

139 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

TransColorado Gas Transmission
Company LLC

Docket No. RP12-245-000

ORDER ON FILING

(Issued June 21, 2012)

1. On December 16, 2011, TransColorado Gas Transmission Company, LLC (TransColorado) filed to revise tariff provisions¹ pertaining to reservation charge credits, to be consistent with Commission policy. A number of parties protested TransColorado's Filing and TransColorado filed an answer, including clarifications it agreed to make to its filing. On January 13, 2012, the Commission issued an order which accepted and suspended the referenced tariff records, subject to refund and further Commission action, effective June 16, 2012, or some earlier date set forth in a subsequent Commission order.² The order further provided that protesters could file a response to TransColorado's answer within 30 days of the date of the order. A number of protesters filed responses to TransColorado's answer. This order directs TransColorado, within 30 days of this order, to file revised tariff records as provided in this order, and include the agreed-to clarifications in its answer.

Background

2. In its December 16 Filing, TransColorado stated it was revising the reservation charge crediting provisions contained in its tariff to be consistent with Commission

¹ GEN TERMS & CONDITIONS, GT&C Section 1 - Definitions, 3.0.0; NOMS/SCHEDULING, GT&C Section 8 - Noms and Scheduling, 1.0.0; and SYSTEM OPERATION, GT&C Section 20 - System Operation, 1.0.0 to Tariffs, FERC NGA Gas Tariff.

² *TransColorado Gas Transmission Co., LLC*, 138 FERC ¶ 61,023 (2012) (the January 2012 Order).

policy as set forth in several recent Commission orders, including *Natural Gas Supply Association*³ and *Southern Natural Gas Co.*⁴ As revised, TransColorado's reservation charge crediting provisions generally comply with Commission policy. However, the Commission requires additional explanation of a few provisions.

3. As summarized in *NGSA*, Commission policy requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event in order to share the risk of an event not in the control of the pipeline. In that event, the Commission allows two different methods for the credit, either full reservation credits after a short grace period (i.e., ten days or less) (Safe Harbor Method) or partial crediting starting on the first day of a *force majeure* event (No Profit Method).⁵ With respect to non-*force majeure* outages, where the curtailment occurred due to circumstances within a pipeline's control, including planned or scheduled maintenance, the Commission requires the pipeline to provide firm shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.⁶ In *North Baja Pipeline, LLC v. FERC*,⁷ the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

4. Section 8.4 of TransColorado's existing General Terms and Conditions of Service (GT&C) requires it to give full credits during *force majeure* outages after a 10-day grace period, consistent with the Safe Harbor Method. TransColorado's existing tariff also provides that, subject to various conditions, it will give full reservation charge credits for non-*force majeure* outages, if it is unable to make deliveries of at least 98 percent of the shipper's scheduled volumes.

³ 135 FERC ¶ 61,055 (2011) (*NGSA*).

⁴ 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*). TransColorado also cited *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050 (2011) (*Kern River*) and *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006) (*Rockies Express*).

⁵ *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257, at PP 19-20 (2011).

⁶ *See, e.g.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,086, *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006).

⁷ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007) (*North Baja*), *affg*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g, North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005).

5. The Commission has held that such a 98 percent threshold requirement conflicts with the Commission's policy requiring full reservation charge credits for the entire undelivered amount during non-*force majeure* or planned maintenance events.⁸ Consistent with that precedent, TransColorado proposed in the December 16 filing to modify section 8.4 of the GT&C to remove its 98 percent requirement.

6. TransColorado also stated that it was making various other changes to its reservation charge crediting provisions, consistent with holdings of recent Commission orders. For example, it proposed additional language to clarify that reservation charge credits shall be limited to situations where TransColorado fails to provide firm service to nominated quantities at a shipper's primary points, citing Tennessee Gas Pipeline Co., 135 FERC ¶ 61,208, at P 67-69 (2011); *Southern*, 137 FERC ¶ 61,050, at PP 11-16 (2011), and other cases. TransColorado also stated it was adding detailed tariff language to describe the calculation of reservation charge credits during (i) non-*force majeure* events and (ii) for *force majeure* events extending beyond the 10-day Safe Harbor period. TransColorado asserted that the proposed language was consistent with the Commission's holding in *Southern*⁹ that, when the pipeline gives advance notice of an outage before shippers have submitted scheduling nominations for the day (or days) of an outage,¹⁰ it is reasonable for the pipeline to calculate the reservation charge credits based on an appropriate historical average of usage, i.e., the shipper's prior seven days utilization of firm capacity.

7. Specifically, TransColorado proposed to add new provision sections 8.4(d) and (e) as follows:

- (d) Reservation Charge Credit Quantities – Except as provided in Section 8.4(e) below, in the event TransColorado fails to schedule nominations on any day under any firm contract, then the applicable reservation charges shall be eliminated for the lesser of:
 - i. the applicable MDQ; or

⁸ Rockies Express Pipeline LLC, 116 FERC ¶ 61,272, at P 63 (2006).

