

139 FERC ¶ 61,089  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Paiute Pipeline Company

Docket No. RP12-130-000

ORDER FOLLOWING TECHNICAL CONFERENCE

(Issued May 2, 2012)

1. On November 2, 2011, Paiute Pipeline Company (Paiute) filed numerous revisions to its existing tariff.<sup>1</sup> By order dated November 30, 2011,<sup>2</sup> the Commission accepted and suspended Paiute's revised tariff sheets, to be effective May 3, 2012, subject to the outcome of a technical conference, which was held on January 24, 2012. On February 23, 2012, Paiute filed *pro forma* tariff records replacing those filed originally and added new language agreed to by the parties to resolve some of the issues that had been in dispute. Parties then filed initial and reply comments on the *pro forma* tariff records addressing the remaining disputed issues. The Commission addresses these comments below, and directs Paiute to file actual tariff records reflecting its *pro forma* submission with further modifications and conditions as required by this order.

**Background**

2. Paiute described the purpose of its November 2, 2011 filing as follows: to (1) update its tariff with respect to various Commission policies and accepted principles and to reflect contemporary industry practices; (2) add, enhance, clarify, improve, update, and/or remove various tariff provisions; and (3) make miscellaneous minor housekeeping changes. Southwest Gas Corporation (Southwest), Sierra Pacific Power Company D/B/A/NV Energy (Sierra), and Northern Nevada Industrial Gas Users (NNIGU) protested Paiute's filing. Protesters raised objections to a number of Paiute's tariff

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<sup>1</sup> Paiute Pipeline Company's Tariff Record is "Paiute Pipeline Company." See also Paiute Pipeline Company FERC Gas Tariff, Fourth Revised Volume No. 1-A.

<sup>2</sup> *Paiute Pipeline Co.*, 137 FERC ¶ 61,164 (2011) (November 30 Order).

revisions including changes to reservation charge crediting policies, transportation service policies, odorization liability, imbalance penalty policies, creditworthiness policies, and Right of First Refusal (ROFR) and evergreen rights.

3. As directed in the November 30 Order, the Commission's staff on January 24, 2012, convened a technical conference to address issues raised in this proceeding. Based on discussions at the technical conference and subsequent meetings among the parties, on February 23, 2012, Paiute filed revised *pro forma* tariff records replacing those it filed originally and added language resolving some of the issues previously in dispute.<sup>3</sup> Southwest, Sierra, NNIGU, and Paiute submitted comments and reply comments following the technical conference on February 27, 2012, and March 6, 2012, respectively.

4. Although Paiute and the aforementioned protesters resolved many of the issues in dispute, the following issues remain: capacity release reservation charge crediting, reservation charge crediting during restricted periods, reservation charge crediting and conditions on upstream pipelines, reservation charge crediting and segmentation, odorization liability, creditworthiness, hourly limitations, imbalance and netting provisions, and ROFR and evergreen rights. Each of these issues is addressed below.

## **Discussion**

### **A. Reservation Charge Crediting – General**

5. In its section 4 filing, Paiute proposed various revisions to the reservation charge crediting provisions in Section 11 of Rate Schedule FT-1. Paiute stated that its proposed revisions were intended to comply with the Commission's policy concerning reservation charge credits, as set forth in recent orders in *Natural Gas Supply Association*<sup>4</sup> and *Southern Natural Gas Co.*<sup>5</sup> As revised, section 11 generally complies with Commission policy.

6. 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

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<sup>3</sup> See *Pro Forma* Tariff Sheets of Paiute Pipeline Company FERC Gas Tariff, Fourth Revised Volume No. 1-A.

<sup>4</sup> 135 FERC ¶ 61,055 (2011) (*NGSA*).

<sup>5</sup> 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*).

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).<sup>6</sup> Section 11.2 of Paiute's Rate Schedule FT-1 requires it to provide partial reservation charge credits equal to its return on equity and associated income taxes during *force majeure* outages, consistent with the No Profit Method.

7. 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.<sup>7</sup> Paiute's existing tariff provides that 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. 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.<sup>8</sup> Consistent with that precedent, Paiute has proposed to remove its 98 percent requirement.

8. In *Southern*,<sup>9</sup> the Commission found that when the pipeline gives advance notice of an outage before shippers have submitted scheduling nominations for the day (or days) of an outage,<sup>10</sup> 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. Accordingly, the Commission has permitted pipelines to propose tariff language using an appropriate historical average. Consistent with *Southern*, Paiute proposes to calculate reservation charge credits based on the shipper's

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<sup>6</sup> *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 at PP 19-20 (2011).

<sup>7</sup> *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).

<sup>8</sup> *Id.* PP 64-66.

<sup>9</sup> *Southern*, 135 FERC ¶ 61,056 at PP 33-34.

<sup>10</sup> 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).

prior seven days utilization of firm capacity in situations where the pipeline has given advance notice of an outage before the Timely nomination cycle.

9. No party has raised any objection with respect to the above described proposals by Paiute. However, Sierra protests certain other of Paiute's proposed revisions to section 11, as well as certain provisions Paiute did not propose to revise. The Commission addresses those issues below.

## **B. Capacity Release Reservation Charge Crediting**

### **1. Proposed Tariff Revisions**

10. Paiute proposes modifying sections 11.2 and 11.3 of Rate Schedule FT-1 to provide that the pipeline may limit the amount of reservation charge credits available to replacement shippers in *force majeure* and *non-force majeure* situations. Under its proposal, Paiute will compute the applicable reservation charge credit due to replacement shippers by multiplying the quantity of gas it failed to deliver by the lesser of the daily reservation charge of the releasing and replacement shippers.

### **2. Comments and Reply Comments**

11. Sierra protests Paiute's proposed modifications to sections 11.2 and 11.3 of its Rate Schedule FT-1. Sierra asserts Paiute's proposal would enable the pipeline to benefit from a "windfall" when replacement shippers pay lower reservation charges than releasing shippers. Sierra further asserts Paiute's proposed modifications disadvantage releasing shippers who cannot release their capacity for 100 percent of Paiute's reservation charges. Sierra proposes that Paiute calculate reservation charge credits based on the amount of reservation charge payable by the releasing shipper. Sierra contends that calculating the reservation charge based on what Paiute is entitled to collect from the releasing shipper would prevent the pipeline from inserting itself into, and benefiting from, the contractual relationships between releasing and replacement shippers.

