

137 FERC ¶ 61,257
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwestern Gas Transmission Company

Docket No. RP11-2254-000

ORDER ON SUSPENDED TARIFF FILING AND DIRECTING FURTHER
COMPLIANCE FILING

(Issued December 30, 2011)

1. On July 1, 2011, Midwestern Gas Transmission Company (Midwestern) filed revised tariff records to make housekeeping changes and substantive changes to various records of Midwestern's currently effective tariff (July 1 Filing). On July 29, 2011, the Commission accepted and suspended the revised tariff records to become effective January 1, 2012 or an earlier date set forth in a subsequent order, subject to refund and conditions.¹ The Commission directed Midwestern to file a response to the issues raised by the parties concerning its proposed tariff changes within twenty (20) days from the issuance of the July 29 Order.

2. On August 18, 2011, Midwestern filed to comply with the Commission's directive concerning the issues raised by the parties (August 18 Compliance Filing). Midwestern also requested in its compliance filing that the Commission issue an order accepting its revised tariff records filed July 1, 2011, with the changes Midwestern proposed in its August 18 Compliance Filing. To allow Midwestern time to implement the proposed changes, Midwestern requests an effective date thirty (30) days from the order date. For the reasons discussed below, the Commission accepts the revised tariff records filed July 1, 2011, with the changes Midwestern proposed in its August 18 Compliance Filing, subject to further revision and conditions, and will permit the tariff records as further revised consistent with this order to become effective January 1, 2012. The Commission cannot suspend the tariff records for more than five (5) months but Midwestern's filing to comply with this order shall not be due until thirty (30) days from the date this order issues.

¹ *Midwestern Gas Transmission Co.*, 136 FERC ¶ 61,064 (2011) (July 29 Order).

I. Background

3. In its July 1 Filing, Midwestern included various non-substantive typographical, capitalization, and grammatical corrections throughout the tariff. Midwestern also proposed to update the Table of Contents and made several clarifying changes. In addition, Midwestern proposed several substantive changes.

4. On July 13, 2011, Northern Indiana Public Service Company (NIPSCO), and Northern Illinois Gas Company (Nicor) filed comments and on August 1, 2011, Nicor filed amended comments. Both NIPSCO and Nicor filed reply comments on August 29, 2011, in response to Midwestern's August 18 Compliance Filing.

II. Discussion

A. Curtailment Credits

5. Under section 37 of its General Terms and Conditions (GT&C), Midwestern proposes to establish the formula for calculating reservation charge credits when a curtailment is due to *force majeure* and non-*force majeure* events.

6. Midwestern states that the Commission recently urged pipelines to review their tariffs and make any necessary filings to bring them into compliance with its policy on reservation charge credits. Midwestern states that it proposes to provide credits for curtailments due to non-*force majeure* events, in accordance with Commission policy. Midwestern states that it will continue to use the "safe harbor" method of crediting reservation charges for curtailments due to *force majeure* events, under which customers receive 100 percent credits after the first ten days of curtailment.

7. The credit will apply to curtailed service between primary points, less any volumes transported on a secondary basis. Midwestern will provide curtailment credits for service under Rate Schedules FT-A, FT-B, FT-C and FT-D. Midwestern proposes to use the quantities that a customer transported in the seven days prior to the curtailment to compute the credit, except when non-*force majeure* curtailments occur with little or no advance notice. Midwestern contends this approach will minimize potential "gaming" of the credit mechanism and avoid penalizing customers that seek to adjust their nominations in response to actual or potential disruptions. In addition, Midwestern proposes to eliminate that tariff provision that provides that no reservation credits will apply when circumstances other than *force majeure*, repair, or maintenance cause a curtailment as long as Midwestern supplies 95 percent of the scheduled quantity.

1. Comments on July 1 Filing

8. Nicor states that Midwestern's proposed curtailment crediting mechanism would not accurately or fairly credit a customer when it is not able to utilize the firm capacity it has contracted for. In addition, Nicor believes basing the proposed mechanism on the

average nominated volume over the prior seven days deprives the customer of its ability to receive proper credit for its capacity since the previous seven days usage would most likely have independent and separate factors that influenced the level nominated for each day including each day's weather, industrial demand and storage availability. Therefore, Nicor requests that Midwestern develop a reasonable curtailment credit mechanism that accurately reimburses the customer the amount of demand charges paid for the level of contracted firm capacity that was not available for utilization, instead of basing the credit on nominated levels. Nicor points to the curtailment credit mechanism in Natural Gas Pipeline Company of America's (NGPL) tariff as a reasonable methodology.²

2. Midwestern's Compliance Filing

9. Midwestern states that to address the potential that some customers may try to take advantage of any prior notice and submit nominations that are not reflective of market needs, it proposed a seven-day average to minimize the incentive to game the crediting mechanism. Midwestern agrees with Nicor's statement that independent and separate factors influence the level nominated for each day including each day's weather or industrial demand and storage availability. However, any method of estimating the level of nominations that would occur if the curtailment had not intervened is no more than an approximation. Midwestern states that seven days is the shortest possible period that reflects changes in demand between weekdays and the weekend and that while imperfect as a basis for estimating customer-specific nominations it is simple to compute, easy to verify, and equally likely to overestimate or underestimate the volumes that customers would have nominated. Midwestern notes the Commission has recently approved the use of the seven-day average approach.³

10. Finally, Midwestern believes that, for its system, its proposed provision is superior to the crediting provision in NGPL's tariff as proposed by Nicor. Midwestern notes the Commission has elected not to mandate a one-size-fits-all approach to reservation charge credits and has allowed pipelines to use different methodologies;⁴ for that reason, the mechanisms that other pipelines use should not dictate how Midwestern calculates reservation charge credits. Further, Midwestern states that NGPL's provision arose from a settlement, entered into prior to the Commission's announced policy instead of a filing

² *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, at P 20-24, *reh'g denied*, 108 FERC ¶ 61,170, at P 10-11 (2004) (*Natural*).