⁹ *Southern*, 135 FERC ¶ 61,056 at PP 33-34.

¹⁰ The North American Energy Standards Board (NAESB) standards currently provide shippers four nomination opportunities: the Timely Nomination Cycle (11:30 a.m. Central Clock Time (CCT) the day prior to gas flow); the Evening Nomination Cycle (6 p.m. CCT the day before gas flow); Intra-Day Cycle 1 (10 a.m. CCT the day of gas flow); and Intra-Day Cycle 2 (5 p.m. CCT the day of gas flow).

- ii. the quantity of gas nominated at Shipper's Primary Point(s) but not scheduled for delivery; or
- iii. the average of the daily usage by Shipper at Primary Point(s) in a 7 day period as set forth below:
 - a. Where a non-*force majeure* firm service curtailment is announced with TransColorado's Monthly Maintenance Schedule posting, then the 7 days immediately preceding such posting; or
 - b. Where a non-*force majeure* firm service curtailment is announced after the Monthly Maintenance Schedule but prior to the Timely Cycle deadline for the day of the firm service curtailment, then the 7 days immediately preceding the firm service curtailment; or
 - c. In the 7 days immediately preceding the announcement of the *force majeure* event consistent with the availability of reservation charge credits pursuant to Section 8.4(e)(iii); except that
 - d. Section 8.4(d)(iii) above shall not apply where a non-*force majeure* firm service curtailment is not announced before the Timely Cycle deadline for the day or where the 7 day period for measurement of Shipper usage is limited by pre-existing firm service curtailments.
- (e) TransColorado shall not be obligated to adjust the reservation charge under any contract pursuant to this Section 8.4:
 - i. to the extent that the Shipper uses alternate receipt or delivery point(s) instead of its Primary Receipt and Delivery Points(s); or
 - ii. when TransColorado's failure to:
 - schedule nominated and confirmed quantities is the result of the conduct of Shipper or the upstream or downstream operator of the facilities at the Receipt or Delivery Point respectively,¹¹ or
 - iii. when TransColorado's failure to schedule nominated and confirmed quantities occurs either (a) within ten (10) days following a

¹¹ Section (e)(ii) modified an existing provision, as more fully explained *infra*.

force majeure event as contemplated by Section 14 of these General Terms and Conditions, or (b) prior to the date TransColorado has or should have, in the exercise of due diligence, overcome the *force majeure* event, whichever occurs first.

8. Further, the revisions included a new term,¹² the Monthly Maintenance Schedule (MMS), which was defined as:

1.22.1 The term “Monthly Maintenance Schedule” shall mean the notice TransColorado posts on its Interactive Website prior to bid-week for the subsequent month that contains a list of scheduled maintenance activities TransColorado anticipates conducting in the subsequent month which are likely to result in curtailment or outages on the pipeline.

9. In the Operations section, Section 20.1(c), TransColorado provided that:

c. TransColorado shall post a Monthly Maintenance Schedule on its Interactive Website each month prior to bid-week for the subsequent month that contains a list of scheduled maintenance activities TransColorado anticipates conducting in the subsequent month which are likely to result in curtailment or outages on the pipeline. Such Monthly Maintenance Schedule posting shall include the facilities anticipated to be impacted by the project, an estimate of the date each project will be conducted, and the name and amount of estimated curtailment for each segment anticipated to be impacted by the project.

10. BP Energy Company (BP) and Indicated Shippers¹³ protested TransColorado’s filing. Encana Marketing, Inc. (Encana) filed a protest out of time.¹⁴ TransColorado filed a motion to answer and an answer to the protests, which the Commission accepted.

¹² Definitions, Section 1.22.1.

¹³ The Indicated Shippers are Chevron U.S.A. Inc., ConocoPhillips Company, and Occidental Energy Marketing, Inc.

¹⁴ On January 10, 2012, Encana filed a motion for leave to answer TransColorado’s answer and an answer. The January 13, 2012 Order did not address this answer.

The Protests

11. BP requested that the Commission direct TransColorado to clarify that its existing tariff requires the pipeline to grant reservation charge credits to a shipper who qualifies for the credit as long as the pipeline's conduct is the primary cause of the curtailment. In addition BP requested that the Commission direct TransColorado to clarify that the Safe Harbor period cannot exceed ten days.

12. Indicated Shippers and Encana protested TransColorado's proposal to use the seven-day average usage preceding the posting of its MMS. Indicated Shippers assert that Commission policy is that the use of an historical period prior to the outage itself is reasonable, but not a historical usage prior to some other event. Encana asserts that because of certain characteristics on the TransColorado system there should be a completely different approach to determining the amount of curtailed volumes subject to crediting.

