138 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP | Docket No. RP12-318-001

ORDER ACCEPTING TARIFF RECORD SUBJECT TO CONDITIONS

(Issued February 16, 2012)

1. On January 20, 2012, Texas Eastern Transmission, LP (Texas Eastern) filed a revised tariff record[1] to revise the *pro forma* service agreement for Texas Eastern's Rate Schedule FTS-5 in order to provide additional flexibility.[2] Texas Eastern requests waiver of the Commission's 30-day notice requirement so that the tariff records become effective on February 19, 2012. The Commission grants waiver of the notice requirement and accepts the revised tariff record listed in footnote no. 1 of this order to be effective February 19, 2012, subject to the conditions discussed herein. In addition, pursuant to section 5 of the Natural Gas Act (NGA), the Commission requires that Texas Eastern either file revisions to its tariff concerning reservation charge credits to conform with Commission policy, as discussed in this order, or show cause why it should not be required to do so.

Details of the Filing

2. Texas Eastern states that the purpose of this filing is to revise the *pro forma* service agreement for Texas Eastern's Rate Schedule FTS-5 in order to avoid the need to file with the Commission new service agreements whose term provisions would be non-conforming under the currently effective *pro forma* service agreement. Texas Eastern further states that, currently, Article II (Term of Agreement) of *pro forma* service agreement for Rate Schedule FTS-5 provides a blank space in which the length of the term in number of years is entered. Texas Eastern proposes to add optional language

[1] 20., FTS-5 Service Agreement, 2.1.0 to Texas Eastern Database 1, FERC NGA Gas Tariff.

[2] The revised tariff record corrected a typographical error in Texas Eastern's January 19, 2012 Filing in Docket No. RP12-318-000.

with a blank space to use if the parties desire to reflect the actual end date of the term of the agreement. Texas Eastern further proposes to add instructional bracketed language that the term of the agreement cannot be less than one year to reflect that the FTS-5 service is a long-term service. Texas Eastern asserts that this modification will provide the flexibility to reflect the term of the agreement agreed upon by the parties and is similar to other *pro forma* service agreements in its tariff.

Notice of Filing , Interventions, Protest, and Answer

3. Public notice of the filing was issued on January 24, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2011)). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2011), all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Indicated Shippers, consisting of BP America Production Company, BP Energy Company, Hess Corporation, and SWEPI LP, filed a collective protest. On February 9, 2012, Texas Eastern filed an answer to the protest (Answer).[3]

4. In their protest, Indicated Shippers request Commission action concerning the reservation charge crediting provisions of Texas Eastern's tariff. Indicated Shippers state that the Commission has encouraged shippers who believe a pipeline's tariff is not in compliance with the Commission's reservation charge crediting policy to file a complaint under section 5 or raise the issue in any section 4 filing made by the pipeline.[4] Indicated Shippers contend that Texas Eastern's current tariff does not comply with that policy and that unjustified restrictions on crediting should be removed.

5. Specifically, Indicated Shippers challenge three existing restrictions on reservation charge crediting in Texas Eastern's Rate Schedules for firm transportation (CDS, FT-1, FTS, FTS-2, FTS-4, FTS-5, FTS-7, FTS-8, SCT, LLFT, VKFT, and MLS-1) and firm storage (FSS-1, SS, and SS-1). Indicated Shippers state that sections 3.3, 3.4, or 3.5 of each firm rate schedule allows a 5 percent tolerance before reservation charge crediting is required. Indicated Shippers assert that this tolerance violates the Commission ban on any tolerance level prior to the provision of full reservation charge crediting for non-*force majeure* events. Indicated Shippers also state that, paragraph (B) of

[3] The Commission's Rules of Practice and Procedure do not permit answers to protests unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2) (2010). However, the Commission finds good cause to accept Texas Eastern's Answer since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record.

