

140 FERC ¶ 61,082
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

July 31, 2012

In Reply Refer To:
Gulf Crossing Pipeline Company LLC
Docket No. RP12-814-000

Gulf Crossing Pipeline Company LLC
9 Greenway Plaza
Suite 2800
Houston, Texas 77046

Attention: E. Adina Owen
Senior Counsel

Reference: Proposed Revision to Demand Charge Credits Tariff Provisions

Dear Ms. Owen:

1. On June 20, 2012, Gulf Crossing Pipeline Company LLC (Gulf Crossing) filed certain tariff records¹ to revise its tariff provisions pertaining to reservation charge credits to be consistent with Commission policy. Gulf Crossing's Filing was protested, and Gulf Crossing filed an answer. As discussed below, the Commission accepts and suspends the referenced tariff records, subject to refund and further Commission action, effective January 1, 2013, or an earlier date set forth in a subsequent order.

2. Gulf Crossing is proposing to modify its tariff provisions related to reservation charge crediting. Specifically, Gulf Crossing states that its proposal provides for reservation charge credits² to customers during instances of *force majeure* and all

¹ Gulf Crossing Pipeline Company LLC, FERC NGA Gas Tariff, First Revised No. 1; Section 1, Table of Contents, 5.0.0; Section 6.7, GT&C - Operating Conditions, 2.0.0; Section 6.21.5, GT&C - Misc Provisions - Force Majeure, 2.0.0; Section 6.23, GT&C - Demand Charge Credits, 2.0.0; Section 6.24, GT&C - List of Non-Conforming Service Agreements, 0.0.0.

² Gulf Crossing employs the term "demand charge credits" for reservation charge credits.

maintenance activities and other non-*force majeure* events, consistent with current Commission policy. The filing includes: (i) a proposed section 6.23³ dedicated to reservation charge credits; (ii) a proposed modification to the definition of *force majeure* at section 6.21.5 to address new pipeline safety and integrity management obligations; and (iii) minor conforming changes to the Table of Contents and the General Terms and Conditions necessary to accommodate the new reservation charge crediting provision. Gulf Crossing asserts that its proposed changes are similar to those approved by the Commission in *Midwestern Gas Transmission Co.*⁴

3. Gulf Crossing states in *Natural Gas Supply Association*,⁵ the Commission urged all pipelines to review their tariffs to determine whether their individual tariffs are in compliance with Commission policy regarding reservation charge credits. Gulf Crossing has reviewed its tariff and found that certain aspects of its reservation charge crediting provisions are inconsistent with Commission policy. Gulf Crossing states its existing tariff does not contain specific language governing the provision of reservation charge credits for *force majeure* events and for non-*force majeure* events the tariff only provides reservation charge credits when Gulf Crossing is unable to transport gas as a result of scheduled maintenance.

4. Gulf Crossing states that it is proposing to modify its tariff to provide reservation charge credits for *force majeure* events utilizing the Safe Harbor Method. Under this method, the customer remains liable for all amounts due or that become due under its service agreement(s) for the first ten days of a *force majeure* event. Following this ten-day grace period, Gulf Crossing will provide reservation charge credits for the “Force Majeure Average Usage Quantity” that Gulf Crossing failed to deliver to the customer’s primary delivery point(s) due to the *force majeure* event provided that the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf Crossing will determine the Force Majeure Average Usage Quantity based upon nominations over the seven gas days prior to the first gas day of the *force majeure* event.

5. Gulf Crossing states that it is also proposing to modify its tariff to provide full reservation charge credits for all non-*force majeure* events, including maintenance events not included in the revised definition of *force majeure* described below. Gulf Crossing

³ This section was formerly dedicated to the “List of Non-Conforming Agreements.” Such list has been relocated to section 6.24 of the Tariff.

⁴ *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*), order on compliance, Docket No. RP11-2254-002 (April 2, 2012) (unpublished letter order).

⁵ *Natural Gas Supply Ass’n*, 135 FERC ¶ 61,055, at P 2 (2011).

will provide reservation charge credits for any “Maintenance Average Usage Quantity” that Gulf Crossing failed to deliver during a non-*force majeure* event provided the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf Crossing will determine the Maintenance Average Usage Quantity based upon nominations over the seven gas days prior to the first gas day of the maintenance and non-*force majeure* event.

6. Gulf Crossing states that it is also proposing to change its definition of *force majeure* in section 6.21.5(1) to address new pipeline safety and integrity management obligations resulting from the recently-enacted Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act). Specifically, Gulf Crossing proposes to include in the definition of *force majeure*:

any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, to comply with the ...2011 Act[], requirements issued by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) pursuant to the 2011 Act, [and] requirements resulting from PHMSA’s ongoing gas rulemaking proceedings.