13. Indicated Shippers and Encana protested that TransColorado's proposed tariff language would limit reservation charge credits in *force majeure* situations to the quantity that is nominated and confirmed. They assert that Commission policy provides that reservation charge credits during curtailments must be based on the amount a shipper nominates, not on the amount that is confirmed.

14. Indicated Shippers requested that the Commission direct TransColorado to clarify what documentation will be required of a shipper that schedules curtailed quantities on an alternate pipeline after notice of curtailment.

TransColorado's Answer

15. TransColorado answered that its proposal for calculating the amount of reservation charge credits beginning the eleventh day following an outage resulting from a *force majeure* event is consistent with the Commission's recent decision in *Midwestern Gas Transmission Co.*¹⁵

16. TransColorado also asserted that its proposal to use the seven-day average quantity preceding the posting of its MMS for non-*force majeure* outages is consistent with Commission policy.¹⁶

¹⁵ *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*).

¹⁶ TransColorado cited *Midwestern*, 137 FERC ¶ 61,257; *Southern Natural Gas Co.*, 135 FERC ¶ 61,056 at P 33, *order on reh'g*, 137 FERC ¶ 61,050 (2011); *NGSA*,

17. TransColorado responded to Indicated Shippers' argument that reservation charge credits during *force majeure* curtailments must be based on the amount a shipper nominates, not the amount that is confirmed, is without merit. Nevertheless TransColorado stated that to resolve any ambiguity, it will strike the words "and confirmed" from Section 8.4(e)(iii) in its filing. TransColorado maintained that the language at Section 8.4(e)(ii), stating TransColorado will not grant reservation credits if the failure to schedule is the result of a failure to obtain confirmation would continue to apply as this refers directly to the default of shipper or an upstream or downstream operator that may cause the gas that is nominated not to be confirmed, but is outside of TransColorado's control.

18. TransColorado agreed to clarify the meaning of the term "documentation," the shipper must supply where it asserts it used an alternate pipeline, and consistent with *Wyoming Interstate Co., Ltd.*,¹⁷ it will clarify that such written evidence shall not contain any commercially sensitive information. In response to BP's assertion that the phrase "whichever occurs first" in section 8.4(e)(iii) of the GT&C is ambiguous due to its placement at the end of the provision rather than the beginning, TransColorado agreed to modify its proposed tariff language accordingly to cure any perceived ambiguity. TransColorado also agreed to clarify its tariff language to provide that the *force majeure* Safe Harbor period cannot exceed ten days.

19. The January 2012 Order found that protesters raised issues that warranted further consideration. Since TransColorado filed a detailed answer to the protests, the order provided the protesters 30 days to respond to TransColorado's answer before making a final determination in this proceeding.

20. Accordingly, the Commission, after finding that the proposed tariff language had not been shown to be just and reasonable, accepted TransColorado's proposed tariff records for filing and suspended their effectiveness for the full five months, until June 16, 2012, or an earlier date if set by a subsequent Commission order.

Responses by Protestors

21. Indicated Shippers, BP, and Encana filed responses to TransColorado's answer.

135 FERC ¶ 61,055 at P 25, *order on reh'g*, 137 FERC ¶ 61,051 (2011). TransColorado also refers to *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 77 (2011).

¹⁷ TransColorado cites *Wyoming Interstate Co., Ltd.*, 130 FERC ¶ 61,091 (2010).

22. BP asserts that the Commission should require TransColorado to remove language in section 8.4(e)(iii) which eliminates TransColorado's reservation charge credit obligation where failure to deliver the nominated quantities is "the result of the conduct of shippers on upstream or downstream operators...." BP argues that this will lead to innumerable controversies and is contrary to Commission policy which holds that credit is due if the pipeline is the primary cause of the curtailment.¹⁸

23. In a similar vein, BP argues that TransColorado must grant credits if curtailment is caused by a point operator, consistent with Commission policy, citing *White River Hub LLC*, 124 FERC ¶ 61,132, at P 33 (2008) (*White River*). BP asserts that in that proceeding the Commission rejected a provision similar to TransColorado's which would have limited the pipeline's liability because of conduct by a point operator.

24. Both Indicated Shippers and Encana restate their objection to TransColorado's proposal to use the period prior to posting of the MMS period as the historical usage for crediting purposes. Indicated Shippers argued that TransColorado has not provided any evidence to support deviation from Commission policy.

25. Indicated Shippers also question the meaning of section 8.4(e)(iii) which states "TransColorado will not grant reservation credits" if the failure to schedule "is the result of conduct of Shipper or the upstream or downstream operator" of the facilities at the delivery or receipt point. Indicated Shippers argues that this is incomprehensible and it is not clear what TransColorado intends to cover by this provision.