[4] *Citing Natural Gas Supply Ass'n, et al.*, 135 FERC ¶ 61,055, at P 13, *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA*).

sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold a reservation charge credit if the curtailment "is the result of Pipeline having operational flow orders [OFO] in effect on such Day" (the OFO Exemption). Indicated Shippers contend that the OFO Exemption violates Commission policy that a pipeline must grant a full credit in non-*force majeure* events and a partial credit in *force majeure* events. Finally, Indicated Shippers state that paragraph (C) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold the reservation charge credit if curtailment is due to "routine operational maintenance and repair" during the period from May 1 through November 1 of any year and in paragraph (D) that Texas Eastern may withhold the credit if the curtailment is due to "repair and maintenance of its facilities to comply with regulatory requirements" (the Maintenance Exemption). Indicated Shippers argue that the Maintenance Exemption violates Commission policy that requires a pipeline to grant a full reservation charge credit in response to a non-*force majeure* curtailment, including when the curtailment is due to scheduled maintenance and repairs.

6. In its Answer, Texas Eastern asserts that Indicated Shippers have failed to satisfy their burden, under NGA section 5, coming forward with evidence to show that Texas Eastern's current reservation charge crediting provisions are unjust and unreasonable and that replacement tariff provisions are just and reasonable. Texas Eastern contends that Indicated Shippers have made no attempt to demonstrate why the Commission's policy is appropriate for Texas Eastern's system or how circumstances have changed on the system since the Commission approved the tariff provisions at issue. Texas Eastern argues that, in *NGSA*, the Commission made no findings under section 5 with respect to either any particular pipeline or all natural gas companies and did not intend anything more than a policy statement. Texas Eastern concludes that Indicated Shippers have not met their burden of going forward and therefore, their request to initiate a section 5 investigation of Texas Eastern's reservation charge crediting provisions should be denied.

<u>Discussion</u>

7. The Commission accepts the revised tariff record listed in footnote no. 1 of this order to become effective February 19, 2012, subject to the conditions. As discussed below, the Commission, pursuant to NGA section 5, directs Texas Eastern to make certain changes in its tariff concerning reservation charge crediting, or explain why it should not be directed to do so.

8. Under the Commission's reservation charge crediting policy, pipelines are required to provide firm shippers with reservation charge credits when they are unable to provide primary firm service. The Commission has discussed and affirmed its

reservation charge crediting policy in several recent orders.[5] That policy differentiates between the credits required in *force-majeure* and non-*force majeure* curtailments. 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 shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.[6] Commission policy also requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure*[7] 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 partial crediting starting on the first day of a *force majeure* event.[8] In *North Baja Pipeline, LLC v. FERC*,[9] 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.

9. In *NGSA*, the Commission stated:

> If any shipper or shippers believe that [the] pipeline's tariff does not comply with Commission policy and the pipeline is not taking appropriate action to bring its tariff into compliance, they can file a complaint alleging non-compliance and, seek section 5 relief, or raise the issue in any section 4 filing by that pipeline.[[10]]

10. Texas Eastern's reservation charge crediting provisions are in conflict with Commission policy, as asserted by Indicated Shippers. First, Commission policy regarding non-*force majeure* outages is that there must be a full reservation charge credit

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[5] *See, e.g., NGSA*, 135 FERC ¶ 61,055; *Southern Natural Gas Co*., 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *Northern Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 (2011); *Midwestern Gas Transmission Co*., 137 FERC ¶ 61,257 (2011) (*Midwestern*).

[6] *See, e.g., Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006).

[7] *Force majeure* events are "unexpected and uncontrollable events." Opinion No. 406, 76 FERC ¶ 61,022 at 61,088.

[8] *Midwestern*, 137 FERC ¶ 61,257 at P 19-20.

[9] 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).

[10] *NGSA*, 135 FERC ¶ 61,055 at P 13.

when the pipeline fails to deliver the entire amount nominated by that shipper, not any lesser amount.[11] However, Texas Eastern's tariff permits it to not provide credits so long as it delivers at least 95 percent of the shipper's nominated volumes. Therefore, Texas Eastern's 5 percent tolerance conflicts with that policy.

11. Second, Texas Eastern's Maintenance Exemption conflicts with the Commission's longstanding policy concerning outages caused by routine maintenance or repairs. Specifically, routine repair and maintenance is not an emergency situation or unexpected loss of capacity and should be planned through scheduling and not interrupt firm service.[12] The Commission has determined that such scheduled maintenance would be a non-*force majeure* event within the pipeline's control, and the pipeline must provide full reservation charge credits for the nominated amounts not delivered during periods of scheduled maintenance.[13] In *North Baja*, the D.C. Circuit upheld that policy. [14] Therefore, the exemption for routine operational maintenance and repair during the period May 1 through November 1 violates Commission policy.