Gulf Crossing contends that these regulatory and policy initiatives are expected to result in an increase in operations and maintenance costs on pipelines’ facilities and greater pressure on the companies to perform upgrades and replacements. Gulf Crossing further contends that, while the exact nature of the additional pipeline safety requirements is still undetermined, disruptions in service and pipeline infrastructure modernization costs are likely to be substantial.

7. Gulf Crossing states that the Commission’s current policy regarding reservation charge crediting with respect to *force majeure* events stems from the U.S. Court of Appeals for the District of Columbia Circuit’s order in *North Baja Pipeline, LLC v. FERC*,⁶ where the court affirmed the Commission’s holding that scheduled maintenance does not constitute a *force majeure* event. However, Gulf Crossing contends that recent pipeline incidents, new legislation, and ongoing rulemakings have resulted in increased scrutiny of pipeline operations, and this scrutiny is evident in several

⁶ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007) (*North Baja*), *aff’d*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh’g*, 111 FERC ¶ 61,101 (2005).

Department of Transportation (DOT) and PHMSA initiatives and actions by the Executive Branch.⁷

8. Gulf Crossing argues that, while the Commission has not treated service interruptions for testing, repair, and maintenance necessary to comply with government orders as *force majeure* events, such outages to comply with the current restructuring of the pipeline safety regulatory regime should not be considered to be the routine scheduled maintenance contemplated in *North Baja*. Gulf Crossing further argues that such service disruptions are the result of broad government-initiated actions that are not reasonably in control of pipelines and which represent a sea change for the natural gas industry.

9. Gulf Crossing contends that, under the Commission's current policy, these pipeline safety compliance activities to comply with the new legislative and regulatory requirements could be considered to be routine scheduled maintenance rather than *force majeure* events and pipelines would be required to issue full reservation charge credits for the period during which scheduled gas is not delivered. However, Gulf Crossing asserts that service interruptions necessary to comply with the current restructuring of the pipeline safety regulatory regime should not be considered to be the routine scheduled maintenance that were contemplated in *North Baja*. Gulf Crossing further asserts that such service disruptions instead are the result of broad, government-initiated actions that are not reasonably in the control of pipelines and which represent a sea change for the natural gas industry.

10. Gulf Crossing also contends that, in *North Baja*, the court's rationale for upholding the Commission's general exclusion of routine maintenance and testing outages from the definition of *force majeure* was that a pipeline's rates "incorporate costs associated with a pipeline operating its system so that it meet its contractual obligations."⁸ Gulf Crossing further contends that rationale does not apply with respect to maintenance and testing outages to comply with the extensive new pipeline safety and integrity management requirements because pipelines' existing rates do not and cannot incorporate the costs associated with complying with the new requirements.

11. Public notice of the filing was issued on June 20, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁹ Pursuant to Rule 214,¹⁰ all timely filed motions to intervene and any unopposed motion to intervene

⁷ Transmittal Letter at 6-7.

⁸ Transmittal Letter at 7 (citing *North Baja*, 483 F.3d 819 at 823).

⁹ 18 C.F.R. § 154.210 (2012).

¹⁰ 18 C.F.R. § 385.214 (2012).

out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place

additional burdens on existing parties. Indicated Shippers¹¹ and Devon Gas Services, L.P. (Devon) filed protests. On July 11, 2012, Gulf Crossing filed a motion to answer and an answer to the protests (Answer).¹² As discussed below, the protestors shall be afforded an opportunity to respond to Gulf Crossing's Answer before the Commission makes a final disposition of the filing.

12. The protestors generally argue that Gulf Crossing's proposal to modify the definition of *force majeure* to include testing, repair, replacement, refurbishment or maintenance activities to comply with the 2011 Act and other governmental requirements conflicts with Commission and judicial precedents that classify such activities as non-*force majeure* events. The protestors further argue that *force majeure* events must be both uncontrollable and unexpected and these maintenance activities, including scheduled maintenance, are not unexpected or outside Gulf Crossing's reasonable control. The protestors assert that testing and maintenance are part of a pipeline's duties under a certificate of service and are not appropriately considered a *force majeure* event. The protestors contend that the court's determination in *North Baja* that scheduled maintenance is a non-*force majeure* event applies to both the routine and non-routine maintenance in this case. The protests further contend that the maintenance which may be necessary to comply with these governmental requirements is expected and that the extent of any outages is speculative. Indicated Shippers argue that *North Baja* only referred to Commission policy that a pipeline's rates should incorporate the costs associated with meeting its contractual obligations not that the pipeline's rates must include such costs. Indicated Shippers and Devon argue that if a pipeline's rates are insufficient to recover its costs it may file pursuant to section 4 of the Natural Gas Act (NGA) to increase its rates.