26. Indicated Shippers also requested that TransColorado be directed to explain what "documentation" has to be supplied by the shipper to support its claim. Indicated Shippers states that while TransColorado explained in its answer that the documentation need not contain commercially sensitive information, it has not explained what documentation is necessary except to state that the shipper should provide "written evidence."¹⁹

¹⁸ BP also addresses Encana's proposal as to how historical average usage should be determined, discussed *infra*. BP stated that if the Commission adopts Encana's proposal, it should not apply to regular shippers, like BP, but only apply to "Basis Shippers," namely a shipper whose throughput on TransColorado is based on the difference between the index price at TransColorado's receipt and delivery areas, as more fully set forth in Encana's proposal.

¹⁹ Indicated Shippers cite to TransColorado's Answer at 15.

27. Indicated Shippers also reiterated that the Commission should reject TransColorado's proposal that no credit is due when curtailed volumes were nominations to alternate receipt or delivery point, as long as those points are within the shipper's contract path.

Discussion

28. The Commission accepts TransColorado's Filing, to be effective June 16, 2012, subject to the revisions discussed below.

A. The 7 Day Historical Usage Average

29. TransColorado proposes that, when it posts an MMS listing the scheduled maintenance activities it anticipates conducting in the subsequent month, the credit for any resulting outage will be based upon the shipper's 7-day average usage of primary firm service prior to the posting of the MMS. The MMS is a new provision that requires TransColorado to post "each month prior to bid-week for the subsequent month" a schedule that lists the anticipated scheduled maintenance activities for that month, the facilities likely to be affected, and the date each project will be conducted.

TransColorado states that this advance notice of maintenance activities benefits its shippers and the market by allowing them to plan for outages and make alternative arrangements for the period of the outage.²⁰ However, TransColorado contends that the advance notice could permit shippers to game its reservation charge crediting provisions, if the credits were calculated based on the shippers' average usage during a seven-day period immediately before the outage and after the MMS is posted. Armed with the information in the MMS, shippers could submit higher nominations at their primary points during the seven days before the posted outage, knowing that those nominated flow levels would establish the level of their reservation charge credits. To prevent such gaming, TransColorado proposes to calculate the credits based on usage during the seven-day period before the MMS is posted.

30. Indicated Shippers' position is that for determining the historical usage prior to curtailment the Commission has adopted a "seven-day average" for the period immediately preceding the curtailment since that is a good approximation of the shipper's use of its contract demand for the curtailment period. Indicated Shippers argue that the period before posting of the MMS, which may be many weeks prior to the curtailment,

²⁰ Section (d) (iii) (b) provides that when TransColorado announces a *non-force majeure* curtailment after the MMS is posted but prior to the first nomination for the day of the firm service curtailment, then the seven days preceding the curtailment will be the historical usage period.

does not provide an accurate estimate of what would have been the shipper's use of its contract demand absent the curtailment. For example, they state, variations in weather or outages on other pipelines occurring after the MMS issued could cause a spike in demand for gas from TransColorado's system not reflected in usage before the MMS was posted. Moreover, they contend, using the posting of the MMS gives the pipeline too much discretion in setting the relevant period.

31. Indicated Shippers also contend that TransColorado has not provided evidence to support its concern about shippers gaming the system. They state that a shipper using its capacity in the days before an announced outage would need to ensure that it has a gas supply and a market for the gas it is transporting. Without a market to receive the gas or a supply area from which to draw the gas onto TransColorado's system, the shipper would incur an imbalance and be subject to imbalance penalties for any quantities that exceed the amount nominated. Indicated Shippers also contend that the MMS merely provides TransColorado's best guess as to when it will conduct maintenance, and TransColorado is under no obligation to perform the maintenance on the stated date. Thus, Indicated Shippers assert that shippers would incur significant risks if they engaged in any gaming.

32. Encana stated that like TransColorado, it supports the use of historical data for determining average usage, just not the same historical data as TransColorado proposes. Encana asserts that although the "seven days" approach may be a just and reasonable approach for some pipelines, that is not the case for TransColorado because of the unique nature of how gas flows on TransColorado which is a hub to hub commodity price delivery pipeline. It asserts that natural gas flows on TransColorado depend on the difference in the prices between the receipt and delivery hubs that TransColorado serves. Accordingly it argues that the historical usage should be based on comparing the prevailing prices for natural gas at the hubs TransColorado serves because that determines the flow on TransColorado.

33. Encana states its proposal is based on whether the transport service on TransColorado is "in the money" or "out of the money." It explains that "in the money" is when there is a positive difference between the price at the receipt point, and the delivery point. Encana proposes that when the service is "in the money," the shipper should be entitled to 100 percent reservation charge credit, or, alternatively, to a percentage determined on the basis of its actual flows during the most recent 30-day period when flows were in the money. On days when the flows are "out of the money," the measure of demand charge credit should be based on the shipper's actual flows during the most recent 30-day periods when the relevant hub-to-hub price spreads were negative.

34. Under the NGA, the Commission must accept a just and reasonable tariff proposal by a pipeline, regardless of whether other tariff provisions would also be just and reasonable.²¹ For the reasons discussed below, the Commission finds that TransColorado's proposal for calculating the reservation charge credits to be given during curtailments posted in an MMS is just and reasonable, and therefore the Commission accepts that proposal.