12. Further, Commission policy does not permit an exemption from providing reservation charge credits for interruptions due to repair and maintenance to comply with applicable regulatory requirements. The Commission has recognized that the actions of an administrative or regulatory agency may support declaration of a *force majeure* event for which only partial reservation charge credits are required.[15] However, "testing and maintenance are a part of the service provider's duties under a certificate of public convenience and necessity that are not appropriately considered a *force majeure* event,"[16] and therefore the Commission has required pipelines to provide full reservation charge credits for outages due to maintenance including where the maintenance is necessary to comply with regulatory requirements.[17] Therefore, there is no basis for Texas Eastern to exempt from the crediting requirement outages during which any repair or maintenance was performed to comply with applicable regulatory requirements. Similarly, the cause of OFO curtailments is only relevant to the amount of the required credit. Therefore, there is no basis for the crediting exemption for OFOs in the OFO Exemption.

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[11] *See, e.g.*, *Southern*, 137 FERC ¶ 61,050 at P 33.

[12] *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123, at 61,663 (1996).

[13] *See, e.g.*, *Southern*, 135 FERC ¶ 61,056 at P 24-27.

[14] 483 F.3d at 822-23.

[15] *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).

[16] *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009).

[17] *Florida Gas*, 107 FERC ¶ 61,074 at P 28-29.

13. Finally, the Commission has recognized that an appropriately designed *force majeure* provision should compliment a pipeline's regulatory obligations.[18] General Terms and Conditions (GT& C) section 17, Force Majeure, of Texas Eastern's tariff includes section 17.3, Scheduling of Routine Maintenance, provides:

> Pipeline shall have the right to curtail, interrupt, or discontinue service in whole or in part on all or a portion of its system from time to time to perform *routine repair and maintenance* on Pipeline's system as necessary to maintain the operational capability of Pipeline's system or to comply with applicable regulatory requirements. Pipeline shall exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and shall provide reasonable notice of the same to Customers. [Emphasis added]

As discussed above, routine repair and maintenance is not a *force majeure* event. Therefore, to be consistent with the Commission's reservation charge crediting policy which requires full reservation charge crediting for non-*force majeure* events, Texas Eastern's tariff should be revised to remove references to routine repair and maintenance as a *force majeure* event.

14. The Commission rejects Texas Eastern's contention that Indicated Shippers have not made a sufficient showing to justify initiating an NGA section 5 investigation of whether Texas Eastern' reservation charge crediting provisions are unjust and unreasonable. As discussed above, Texas Eastern's tariff provisions are inconsistent on their face with the Commission's policy concerning reservation charge credits for non-*force majeure* outages, as established in previously litigated adjudications. In addition, our policy requiring full reservation charge credits during outages for routine maintenance "is not dependent upon specific operating conditions on the pipeline."[19] Therefore, at least a *prima facie* showing has been made that Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable. Accordingly, it is appropriate for the Commission to initiate a section 5 proceeding in this order and require Texas Eastern to explain why its tariff should not be modified consistent with Commission policy.[20]

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[18] *Id*. P 32.

[19] *North Baja*, 483 F.3d at 823, *quoting El Paso Natural Gas Co.* 105 FERC ¶ 61,262 at P 15 (2003).

[20] *See East Tennessee,* 863 F.2d 932, 938 (D.C. Cir. 1988) (finding that the Commission may, consistent with its burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill, once a *prima facie* showing is made that the minimum bill is anticompetitive).

15. For the foregoing reasons, the Commission finds that Texas Eastern's existing tariff is inconsistent with the Commission's reservation charge crediting policy, and, under NGA section 5, directs Texas Eastern, within thirty days of the date of this order, either to file revised tariff records to conform with the Commission's reservation charge crediting policy, consistent with the discussion in this order, or explain why it should not be required to do so.

The Commission orders:

(A) The tariff record listed in the footnote no. 1 to this order is accepted to become effective February 19, 2012, subject to conditions, as discussed in this order.

(B) Texas Eastern is directed to file revised tariff records to conform with the Commission's reservation charge crediting policy, consistent with the discussion in this order, within thirty (30) days of the date of this order, or explain why it should not be required to do so.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.