12. In its reply comments, Paiute contends that Sierra based its objections to Paiute's proposal on a fundamental misunderstanding of the proposal and other applicable portions of the pipeline's tariff. Paiute argues the proposed language in sections 11.2 and 11.3 addresses the reservation charge credit applicable to the replacement shipper, not the releasing, shipper. Paiute states that, under its proposal, it will provide the releasing shipper the same credits against the releasing shipper's reservation charge, whether or not an outage occurs. In its reply comments, Paiute illustrates this with two examples, in both of which the releasing shipper's rate is 50 cents. In the first example, the replacement shipper's rate is 25 cents. During a *non-force majeure* outage, Paiute would provide the replacement shipper a reservation charge credit of 25 cents, because its rate is lower than the releasing shipper's. However, Paiute states that it would continue to

reduce the rate charged to the releasing shipper by the replacement shipper's 25 cent rate, so that the releasing shipper would pay the same net 25 cent rate as if the outage had not occurred.

13. In the second example, the replacement shipper's rate is 75 cents. In this example, Paiute would give the replacement shipper a reservation charge credit equal to the releasing shipper's lower 50 cent rate, reducing the replacement shipper's rate to 25 cents. Paiute would also provide the releasing shipper a credit of 50 cents for the released capacity, plus the remaining 25 cents owed by the replacement shipper. Thus, the releasing shipper would make the same 25 cent profit on the release as if the outage had not occurred. Paiute further argues that its proposal has no effect on the contractual relationship between replacement and releasing shippers. Paiute insists its primary objective in making these modifications is to put the releasing shipper in the same position it would have been in if Paiute provided service to the replacement shipper.

14. In its reply comments, Sierra renews its objections and argues that the Commission should prevent Paiute from benefiting from a windfall. First, Sierra argues the Commission should require Paiute to calculate the capacity release reservation charge credits using the reservation charge it is entitled to collect from the releasing shipper even when the replacement shipper's rate is lower than the releasing shipper's rate. Alternatively, Sierra asserts the Commission should require Paiute to agree that when it provides a reservation charge credit to a replacement shipper it will not bill the releasing shipper for the difference between what the replacement shipper pays Paiute and what the releasing shipper owes Paiute.

### **3. Commission Determination**

15. The Commission finds Paiute's revisions to sections 11.2 and 11.3 of its Rate Schedule FT-1 addressing the reservation charge credit available to replacement shippers in *force majeure* and *non-force majeure* situations to be just and reasonable. The Commission recently addressed this issue in *Kern River Gas Transmission Company*.<sup>11</sup> There, in a compliance filing addressing the Commission's reservation charge crediting policy, the pipeline proposed that during periods when a shipper releases its capacity to a replacement shipper the reservation charge credit applicable to the replacement shipper will be the reservation rate of either the releasing or replacement shipper, whichever is lower. The Commission found this proposal, subject to conditions discussed below, to be just and reasonable. Specifically, in the situation where the replacement shipper is paying a reservation charge that is lower than the releasing shipper's rate, the Commission found it reasonable for the pipeline to base the reservation charge credit

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<sup>11</sup> 139 FERC ¶ 61,044 (2012) (*Kern River*).

applicable to the replacement shipper on the replacement shipper's reservation charge, so long as the pipeline continues to reduce the releasing shipper's rate by the amount of the replacement shipper's reservation charge.<sup>12</sup> The Commission found that because the replacement shipper is not paying the higher reservation charge applicable to the releasing shipper, there is no reason for the pipeline to provide the replacement shipper a credit in excess of the replacement shipper's reservation charge.

16. While Kern River's filing did not address how it intended the reservation charge credit given to the replacement shipper to affect its obligation under the Commission's capacity release regulations to credit the replacement shipper's reservation charge payments to the releasing shipper's reservation charge, the Commission found that the pipeline should continue to credit the replacement shipper's reservation charge to the releasing shipper, without regard to the credits given to the replacement shipper for the outage.<sup>13</sup> To do otherwise would require the releasing shipper to subsidize the reservation charge credits given to the replacement shipper for the pipeline's failure to provide the contracted-for service. As described above, Paiute states that under its proposal it will continue to credit the replacement shipper's reservation charge to the releasing shipper, without regard to any reservation charge credits given to the replacement shipper for the outage. The Commission also stated there was no reason to require a pipeline to provide the releasing shipper any greater credits against its reservation charge than the releasing shipper would have received absent the outage.

17. The Commission also found in *Kern River* that it is reasonable to limit the reservation charge credit given to the replacement shipper to the reservation charge paid by the releasing shipper when the replacement pays a higher reservation charge than the releasing shipper's reservation charge. The Commission finds Paiute's similar proposal reasonable as well. As explained in *Kern River* and illustrated by the second example described above, limiting the credit to the replacement shipper to the releasing shipper's rate has the effect of requiring the replacement shipper to continue to fund the releasing shipper's profit on its release. The replacement shipper would continue to pay the pipeline the amount by which its reservation charge exceeds the releasing shipper's reservation charge. This puts the releasing shipper in the same position as if the outage had not occurred, and thus treats the releasing shipper in a reasonable manner. Although the replacement shipper would not be credited the entire amount of its reservation charge, this result is reasonable because the pipeline has no control over the release rate agreed to

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<sup>12</sup> *Kern River*, 139 FERC ¶ 61,044 at P 62.

<sup>13</sup> *Id.* P 62 (citing 18 C.F.R. § 284.8(f) (2011)).

between the releasing shipper and the replacement shipper, and never had any right to retain the excess amount paid by the replacement shipper.<sup>14</sup>

18. Hence, the Commission finds Paiute's treatment of capacity releases just and reasonable, and accepts Paiute's proposed changes in sections 11.2 and 11.3 of its Rate Schedule FT-1.

### **C. Reservation Charge Crediting During Restricted Entitlement Period**

#### **1. Initial Comments**

19. In its initial comments, Sierra points out that existing section 11.4(c)(3) of Paiute's Rate Schedule FT-1 provides that reservation charge credits do not apply when a shipper fails to comply with a restricted delivery entitlement notification pursuant to section 5.2 of the General Terms and Conditions (GT&C) of Paiute's tariff. Section 5.2(a) provides that when conditions or events "threaten or could threaten the safe operation or integrity of Paiute's system," it will issue an Operational Flow Order (OFO). Once a section 5.2 OFO is issued, shippers may not take either more or less gas than the quantities scheduled for delivery to them, depending on whether the event involves an overrun or underrun situation.

