

175 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Southern Star Central Gas Pipeline, Inc.

Docket No. RP21-618-000

ORDER GRANTING WAIVER REQUEST

(Issued April 9, 2021)

1. On March 11, 2021, Southern Star Central Gas Pipeline, Inc. (Southern Star) submitted a request for waiver of the invoicing, collection and related crediting of penalties associated with Operational Flow Orders (OFO) issued February 11 through February 19, 2021 (OFO Period), during the recent extreme winter weather event. As discussed below, we grant Southern Star's request for waiver of the invoicing, collection, and crediting of penalties as provided for in section 10 of the General Terms and Conditions (GT&C) of its tariff for non-compliance associated with the OFOs issued during the OFO Period.

I. Background and Southern Star's Filing

2. Southern Star states that it submitted reports to the Commission on February 12 and 19, 2021 to notify the Commission that it had issued OFOs to protect the integrity of its pipeline system during the extreme weather event. Southern Star reports that it issued "standard" OFOs as provided for under GT&C section 10.¹ Section 10 provides for penalties of \$5 per dekatherm (Dth) or 2.5 times an index price. Furthermore, any storage shipper who exceeds withdrawal limits is assessed a penalty equal to 365 times the maximum daily reservation rate for the applicable area per Dth, subject to tolerance levels.

3. Southern Star states that it issued Storage and Delivery Location OFOs during the February weather event. The Storage OFOs were addressed to firm storage customers, requiring shippers to remain within their contractual quantities, while the Delivery Location OFOs were addressed to delivery point operators and required takes at delivery

¹ Section 10, Operational Flow Orders, is located on Sheet Nos. 249 through 256A in Southern Star's tariff.

points to not exceed the sum of the confirmed scheduled transportation quantities at the delivery point.

4. In its filing, Southern Star proposes to waive all OFO penalties for all shippers and delivery point operators who may have incurred penalties during the OFO period, in recognition of the historic nature of the winter weather event. Southern Star states that the purpose of OFOs is to deter behavior by shippers and point operators, and ensure the integrity and reliability of its pipeline and storage operations. Southern Star reports that shippers and point operators in aggregate behaved in a manner that allowed it to sustain pipeline operations during a critical weather event and continue serving its markets without curtailing primary firm service.²

5. Southern Star acknowledges that many shippers and delivery point operators were unable to adhere completely to the OFOs and would be subject to penalties absent waiver. Nevertheless, Southern Star reports that many of the shippers and delivery point operators assisted Southern Star during the event and helped it to provide firm service without curtailment. Southern Star believes that a waiver of all OFO penalties is appropriate where the aggregate level of compliance alleviated the strain on its system and the collaborative effort among shippers and delivery point operators avoided impairment of Southern Star's ability to operate its system.

6. Southern Star contends that GT&C section 8.8 provides it with discretion to waive any one or more defaults by a shipper.³ Southern Star, however, states that it is appropriate to inform the Commission and seek its approval of Southern Star's proposal to waive the collection and crediting of the OFO penalties incurred for deviations from

² Southern Star Filing at 2.

³ *Id.* Southern Star cites its OFO Report in Docket No. RP15-194-000 (Nov. 21, 2014) as an example of how it has used this authority in the past. Section 8.8, Operating Conditions for Transportation Service, located on Sheet No. 225 of Southern Star's tariff, provides:

Southern Star shall not be required to perform or continue service on behalf of any Shipper that fails to comply with the terms contained in this Section 8 and the terms of the applicable rate schedule and service agreement. Southern Star shall have the right to waive any one or more specific defaults thereof by any Shipper; provided, however, that no such waiver shall operate or be construed as a waiver of any other existing or future default or defaults, whether of a like or different character.

OFOs that occurred during this OFO Period, rather than wait until its annual report is filed to address any issues related to such waivers.

7. Southern Star also asks the Commission to approve waiver of the invoicing, collection, and related crediting of OFO penalties incurred by shippers and delivery point operators during the OFO Period. Southern Star contends a waiver serves the public interest and is consistent with prior Commission approvals under similar circumstances.⁴ Southern Star requests that the Commission approve this request no later than April 9, 2021 to provide certainty regarding this billing issue prior to the issuance of invoices for the month.

II. Notice, Intervention, and Responsive Pleadings

8. Public notice of Southern Star's filing was issued on March 15, 2021. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁵ Atmos Energy Corporation (Atmos Energy), City Utilities of Springfield, Missouri (City Utilities), The Evergy Companies (Evergy),⁶ Exelon Corporation (Exelon),⁷ Symmetry Energy Solutions, LLC (Symmetry), Union Electric Company d/b/a Ameren Missouri (Ameren Missouri), and WoodRiver Energy, LLC and BlueMark Energy, LLC (WoodRiver and BlueMark) filed comments supporting the filing. Spire Missouri Inc. (Spire Missouri) filed comments reserving the right to add future comments based on further evaluation of the proposal and the events that unfolded during the OFO Period. Empire District Electric Company (Empire) filed a protest.