³ *Southern Natural Gas Company*, 135 FERC ¶ 61,056 (2011) (*Southern*).

⁴ *North Baja Pipeline, LLC v. Federal Energy Regulatory Comm'n*, 483 F.3d 819, 821 (2007).

in which the Commission could rule on its merits as a stand-alone tariff revision. Midwestern states that although the methodology is not mandatory, the Commission has in its *Southern* decision approved, as acceptable, the methodology Midwestern proposes to use.

11. Lastly, Midwestern is also requesting to correct a typographical error in its July 1 Filing, at proposed GT&C section 37.2(a). Midwestern proposes to change “Customer shall” to “Company shall” as People Gas Light and Coke Company had indicated was necessary.

3. Comments to Midwestern’s Compliance Filing

12. Nicor believes that in its current form Midwestern’s reservation charge crediting formula does not balance the interests of the pipeline and its shippers and is therefore unjust and unreasonable. Nicor states the proposed credit fails to take into account the risk related to a shipper nominating more than the capacity Midwestern states is available during a curtailment. For example, if a shipper nominates more than the capacity Midwestern anticipates will be available, then the shipper will be responsible for the damage to its reputation and possible penalties from its gas suppliers if it cannot actually transport the amount nominated. In addition, Nicor contends that the seven-day average fails to account for the specifics of weather and other conditions on the day of the curtailment, which could be significant, especially in *force majeure* conditions. According to Nicor, a seven-day average fails to adequately consider a *force majeure* condition that may extend over a period of time.

13. Nicor states that while the seven-day period has been accepted by the Commission in the past, it is Nicor’s position that Midwestern has not provided an adequate explanation of its proposed credit as a whole. Nicor requests that the Commission reject the provision, and require Midwestern to craft a more just and reasonable way of calculating the credit, similar to the curtailment credit provision in NGPL’s tariff.

14. NIPSCO states that Midwestern’s reservation charge crediting proposal fails to address the fact that it unreasonably places all of the risk on its shippers. NIPSCO contends the seven-day rolling average is also problematic in that it presumes that recent usage best reflects near-term future use. In cases where market conditions indicate that expected changes are imminent, this formula may fail to reflect reality. Midwestern’s assertion that this method is “equally likely to overestimate or underestimate the volumes that a customer would have nominated” simply confirms that this methodology is likely to be wrong in most instances. Moreover, NIPSCO notes there are also shippers who reserve capacity (particularly shippers supplying fuel to combustion turbines) and whose actual usage fluctuates dramatically from day to day. In such cases, shippers would only flow gas on days when the generating unit clears in the electricity market. In those instances, shippers’ intended capacity usage can be calculated independently. For these

reasons NIPSCO believes that the proposed tariff changes to GT&C section 37.1 should be rejected as they may have a material, adverse impact on shippers relative to current practice.

4. Commission Determination

15. Proposed section 37.2 of Midwestern's GT&C provides that in a non-*force majeure* event, Midwestern will provide a reservation charge credit for any quantity that it fails to deliver. Section 37.2(b) sets forth a general rule that the credit for non-*force majeure* curtailments during any Gas Day shall be equal to the quantity of primary firm service Midwestern fails to deliver below the customer's average usage for the seven Gas Days prior to the first Gas Day of the curtailment. However, during the first Gas Day of a curtailment, if Midwestern did not post notice of the potential curtailment before 7:00 a.m. CCT of the preceding Gas Day, the credit will be equal to the quantity of primary firm service Midwestern "scheduled or, if greater, the quantity it would have scheduled but for the curtailment."⁵ Nicor and NIPSCO oppose the use of the seven-day average for determining reservation charge credits as not providing shippers with full value for their capacity, not balancing the interests between the pipeline and the shipper and for being an inaccurate tool for estimating usage.

16. The amount of reservation charge credits a pipeline must give in a non-*force majeure* situation is measured by the amount of service which the shipper nominated for scheduling but the pipeline was unable to deliver. The reservation charge credit is not measured by a shipper's contractual entitlement for service if the shipper nominated less than its contractual entitlement. Thus, if the shipper's nominated service is equal to 50 percent of its total contractual entitlement and the pipeline was unable to deliver any of the nominated service, the reservation charge credit would be equal to 50 percent of the shipper's reservation charge for that day, not the entire reservation charge. When the pipeline gives notice of the non-*force majeure* service interruption at any time after the shipper's first opportunity to submit a scheduling nomination for the day in question, the amount of service which the shipper nominated, but the pipeline was unable to perform, is easily measured. Accordingly, in that situation, the reservation charge should be based on the volume the shipper nominated for scheduling but the pipeline was unable to deliver.⁶

⁵Section 37.2(b) further limits the use of this method of determining the credit to situations where the customer had not changed its nomination after Midwestern posted notice of the potential curtailment.

⁶ *Southern*, 135 FERC ¶ 61,056 at P 32.