35. The Commission has explained that, when the pipeline gives notice of curtailment before the shipper's first opportunity to submit nominations for service during the curtailment period, the pipeline may use an appropriate historical average of past usage to determine the level of the shipper's reservation charge credits. The purpose is to eliminate gaming by the shipper. Otherwise once the shipper knows there will be a curtailment, the shipper could make nominations at its maximum contract quantity for service during the curtailment with knowledge that the nominations would not be effective. Thus, in *Southern*, the Commission accepted the pipeline's proposal to use the seven-day average for the period "immediately preceding the service interruption."²²

36. TransColorado's proposal uses a previous seven-day usage average but it proposes to use the seven-day period before it posts an MMS, instead of the seven-day period immediately before the curtailment event. As TransColorado states, its posting of an MMS before bid-week for the subsequent month provides important benefits for its shippers and the market. The MMS describes TransColorado's planned maintenance activities for the following month, including the specific facilities to be affected by each maintenance project, the date each project will be conducted, and the name and amount of estimated curtailment for each segment affected by the project. This information gives shippers and others time to plan for each outage and make alternative arrangements to obtain needed gas supplies during the period of the outage.

37. However, TransColorado is concerned that providing such detailed advance notice of planned maintenance activities could permit shippers to game its reservation charge crediting provisions. Thus, if the credits are calculated based on the shippers' service nominations during the seven days immediately before the curtailment, after the MMS is posted the shippers could use that notice to maximize their nominations in that period to increase their credits for the curtailment. The Commission finds that this concern is reasonable. Indicated Shippers argue that any such gaming would be limited by the fact that a shipper engaged in such gaming would be subject to imbalance penalties, for example if it failed to arrange for a purchaser to take any gas it placed on the system

²¹ *Consolidated Edison Co. v. FERC*, 165 F.3d 992, 998, 1002-1004 (1999).

²² 137 FERC ¶ 61,050 at P 21.

during the period in question. However, shippers only incur imbalance penalties based on their net imbalances for the entire month.²³ Thus, any imbalances a shipper incurred during the seven days immediately before an announced curtailment while trying to maximize its credits could be offset by imbalances in the opposite direction during the rest of the month. In addition, using the seven days immediately before the announced curtailment would give shippers an added incentive to nominate primary firm, rather than secondary firm, during that period, since credits are limited to primary firm service.

38. Given TransColorado's reasonable concerns about gaming, requiring it to base reservation charge credits on usage during the seven days immediately before the curtailment could discourage it from providing detailed and exact information about planned maintenance activities in its MMS. For example, it might not specify the exact date on which it intended to conduct maintenance on a particular pipeline segment. Alternatively, it might postpone planned maintenance if it believed gaming was occurring. This would reduce the benefits to shippers and the market of TransColorado's posting of the MMS and reduce their ability to rely on the MMS to make alternative plans for periods when service on particular facilities is curtailed because of planned maintenance.

39. Protestors object that the posting can occur many weeks in advance of the actual curtailment. Thus, they contend, there is no good reason to think that those seven days would be a good approximation of what the shipper would have nominated but for curtailment. The Commission recognizes that a shipper's need to transport gas may change over time, with the result that usage during a period significantly removed from the period of the curtailment may be less representative of the service a shipper would have nominated during the outage than usage during a period closer in time.²⁴ Here, however, TransColorado's proposal requires it to post its MMS describing its maintenance activities for a particular month during the immediately preceding month and before the bid week for the subsequent month which in TransColorado's case is the last week of the preceding month. Thus, TransColorado's proposal to use the seven-day period before the MMS is posted will generally result in credits being based on a shipper's usage during a week in the month immediately preceding the curtailment. Therefore, we find that, on balance, TransColorado's proposal provides a reasonable method of estimating the service a shipper would have used during the curtailment, while minimizing opportunities for gaming and avoiding any disincentive for TransColorado to provide the most accurate possible information in its MMS.

²³ BALANCING OF GAS, GT&C Section 12- Balancing of Gas, 5.0.0 Tariffs, NGA Gas Tariff.

²⁴ See *Kern River*, 139 FERC ¶ 61,044, at P 49 (2012).

40. Protesters also contend using the seven days before issuance of the MMS would give the pipeline greater opportunity to choose a period when shipper nominations were low. They assert that just as the Commission did not want the shipper to take advantage once notice of a curtailment was given by nominating its entire contract demand, so too the Commission should not give TransColorado the opportunity to limit the credits by being able to post the MMS immediately after a low period of activity.