13. Indicated Shippers argue that the Commission should initiate action under NGA section 5 and find Gulf Crossing's currently effective definition of *force majeure* unjust and unreasonable. Indicated Shippers state that Gulf Crossing's currently effective tariff at GT&C section 6.21.5(1) include as instances of *force majeure*:

¹¹ For the purposes of this proceeding, the Indicated Shippers are BP Energy Company, and Cross Timbers Energy Services, Inc.

¹² Rule 213(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)(2) (2012)) prohibits answers to protests unless otherwise ordered by the decisional authority. In this case, the Commission will accept Gulf Crossing's Answer because it may assist the Commission in its decision-making process.

the necessity for compliance with any court order, law, regulation or ordinance promulgated by any governmental authority having jurisdiction, either federal, Indian, state or local, civil or military; ... [and] the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party).

Indicated Shippers assert that this definition of *force majeure* violates Commission policy related to *force majeure* which is limited to uncontrollable and unanticipated events and specifically excludes scheduled maintenance.

14. Indicated Shippers also object to proposed section 6.23.4, which states that the “Customer shall not be entitled to demand charge credits as a result of the loss of any of the following: (a) gas supply; (b) markets, or (c) transportation upstream or downstream of Gulf Crossing’s system.” Indicated Shippers argue that this conflicts with the Commission’s policy, which holds that a pipeline is absolved from providing reservation charge credits only where the outage is solely due to an upstream or downstream disruption or the conduct of shipper and not controlled by the pipeline.

15. Indicated Shippers argue that section 6.23 also does not comply with the Commission’s policy on determining when a firm shipper is eligible to receive reservation charge credits, as set forth in *Wyoming Interstate Co.*¹³ Indicated Shippers further argue that, under *WIC*, a shipper only needs to submit a nomination in the Timely and Evening cycles to be eligible for credits, except where the shipper flows the curtailed amounts on another pipeline. Indicated Shippers contend that, in this case, the shipper would only need to submit a primary firm nomination in the Timely Nomination Cycle.

16. Indicated Shippers argue that proposed sections 6.23.1 and 6.23.2 would limit the calculation of reservation charges to the amount that is scheduled or would have been scheduled and omits the requirement that reservation charge credits be based upon the amount nominated. Indicated Shippers further argue that section 6.23.2(b) does not comply with the Commission’s policy that notice of an outage must be provided prior to the Timely Nomination Cycle in order for the pipeline to use the seven-day average of a shipper’s nominated quantities. Indicated Shippers contend that Gulf Crossing would only need to provide notice of a maintenance event prior to 7:00 a.m. CCT of the day prior to the first gas day on which the maintenance event occurs and not when the maintenance event occurs over a multi-day period. Indicated Shippers request that Gulf Crossing be directed to revise this section to state that the seven-day average applies to subsequent days only if Gulf Crossing gives the required advance notice of the outage on that gas day.

¹³ *Wyoming Interstate Co.*, 130 FERC ¶ 61,091, at P 17 (2010) (*WIC*).

17. Indicated Shippers urge the Commission to reject proposed section 6.23.3, which states that if a customer “nominates any non-primary service ... Gulf Crossing shall not provide demand charge credits to the extent Gulf Crossing provides such service on a non-primary basis.” Indicated Shipper argue that the proposed language could permit Gulf Crossing to act on its own without action on the shipper’s part to deliver the gas to non-primary delivery points and reduce a shipper’s reservation charge credits. Indicated Shippers request that Gulf Crossing be required to revise the proposed language to require that only when a shipper nominates to a secondary point, and Gulf Crossing schedules and delivers such nominated quantities, reservation charge credits may be reduced.

18. Finally, Indicated Shippers objects to sections 6.23.1(c) and 6.23.5(d), which both define the reservation charge credits owed for segmented capacity, capacity release, or partial assignment. Indicated Shippers contends that section 6.23(1)(c) should be eliminated as redundant to section 6.23(5)(d).