17. In situations where the pipeline has provided advance notice of the unavailability of service, e.g., due to a planned outage or scheduled maintenance, before shippers' first opportunity to submit scheduling nominations for the day (or days) of the outage,⁷ the Commission has found that it is reasonable for the pipeline to use an appropriate historical average of usage as a substitute for the use of actual nominated amounts to determine the level of the shipper's reservation charge credits. This approach minimizes the potential for gaming, where shippers would submit scheduling nominations for high amounts knowing that the scheduling nomination will be rejected, while ensuring that shippers who do not nominate will receive credits based on their recent usage of the system.⁸ Accordingly, the Commission finds that it is reasonable for Midwestern to use the shipper's prior seven day's utilization of primary firm capacity to calculate the reservation charge credit when the pipeline has given advance notice before the first opportunity to submit a scheduling nomination for service during the day of the non-*force majeure* curtailment. However, when Midwestern has not given such advance notice of an outage and fails to deliver the quantity the shippers nominated for scheduling that day, the reservation charge credit must be based on the amount the shipper nominated. Absent advance notice of the non-*force majeure* outage, the amount of service the shipper nominated for that day is the best measure of the service it would have taken if the outage had not occurred.

18. Proposed section 37.2(b) of Midwestern's GT&C is consistent with this policy with regard to the first day of a non-*force majeure* outage. However, that section requires use of the seven-day average to calculate the credits for all subsequent days of the non-*force majeure* outage; even if Midwestern did not give advance notice that the outage would continue before the first opportunity to submit a scheduling nomination for service on the subsequent days of the non-*force majeure* outage. Therefore, Midwestern is directed to revise its tariff to provide the previous seven days' average daily quantities will only be used to determine the level of reservation charge credits when the pipeline has notified the shipper prior to the first opportunity to submit a scheduling nomination that the capacity will be unavailable for the day in question.

19. We now turn to Midwestern's proposal to provide partial reservation charge credits during *force majeure* outages. *Force majeure* outages are no-fault occurrences

⁷ 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).

⁸ *Ibid.*, P 33.

because they are unexpected and uncontrollable events. Since no blame can be ascribed to either party, the Commission's policy is that both the pipeline and its customers should share the risk equitably. Accordingly, after Order No. 636, the Commission held that pipelines using the straight fixed variable rate design method must provide partial reservation charge credits in order to share the risk of *force majeure* interruptions of service. To implement that policy, the Commission has permitted pipelines to use two different methods to determine the partial credit and permits the pipeline to choose which one to adopt. Moreover, the Commission has stated that it is open to any other method provided it results in the same type of risk-sharing as the two approved methods do.

20. The first method is the No-Profit method, where the pipeline provides for partial refunds starting on the first day of the interruption in service, covering the portion of the pipeline's reservation charge that represents the pipeline's return on equity and associated income taxes.⁹ The second method is the Safe Harbor method where reservation charges must be credited in full to the shippers after a short grace period when no credit is due the shipper (i.e., 10 days or less).¹⁰ Midwestern's proposal adopts the Safe Harbor method by providing reservation charge credits in *force majeure* situations after the first ten days of the curtailment. After the first ten days, Midwestern will provide reservation charge credits for any volumes it does not deliver because of the *force majeure* situation. Midwestern proposes to calculate the amount it does not deliver based upon the customer's average usage for the seven Gas Days prior to the first Gas Day of the curtailment.

21. We agree with Midwestern that the customer's average usage for the seven Gas Days prior to the first Gas Day of the curtailment is a reasonable measure of the credit the shipper should receive. Under the Safe Harbor partial crediting method Midwestern proposes to use, the Commission requires the pipeline to provide full reservation charge credits beginning on the eleventh day of the outage. The protesters have suggested that those full credits should be measured by a shipper's contractual entitlement for service, without regard to the amount of service the shipper would have scheduled that day if the *force majeure* outage had not occurred. However, Commission policy is that the full credits to be provided after the tenth day of a *force majeure* outage are measured in the same manner as the full credits provided throughout a non-*force majeure* outage. Thus, in *Texas Eastern*, where the Commission first adopted the Safe Harbor method, and in

⁹ *Texas Eastern Transmission Co.*, 62 FERC ¶ 61,015 (1993) (*Texas Eastern*). *Natural*, 106 FERC ¶ 61,310 at P 20-24, *reh'g denied*, 108 FERC ¶ 61,170 at P 10-11.

¹⁰ *Natural Gas Supply Association, American Forest and Paper Association, American Public Gas Association, Independent Petroleum Association of America and Process Gas Consumers Group*, 135 FERC ¶ 61,055 at P 17 (2011).

Natural, relied upon by Nicor, the Commission approved tariff language under which the full credits to be given after the tenth day of a *force majeure* outage are measured in the same way as the full credits given during a non-*force majeure* outage: based upon the amount of service the shipper requested for that day which the pipeline failed to deliver.¹¹ The credit is for the purpose of compensating the customer for the service it would have received but for the curtailment. The Commission has not required the pipeline to base the credit to be given during curtailment periods on the customer's contractual entitlement since there is no reason to assume that the customer would have nominated that amount in the curtailment period.