20. While acknowledging that section 11.4(c)(3) is not part of Paiute's proposed changes, Sierra argues there should be no exception from the requirement to provide a reservation charge credit during a restricted entitlement event, except to the extent the shipper's non-compliance caused Paiute's inability to deliver nominated quantities. According to Sierra, since the Commission's issuance of *NGSA* in 2011,<sup>15</sup> the Commission has focused on non-compliant tariff provisions and taken action under Natural Gas Act (NGA) section 5 when necessary. Sierra argues the Commission should require Paiute to clarify section 11.4(c)(3) to state that reservation charge credits will only apply when a shipper's non-compliance causes the pipeline's inability to deliver the shipper's nominated quantities

#### **2. Reply Comments**

21. In its reply, Paiute argues that Sierra's concerns are outside the scope of this NGA section 4 proceeding because, as Sierra acknowledges, the language existed before Paiute

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<sup>14</sup> *Id.* P 63.

<sup>15</sup> Sierra Initial Comments at 4 (citing *Natural Gas Supply Ass'n, et al.*, 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051 (2011)).

made its filing. In any event, Paiute contends that section 11.4(c)(3) is reasonable, because the section does not release the pipeline from reservation charge credit liability solely because it has issued an OFO pursuant to section 5.2 of its GT&C to protect system integrity. Rather, Paiute asserts section 11.4(c)(3) states that when a shipper violates such an OFO, thereby threatening the integrity of the system, it will not receive reservation charge credits. Paiute states this is reasonable because a shipper should not be financially rewarded when it acts in a manner that threatens system integrity.

22. In its reply, Sierra states it “agrees that if a shipper’s non-compliance causes Paiute’s inability to deliver nominated quantities the shipper should not receive a reservation charge credit.”<sup>16</sup> However, Sierra maintains that Paiute’s tariff language is overly broad. Under Sierra’s rationale, a shipper that ignores an OFO is not necessarily putting the system at risk and Paiute should only penalize the shipper if its refusal to comply causes harm. Consequently, Sierra recommends that Paiute modify section 11.4(c)(3) to ensure that Paiute provides reservation charge credits when a shipper’s non-compliance does not cause harm to Paiute’s system and does not contribute to Paiute’s inability to deliver nominated quantities.

### **3. Commission Determination**

23. It is the Commission’s policy that pipelines design their penalty structures to reasonably anticipate and deter behavior that might occur or which has previously occurred that is harmful to the pipeline’s ability to provide contracted levels of service.<sup>17</sup> Paiute clarifies that section 11.4(c)(3) is not intended to release it from providing reservation charge credits solely because it issued an OFO to protect system integrity.<sup>18</sup> Sierra suggests a shipper’s decision to ignore an OFO may not in and of itself, be a harmful act. Accordingly, Sierra argues that Paiute should penalize shippers that ignore OFOs only when their refusal to comply causes harm.

24. The Commission disagrees that a shipper’s violation of an OFO may be treated as not having threatened system operations. Under Paiute’s tariff, the pipeline only issues an OFO when conditions or events occur that might threaten the operational integrity of the pipeline. It follows then, that a shipper’s non-compliance with such an order, may further threaten the integrity of the pipeline. For that reason, the Commission has

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<sup>16</sup> *Id.* at 4.

<sup>17</sup> See *Tennessee Gas Pipeline Co.*, 83 FERC ¶ 61,063 (1988). See also *NorAm Gas Transmission Co.*, 79 FERC ¶ 61,126 (1997).

<sup>18</sup> Paiute Initial Comments at 7.

consistently approved substantial penalties for violations of pipeline OFO's. As the Commission explained in approving a pipeline proposal to increase penalties for failure to comply with an OFO:

The Commission's primary concern with respect to penalties which only apply to conduct that is harmful to the system is that the penalties be high enough to act as an effective deterrent to the harmful conduct. Since such conduct risks harm to other customers, as well as the pipeline, the Commission believes that significant penalties for such conduct are appropriate and consistent with Order No. 637.<sup>19</sup>

25. For similar reasons, we find that a tariff provision denying reservation charge credits to a shipper that violates an OFO is reasonable. Such a provision provides a further deterrent to conduct by a shipper which risks harm both the pipeline and to other shippers on the system. Accordingly, we find existing section 11.4(c)(3) is just and reasonable, and we will not modify it pursuant to NGA section 5.

#### **D. Reservation Charge Crediting and Conditions on Upstream Pipelines**

##### **1. Proposed Tariff Revisions**

26. Paiute proposes modifying section 11.4(e) of Rate Schedule FT-1 to provide that it is not required to issue reservation charge credits when its failure to schedule or deliver gas is due to operating conditions on upstream pipelines beyond its control.

##### **2. Comments and Reply Comments**

27. Sierra protests Paiute's revisions of section 11.4(e). Sierra asserts that under Paiute's tariff, *force majeure* events include the failure of upstream gas supply facilities to supply nominated quantities of gas. Consequently, Sierra reasons that operating conditions on upstream pipelines that cause Paiute's inability to delivery nominated quantities should constitute *force majeure* events for which partial reservation charge credits are available. Sierra requests that Paiute clarify section 11.4(e) to indicate it will not issue reservation charge credits when Paiute's failure to schedule or deliver gas was due to operating conditions on upstream pipelines not within the control of Paiute that prevent Paiute from receiving gas for transportation. Alternatively, Sierra proposes that Paiute add language clarifying that Paiute will not issue reservation charge credits when

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<sup>19</sup> *Columbia Gas Transmission Corp.*, 115 FERC ¶ 61,134, at P 12 (2006) (*Columbia Gas*).

its failure to schedule or deliver gas was solely due to operating conditions on upstream pipelines not within Paiute's control.

28. NNIGU also protests Paiute's proposed modifications to section 11.4(e). NNIGU states that the Commission has previously determined that when both a downstream and upstream pipeline incur damage that causes their systems to become inoperable and unable to schedule or deliver gas, the downstream pipeline should not be exempt from issuing reservation charge credits unless and until it is able and willing to renew service.<sup>20</sup> NNIGU further asserts that because of Paiute's total dependence on upstream pipelines to meet its shippers' demands, and Paiute's potential inoperability as a result of damage or malfunction to the point operator's facilities at the interconnect, Paiute should modify its tariff to reflect the Commission's stated policy. NNIGU and Sierra contend that Paiute's proposed modifications do not take into account situations in which both an upstream pipeline and Paiute are unable to schedule or deliver gas.

29. In its reply comments, Paiute states that the purpose of section 11.4(e) is to ensure that Paiute is not a guarantor of upstream pipelines. Paiute therefore asserts that when it fails to deliver gas supplies due to operating conditions on upstream pipelines beyond its control, the Commission should not require it to provide reservation charge credits to shippers. With respect to NNIGU's initial and reply comments, Paiute asserts it is unreasonable to expect section 11.4(e) to prescribe an outcome for every possible scenario. Furthermore, Paiute asserts its proposed tariff language in section 11.4(e) is reasonable, and that NNIGU has not shown section 11.4(e) to be either unjust or unreasonable.