19. In its Answer, Gulf Crossing responds that the Commission must accept Gulf Crossing’s proposal to revise the definition of *force majeure* and reservation charge crediting tariff provisions, if the Commission determines that the proposal is just and reasonable, regardless of whether other tariff or rate mechanisms are also just and reasonable or it has approved different provisions for other pipelines.¹⁴

20. Gulf Crossing argues that its proposal to amend its definition of *force majeure* to include service interruptions associated with compliance with the 2011 Act is just and reasonable. Gulf Crossing asserts that the outages which may occur under the new requirements are not within its control and not contemplated in existing rates. Gulf Crossing further asserts that it has proposed a mechanism to equitably share the risk of such service interruptions with its shippers utilizing the well-established Safe Harbor method.

21. Gulf Crossing argues that the protestors fail to accurately characterize the 2011 Act’s requirements which will result in significant, new obligations for Gulf Crossing that may require previously not contemplated service disruptions. Gulf Crossing asserts that these obligations will result in the increased risk of service disruptions which cannot be considered “routine” and over which the pipeline will have little control. Gulf Crossing further asserts that the 2011 Act represents a fundamental expansion of pipeline safety regulation to all gas transmission pipelines. Gulf Crossing contends that the

¹⁴ Gulf Crossing Answer at 5 & n.8 (citing *Columbia Gas Transmission Corp.*, 124 FERC ¶ 61,122, at P 26 (2008) (citing *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993); and *Consolidated Edison Co. v. FERC*, 165 F.3d 992 (D.C. Cir. 1999)), *reh’g denied*, 133 FERC ¶ 61,217 (2010)).

resulting service disruptions were not contemplated prior to the 2011 Act and are not accounted for in Gulf Crossing's existing rates. Gulf Crossing further contends that the Commission's existing policy regarding the definition of *force majeure* does not address these changed circumstances.

22. Gulf Crossing argues that the protestors' contentions that it may only amend its *force majeure* provision to implement a risk-sharing mechanism by filing a general section 4 rate case are mistaken because this argument is contrary to recent Commission practice directing pipelines to change their reservation charge crediting provisions, including *force majeure* provisions, in limited section 4 proceedings. Gulf Crossing argues that any rate changes through a general section 4 rate case or adjustment of its billing determinants and return on equity would only take place on a prospective basis. Gulf Crossing asserts that the exact level of service interruptions resulting from the new requirements is still unknown, and those costs could potentially be rejected as speculative and non-recurring events. Gulf Crossing asserts that resolution through a general section 4 rate case ignores the realities of the current natural gas market, and it likely would be unable to recover any increased rate because of competitive circumstances.

23. Gulf Crossing argues that the rationale in *North Baja* for excluding scheduled maintenance from the definition of *force majeure* was that a pipeline's rates include the costs of operating its system to meet its contractual obligations and the outages to comply with the new requirements and associated reservation charge credits are not contemplated by pipelines' existing rate structures. Gulf Crossing further argues that, unlike the situation in *North Baja*, Gulf Crossing is seeking to include in the definition of *force majeure* only disruptions resulting from specific, new regulatory requirements and not to include disruptions resulting from routine scheduled maintenance. Gulf Crossing asserts that the court in *North Baja* did not address the type of non-routine testing and maintenance that will result from these extensive, new pipeline safety requirements and does not preclude a determination that certain non-routine maintenance can be treated as a *force majeure* event.

24. Gulf Crossing argues that Commission policy is clear that disruptions caused by acts of governmental authorities that are outside of the pipeline's control may be included in the definition of *force majeure*.¹⁵ Gulf Crossing asserts that the risk of outages under the new pipeline safety requirements is sufficiently detailed to provide certainty as to the range of impacts and is not speculative. Gulf Crossing further asserts that the risk sharing mechanism will not provide an incentive to prolong outages because it will have an

¹⁵ Gulf Crossing Answer at 18 (citing *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275, at P 19 (2012), and *Florida Gas Transmission Company*, 107 FERC ¶ 61,074, at P 32 (2004)).

incentive to keep outages to the shortest possible duration to reduce the amount of reservation charge credits after the 10-day safe harbor grace period.