22. Because the full credits to be given after the tenth day of a *force majeure* outage are measured in the same way as the full credits to be given throughout a non-*force majeure* outage, the same reasons for permitting the use of a seven-day average usage in the non-*force majeure* situation apply equally in the *force majeure* situation. Where there is advance notice that service will not be available after the tenth day of a *force majeure* outage, the use of the shipper's seven-day average usage during the period before the *force majeure* event minimizes the potential for gaming, where shippers would submit scheduling nominations for high amounts knowing that the scheduling nomination will be rejected, while ensuring that shippers who do not nominate will receive credits based on their recent usage of the system. We recognize the protesters' concern that a shipper's need to transport gas may have changed during the ten days of the *force majeure* outage, such that the seven-days average Midwestern proposes to use may not be fully representative of the service the shipper would have nominated during the continuing *force majeure* outage. However, the shippers have not suggested any more accurate method of estimating the service the shipper would have nominated. As explained in *Southern, supra* n.3, we believe that the preceding seven day average is an appropriate estimate of what the customer would have nominated during that period. Although *Southern* involved the non-*force majeure* situation the rationale is equally applicable to the *force majeure* situation. Accordingly, we will accept Midwestern's proposal.

B. Right of First Refusal/Evergreen Provisions

23. Midwestern is proposing to replace its right of first refusal (ROFR) language in section 16 of its GT&C. Midwestern states the changes will make Midwestern's ROFR language more consistent with its affiliate Guardian Pipeline, L.L.C.'s (Guardian) ROFR

¹¹ See Natural Gas Pipeline Company of America, FERC Gas Tariff, Part 6.5, Priority of Service, 0.0.0; Texas Eastern Transmission, LP, Texas Eastern Database 1, 2., Rate Schedule FT-1, 0.0.0.

language and will further the goal of making their notice, bidding, and award processes more uniform.¹²

24. Midwestern's existing ROFR language requires notice of expiration to the shipper under a qualifying agreement 13 months prior to the expiration of the agreement. For agreements with a one-year term, Midwestern has been providing notice of expiration upon execution of the agreement. Midwestern proposes to eliminate that notice requirement.

25. Midwestern states that for agreements with a term of five years or more, the tariff currently requires customers to provide notice one year before the agreement's expiration in order to exercise their ROFR. Midwestern proposes to reduce this period by requiring customers to provide notice six months before the agreement's expiration.

26. Midwestern is also proposing revisions to its Evergreen tariff provisions. Midwestern states that section 16.2 of its GT&C provides that unless the customer provides a termination notice, firm service agreements with a term of one year or more automatically extend for an additional five years beyond the primary term, absent such notice. The customer must provide the required notice six months prior to expiration of the initial or extension term if the agreement has an initial term of less than five years and at least one year prior to expiration if the initial term is five years or more. Midwestern proposes, except as the tariff or a service agreement provides otherwise, to reduce the renewal term from five years to one year. It also proposes to shorten the notice requirement for agreements with an initial term of at least five years from one year to six months.

1. Comments on July 1 Filing

27. Nicor requests clarification of Midwestern's proposed section 16.3. Nicor states it is unclear whether a customer who notifies Midwestern a minimum of 6 months prior to the expiration of their service agreement that the customer is electing the right of first refusal still has an obligation under section 17.5, "Termination of Agreements," to provide notice to Midwestern in order to prevent the agreement from automatically extending upon the expiration of the primary term for a term of one year at the applicable Maximum Rate. In addition, Nicor states that Midwestern has proposed to eliminate its

¹² Midwestern Gas Transmission Company, Guardian Pipeline L.L.C., Viking Gas Transmission Company and OkTex Pipeline Company are interstate natural gas pipelines that are subsidiaries of and owned by ONEOK Partners, L.P. (ONEOK LP). All four interstate pipelines are operated by ONEOK Partners, L.L.C. (ONEOK LLC) who is the general partner of ONEOK L.P.

requirement to notify shippers eligible for ROFR 13 months prior to the expiration of the agreement or upon execution of a one-year agreement. Nicor states that this notification serves a valuable purpose in that section 17 of Midwestern's tariff requires that shippers who have agreements with a primary term of one year or more must give notice to Midwestern to terminate the agreement in whole or request a lesser extension of term. Absent such notice from the shipper the agreement will continue in effect at maximum rates for one year. Nicor states Midwestern's current obligation to notify shippers that a contract is expiring is useful to shippers in that it gives the shipper an alert before a contract is extended at maximum rates for a year, and therefore should not be eliminated.

2. Midwestern's Compliance Filing

28. Midwestern states it originally added the 13-month notice period along with the five-year evergreen provision in 2004. Midwestern believes that reducing the term of the renewal from five years to one year removes any reason to retain the 13-month notice period. Midwestern states that in recent years when it has entered into long-term agreements at maximum rates, many were for just 12 months, which, under the antiquated 13-month notice period, put Midwestern in the position of having to provide notice of termination upon execution of the agreement. In fact, over the last 12 months, Midwestern states it has not entered into any new transportation agreements for a term of 12 months or more thereby rendering a 13-month notice unnecessary. Midwestern claims that the changes to section 16 make Midwestern's ROFR process more favorable to its customers by significantly reducing the period of time and financial commitment customers may be required to enter into as a result of the ROFR process.

29. Midwestern contends the proposed changes will make the ROFR process more consistent with the Guardian's ROFR process and conversely, retaining the notice clause would limit the ability of Midwestern's operator, ONEOK Partners LLC, to implement consistent procedures for the four interstate pipelines it operates. Midwestern states the forms of agreement executed by customers provide that the agreement continues after the primary term until extended or terminated in accordance with section 16, and, as proposed, section 17. Midwestern states that whether or not Midwestern provides notice to a customer, the customer must still monitor its agreement's expiration to provide the appropriate notice to Midwestern with respect to the ROFR and termination. In addition, Midwestern notes that failure to notify Midwestern results in the customer retaining its capacity, rather than losing its capacity.