### **3. Commission Determination**

30. The Commission finds Paiute's proposed section 11.4(e), providing that the pipeline is not required to issue reservation charge credits when its failure to schedule or deliver gas is due to operating conditions on upstream pipelines beyond its control should be clarified. If Paiute cannot schedule or provide service for a shipper on its system solely because the upstream pipeline is unable to deliver the gas to Paiute, it is reasonable for Paiute not to provide a reservation charge credit to the shipper. In that situation, Paiute was able to fulfill its obligation under its contract with the shipper to provide primary firm service to the shipper. Thus, the Commission has found it reasonable to limit the obligation to provide reservation charge credits to situations where *force*

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<sup>20</sup> NNIGU Comments at 9 (citing Southern Natural Gas Company, FERC Gas Tariff, Eighth Revised Volume No. 1, Rate Schedule-FT-1, section 3(a)(i)(B)).

*majeure* or non-*force majeure* events affecting the pipeline's own facilities render it unable to provide primary firm service to a shipper.<sup>21</sup>

31. However, a *force majeure* event could affect the facilities of both Paiute and its upstream pipelines simultaneously. In such a situation, where the event was not solely caused by the upstream pipeline, the general policy regarding partial *force majeure* credits should apply. *Force majeure* events are "events that are not only uncontrollable, but also unexpected."<sup>22</sup> When *force majeure* events prevent pipelines from providing service, the Commission requires those pipelines to provide partial reservation charge credits to shippers in order to share the risk of an event for which neither party is responsible.<sup>23</sup>

32. We agree with Sierra that section 11.4(e) could be interpreted to deny shippers partial reservation credits when *force majeure* events occur on more than one system that prevent the pipelines from providing service. The Commission directs Paiute to narrow the scope of section 11.4(e) of Rate Schedule FT-1 and ensure that it provides partial reservation charge credits to shippers when *force majeure* events occur that affect Paiute's facilities. Either of the clarifications to section 11.4(e) suggested by Sierra – (1) making clear Paiute is exempted from issuing reservation charge credits only when Paiute's failure to schedule or deliver gas was due *solely* to operating conditions on upstream pipelines; or (2) adding language clarifying that Paiute will not issue reservation charge credits when conditions on upstream pipelines prevent Paiute from receiving gas for transportation – would appear to satisfactorily prevent Paiute from being a guarantor of upstream pipelines while ensuring partial reservation charge credits in *force majeure* situations.

## **E. Reservation Charge Credits for Segmented Capacity**

### **1. Proposed Tariff Revisions**

33. Paiute proposes modifying sections 11.2 and 11.3 of Rate Schedule FT-1 to provide that it is not obligated to issue reservation charge credits when it fails to deliver nominated quantities to or from secondary points. Paiute states that this proposal is

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<sup>21</sup> See *Tennessee Gas Pipeline Co.*, 139 FERC ¶ 61,050 at PP 100-101 (2012).

<sup>22</sup> *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,088 (1996).

<sup>23</sup> See Opinion No. 406, 76 FERC at 61,088. See also *North Baja Pipeline, LLC v. FERC*, 483 F. 3d. 819 (D.C. Cir. 2007).

consistent with the Commission's holding in *Southern*<sup>24</sup> that reservation charge credits need only be provided for the pipeline's inability to provide primary firm service. Paiute also states that this modification means that no credits will be provided for segmented transactions using secondary points.

## **2. Comments and Reply Comments**

34. Sierra protests Paiute's proposed modifications to sections 11.2 and 11.3 of Rate Schedule FT-1, arguing that segmented shippers should be entitled to the same reservation charge credits as primary shippers on a pipeline. Sierra argues that although recent Commission orders indicate pipelines have no obligation to issue reservation charge credits to shippers using secondary points, these orders do not address segmented shippers.<sup>25</sup> Accordingly, Sierra argues that the availability of reservation charge credits to segmented shippers is an issue of first impression. While Sierra concedes that Paiute should not be compelled to increase its maximum obligation to provide reservation charge credits to shippers, Sierra asserts that the Commission should recognize that segmented shippers, like other shippers, should receive reservation charge credits when a pipeline is unable to deliver gas. Sierra offers language that it asserts strikes a reasonable balance between Paiute and segmented shippers.

35. In its initial and reply comments, Paiute asserts that segmentation should not increase the pipeline's maximum obligation to provide reservation charge credits, and references the Commission's decision in *Southern*. According to Paiute, in *Southern*, the Commission clearly established that reservation charge credits are reserved for primary, not secondary service.<sup>26</sup> Paiute argues the Commission's policy is unambiguous and that reservation charge credits apply only when a pipeline fails to provide service between primary points. Paiute asserts that service to segmented points is, by definition, service to secondary points. As such, Paiute maintains that the Commission's holding in *Southern* controls in this proceeding.

## **3. Commission Determination**

36. The Commission finds Paiute's proposed revisions to sections 11.2 and 11.3 limiting the reservation charge credits for segmented capacity are just and reasonable.

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<sup>24</sup> 137 FERC ¶ 61,050 at PP 11-16.

<sup>25</sup> See Sierra Initial Comments at 6 (citing *Southern*, 137 FERC ¶ 61,050 at P 15).

<sup>26</sup> Paiute Reply Comments at 11 (citing *Southern*, 137 FERC ¶ 61,050 at P 8).

Paiute appropriately observed that the Commission's holding in *Southern* is applicable and relevant in this proceeding. In *Southern*, the Commission held that "the reservation charge crediting policy requirement is directed to the pipeline's responsibility to meet its contractual obligation to the shipper, and the firm shipper is guaranteed a firm right to delivery *only* at its primary points."<sup>27</sup>

37. Under Paiute's tariff, shippers may segment firm transportation capacity into separate parts for their own use or for the purpose of releasing a portion of their capacity to another shipper. Paiute's tariff provides that such segmentation may occur on a primary firm basis or secondary firm basis. Sierra admits that the "very nature of segmented service means all segmented shippers use either a secondary receipt point or a secondary delivery point."<sup>28</sup> Hence, if segmentation occurs on a secondary firm basis, that transaction is not entitled to a reservation charge credit because a firm shipper is only guaranteed delivery to primary points.<sup>29</sup> The Commission concludes Paiute is not obligated to provide reservation charge credits when it fails to deliver scheduled quantities to Sierra's segmented secondary points.

## **F. Liability Disclaimer for Odorization Obligation**

### **1. Proposed Tariff Revisions**

38. Paiute proposes incorporating a liability disclaimer into section 3.2(d) of its GT&C. The proposed disclaimer requires shippers to indemnify Paiute against any claims related to Paiute's "passive or actively negligent failure" to odorize gas. Paiute argues this disclaimer is common in the industry, citing other pipelines' tariff language.