25. Gulf Crossing argues that Indicated Shippers' request that the Commission act under section 5 to find that Gulf Crossing's existing *force majeure* provision is unjust and unreasonable should be rejected. Gulf Crossing contends that the *force majeure* language, read as a whole with the proposed changes, makes clear that only non-routine maintenance and testing are included in the definition of *force majeure*.¹⁶

26. Gulf Crossing also argues that the reservation charge crediting in proposed section 6.23 is just and reasonable. Gulf Crossing contends that the calculation of the Maintenance Average Usage Quantity in section 6.23(2)(b) based on the amounts that are scheduled, rather than nominated when Gulf Crossing does not give advance notice of the outage is appropriate. Gulf Crossing asserts that this provision is consistent with Commission policy and similar to language approved in *Midwestern*. Gulf Crossing further asserts that this section 6.23(2)(b) reasonably takes into consideration the circumstances both when notice is and is not provided prior to the Maintenance Event and, as in *Midwestern*, is appropriately designed to prevent gaming.¹⁷

27. Gulf Crossing contends that the proposed section 6.23(5)(a) which states that reservation charge credits shall be reduced by the quantity of gas delivered by Gulf Crossing to non-primary delivery points during the event is also appropriate. Gulf Crossing argues that it does not have the authority to deliver customer's gas to points on its own accord; rather, it must receive and deliver gas based upon nominations and, Gulf Crossing argues, the Commission approved nearly identical language in *Midwestern*.

28. Gulf Crossing agrees with Indicated Shippers' proposed revision to state that the seven-day average may be used to calculate the Average Usage Quantity after the first day of an event only if Gulf Crossing gives advance notice before the first nomination cycle for the applicable gas day that the interruption will continue through the next day. Accordingly, Gulf Crossing offers to add the following language to section 6.23.2(b), which it states is similar to language accepted in *Midwestern*:

The previous seven (7) days' average daily quantity usage will only be used in the determination of the Maintenance Average Usage Quantity when Gulf Crossing has posted notice prior to the Timely Cycle nomination deadline that the

¹⁶ Gulf Crossing Answer at 25.

¹⁷ Gulf Crossing Answer at 27-28.

capacity will be unavailable for the day in question.¹⁸

29. Gulf Crossing states that it also will amend section 6.23(2)(b), changing the 7:00 a.m. CCT deadline to conform to the deadline established above, which is tied to the Timely Cycle nomination deadline. Gulf Crossing asserts that such deadline for the posting notice is appropriate because it better synchronizes with the actual nominations process.¹⁹

30. Gulf Crossing also agrees that proposed section 6.23(1)(c) should be deleted because it is redundant to proposed section 6.25(5)(d). Gulf Crossing states that, while this language is consistent with the language approved in *Midwestern*, it agrees to delete both proposed section 6.23(1)(c) and section 6.23(2)(c) because they are redundant.²⁰

31. Gulf Crossing also agrees to modify a contested portion of proposed section 6.23(4), which provides that a “Customer shall not be entitled to demand charge credits as a result of loss of any of the following: (a) gas supply, (b) markets, or (c) transportation upstream or downstream of Gulf Crossing’s system.” Gulf Crossing states that it is willing to modify its proposed tariff language with the following emphasized language:

*Unless Gulf Crossing has declared a force majeure, maintenance, or non-force majeure event, Customer shall not be entitled to demand charge credits as a result of loss of any of the following: (a) gas supply, (b) markets, or (c) transportation upstream or downstream of Gulf Crossing’s system.*²¹

Gulf Crossing asserts that this addition makes clear that it will not be exempt from providing credits if it cannot provide service due to an interruption on its facilities. Gulf Crossing further asserts that this clarification is more appropriate than limiting the exemption to circumstances solely due to others’ operating conditions or the conduct of others not controlled by the pipeline since use of the term “solely” could be interpreted to require reservation charge credits when none are appropriate.

¹⁸ Gulf Crossing Answer at 29.

¹⁹ Gulf Crossing Answer at 30.

²⁰ Gulf Crossing Answer at 30.

²¹ Gulf Crossing Answer at 30-31.

32. The Commission accepts Gulf Crossing's proposed tariff records for filing and suspends their effectiveness for the period set forth below. The protestors have raised a number of issues that warrant further consideration. In addition, Gulf Crossing filed a detailed answer to the protests in which it proposed various modifications to its original proposal. Therefore, the Commission will provide the parties the opportunity to respond to that Answer before making a final determination in this proceeding.

33. Based upon a review of this filing, the Commission finds that the proposed tariff language has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. The Commission's policy regarding suspensions is that filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or inconsistent with other statutory standards.²² It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.²³ Such circumstances do not exist here. Accordingly, the Commission shall suspend the effectiveness of the referenced tariff records for the full five months, until January 1, 2013, or an earlier date if set by a subsequent Commission order.

34. Consistent with the discussion above, the tariff records set forth in footnote 1 are accepted and suspended, subject to refund and further Commission action, to be effective January 1, 2013, or an earlier date established in a subsequent Commission order in this proceeding. Within twenty days of the date of this order, parties may file a response to the Answer filed by Gulf Crossing in response to their protests.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

²² See *Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

²³ See *Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).