30. Midwestern states it does not believe that two separate notices are required as a result of its change to section 16.3 and it anticipates that a customer considering contract termination would provide one notice advising Midwestern either that it elects to exercise its right of first refusal, or in the alternative, that it does not want the agreement to automatically extend. In order to eliminate any ambiguity Midwestern states it is willing to add language in section 16.3 clarifying if a customer provides notice of its election of

the right of first refusal, the customer is not required to provide an additional notice of termination.

3. Comments on Midwestern's Compliance Filing

31. Nicor reiterates that notice by Midwestern to its shippers of contract expiration is important because Midwestern's service agreements contain an evergreen provision that continues the contract at maximum rates for one year if the shipper does not notify Midwestern that it does not wish to extend the agreement. Nicor states that if Midwestern were to remove the evergreen provision in its entirety, Nicor could agree to a removal of the notice provision.

32. Nicor does not believe that the last twelve months of activity is necessarily indicative of future activity on Midwestern, but may be more reflective of the value of Midwestern's capacity, a function of how much capacity is available, or as a result of any number of reasons. Nicor states Midwestern provides no assurances that it will only enter into contracts of one year or less in the future and notes that the term for both its current and prior contracts on Midwestern is three years, which under Midwestern's own analysis, would mandate a prior notice.

33. NIPSCO states that Midwestern's attempt to eliminate its obligation to notify customers of their need to notify Midwestern of their intention to renew their agreements shifts additional burdens to customers that far outweigh any desire of Midwestern to maintain some sort of consistent administrative practice among pipeline companies, particularly where, as is the case in this instance, each pipeline has its own unique set of operating requirements and customer needs.

34. NIPSCO states Midwestern's proposal to modify its long-standing contract renewal notification provisions should be rejected. NIPSCO states that while it makes every effort to track and monitor these deadlines it is Midwestern's existing tariff obligation to provide notice to customers of impending contractual deadlines.

4. Commission Determination

35. The Commission will accept Midwestern's proposal as modified with the addition of language in section 16.3 that if a customer provides notice of its election of the right of first refusal, the customer is not required to provide an additional notice of termination under section 17.5, "Termination of Agreements," in order to prevent the agreement from automatically extending upon the expiration of the primary term for a term of one year at the applicable Maximum Rate.

36. Midwestern proposes to remove the following ROFR language from section 16.2 of its GT&C:

Company shall provide notice to a Shipper receiving service from Company pursuant to Part 284 of the Commission's regulations under a qualifying agreement thirteen (13) months prior to the expiration of the agreement's primary term.

However, Midwestern proposes to include the following ROFR language in section 16.3 of its GT&C regarding Notice to Company:

Customer shall notify Company in writing of its intention to exercise a right of first refusal for all or a portion of the Transportation Quantity stated in its service agreement at least six (6) months prior to the expiration of the service agreement. Except as this FERC Gas Tariff or a service agreement expressly provide otherwise, unless Customer elects upon at least six (6) months prior written notice to Company to terminate the agreement in whole or to request a lesser extension of the term, the agreement will automatically extend upon the expiration of the primary term for a term of one year at the applicable Maximum Rate. Thereafter the agreement shall repeatedly extend for successive one year terms unless Customer provides at least six (6) months notice as described herein in advance of the expiration of a succeeding term.

37. The Commission has stated that, “under the ROFR, a reasonable period before a contract expires, normally six months to a year, a shipper would provide notice to the pipeline stating whether or not it was interested in renewing its contract.”¹³ Midwestern’s tariff includes language providing that a shipper provide Midwestern such notice six months prior to the expiration of a service agreement and is acceptable.

38. We find that Midwestern’s removal of the requirement that it provide shippers a 13-month notice prior to the expiration of a service agreement to be consistent with Commission policy. The Commission previously addressed parties’ requests to require a pipeline to provide notification before their ROFR rights expire. In *Dominion Transmission, Inc. (DTI)*,¹⁴ the Commission found that no party had shown the Commission has required other pipelines to provide shippers with notification with regard to ROFR rights. The Commission recognized that ROFR rights are valuable to

¹³ See *Gulf South Pipeline Co., LP*, 119 FERC ¶ 61,032 at P 10 (2007); *Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,295, at 62,150 (2003); *Texas Eastern Transmission, LP*, 101 FERC ¶ 61,215, at 61,922 (2002), *order on reh’g*, 103 FERC ¶ 61,135, at 61,462 (2003).

¹⁴ *Dominion Transmission, Inc.*, 111 FERC ¶ 61,135, at P 41 (2005).

shippers and, as such, expects that shippers will vigilantly guard their ROFR and sees no need to burden the pipeline with an obligation to further remind its shippers of their rights. Accordingly, we find Midwestern's removal of section 16.2 acceptable.