41. We do not believe the pre-MMS posting period provides TransColorado with a possible gaming opportunity, any different than the advantage the pipeline always has as to when to schedule maintenance. It is in the shippers' interest for the pipeline to perform maintenance during periods when it will cause the least disruption, i.e., when shippers are making the least use of the affected facilities. A shipper's usage during the immediately preceding month should provide one of the best methods for TransColorado to estimate shippers' usage during the following month for purposes of determining what maintenance activities will cause the least disruption. Therefore, when TransColorado determines what maintenance activities to include in an MMS, it may reasonably take into account the level of its shippers' usage of affected facilities during the period immediately before it issues that MMS.

42. We also find no merit in Encana's proposal to use the hub-to-hub price spread over certain 30-day periods. That proposal would require determining whether each shipper's flows during the 30 day period before the curtailment were "in the money" or "out of the money," based on gas prices at the shipper's receipt and delivery points for each of its transactions. Not only is this extremely complex but it could lead to disputes over what number should be used. By contrast, a shipper's historical usage of the pipeline is easily determined by both the pipeline and the shipper and thus unlikely to engender factual disputes. Moreover, as BP notes in its response, the hub-to-hub proposal is inappropriate for traditional shippers moving their own production. Further, Encana has not shown that use of a historical seven-day average period preceding curtailment or posting of the MMS is not just and reasonable.

B. Secondary Receipt Points

43. Indicated Shippers protest proposed section 8.4(e)(i), which limits reservation charge credits to situations where the pipeline fails to provide nominated service at primary points. They contend that TransColorado should also be required to provide credits, if it is unable to provide secondary firm service at secondary points that are within the shipper's contract path.

44. The Commission's policy is to limit the reservation charge credits to the pipeline's failure to provide primary firm service. In *Kern River*, 138 FERC ¶ 61,044, at PP 12-15

(2012), the Commission reaffirmed its policy that there is no credit when service is curtailed at a secondary point. More recently in *Tennessee Gas Pipeline, LLC*,²⁵ the Commission at PP 93-96 rejected a request, similar to Indicated Shippers' request here, to require the pipeline to grant reservation charge credits for interruptions of service from secondary in-path receipt points to primary delivery points. That decision explained that the firm shipper has a guaranteed firm contractual right to service only at its primary point, not at its secondary points, since the pipelines "design their systems in order to have the capacity to satisfy their primary firm obligations and the Commission has never required the pipelines to maintain sufficient capacity to give firm shippers a guaranteed right to service at secondary points."²⁶ The Commission also stated that expanding the requirement of full reservation charge credits to failure to provide secondary firm service could increase the pipeline's costs of operating its system and ultimately lead to higher rates for shippers. Whether or not the secondary point is within, or not within the path does not change the rationale for limiting credits to situations where the pipeline has failed to meet its contractual obligation to provide primary firm service. We see nothing in Indicated Shippers' contention that in any way undermines the Commission's explanations in *Kern River* and *Tennessee*.

C. Conduct Limiting Credits

45. In its protest to TransColorado's December Filing, BP requested that the Commission clarify proposal GT&C section 8(e)(ii) which stated that no reservation charge credits would be required "... when TransColorado's failure to schedule nominated and confirmed quantities is the result the conduct of Shipper or the upstream or downstream operator of the facilities at the Receipt or Delivery Point, respectively."

46. In its answer TransColorado contended that section 8.4(e)(ii) is necessary since it refers to situations where its failure to deliver was due to actions by others "outside of TransColorado's control."²⁷

47. BP requested that the section be clarified to provide that this is not applicable "where TransColorado's actions" are the primary cause of the curtailment. Thus, conduct by third parties would not release TransColorado of the obligation to grant credit if TransColorado was the primary cause of the curtailment.

²⁵ *Tennessee Gas Pipeline, LLC*, 139 FERC ¶ 61,050 (2012)

²⁶ *Id.* at P 96.

²⁷ Answer at 15.

48. BP also requested that the Commission should clarify that TransColorado must grant a curtailment credit, even if the receipt or delivery point operator is solely responsible for the curtailment. BP cited *White River* where the Commission found a tariff provision contrary to Commission policy, because it limited crediting when the curtailment “is the result of the conduct of ... the upstream or downstream operator of the facilities at the Receipt or Delivery Point, respectively.” BP quoted the Commission’s statement:

A pipeline operator is responsible for managing its system. A disruption that is considered a non-*force majeure* event does not excuse the pipeline operator from its obligation to deliver its scheduled volumes. Thus, White River must provide full reservation charge credits under these circumstances. [124 FERC ¶ 61,132, at P 33 (2008)]