9. On March 19, 2021, Black Hills Service Company, LLC (Black Hills) filed late comments in support of the proposal. On March 23, 2021, Midwest Energy, Inc. (Midwest Energy) also filed a late intervention and comments in support of the waiver request. On March 24, 2021, Southern Star filed a motion to leave to answer and an answer. On March 26, 2021, Empire filed a motion to leave to answer and an answer. Pursuant to Rule 214, all timely motions to intervene and any unopposed motion to

⁴ Southern Star Filing at 3 (citing *E. Tenn. Nat. Gas, LLC*, 166 FERC ¶ 61,096 (2019); *Tex. E. Transmission, LP*, 155 FERC ¶ 61241 (2016); *E. Tenn. Nat. Gas, LLC*, 151 FERC ¶ 61,106 (2015); *El Paso Nat. Gas Co.*, 136 FERC ¶ 61,219 (2011)).

⁵ 18 C.F.R. § 154.210 (2020).

⁶ The Evergy Companies consist of Evergy Kansas Central Inc., Evergy Metro, Inc., and Evergy Missouri West, Inc.

⁷ Exelon Corporation includes its subsidiaries Exelon General Company, LLC and Constellation NewEnergy-Gas Division, LLC.

intervene out-of-time filed before the issuance date of this order are granted.⁸ Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. We also accept Black Hills' and Midwest Energy's late-filed comments, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.⁹

10. Furthermore, pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁰ answers to protests and answers to answers are prohibited unless otherwise ordered by the decisional authority. We accept the answers of Southern Star and Empire because they provide information that will assist us in our decision-making process.

11. Commenters supporting the requested waiver note that the unprecedented weather event caused extreme disruptions which made normal operation during the OFO Period nearly impossible.¹¹ Additionally, some commenters argue that because shippers and delivery point operators behaved in a manner that allowed Southern Star to continue operations without curtailment, the Commission should approve the proposal.¹² Exelon states that during the OFO Period their primary focus was ensuring that the needs of essential human needs customers were met amid wildly variable market conditions.¹³ Commenters also note that the Commission has granted waivers previously for similar unprecedented conditions.¹⁴

12. Some commenters assert that the penalties that Southern Star wishes to waive did not work to deter the bad behavior that they are meant to deter, and that collecting the

⁸ 18 C.F.R. § 385.214 (2020).

⁹ *Am. Elec. Power Serv. Corp.*, 173 FERC ¶ 61,264, at P 32 (2020).

¹⁰ 18 C.F.R. § 385.213(a)(2) (2020).

¹¹ Exelon Comments at 2-3; Symmetry Comments at 2.

¹² City Utilities Comments at 3; Ameren Missouri Comments at 2; Atmos Comments at 4.

¹³ Exelon Comments at 3.

¹⁴ BlueMark and WoodRiver Comments at 2 (citing *El Paso Nat. Gas Co.*, 136 FERC ¶ 61,219, at P 16); Symmetry Comments at 3 (citing *E. Tenn. Nat. Gas, LLC*, 166 FERC ¶ 61,096; *Tex. E. Transmission, LP*, 155 FERC ¶ 61,241 (2016); *E. Tenn. Nat. Gas, LLC*, 151 FERC ¶ 61,106; *El Paso Nat. Gas Co.*, 136 FERC ¶ 61,219).

penalties is not intended to make other shippers whole.¹⁵ Symmetry argues that collecting the penalties would be unjust, unreasonable, and inequitable because of the extreme natural gas prices in the region at the time of the OFO event.¹⁶

13. Some commenters argue that the proposal would alleviate the burden on customers, both the time spent reviewing and disputing OFO invoices and the high prices that would be paid.¹⁷ Evergy states that the proposal will help align the competing priorities of natural gas generators in the electric and natural gas markets as both markets work to recover from the cold snap fallout.¹⁸

14. In its protest, Empire states that it believes that it complied with all OFOs during the event and that it stands to receive OFO penalty credits pursuant to GT&C section 10.4 unless penalties are waived.¹⁹ Empire argues that Southern Star's authority to waive shipper defaults under GT&C section 8.8 does not relieve Southern Star of obligations under the tariff to collect and credit OFO penalties.²⁰ Empire asserts that GT&C section 8.8 does not apply to delivery point operators.²¹ As a result, Empire contends that the proposal violates the filed rate doctrine by avoiding these obligations and that Southern Star failed to provide adequate support for waiving penalties based on individual actions.²²

15. Empire further contends that Southern Star's request fails to address the provisions of the Commission four-factor test for granting waivers.²³ Empire asserts that a blanket waiver of penalties for all parties does not qualify as a solution that is narrowly tailored to

¹⁵ BlueMark and WoodRiver Comments at 2; Exelon Comments at 3; Evergy Comments at 2-3.