C. Request for Service – Timelines

39. Under GT&C section 25.1(b), Midwestern proposes to establish “ordering windows” to allow customers to request available capacity for service to commence at a future date. Midwestern proposes the following ordering windows in section 25.1(b):

Primary Contract Term	Earliest Time to Request Service before Commencement of Contract Term
Less than six months	45 days
Six months or more, but less than one year	Six month
One year or more	Eleven months

40. Midwestern states the ordering windows will lead to a more efficient allocation of capacity than would an unrestricted first-come, first-served approach. Midwestern notes the Commission has indicated that pipelines seeking approval of ordering windows shorter than ninety days before the start of the contract term would need to cite specific factors justifying a deviation from FERC policy. Midwestern submits the fact that its 45-day ordering window applies only to requests for capacity with a contract term of less than six months and the Commission has more recently concluded that pipelines can use shorter ordering windows for short-term capacity requests, in some instances much shorter than those Midwestern proposes.

41. Under section 25.1(d), Company may consider, on a not unduly discriminatory basis, a request for firm service outside the time periods specified in section 25.1(b), if the request involves circumstances which include but are not limited to the following: (i) the request is for capacity pursuant to an open season initiated by Company; or (ii) the request involves the acquisition, modification or construction of facilities or, terms and conditions that may require prior Commission approval or notice.

1. Comments on July 1 Filing

42. Nicor states that it has concerns with Midwestern's new language in section 25, Requests for Service. Specifically, section 25.1(b)(iii) provides that “[f]or service with a primary contract term of one (1) year or longer, the request for service shall be made no earlier than 11 months prior to the proposed commencement date of service.” Nicor states that it historically has held firm pipeline transportation capacity upstream of

Midwestern that delivers Nicor's gas supply requirements into Midwestern for redelivery to Nicor. Nicor states that when securing firm pipeline transportation, Nicor must have Midwestern capacity under contract prior to contracting for upstream capacity. Nicor contends that by restricting a customer's ability to start the process of acquiring Midwestern capacity to 11 months prior to the proposed commencement date of service, Midwestern would be reducing the amount of time such customer has to negotiate its required upstream capacity and significantly reducing the amount of time available to secure the gas supply for this transportation capacity. Nicor contends that as an LDC who has the obligation to serve its customers, Nicor believes this provision may be unnecessarily restrictive and requests this provision be further explored.

2. Midwestern's Compliance Filing

43. Midwestern states it selected the 11-month time period to be consistent with the time period established in the Viking Gas Transmission Company (Viking) tariff, noting that Viking has not experienced any customer issues with the 11-month period. In addition, Midwestern states the 11-month period gives the customers a longer time period than the Commission approved in the *Algonquin Gas Transmission, LLC*¹⁵ and *Wyoming Interstate Co.*¹⁶ for agreements with terms of at least one year.

44. Midwestern states that the proposed tariff language in section 25.1(b) expressly states in part "[u]nless otherwise agreed to by Company" and section 25.1(d) goes on to say in part "Company may consider, on a not unduly discriminatory basis, a request for firm service outside the time periods specified in Section 25.1(b)." Thus, according to Midwestern, customers have the opportunity, predicated on agreement of the company, to request available capacity to commence at a future date outside of the periods proposed.

45. In hopes of addressing Nicor's concerns about the use of an 11-month period, Midwestern states it is willing to modify the proposed language so that the time period begins on the date capacity is awarded, rather than from the date of the request for service, in hopes of providing parties the ability to begin discussions in advance of the ordering window.

¹⁵*Algonquin Gas Transmission, LLC*, 120 FERC ¶ 61,072, P 29 n.29 (2007) (*Algonquin*).

¹⁶*Wyoming Interstate Co.*, 110 FERC ¶ 61,238 (2005) (*Wyoming*).

3. Comments to Midwestern's Compliance Filing

46. Nicor states that Midwestern attempt to have its ordering window provision be consistent with its sister pipeline, Viking, should not be given much weight by the Commission. Nicor contends that each of ONEOK Partners LLC's pipelines is operationally different and a pipeline's tariff provisions should reflect both the nature of the system and the needs of its shippers. While consistency across its pipelines may improve ONEOK Partners LLC's internal operations, Nicor wants the Commission to consider the impact of each tariff change on the individual system first and cross-pipeline consistency second - not the other way around. Additionally, Nicor contends Midwestern fails to provide any explanation or support for its assertion that there has not been any customer "issues" on Viking related to the 11-month period.

47. Nicor notes the fact that other pipelines have shorter ordering windows fails to address Nicor's claim that it may need more than 11 months to arrange for both upstream transportation and supply for its delivery obligations to its customers, which is specific to Nicor's geographic footprint. Additionally, Nicor notes the Commission has addressed the issue of allocation of long-term capacity in other ways, which are consistent with FERC's open access policies. The Commission has approved tariff provisions for pipelines to hold initial open seasons for available capacity and then enter into further discussions with parties who express interests in the available capacity. Nicor states this process provides flexibility and furthers the Commission's open access policies more so than an arbitrary 11-month window.

48. Nicor contends that Midwestern's proposed revision allowing Midwestern to "consider, on a not unduly discriminatory basis, a request for firm service outside the time period specified in Section 25.1(b)," provides no assurance to shippers that Midwestern would enter into negotiations for service outside the 11-month period. This provision gives too much discretion to the pipeline and leads to a potential for undue discrimination despite Midwestern's claim otherwise.

49. Finally, Nicor states that Midwestern's proposed modification to let the time period run from the date capacity is awarded rather than the date of the request of service does not ameliorate any of Nicor's concerns. Nicor argues that negotiations for service are just that - negotiations, and Midwestern will have no obligation to enter into long-term firm contracts during the period in which Nicor needs to arrange for supply and upstream transportation. Accordingly, Nicor requests that Midwestern clarify how this provision addresses Nicor's comments.

