin.[197] The Commission found that such a surcharge mechanism provides the pipeline and its customers certainty as to what categories of costs may be recovered and how they will be allocated among shippers.[198] The Commission expressly found that Sea Robin's proposal to include previously incurred Hurricane Ike costs in the surcharge to be reasonable.[199] Finally, the Commission held that the Hurricane Surcharge does not violate the filed rate doctrine or the rule against retroactive ratemaking because the Hurricane Surcharge does not retroactively change rates provided for service before the effective date of the Hurricane Surcharge.[200]

219. The arguments made by ExxonMobil and Hess in their request for rehearing of the March 31, 2010 suspension order are practically identical to arguments made in the their request for rehearing of the Suspension Order. In turn, ExxonMobil and Hess have raised generally the same arguments in their request for rehearing of Opinion No. 516. As shown above, the Commission has already addressed and denied these arguments in the

[195] 18 C.F.R. § 385.713(d)(1) (2012).

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

[197] *Id.*

[198] *Id.* P 21.

[199] *Id.* P 18.

[200] *Id.* P 14.

Rehearing Order. For the same reasons articulated in the Rehearing Order, ExxonMobil and Hess' requests for rehearing on these issues are denied.

VII. Requests for Rehearing of March 2012 Order

A. Background

220. On January 13, 2012, Sea Robin filed revised tariff records in compliance with Opinion No. 516 in Docket No. RP12-313-000. By February 2012 Order,[201] the Commission accepted the proposed tariff records, to become effective on the dates listed in the Appendix to the order, subject to refund and conditions, and a further filing by Sea Robin to modify certain language in its tariff records as directed by the Commission.

221. On March 1, 2012, Sea Robin filed its semi-annual Hurricane Surcharge filing in Docket No. RP12-469-000 and a compliance filing reflecting the tariff revisions required by the February 2012 Order. On March 13, 2012, Apache and Chevron (jointly, Indicated Shippers) filed a protest. Among other things, Indicated Shippers argued that Sea Robin must allocate insurance proceeds and Hurricane Surcharge recoveries to the oldest surcharge balance first.

222. On March 20, 2012, Century Exploration New Orleans, LLC, Dynamic Offshore Resources, LLC, Energy XXI (Bermuda) Ltd., Hilcorp Energy Company, Inc (Hilcorp), McMoRan Oil & Gas LLC, Pisces Energy LLC (Pisces), and W&T Offshore, Inc. (collectively, Producer Coalition), which are either interruptible transportation customers or potential shippers on Sea Robin, filed a motion to intervene out-of-time and protest in Docket No. RP12-469-000. Producer Coalition stated that several of its members are also shippers on two pipeline systems that Trunkline Gas Company, LLC (Trunkline) has proposed to abandon and convey to Sea Robin in Docket No. CP12-5-000. Producer Coalition further stated that Sea Robin has proposed to assess the Hurricane Surcharge on the shippers on the two Trunkline systems.[202]

223. Sea Robin filed an answer on March 21, 2012 to Indicated Shippers' and Producer Coalition's protests. With respect to the Producer Coalition's motion and protest, Sea Robin asserted that two members of the Producer Coalition, Hilcorp and Pisces, were not, by their own admission, customers of Sea Robin, and, therefore, their interventions

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[201] February 2012 Order, 138 FERC ¶ 61,131.

[202] Producer Coalition, Motion to Intervene Out-of-Time, Docket No. RP12-469-000, at 5-6 (Mar. 20, 2012).

should be denied as they had no stated interest in the Docket No. RP12-469-000 proceeding.[203]

224. On March 30, 2012 (March 2012 Order),[204] the Commission accepted and suspended the semi-annual filing and accepted the tariff records filed by Sea Robin to comply with the February 2012 Order, subject to the outcome of the pending rehearing requests in Docket Nos. RP09-995-004 and RP10-422-003. The Commission noted Producer Coalition's untimely protest, but did not address the untimely, opposed interventions of Hilcorp and Pisces.[205] The Commission also found that Producer Coalition's concerns regarding the applicability of the Hurricane Surcharge to the Trunkline facilities would be addressed in the abandonment proceeding.[206]

225. On April 30, 2012, Indicated Shippers and Producer Coalition each requested rehearing of the March 2012 Order. In its rehearing request, Indicated Shippers raises three issues. It argues that the Commission erred in approving Sea Robin's treatment of insurance proceeds and reiterates its position that Sea Robin should credit its insurance proceeds and Hurricane Surcharge recoveries (i.e., amounts not recovered via insurance or third parties, but from customers) to its oldest Hurricane Surcharge account balance first. Second, Indicated Shippers assert the Commission also erroneously rejected its request to require Sea Robin to recalculate the applicable carrying costs in accordance with its proposal for crediting insurance proceeds and Hurricane Surcharge recoveries. Third, Indicated Shippers state that the Commission failed in the March 2012 Order to

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[203] Sea Robin, Answer, Docket Nos. RP12-469-000, RP12-313-001, at 10 (Mar. 21, 2012).

[204] March 2012 Order, 138 FERC ¶ 61,242.

[205] 138 FERC ¶ 61,242 at P 16.