49. In its answer, TransColorado stated that its proposal is similar to existing provisions in numerous other pipelines which the Commission has accepted.²⁸ It asserted that BP’s reliance on *White River* is misplaced because in a subsequent proceeding, the Commission required White River to modify the sentence to clarify that the upstream or downstream facilities must not be controlled by White River, and White River’s current tariff states no credit is due if the failure “(i) is the result of the conduct of Shipper or the operation of upstream or downstream facilities not controlled by White River,” citing White River Hub LLC, FERC Gas Tariff, GTC § 11.12 (d) (i). In its response, BP again argues that the Commission should clarify that TransColorado must grant credits if it is the primary cause of curtailment. It also asserts that the exception should not apply when curtailment is due to actions by a third-party point operator on TransColorado’s system with whom TransColorado has a contractual relationship, which TransColorado did not answer. Finally, BP contended that TransColorado’s attempt to distinguish *White River* is deficient. BP states that while TransColorado refers to a subsequent proceeding in *White River*, it does not identify the “subsequent proceeding”; consequently it is unclear what factors the Commission considered in that “subsequent proceeding.”²⁹

²⁸ TransColorado cites to Southern Natural Gas Co. FERC Gas Tariff, Rate Schedule FT § 3(a)(i)(B); Wyoming Interstate Co., FERC Gas Tariff, GT&C § 16.1; Columbia Gas Transmission, LLC, FERC Gas Tariff, GT&C § 38.1(e); Colorado Interstate Gas Co., FERC Gas Tariff, GT&C § 16.1(d), and Rison Pipeline FERC Gas Tariff GTC § 6.44(2).

²⁹ White River revised the language in GTC § 11.12 (d) (i) in a September 30, 2008 compliance filing in Docket Nos. CP08-398-000 and RP08-645-000. The transmittal letter at page 3 specifically referred to the change in that section which now

(continued...)

50. We find that TransColorado's proposal is basically consistent with Commission policy but may require further refinement. Commission policy is to require the pipeline to grant credits for non-*force majeure* outages where the failure to deliver is due to events within the pipeline's control such as scheduled maintenance of its own facilities. It follows that if a pipeline cannot deliver the service because of non-*force majeure* events not within the pipeline's control, i.e., due to the conduct of the shipper or the operator of upstream or downstream facilities, the pipeline should not be required to grant credits.³⁰ BP's reliance on *White River* is misplaced, since as TransColorado pointed out, *supra*, that pipeline's current tariff does not require credits where the failure is due to conduct of others as long as they are "not controlled by [the pipeline]." Therefore, it is reasonable for TransColorado's tariff to include an exemption from providing full reservation charge credits, where its failure to provide service is due to the conduct of the upstream or downstream operator of the facilities at the Receipt or Delivery Point, if those operators are outside of the control of TransColorado. However, proposed GT&C section 8(e)(ii) does not clearly limit the exemption from crediting to point operators who are outside TransColorado's control. Therefore, we require TransColorado to modify that section to specify that it only applies when the point operator is outside its control.

51. A *force majeure* event presents a different issue since the event causing the failure could affect both TransColorado and connecting pipeline facilities. In a *force majeure* event, where only others are affected and TransColorado was ready and able to deliver nominated volumes TransColorado should not be required to grant credits. However, when both its facilities and the facilities of others are affected, then TransColorado could not have provided service regardless of the situation on interconnecting facilities. Since *force majeure* events are "events that are not only uncontrollable but unexpected," the pipeline must give partial credits "in order to share the risk of an event for which neither party is responsible."³¹ Thus, in *Paiute Pipeline (Paiute)*,³² the Commission explained that in a *force majeure* event, when both the pipeline's facilities and the facilities of others are affected, then the traditional *force majeure* rule applies and the pipeline must give partial credits.

included the phrase "not controlled by White River." The Commission accepted the filing by delegated order issued November 13, 2008.

³⁰ See, e.g., *Natural*, 106 FERC ¶ 61,310 at P 15, n.10, and *Tennessee*, 139 FERC ¶ 61,050 at PP 100-101.

³¹ *North Baja Pipeline LLC v. FERC*, 483 F.3d 819 (D.C.Cir. 2007).

³² 139 FERC ¶ 61,089 (2012).

52. Accordingly, TransColorado should clarify section 8.4(e)(ii) consistent with the Commission's policy to provide that it need not grant credits when the failure to deliver is solely due to conduct of others "not controlled by TransColorado."

53. In addition TransColorado must make the revisions it agreed to in its answer, including what document shipper is to furnish when the shipper claims it nominated on another pipeline after the curtailment was announced (Answer at p. 15), striking the word "confirmed" from section 8.4(e)(iii), and removing the phrase "whichever occurs first" from the end of that provision(Answer at p. 14), and clarifying that the Safe Harbor period for a *force majeure* event cannot exceed ten days (Answer at p. 15).

D. Force Majeure

54. Although no party objected to TransColorado's tariff definition of *force majeure* in GT8C, section 14, that definition is not consistent with Commission policy since it is overly broad and includes events that are not *force majeure* events. The Commission is exercising its NGA section 5 jurisdiction and will require TransColorado to revise that definition or explain why it should not be required to do so as more fully explained below.³³ As explained above, the Commission has always considered *force majeure* events as "interruptions due to uncontrollable and unexpected factors like severe weather," which definition the court affirmed in *North Baja Pipeline v. FERC*, 843 F.3d 819 (D.C. Cir. 2007) (*North Baja*).