### **2. Comments and Reply Comments**

39. Sierra protests the addition of Paiute's proposed indemnification language in section 3.2(d) of its GT&C asserting the language is overbroad. Sierra argues the proposed language undermines Paiute's obligation to provide odorized gas consistent with section 3.2(d) of the GT&C and Title 49 of the Code of Federal Regulations. Sierra further asserts that the indemnification clause is not just and reasonable, and offers a revision to the proposed indemnification language, which it argues would make the

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<sup>27</sup> See *Southern*, 137 FERC ¶ 61,050 at P 8 (emphasis added).

<sup>28</sup> Sierra Initial Comments at 6.

<sup>29</sup> *Southern*, 137 FERC ¶ 61,050 at P 8.

language just and reasonable.<sup>30</sup> Sierra proposes that Paiute incorporate a not unduly discriminatory indemnification clause that allocates loss between Paiute and shippers according to the fault of each party, unless otherwise expressly agreed in writing between Paiute and a shipper.

40. Southwest also protests Paiute's proposed modifications to its tariff as overly broad. Southwest also challenges Paiute's citations to Kern River's, Northwest's, and El Paso's GT&C liability disclaimers and indemnification clauses because Paiute, unlike those pipelines, assumed an affirmative obligation to odorize gas.<sup>31</sup> Southwest also expresses support for Sierra's proposed modifications to Paiute's indemnification clause.

41. In its reply comments, Paiute defends its indemnification clause, asserting the proposed language is common in the industry. Further, Paiute explains that the intent of the provision is to shield itself from liability for claims made by a shipper's customers and other downstream receiving parties.

42. Sierra insists in its reply comments that Paiute's indemnification clause is "one-sided" and inconsistent with the pipeline's obligations. Like Southwest, Sierra distinguishes Paiute's indemnification clause from that of other pipelines and argues that Paiute's references to the Kern River, Northwest, Southern and El Paso tariffs are improper because Paiute, unlike those pipelines, has an established obligation to odorize gas.

### **3. Commission Determination**

43. The Commission finds the proposed odorization indemnity provisions unjust and unreasonable. When determining liability issues, the Commission adheres to two general principles: (1) there should be no liability without fault; and (2) neither a pipeline nor a shipper should be able to avoid all liability caused by its own gross negligence or intentional actions.<sup>32</sup> Paiute's proposed indemnification clause requires shippers to indemnify the pipeline against any claims related to the pipeline's passive or actively negligent failure to odorize its gas. As written, the proposed indemnification clause may shield Paiute from all liability, even liability resulting from its own gross negligence or

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<sup>30</sup> See Sierra Initial Comments at 8.

<sup>31</sup> See Southwest Reply Comments at 5.

<sup>32</sup> *White River Hub, LLC*, 129 FERC ¶ 61,035, at P 16 (2009); *Texas Gas Transmission, LLC*, 129 FERC ¶ 61,003, at P 9 (2009); *Arkla Energy Resources Co.*, 64 FERC ¶ 61,166, at 62,490 (1993).

willful misconduct. The Commission has prohibited pipelines from limiting their liability in a way that would immunize them from direct damages resulting from simple negligence.<sup>33</sup> Specifically, the Commission has explained that “a simple negligence standard gives service providers a powerful incentive to operate their systems in a reasonable and prudent manner.”<sup>34</sup> Moreover, the Commission has prohibited pipelines from limiting liability due to their “sole” negligence because such a limitation would rule out a situation where the pipeline and another party are both negligent.<sup>35</sup> Furthermore, the Commission has prohibited pipelines from insulating their exposure to indirect damages resulting from their gross negligence, bad faith or willful misconduct.<sup>36</sup>

44. Paiute’s claim that its proposed indemnification clause is similar to other clauses in the industry is misleading. These clauses are distinguishable from Paiute’s proposed language for several reasons. First, Kern River and Northwest’s indemnification clauses contain mutual, not unilateral, indemnity language.<sup>37</sup> Second, Southern’s indemnification clause disclaims the pipeline’s liability for damages and claims, but does not require shippers to indemnify Southern.<sup>38</sup> Third, El Paso’s tariff, though most similar to the language Paiute proposes, is narrower in application, and applies solely to liability loss claims or damages—not any demand, claim or cause of action.<sup>39</sup> In sum, we find Paiute’s indemnification clause overly broad, inconsistent with Commission policy, and unjust and unreasonable. Consequently, the Commission rejects revised section 3.2(d). Paiute should modify its indemnification clause in accordance with established Commission policies, as discussed above. Sierra’s indemnification language suggested in its comments would appear to be an acceptable alternative (*see* Sierra Comments at 8-9),

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<sup>33</sup> *See, e.g., Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 58 (2009).

<sup>34</sup> *Id.* (citing cases).

<sup>35</sup> *Id.* P 59.

<sup>36</sup> *MarkWest*, 125 FERC ¶ 61,165 at P 54.

<sup>37</sup> *See* Kern River Gas Transmission Company FERC Gas Tariff, Third Revised Volume No. 1. *See also* Northwest Pipeline GP FERC Gas Tariff, Fifth Revised Volume No. 1.

<sup>38</sup> *See* Southern Natural Gas Company, L.L.C. FERC Gas Tariff, Seventh Revised Volume No. 1.

<sup>39</sup> *See* El Paso Natural Gas Company FERC Gas Tariff, Second Revised Volume No. 1-A.

but some other formulation, so long as it is consistent with the Commission's policies on indemnification language, would also be acceptable.

## **G. Creditworthiness Language**

### **1. Proposed Tariff Revisions**

45. Paiute proposes modifying its creditworthiness provisions in section 7.4(a) of the GT&C of its tariff. Specifically, Paiute proposes alternate evaluation methodologies for assessing a shipper's financial ability to satisfy obligations under a service agreement, when that shipper does not meet traditional creditworthiness criteria. Paiute details acceptable alternate evaluation practices in sections 7.4(a)(3) and 7.4(a)(4). These alternate evaluation practices include examining Standard and Poor's (S&P) and Moody's Investor Service's (Moody) unsecured debt security ratings, reviewing a shipper's long-term and short-term debt profiles, determining whether the sum of twelve months of charges under a firm or interruptible service agreement is less than ten percent of a shipper's net worth, and examining shipper's credit ratings from multiple credit rating agencies.