[206] *Id.* P 33. On June 21, 2012, the Commission approved the abandonment and sale of Trunkline's facilities to Sea Robin but found that Sea Robin may not impose its existing hurricane surcharge on the existing and new customers on the two systems to recover costs from past hurricane damage on the Sea Robin system. The Commission's finding was without prejudice to Sea Robin proposing in a future NGA section 4 proceeding to apply the hurricane surcharge to all of its customers. *Trunkline Gas Company, LLC and Sea Robin Pipeline Company, LLC*, 139 FERC ¶ 61,239 (2012) at P 129.

address its request that Sea Robin also credit Hurricane Surcharge recoveries to the oldest remaining Hurricane Surcharge Account balance first.[207]

226. Producer Coalition filed a request for rehearing on the limited issue of the Commission's failure to grant intervenor status for Hilcorp and Pisces. Producer Coalition states that Hilcorp and Pisces meet the standards for intervention set out in Rule 214[208] of the Commission's Rules of Practice and Procedure. It argues that Hilcorp and Pisces would be directly affected by the outcome of Sea Robin's Hurricane Surcharge filings if the Trunkline sale is approved, since Sea Robin has proposed to assess the Hurricane Surcharge on shippers using the Trunkline facilities.[209] Producer Coalition further note that Sea Robin did not argue that Hilcorp and Pisces' untimely interventions unduly burden Sea Robin or that the granting of the untimely interventions would burden any other party or disrupt the proceeding at this early stage.[210]

B. <u>Commission Determination</u>

227. As discussed below, the Commission denies Indicated Shippers' rehearing request and grants Producer Coalition's rehearing request. In the March 2012 Order, the Commission found unpersuasive Indicated Shippers' argument that Sea Robin should credit insurance recoveries to the oldest surcharge first. There, we noted that Sea Robin confirmed that under its existing methodology, it credits insurance proceeds against any costs incurred in a particular semi-annual filing time period, and provides a 100 percent credit to the shippers immediately as of the effective date of that semi-annual filing. If insurance recoveries received by Sea Robin exceed the hurricane costs filed in a particular semi-annual filing period, it credits the excess to the oldest Hurricane Surcharge balances.[211] We further found that Sea Robin had correctly followed our directive in the February 2012 Order to maintain its existing methodology for crediting insurance proceeds. Accordingly, we rejected Indicated Shippers' request to require Sea Robin to recalculate the applicable carrying costs associated with such re-credited

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[207] Indicated Shippers, Rehearing Request, Docket Nos.RP12-469-001,RP12-313-003, at 7-8.

[208] 18 C.F.R. § 385.214(d) (2012).

[209] Producer Coalition, Rehearing Request, Docket No. RP12-469-001, at 5 (Apr. 30, 2012).

[210] *Id.* at 7-8.

[211] March 2010 Order, 138 FERC ¶ 61,242 at P 27.

insurance proceeds.[212] Our decision in the March 2012 Order reflects the unique facts and circumstances surrounding Sea Robin's Hurricane Surcharge mechanism. Indicated Shippers has not made any additional arguments in its request for rehearing which would alter our determination on the treatment of insurance proceeds.

228. Indicated Shippers state on rehearing that we did not address their request that Sea Robin also credit Hurricane Surcharge recoveries to the oldest Hurricane Surcharge account balances first. Indicated Shippers argue that their proposed method is just and reasonable and allows Sea Robin to recover its costs and reduces the overall surcharges shippers must pay.[213]

229. While the March 2012 Order referenced Indicated Shippers' request to allocate both insurance proceeds and Hurricane Surcharge recoveries to the oldest surcharge first, it did not specifically include the Hurricane Surcharge amounts in its discussion of the treatment of insurance proceeds.[214] However, we find that discussion applies equally to the treatment of Hurricane Surcharge recoveries. To the extent such recoveries exceed the uncollected costs in a particular surcharge filing, any excess amounts should be credited to the oldest Hurricane Surcharge. Because Sea Robin has included new costs in certain of its additional surcharge filings, it would not be appropriate to apply all Hurricane Surcharge recovery amounts to the oldest surcharge balance. Accordingly, Indicated Shippers' request for rehearing of the March 2012 Order is denied.

230. In considering a motion to intervene out of time, the Commission applies the criteria set forth in Rule 214(d) and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interest of any party. Therefore, the Commission is more liberal in granting late intervention at the early stages of a proceeding, but is more restrictive as the proceeding nears its end.[215]

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[212] *Id.*

[213] Indicated Shippers, Rehearing Request, Docket Nos.RP12-469-001, RP12-313-003, at 10.

[214] 138 FERC ¶ 61,242 at PP 26-27.

[215] *Williston Basin Interstate Pipeline Co.*, 112 FERC ¶ 61,038 at P 12 (2005).

231. We find that Hilcorp and Pisces have an interest in Docket No. RP12-469-000, since at the time of their late interventions they were shippers on the Trunkline facilities and Sea Robin had indicated that such shippers might become subject to Sea Robin's Hurricane Surcharge. Sea Robin's contention that Hilcorp and Pisces' interventions should be denied because they were not current shippers on Sea Robin's system is without merit.

232. Accordingly, Producer Coalition's request for rehearing is granted. Pursuant to Rule 214(d), the Commission will grant Hilcorp and Pisces' late intervention due to their interest in the proceeding, the early stage of the Docket No. RP12-469-000 proceeding when they requested late intervention, and the absence of undue burden on, or prejudice to, any other party.

<u>The Commission orders</u>:

(A) The requests for rehearing of Opinion No. 516 and the March 31, 2010 suspension order are denied. The requests for rehearing of, the March 30, 2012 order are granted in part and denied in part.

(B) The requests for late intervention in Docket No RP12-469-00 by Hilcorp and Pisces are granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.