50. NIPSCO agrees with Nicor's concerns that the timeframes established for the ordering windows may be too restrictive and states that irrespective of whether Midwestern's tariff proposals are consistent with other pipelines, it is incumbent on Midwestern to demonstrate that its tariff changes are just and reasonable and Midwestern has not met its burden.

51. NIPSCO believes Midwestern's 11-month period as the earliest time to request commencement of a contract term of one year or more to be somewhat arbitrary and shares Nicor's concerns that it is unnecessarily restrictive. NIPSCO also takes exception with Midwestern's proposed language that it may consider a customer's request for longer lead times, but it makes clear that accommodating such requests will be within Midwestern's sole discretion.

52. NIPSCO agrees with Nicor's comments that highlight the need many customers have to plan and put into place any downstream transportation arrangements prior to contracting for upstream transportation needs. NIPSCO states the Commission should recognize that future planning needs can, and often do, exceed the proposed 11-month horizon. For example, if a shipper were seeking to supply incremental power plant load, that shipper would likely need to guarantee firm service to supply any new combustion turbines, which typically take several years to construct. Similarly, assuming a gas storage facility were being developed adjacent to Midwestern's system with an expected in-service date in 2013, most shippers would want to have their transmission capacity secured prior to committing to gas storage service. NIPSCO states the forgoing represent real-world examples of complex customer planning requirements that would be unjustly, unreasonably and adversely impacted by Midwestern's ordering window tariff changes.

4. Commission Determination

53. We will deny Midwestern's proposed timelines for reserving capacity. Since the Commission began implementing open access, it has been concerned about allowing shippers to reserve firm capacity at a future date without requiring a shipper to begin paying a reservation charge for that capacity once the transportation agreement is executed. To do so would possibly tie up long-term firm transportation service at the expense of other shippers who may place higher value on the capacity.

54. The Commission has addressed the request for service timelines proposed by pipelines and the appropriate time period that should be allowed between when capacity is awarded to a shipper and when service is to commence. Generally, the Commission's policy has determined this period to be ninety (90) days for agreements with a term of a year or more, and has accepted shorter time periods between the capacity being awarded and the commencement of service for agreements having terms of less than a year. For example, *El Paso Natural Gas Company's* tariff is representative of the timelines the Commission has accepted:¹⁷

¹⁷ *El Paso Natural Gas Co.*, 118 FERC ¶ 61,102 (2007). See also *Wyoming*, 110 FERC ¶ 61,238.

For service with a term of one year or longer, a shipper must request that service begin no later than three months from the date that the service request is granted;

For service with a term of greater than three months, but less than one year, the shipper must request that service begin no later than one month from the date that the request is granted; and

For service of three months or less, the shipper must request that service begin no later than ten business days from the date the request is granted.

55. The Commission has explained that its 90-day policy is based on a concern that permitting shippers to reserve firm capacity at a future date without requiring the shipper to begin paying reservation charges upon execution of a service agreement could allow those shippers to unreasonably tie up long term firm transportation capacity at the expense of other shippers that may place a higher value on that capacity.¹⁸ The Commission has held that ninety (90) days is an appropriate time frame to avoid tying up future capacity while also allowing the pipeline sufficient time to process the request and execute an agreement with the shipper.

56. We find that Midwestern's has not supported the justness and reasonableness of its proposed timelines applicable to requests for service. We are not swayed by the fact Midwestern selected the 11-month time period to be consistent with the time period established on Viking's system, nor is it relevant that Viking has not experienced any customer issues with the 11-month period. The Commission did not address the merits of Viking's 11-month time period at the time it was incorporated into the tariff. Further, Midwestern's suggestion that the 11-month period gives the customers a longer time period than the Commission approved in the *Algonquin*¹⁹ and *Wyoming*²⁰ is misplaced. As discussed above, the Commission has determined that ninety (90) days is the

¹⁸ *Gulf South Pipeline Co., LP*, 119 FERC ¶ 61,032, at P 20 (2007). See also *Trailblazer Pipeline Co.*, 103 FERC ¶ 61,225, at P 78 (2003); *Gas Transmission Northwest Corp.*, 109 FERC ¶ 61,141 (2004) (*GTN*); and *Northern Natural Gas Co.*, 109 FERC ¶ 61,388 (2004) (*Northern Natural*), for a discussion of Commission policy concerning exceptions to the 90-day policy and the requirement that the pipeline sell any capacity reserved for a future contract during the interim period before the future contract takes effect.

¹⁹ *Algonquin*, 120 FERC ¶ 61,072 at P 29 n.29.

²⁰ *Wyoming*, 110 FERC ¶ 61,238.

appropriate time period that should be allowed between when capacity is awarded to a shipper and when service is to commence for agreements with terms of at least one year, and why ninety (90) days is appropriate.

57. Therefore, we will require Midwestern to revise its service request timelines to be consistent with our 90 day policy. Further, we accept Midwestern's proposal to modify its proposed language so that the time period begins on the date capacity is awarded, rather than from the date of the request for service, in hopes of providing parties the ability to begin discussions in advance of the ordering window timelines for requesting service.

58. Midwestern's proposed tariff language in section 25.1(d) provides that it may consider, on a not unduly discriminatory basis, a request for firm service outside the time periods specified in section 25.1(b), if the request involves circumstances which include, but are not limited to (1) a request for capacity pursuant to an open season initiated by Midwestern; or (2) the acquisition, modification or construction of facilities or, terms and conditions. We find the phrase "but not limited to" to be vague as to what is contemplated or how it would be determined and therefore must be removed.