### **2. Comments and Reply Comments**

46. In its initial comments, Sierra protested these modifications, arguing the proposal does not require Paiute to take into account the individual circumstances of different shippers, in accordance with the Commission's policy. Sierra asked Paiute to clarify section 7.4(b) to provide that it will assess a shipper's individual circumstances in the event that the shipper is unable to satisfy Paiute's creditworthiness standards. Paiute provided such clarification in its reply comments. Pursuant to that clarification, Sierra in its reply comments accepts, without protest, Paiute's revised creditworthiness policies.

### **3. Commission Determination**

47. The Commission requires pipelines to establish and use objective criteria for determining creditworthiness.<sup>40</sup> The Commission recognizes the difficulty in establishing a defined set of criteria for evaluating the circumstances facing each shipper, and therefore, the Commission requires pipelines to consider the individual circumstances and complexities of different relationships when determining a shipper's

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<sup>40</sup> *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats & Regs., Regulations Preambles 2001-2005 ¶ 31,191, at P 11 (2005) (Creditworthiness Policy Statement).

creditworthiness.<sup>41</sup> Here, Sierra initially asserted that Paiute's proposed modifications did not consider each individual shipper's circumstances. However, as proposed, the range of options in Paiute's new creditworthiness provisions do permit individualized assessment of a shipper's creditworthiness, and Paiute has clarified that is its intent. For instance, if a shipper cannot demonstrate that it meets the creditworthiness tests outlined in 7.4(a), then section 7.4(c)(5) permits the establishment of mutually agreeable credit arrangements with shippers on a not unduly discriminatory basis.<sup>42</sup> Paiute's creditworthiness provisions appear similar to provisions in other pipelines' tariffs. Moreover, whether in the tariff or not, the Commission previously held that where rating agency evaluations are absent, for example, the pipeline should evaluate shipper creditworthiness using other means for that shipper.<sup>43</sup> Accordingly, we find Paiute's proposal as clarified is consistent with the Commission's policy, and is just and reasonable. The Commission therefore accepts Paiute's proposed creditworthiness provisions as set forth in section 7.4(b) of the GT&C.

## **H. Hourly Limitations for FT-1 Form of Service Agreement**

### **1. Proposed Tariff Revisions**

48. Paiute proposes adding new hourly limitation language to its FT-1 Transportation Service Agreement. Specifically, Paiute proposes to add language allowing the pipeline to stipulate it is not obligated to transport quantities for re-delivery in excess of a certain amount. Paiute also proposes adding language providing that shippers are not entitled to receive quantities in excess of a pre-established daily amount.

### **2. Comments and Reply Comments**

49. In its initial comments, Sierra protests Paiute's inclusion of hourly limitations for the FT-1 Form of Service Agreement. Sierra argues that hourly limitations can become burdensome for local distribution companies and should not be adopted in the absence of an operational need. Sierra further asserts that Paiute has not articulated an operational need for these provisions, and should therefore clarify that it does not intend to automatically impose hourly limitations on Sierra service agreements now or in the future.

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<sup>41</sup> *Id.*

<sup>42</sup> *See* Paiute Reply Comments at 3.

<sup>43</sup> *See* Creditworthiness Policy Statement, FERC Stats & Regs., Regulations Preambles 2001-2005 ¶ 31,191 at P 11.

50. In Paiute's initial comments, the pipeline clarified that the hourly limitation language it proposes to add to the FT-1 Transportation Service agreement is "nothing more than a ministerial addition to the form of service agreement and not a new provision affecting its shippers' rights."<sup>44</sup> Paiute also clarified that it will establish hourly limitations only in situations in which such limitations are required to preserve the pipeline's operational integrity, as permitted by section 4.3(b) of the GT&C. In its reply comments, Sierra accepts Paiute's proposed revisions to section 4.3(b) of its GT&C, pursuant to the aforementioned clarification Paiute provided in its initial comments.

### **3. Commission Determination**

51. The Commission accepts Paiute's proposed hourly limitations option for the FT-1 Form of Service Agreement, with the understanding that the proposed changes do not otherwise affect shippers' rights on the pipeline, and will only need to be used where required to preserve the pipeline's operational integrity and is not an option that must be exercised for every FT-1 agreement.

#### **I. Interpretation of Section 5.3 Imbalance and Netting Provisions**

##### **1. Proposed Tariff Revisions**

52. Paiute proposes revising and deleting certain language in its existing tariff concerning the netting of imbalances, which was originally included at section 5.3(d) of the GT&C.

##### **2. Comments and Reply Comments**

53. In its initial comments, Sierra asserts that it accepts Paiute's revised language with the understanding that a receiving party will still be able to effectively net any imbalances across days, months, and contracts by virtue of Paiute's maintenance of a single, cumulative imbalance for each receiving party.

54. In Paiute's reply comments, the pipeline affirms that Sierra's interpretation of its imbalance policies are correct and that a receiving party's imbalances will be netted across days, months, rate schedules, and its service agreements within a single cumulative imbalance account as its overpulls and underpulls continuously accrue and offset one another.

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<sup>44</sup> Paiute Initial Comments at 21.

### **3. Commission Determination**

55. The Commission accepts Paiute's modifications to its imbalance and netting provisions with the understanding that a receiving party will still be able to effectively net any imbalances across days, months, and contracts by virtue of Paiute's maintenance of a single, cumulative imbalance for each receiving party.

## **J. ROFR and Evergreen Rights**

### **1. Proposed Tariff Revisions**

56. Paiute proposes modifying section 16.2 of its GT&C to provide that if either Paiute or a shipper elects termination under an evergreen provision, Paiute will not be obligated to continue a shipper's evergreen rights on a contract extended through the ROFR process. The changes in the new section 16.2 provision, which is titled "Right-of-First-Refusal," are extensive and voluminous, and are at *Pro Forma* Sheet Nos. 204 through 212. The essence of the revision, however, is to tie expansion project open-seasons into the ROFR process. Paiute proposes altering section 16.2(c) to provide that no less than 30 days after the issuance of the service continuation notice, a shipper must "elect to (1) discontinue service under the provisions of its Service Agreement in a manner that permits the use of the associated capacity for the expansion project once the existing Service Agreement terminates or expires pursuant to its terms, or (2) extend the full Daily Reserved Capacity of its Service Agreement by matching the applicable term and rate, up to the maximum historical rate that applies to the affected existing capacity holder."<sup>45</sup> Currently, shippers have at least twelve months prior to the expiration of a transportation service agreement (TSA) to provide notice of intent to exercise a ROFR, and the posting of capacity for bidding begins at least six months prior to the termination of the TSA. Under the new proposal, a shipper could be required to elect to participate in an expansion within 30 days after the issuance of the service continuation notice. Moreover, by bidding for the expansion capacity, the shipper's evergreen renewal option under an existing TSA would become subject to expiration.