¹⁶ Symmetry Comments at 3.

¹⁷ Exelon Comments at 3; Symmetry Comments at 3; Atmos Comments at 4.

¹⁸ Evergy Comments at 1-2.

¹⁹ Empire Comments at 1.

²⁰ *Id.* at 7.

²¹ *Id.*

²² *Id.* at 6

²³ *Id.* at 7

address a specific need.²⁴ Empire argues Southern Star has not identified a specific concrete problem but has only offered that the waiver would save customers time, recognize the seriousness of the storm, and prevent those who cooperated with the pipeline from being penalized.²⁵

16. Finally, Empire argues that the requested waiver would have undesirable consequences. Empire asserts that a blanket waiver would reward shippers and delivery point operators who jeopardized pipeline security and reliability by violating Southern Star's OFOs. Empire contends that such a broad waiver is likely to have the undesirable consequence of degrading the deterrence value of OFO penalties.²⁶

17. In its answer, Southern Star states that it believes that the totality of the circumstances presented during the OFO Period, including the collaborative behavior by its shippers and delivery point operators who worked with Southern Star and assisted Southern Star in continuing to provide firm service without curtailment, warrants waiver of OFO penalties incurred during this period. Southern Star asserts that denial of the waiver request will result in undesirable consequences. Southern Star cites particular concern for small shippers, such as municipalities that may be unable to absorb the cost of such penalties in addition to the steep increases to the cost of gas supplies during the event.²⁷

18. Southern Star also commits to review its tariff, and to seek customer input, regarding possible changes to enhance operations in an equitable and efficient manner, while at the same time protecting the operational integrity of the Southern Star system and its ability to meet primary firm obligations to customers. Southern Star intends to review with all its customers any potential tariff revisions prior to filing revised tariff provisions with the Commission for review and approval.

19. In its answer, Empire argues that Southern Star is essentially asking the Commission to trust that the waiver request satisfies the four-part waiver test. Empire argues that it is unclear to what extent Southern Star has actually evaluated the behavior of any individual shippers because it has not shared basic facts with the participants in this docket or the Commission. Additionally, Empire states that the waiver request is not of limited scope because of its indiscriminate application across all offenders equally.

²⁴ *Id.* at 8

²⁵ *Id.*

²⁶ *Id.*

²⁷ Southern Star Answer at 7-8.

Lastly, Empire argues that Southern Star has not provided any support showing there will be no undesirable consequences to the waiver.

20. On April 2, 2021, Commission staff issued a data request to Southern Star asking for more information on the delivery point operators on its system, including a classification of the entities according to type of business and the level of penalties incurred during the OFO Period. In a response dated April 6, 2021, Southern Star provided a list of delivery point operators and levels of penalties for each entity. Southern Star also classifies each delivery point operator by type of business, such as distribution companies and direct end-users. The data provided by Southern Star showed impacts to a wide range of customers, including but not limited to, municipal utilities, industrial customers and local distribution companies. In general, the majority of impacted companies were small distribution companies and small direct customers.

III. Discussion

21. Under its tariff, Southern Star has the authority to waive penalties incurred by shippers as a result of an OFO violation. Specifically, section 8.8 of the GT&C provides that Southern Star may waive defaults by shippers of the applicable rate schedules and service agreements. Southern Star's rate schedules and service agreements incorporate by reference the GT&C, including section 10 pertaining to OFOs and related penalties.²⁸ Accordingly, we find Southern Star's proposal to waive these penalties for shippers is not an unduly discriminatory application of its tariff.

22. However, section 8.8 does not apply to delivery point operators. Regarding the penalties incurred by delivery point operators, we grant Southern Star's request for waiver of GT&C section 10. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.²⁹ We find that the circumstances of the instant case satisfy the foregoing criteria.

23. First, we find that Southern Star acted in good faith by submitting this filing on March 11, 2021, in advance of the requested date for Commission action and the issuance of invoices for penalties incurred during the February weather event. Additionally, we

²⁸ See, e.g., FTS Rate Schedule, Sheet No. 122, and Form of Service Agreement – FTS, Sheet No. 417.

²⁹ See, e.g., *Citizens Sunrise Transmission LLC*, 171 FERC ¶ 61,106, at P 10 (2020); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

find that Southern Star acted in good faith by collaborating with shippers and delivery point operators to ensure system reliability during the extreme weather event.