55. Section 14 of TransColorado's tariff provides as follows:

14. FORCE MAJEURE

14.1 A force majeure event includes without limitation by this recital: acts of God, including fires, explosions, earthquakes or volcanic eruptions, storms, floods, washouts and extreme cold or freezing weather; necessity for compliance with any court order,

³³ This proceeding was initiated by TransColorado Filing to revise its reservation charge credits provision so our action here is consistent with that filing. In fact, the Commission has exercised this authority when the pipeline's filing was unrelated to reservation charge credits but the Commission became aware that certain tariff provisions were not consistent with Commission policy and required corrective action by the pipeline. See *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,129, at P22 (2009); *Petal Gas Storage, LLC*, 124 FERC ¶ 61,082, at P 12 (2008); *Wyoming Interstate Co., Ltd.*, 129 FERC ¶ 61,022 (2009); and *Tuscarora Gas Transmission Co.*, 120 FERC ¶ 66,022 (2007).

law, regulation or ordinance promulgated by any government authority having jurisdiction, either federal, Indian, state or local, civil or military; acts of a public enemy; wars and civil disturbances; strikes, lockouts or other industrial disturbances; shutdowns for purposes of necessary repairs, relocations, or construction of facilities, breakage or accident to machinery or lines of pipe; the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party); inability to obtain necessary materials, supplies, permits, or labor to perform or comply with any obligation or conditions of this Tariff; inability to obtain rights of way; and any other causes that are not reasonably in the control of the party claiming suspension.

56. The primary issue concerning *force majeure* has been whether scheduled maintenance could be considered a *force majeure* event, where only partial reservation credits are required, or as a non-*force majeure* event, where the shipper is entitled to a greater amount of reservation credit for the undelivered amount. In *North Baja* the court affirmed the Commission's consistent and long-standing position that scheduled maintenance is not a *force majeure* event and the shipper must receive full reservation charge credits for the curtailed amount.

57. The Commission has consistently applied that position, including where the pipeline had little excess capacity, *El Paso Natural Gas Co.*, 105 FERC ¶ 61,232 (2003). In fact, in *North Baja*, the pipeline argued that it operated at full capacity and thus could not avoid interruptions to perform necessary maintenance, so curtailment was uncontrollable when scheduled maintenance was required and therefore the resulting curtailment should be considered a *force majeure* event. The court affirmed the Commission's ruling rejecting the pipeline's position stating:

Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipeline's rates should incorporate costs associated with a pipeline 'operating its system so that it can meet its contractual obligations,' and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service.³⁴

³⁴ 843 F.3d at 823.

58. Recently in *Tennessee Gas Pipeline Co., LLC (Tennessee)*³⁵ the Commission addressed whether a pipeline was required to grant reservation charge credits where the service interruption was the result of “corrective action orders or other imposition of government agencies.” The Commission stated that the answer depended on whether the required action was within the control of the pipeline. Thus, where the governmental directive required the pipeline to take certain action so the curtailment was “not reasonably within the control of the pipeline,” it could be considered a *force majeure* event.³⁶ For example, the Commission held that a government order requiring a pipeline to be relocated for highway construction could be treated as a *force majeure* event.³⁷ However, consistent with Commission policy the Commission held that routine testing maintenance and repairs events are not *force majeure* events because such actions “to ensure safe and reliable operations of a pipeline are within the pipeline’s control including when performed in compliance with governmental orders and regulations.”³⁸ Thus, the pipeline could not include under *force majeure* circumstances within its control, or explain why it should be permitted to include such events.

59. In short, a review of section 14 indicates that several clauses defining what constitutes a *force majeure* event are overbroad. For example, the clause concerning “necessity for compliance with any court order, law, regulation or ordinance promulgated by any government authority having jurisdiction . . .” appears to include compliance with all government regulations regardless of whether they involve matters within the control of the pipeline. In addition, the clause concerning “the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party)” is contrary to the Commission’s policy that routine testing is a matter within the control of the pipeline and thus not a *force majeure* event. Accordingly, TransColorado must revise section 14 to exclude from the definition matters that are not consistent with Commission policy or explain why its tariff should be permitted to include such provisions.

³⁵ 139 FERC ¶ 61,050 (2012).

³⁶ *Id.* at P 80.

³⁷ See *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at P 32 (2004) (*Florida Gas*); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*); *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126, at P 12 (2012) (*Texas Eastern*).

³⁸ *Tennessee* at P 82.

The Commission Orders

(A) TransColorado's Filing of December 13, 2011, is accepted, effective June 16, 2012, subject to the conditions described above.

(B) TransColorado shall within 30 days of issuance of this order file revised tariff records as discussed above.

By the Commission. Commissioner Clark voting present.

(S E A L)

Kimberly D. Bose,
Secretary.