### **2. Comments**

57. NNIGU protests Paiute's proposed modifications. NNIGU argues that the proposed changes would eliminate evergreen provisions from future service agreements resulting from a ROFR process. In practice, NNIGU argues, the modification would

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<sup>45</sup> Paiute Initial Comments at 18 (citing Pipeline Company *Pro Forma* FERC Gas Tariff, Fourth Revised Volume No. 1-A, Sheet No. 211, Section 16.2(c)).

enable Paiute to unilaterally terminate the evergreen rights of existing shippers and force those shippers into TSAs longer than one year, because no viable alternatives other than Paiute currently exist for the NNIGU shippers.

58. NNIGU explains that its members are captive long-term customers on Paiute's pipeline. NNIGU explains that its member companies in 1993 committed to initial primary service terms of ten years, with year-to-year evergreen provisions thereafter.<sup>46</sup> NNIGU argues that Paiute is attempting to terminate these evergreen rights through the deterioration of shippers' ROFR rights. NNIGU also argues that Paiute's proposed modifications contravene the terms of a five-year settlement, which should be modified exclusively through an NGA general section 4 filing, not by revising provisions of the tariff.<sup>47</sup> NNIGU asserts that Paiute's proposal to merge the ROFR and expansion bidding process improperly weakens affected NNIGU companies' evergreen rights as well as the ability to exercise their ROFRs, and should therefore be rejected.

59. NNIGU also contends that Paiute's proposed language in section 16.2(c) is unduly discriminatory because it adversely affects only shippers that have evergreen provisions in their service agreements.<sup>48</sup> NNIGU argues that Paiute's proposed language uses the open season for expansion capacity to further its persistent efforts to eliminate evergreen capacity by coupling the expansion bidding with the ROFR process. NNIGU points out that the Commission's current policy, as set forth in *Gas Transmission Northwest Corporation*,<sup>49</sup> and *Southern Natural Gas Company*,<sup>50</sup> requires pipelines to hold separate open seasons for expansion capacity and for ROFR capacity to ensure that existing shippers are not "required to subsidize expansion projects implemented during the term of their contracts."<sup>51</sup>

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<sup>46</sup> NNIGU Initial Comments at 5.

<sup>47</sup> *Id.* at 6 (citing *Paiute Pipeline Co.*, 129 FERC ¶ 63,014 (2009)).

<sup>48</sup> *Id.* at 7.

<sup>49</sup> 117 FERC ¶ 61,315 (2006) (*GTN*).

<sup>50</sup> 128 FERC ¶ 61,211 (2009) (*Southern Natural Gas*).

<sup>51</sup> See NNIGU Initial Comments at 7 (citing *GTN*, 117 FERC ¶ 61,315 at PP 54, 58 (quoting *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 90 FERC ¶ 61,109 (2000)).

60. NNIGU asks that the Commission reject Paiute's revisions to section 16.2(c). In sum, NNIGU argues that the proposed revisions force NNIGU's captive members to make an untenable choice: either enter into new long term contracts with Paiute, or risk termination of service. NNIGU requests at a minimum that the Commission require Paiute to modify the final paragraph of section 16.2(c) to reflect the pipeline's assurances, made in response to NNIGU's protests, that it will reinstate evergreen provisions when a proposed expansion project is cancelled. NNIGU also requests that Paiute clarify whether shippers who elect not to exercise a ROFR, but pursue alternatives like capacity release, interruptible transportation (IT), and physical relocation of a plant, are able to take back the previously relinquished capacity.

### **3. Reply Comments**

#### **a. Paiute**

61. In its reply comments, Paiute argues that it is not attempting to re-trade or re-negotiate its settlement with NNIGU and that it never guaranteed that all future agreements between NNIGU members and Paiute would contain an evergreen provision. Paiute also asserts that evergreen provisions are voluntary additions to service agreements that the pipeline should be able to modify.

62. Paiute argues that its modifications to section 16.2(c) are just and reasonable, and contends that 16.2(c) is similar in all material respects to a provision in Tuscarora Gas Company's tariff, which the Commission has approved. Paiute challenges NNIGU's characterization of section 16.2(c) as unduly discriminatory. Paiute asserts that this section is not limited to NNIGU members or shippers with evergreen rights. Instead, Paiute argues that the section is applicable to all customers whose capacity retention decision would affect the amount of construction for an expansion project. Paiute argues that such customers include entities with less than thirty-six months remaining under their service agreements and customers with evergreen rights.

63. Paiute states that the proposed modifications to section 16.2(c) are intended to rationalize capacity and to prevent future unsubscribed capacity. Paiute explains that capacity rationalization is particularly important on a small system like its own. Paiute states that in the event of unsubscribed capacity, captive shippers would be burdened with fixed costs related to that capacity. Paiute asserts that even its best efforts may be insufficient to rationalize capacity, because there is limited end use demand on its system. Accordingly, Paiute argues that capacity rationalization is equally as important a policy goal as ROFR rights and that both are designed to protect long-term captive customers.

64. Paiute argues that NNIGU has not appropriately established good cause for Paiute to retain its current ROFR procedures and timeline. Paiute argues that once it receives notice of intent to exercise a ROFR, it could immediately post that shipper's capacity.

Thus, Paiute explains that its old ROFR timeline did not require that the pipeline wait six months before expiration of a shipper's rights to post capacity. In any event, Paiute maintains that the differences between its traditional ROFR process and its proposed ROFR and expansion process are immaterial. Paiute points out that timelines for expansion projects are often difficult to meet. Paiute also states that if a pipeline must choose between a project timeline and capacity rationalization, it may need to sacrifice capacity rationalization. Paiute asserts that many, if not most, precedent agreements allow shippers to cancel their agreements if the pipeline does not meet an in-service date specified in them. Paiute argues that a pipeline's timing of an expansion project is rarely, an exercise of monopoly power, and to the extent that facts and circumstances indicate that a pipeline is exercising monopoly power, the Commission could act on a case-by-case basis.

65. Paiute also states that its proposal does not, as NNIGU describes, force NNIGU members to subsidize shippers seeking expansion capacity. Paiute argues that if a shipper receives a service continuation notice, it would have the right to continue service under its contract for the remainder of its term or the right to continue service under a new contract for a term determined in accordance with section 16.2(c). Paiute states that this approach does not result in the subsidization of expansion shippers, because those shippers would pay the same or a higher rate, as the rate paid by shippers subject to 16.2(c).