24. Second, we find that the waiver request is limited in scope because Southern Star seeks a one-time waiver of the relevant tariff provision, and only for penalties incurred during the specific time period of the February weather event (i.e., February 11 through February 19, 2021).³⁰

25. Third, we find that the requested waiver addresses a concrete problem because, absent the waiver, Southern Star's delivery point operators would face extreme penalties. Moreover, these extreme penalties do not accomplish the purpose of penalties, which is to deter behavior that could impair system reliability. The extreme weather event presented circumstances outside the control of the delivery point operators. Southern Star found no evidence of gamesmanship by any entity incurring penalties during this critical time.³¹ Rather, based upon the record in this proceeding, it appears that the cooperation of the pipeline's customers (including delivery point operators), helped maintain system integrity and, as a result, they should not be burdened by extreme penalties.³²

26. Finally, we find that the requested waiver does not result in undesirable consequences, such as harm to third parties. Empire argues that a blanket waiver would reward delivery point operators who jeopardized pipeline security and reliability by violating Southern Star's OFOs. We disagree. As noted above, Southern Star found no evidence of gamesmanship by parties incurring penalties. Instead, Southern Star explained that the cooperation of delivery point operators helped maintain system integrity. Likewise, no shipper (including Empire) has a right to a windfall as the result of administration of penalties on other entities. The Commission requires pipelines to

³⁰ Southern Star informed the Commission that it issued nine OFOs between February 11 and February 19, 2021. *See* Southern Star Supplemental Notice of Issuance of Operational Flow Orders (Feb. 19, 2021).

³¹ Southern Star Answer at 6.

³² Southern Star informed the Commission that the price of gas on its system exceeded \$600 per Dth at one point during the weather event. Because standard OFO penalties are calculated at 2.5 times the average price, the OFO penalties would add an enormous financial burden to delivery point operators. In Southern Star's April 6, 2021 data response, Southern Star reports that 27 different delivery point operators each incurred penalties exceeding \$1 million. Furthermore, Southern Star estimates that in the aggregate delivery point operators incurred a total of \$158 million in penalties.

credit penalties to shippers so they will not be a source of revenue to the pipeline.³³ Similarly, penalties are not intended to provide a windfall for other shippers, and these penalties do not reimburse shippers for any cost or relate to any service received by those shippers. In these circumstances, we find no harm to third parties resulting from the waiving of penalties.

27. We disagree with Empire's assertion that Southern Star's waiver request is inconsistent with the filed rate doctrine. We find that Southern Star's request is prospective in nature. In this case, Southern Star filed its request for waiver on March 11, 2021, prior to the deadline for the issuance and collection of penalties related to the February weather event. The Commission previously has granted waiver where the company has filed for authority to not issue invoices for OFO penalties in similar situations, prior to the billing date.³⁴

The Commission orders:

Southern Star's request for waiver is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³³ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,315 (2000) (cross-referenced at 90 FERC ¶ 61,109).

³⁴ *E. Tenn. Nat. Gas, LLC*, 166 FERC ¶ 61,096.

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(Issued April 9, 2021)

DANLY, Commissioner, *concurring*:

28. I concur with today's order regarding the request filed by Southern Star Central Gas Pipeline, Inc. (Southern Star) to prospectively waive the invoicing, collection and related crediting of penalties incurred by shippers and delivery point operators following the issuance of Operational Flow Orders (OFOs). I agree that the waiver as it applies to shippers is consistent with section 8.8 of the General Terms and Conditions (GT&C) of Southern Star's tariff.³⁵ I also agree that we should grant the waiver of GT&C section 10 regarding invoicing, collecting, and crediting the penalties incurred by delivery point operators.

29. I write separately to express two concerns. *First*, OFOs are necessary to protect the integrity of pipeline systems. I am therefore generally disinclined to waive tariff provisions related to the issuance of OFOs and their corresponding penalties. However, in this case, where there were extraordinary circumstances and there is no evidence of gamesmanship by the parties subject to penalties, I support waiving those tariff provisions.

30. *Second*, I write to express my anxiety that this order may later serve as a model for an end-run around the filed rate doctrine. The tariff provisions establishing OFOs and associated penalties were not themselves the subject of this waiver request, but instead waiver was sought for the tariff provisions that relate to the ministerial actions that perfect already-incurred penalties. In cases such as this, it is doubly important for the Commission to make an honest and clear-eyed assessment of the propriety of the requested waiver under its four-part test. In particular, the Commission must engage in a searching examination of whether there are unintended consequences such as harm to third parties under the test's fourth factor. In this case, I am satisfied that no third party is being deprived of payments to which they would otherwise be entitled.

³⁵ While the waiver request is consistent with GT&C section 8.8 and Commission policy, the language in that section appears to be overly broad and potentially inconsistent with Commission precedent. *See Panhandle E. Pipe Line Co., LP*, 174 FERC ¶ 61,237 (2021) (Danly, Comm'r, concurring).

For these reasons, I respectfully concur.

James P. Danly
Commissioner