59. We note commenters' concerns about the need on occasion to reserve future capacity outside the timelines set for the sale of capacity. Also, we acknowledge Nicor's observation that the Commission has approved tariff provisions for pipelines that permit them to hold initial open seasons for available capacity and then enter into further discussions with parties who express interests in the available capacity. In *Gas Transmission Northwest Corporation*²¹ and *Northern Natural Gas Company*,²² the Commission recognized that permitting pipelines to sell capacity for service to commence in the future has efficiency benefits and will benefit customers with long lead times who do not need capacity immediately, but need assurance that they can get capacity in the future. *GTN/Northern* provide for open-season bidding and an evaluation on a net present value basis (NPV).

60. In its compliance filing Midwestern contends that customers have the opportunity, predicated on agreement of the company, to request available capacity to commence at a future date outside of the periods proposed. We note that Midwestern's tariff provisions regarding open seasons for capacity, at section 25.1(d), provide that

²¹ *GTN*, 109 FERC ¶ 61,141.

²² *Northern Natural*, 109 FERC ¶ 61,388.

Midwestern may consider requests for firm service outside its time periods listed for request for service. Further, section 25.6, Solicitation of Bids for Capacity of its GT&C, provides that capacity will be awarded on the basis of the NPV criteria. Thus, we interpret Midwestern's compliance filing as allowing customers to request available capacity under these provisions. Therefore, Midwestern is directed to clarify its tariff to specify that shippers' requests outside the timeline would be considered under its open season language.

61. In addition, Midwestern's existing tariff includes provisions limiting extension rights for capacity sold on an interim basis where the capacity is already reserved for a future expansion/extension project. However, it has no provisions in its tariff for addressing potentially conflicting ROFRs between shippers when capacity is sold more than a year in advance through an open season. Midwestern is required to offer any capacity sold in advance to others during the interim period when it is not being utilized. To the extent an interim shipper purchases the reserved capacity at the maximum rate for a year or more, the interim shipper obtains a ROFR under section 284.221(d) of the Commission's regulations and Midwestern's tariff, absent an exemption from the ROFR in Midwestern's tariff. Thus, Midwestern would have a potential obligation to serve both the interim shipper and the original purpose shipper for whom the capacity was originally reserved in advance. The Commission finds that Midwestern's tariff must be clarified accordingly to deal with these circumstances.

D. Reservation of Capacity for Expansion Projects

62. Midwestern proposes in section 35.2(b) of its GT&C to reserve capacity for projects "dependent upon the construction of new facilities by another Person for which such Person will request that the Commission issue a new certificate" and in section 35.2(c) to reserve capacity for projects that it will construct pursuant to the Commission's blanket certificate prior notice regulations,²³ one year prior to filing the prior notice application.

63. The Commission has allowed pipelines to reserve capacity for major expansion projects to help ensure that the projects are properly sized and to reduce the environmental impact of new pipeline construction. In allowing this policy the Commission balances the goal of ensuring that projects are properly sized with the need to limit the pipeline's ability to exercise market power by taking the capacity off the market. The Commission is concerned that allowing Midwestern to reserve capacity for an expansion project by another pipeline that may request a certificate unnecessarily broadens the range of projects that may fall under this category and may lead to

²³ 18 C.F.R. § 157.208(b) (2011).

inordinate amounts of capacity being reserved for future use. Therefore, Midwestern is directed to eliminate this provision from its tariff. If Midwestern believes that the reservation of capacity on its system in conjunction with another pipeline's expansion is essential for the project, then Midwestern may request that the Commission grant waiver of its tariff for that project and the Commission will evaluate the waiver request based on the circumstances and the support which Midwestern provides for the requested waiver.

64. In addition, although the Commission allows pipelines to reserve capacity for major expansion projects in which a certificate application is filed, it has not allowed pipelines to reserve capacity for smaller prior notice projects. Midwestern has not adequately explained why capacity reservation and the loss of ROFR for interim shippers are necessary for these smaller projects. When the Commission adopted this capacity reservation policy in *Tennessee*,²⁴ it pointed out it would lead to the efficient use of the pipeline's existing capacity and accomplish the goal of encouraging properly sized construction of expansion projects. Midwestern has not demonstrated a sufficient need for a new policy reserving capacity for construction of these smaller projects. For instance, it is unclear the extent to which such a policy would lead to a more efficient use of a pipeline's existing capacity, or encourage the construction of appropriately sized facilities. In fact, such a policy might have no effect on the size or efficiency of these smaller projects and would only result in the loss of a shipper's ROFR. Further, Midwestern has failed to address how the Commission can ensure that the prior notice process, which is easier to employ than the formal certificate process, will not be utilized to withhold capacity unnecessarily from the market. Therefore, Midwestern is directed to remove section 35.2(c) from its tariff.

The Commission orders:

(A) The tariff records referenced in the Appendix of the July 29 Order, as modified consistent with the discussion in this order, are permitted to become effective January 1, 2012.

(B) Within thirty (30) days of the issuance of this order, Midwestern shall file revised tariff records to implement the directives and requirements of this order. The effective date of the revised tariff records should coincide with the date Midwestern motions its suspended tariff records into effect.

²⁴ *Tennessee Gas Pipeline Co.*, 82 FERC ¶ 61,288, at 62,115 (1998) (*Tennessee*).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.