66. Paiute argues that NNIGU is incorrect in asserting that 16.2(c) is silent as to the concomitant reinstatement of affected TSAs in evergreen status. Paiute asserts that the only change it is making to affected service agreements is that it is extending contracts. Paiute maintains that section 16.2(c) is clear that contract extensions will be rescinded if the proposed expansion is cancelled. Thus, Paiute confirms that upon cancellation of the proposed expansion, the prior TSAs including any evergreen provisions will be reinstated. Finally, Paiute requests that the Commission reconsider the precedent in *GTN* and *Southern Natural Gas*, to the extent that those cases are applicable in this proceeding. Assuming the merging of ROFR and expansion bidding into one open season is contrary to existing case law, Paiute asks the Commission to reconsider those cases in light of the impact that the profusion of natural gas from shale sources has had on the natural gas pipeline grid.

**b. NNIGU**

67. In its reply comments, NNIGU emphatically re-asserts that Paiute's revisions to section 16.2 will ultimately diminish a shipper's evergreen rights. NNIGU insists that Paiute should honor captive shippers' existing evergreen rights, particularly when those rights have been previously bargained for and settled. NNIGU asserts that its existing evergreen provision is a value item that NNIGU agreed to as a basis of the bargain in the settlement with Paiute. Accordingly, NNIGU re-asserts that Paiute should address any

and all material changes to shippers' evergreen contract rights in its next NGA general section 4 rate filing, and not through selective tariff revisions.

68. NNIGU reiterates that Paiute's modifications in section 16.2(c) contravene the Commission's requirement that pipelines hold separate open seasons for expansion capacity and for ROFR capacity to ensure that existing shippers are not required to subsidize expansion projects implemented during their contracts. NNIGU explains that it has never suggested that Paiute was attempting to force its customers to cease taking service in 30 days. Rather, NNIGU argues that Paiute's proposed section 16.2(c) reduces to as little as thirty days, the amount of time that NNIGU affiliate companies have to make ROFR decisions. Thus the 30 day timeline is a possible, but not mandatory, scenario. NNIGU contends that it is unreasonable to guarantee shippers only thirty days to exercise a ROFR and to commit to match open season terms of up to fifteen years.

#### 4. Commission Determination

69. For the reasons discussed below, the Commission rejects Paiute's proposed revisions to section 16.2 of its tariff. Paiute proposes modifying section 16.2 to provide that when there is a fully subscribed expansion open season process and either Paiute or a shipper elects termination of an evergreen provision, Paiute shall not be obligated to continue a shipper's evergreen rights on a contract extended through the ROFR process. The Commission is persuaded by NNIGU's arguments that these tariff revisions may erode the rights of long-term captive shippers, and that tying the expansion open season process into the ROFR process is contrary to Commission policy.

70. In *GTN*, the Commission articulated that pipelines must hold separate open seasons for ROFR capacity and expansion capacity, to ensure that shippers are not required to subsidize expansion projects implemented during the term of their contracts.<sup>52</sup> In *GTN*, the pipeline revised its bidding policies and applicable bidding terms for ROFR capacity and expansion capacity. The Commission expressly held that pipelines may not impose conditions on shippers with ROFR rights that preclude those shippers from retaining their capacity rights.<sup>53</sup> The Commission recognizes that it is reasonable and necessary for a pipeline to be able to plan and rationalize its expansion projects, but the pipeline must do so while continuing to honor shippers' ROFR rights.<sup>54</sup>

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<sup>52</sup> *GTN*, 117 FERC ¶ 61,315 at P 54.

<sup>53</sup> *Id.* at P 18.

<sup>54</sup> *Id.* at P 55.

71. In *Southern Natural Gas*, the Commission re-articulated and clarified its holding in *GTN*, holding that once a shipper states that it wishes to exercise its ROFR and extend its contract, pipelines must hold an open season requesting bids from third parties for the existing shipper's expiring capacity, and the existing shipper may then match such third party bids for its capacity. The Commission also confirmed that it is unduly discriminatory to require shippers with ROFR rights, whose contracts expire during a period an expansion is being planned, to match rates or contract bids in an expansion open season.<sup>55</sup> The Commission recognized that it may be economically efficient for pipelines to require ROFR shippers with contracts expiring contemporaneous with an expansion to meet expansion project prices. However, the ROFR is a valuable right designed to protect captive long-term customers from the pipeline's exercise of monopoly power and the effectiveness and price of this right should not turn on the pipeline's timing of its expansion projects.<sup>56</sup> Where new sources of natural gas affect the value of existing assets and present new challenges and opportunities for both shippers and pipelines, such balanced policies as reflected in *GTN* and *Southern Natural Gas* should be maintained rather than jettisoned.

72. Paiute proposes modifying section 16.2(c) to give shippers with evergreen rights thirty days notice prior to the bidding process to exercise their ROFR and commit to match open season terms. Paiute's modification to 16.2 would effectively require shippers with a ROFR whose contracts expire during an expansion planning period, to match contract bids contrary to the Commission's policy. Furthermore, the revision to 16.2(c) requiring a shipper with evergreen rights to elect either to (1) discontinue service under the provisions of its Service Agreement in a manner that permits the use of the associated capacity for the expansion project once the existing Service Agreement terminates or expires pursuant to its terms, or (2) extend the full Daily Reserved Capacity of its Service Agreement by matching the applicable term and rate, up to the maximum historical rate that applies to the affected existing capacity holder, is also contrary to Commission policy. If a shipper chooses to discontinue service, the shipper's contract would effectively terminate under these provisions. If a shipper extends the full Daily Reserved Capacity of its Service Agreement by matching the applicable term and rate, up to the maximum historical rate that applies to the affected existing capacity holder, as the second aspect of Paiute's revisions require, then Paiute would have effectively rescinded the shipper's ROFR rights by requiring a shipper to match a bid offer in as little as thirty days although its service agreement provides that it has one year before the expiration of

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<sup>55</sup> *Southern Natural Gas*, 128 FERC ¶ 61,211 at P 88.

<sup>56</sup> *Id.* P 89.

the service agreement before deciding whether to give notice of intent to exercise its ROFR.

73. We therefore find revised section 16.2(c) as proposed by Paiute unjust and unreasonable and contrary to the Commission's policy as set forth in both *GTN* and *Southern Natural Gas*, and we decline to overturn the *GTN* and *Southern Natural Gas* precedents, as this policy fairly balances the rights and economic interests of a pipeline with the rights and economic interests of its shippers.

The Commission orders:

(A) The tariff revisions reflected in the *pro forma* tariff sheets, subject to the clarifications and modifications adopted and required in this order are accepted in lieu of the original filing in this docket.

(B) Within thirty (30) days of the date of this order, Paiute must file actual compliance tariff records, effective the date of this order, to implement the *pro forma* proposal as clarified and modified above.

(C) The tariff records originally filed on November 2, 2011, are rejected as moot.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.