141 FERC 61,101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gas Transmission Northwest LLC — Docket Nos. RP12-15-001, RP12-15-002, RP12-15-003

ORDER ON REHEARING AND COMPLIANCE

(Issued November 6, 2012)

1. On November 10, 2011, the Commission issued an order (1) addressing a Gas Transmission Northwest LLC (GTN) proposal allowing GTN to make pressure commitments to shippers on a non-discriminatory basis, and (2) directing GTN to revise its tariff to provide reservation charge credits consistent with Commission policy or show cause why it should not be required to do so.[1] On December 12, 2011, GTN filed a request for clarification, or in the alternative rehearing, as well as a compliance filing with respect to the first issue (Pressure Commitments Filing). While GTN did not seek rehearing on the second issue, it did make a compliance filing with respect to that issue as well (Reservation Charge Filing).

2. For the reasons discussed below, the Commission grants GTN's request for rehearing of the November 10 Order, rejects the tariff record contained in the Pressure Commitments Filing as moot, and requires a further compliance filing. The Commission also accepts the tariff records contained in the Reservation Charge Filing, subject to the conditions set forth in this order. Finally, the Commission finds that the definition of *force majeure* events in GTN's tariff is unjust and unreasonable, and therefore directs GTN to file revised tariff records or show cause why it not be required to do so. GTN must file revised tariff records within 30 days of the date this order issues, consistent with the discussion below.

[1] *Gas Transmission Northwest LLC*, 137 FERC ¶ 61,115 (2011) (November 10 Order).

I. Background

3. In its initial filing in this proceeding, GTN proposed tariff records outlining the procedure for entering into mutually agreed upon pressure commitments. GTN proposed to offer minimum or maximum receipt or delivery pressure commitments to firm shippers on a non-discriminatory basis. GTN also proposed language stating that GTN "will not be required to enter into pressure commitments that will alter its available capacity."[2] GTN argued that such changes would enable it to maximize the utilization of its system. Finally, GTN proposed giving shippers a reservation charge credit when the pipeline is unable to meet its pressure obligations due to non-*force majeure* events.

4. Indicated Shippers[3] objected to GTN's proposed tariff language for a number of reasons, among them that it would allow GTN to enter into agreements or commitments that would alter its available capacity. Indicated Shippers asserted that alterations in available capacity could very seriously impact shippers, and that a reservation charge credit would be inadequate compensation. Indicated Shippers also urged the Commission to require GTN to revise its reservation charge crediting provisions to comply with Commission policy. Specifically, Indicated Shippers objected to GTN's tariff provisions (1) allowing for reservation charge credits for non-*force majeure* events only when the pipeline fails to deliver 95 percent or more of the aggregate confirmed daily nominations, and (2) limiting the reservation charge credit to the lesser of the shipper's maximum contract quantity, the amount GTN can deliver on its own system, or the amount GTN is able to confirm with an interconnected downstream or upstream service provider.

II. Discussion

A. Pressure Commitments

1. November 10 Order

5. The Commission found that Indicated Shippers raised a reasonable concern about GTN's proposed pressure commitment provisions.[4] Accordingly, the Commission accepted GTN's pressure commitment provisions, subject to GTN clarifying those

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[2] Gas Transmission Northwest LLC, FERC NGA Gas Tariff, GTN Tariffs, 6.42 - GT&C, Pressure Commitments, 0.0.0.

[3] Indicated Shippers are Apache Corporation, Chevron U.S.A., Inc., ConocoPhillips Company, and Shell Energy North America (US), L.P.

[4] November 10 Order, 137 FERC ¶ 61,115 at P 7.

provisions to specify that it will not enter into pressure commitments that alter its available capacity. The Commission suggested that this could be achieved by deleting the phrase “be required to” from proposed language stating that GTN “will not be required to enter into pressure commitments that will alter its available capacity.”[5] With this revision, the section would state that GTN “will not enter into pressure commitments that will alter its available capacity.”

2. GTN’s Request for Clarification/Rehearing

6. In its request for clarification or rehearing, GTN requests that the Commission clarify that it did not intend to limit GTN’s ability to utilize posted available capacity to provide pressure commitments.[6] GTN acknowledges that its proposed language would allow it to enter into a service agreement that provides for a pressure commitment that would reduce the capacity available on its system by an amount greater than the contract quantity for the length of the service agreement that contains the pressure commitment. GTN asserts, however, that its proposed tariff language would not allow it to alter its *certificated* capacity, which would require Commission approval. Instead, GTN explains that it intends this language to only allow it to decrement posted *available* capacity, i.e., unsubscribed firm capacity available for contractual sale.

7. GTN also states that its language would prevent GTN from agreeing to a pressure commitment that would affect its existing firm service obligations. GTN argues that while the Commission has limited pressure commitments to the extent that they may adversely affect a pipeline’s existing firm shippers,[7] it has not limited pressure commitments such that they may not affect available capacity at all. GTN further contends that the Commission has acknowledged that pressure commitments may affect a pipeline’s posted available capacity by an amount greater than the contract quantity.[8]

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[5] *Id.* at n.4.

[6] GTN, Rehearing Request at 3.

[7] *Id.* 3-4 (citing *Colorado Interstate Gas Co.*, 99 FERC ¶ 61,035, at 61,132 (2002) (*CIG*) (“[B]ecause CIG’s revised tariff language commits it to deny minimum receipt or delivery pressures that will render it unable to meet its existing firm service obligations, the commitments reflected in CIG’s revised tariff language will ensure that the quality of service for CIG’s existing customers will not be adversely affected by the new agreements.”)).

[8] *Id.* at 4 (citing *Guardian Pipeline, L.L.C.*, 108 FERC ¶ 61,066, at PP 3, 9 (2004) (*Guardian*) (acknowledging that “capacity . . . may be created” following a shipper’s

(continued…)

8. Finally, GTN points out that it currently has a significant amount of unsubscribed capacity, approaching 1 Bcf per day. GTN argues that the Commission's policy is to encourage pipelines to utilize such unsubscribed capacity,[9] and that the tariff language at issue will help to accomplish that goal.

3. GTN's Pressure Commitments Filing

a. GTN's Filing

9. On December 12, 2011, GTN filed revisions to its pressure commitments provisions. Rather than adopting the language suggested by the Commission in the November 10 Order ("will not enter into pressure commitments that will alter its available capacity"), GTN's Pressure Commitments Filing proposed that GTN "will not be required to enter into pressure commitments that will require the dedication of posted, unsubscribed capacity in excess of contractual [Maximum Daily Quantity]."[10] In support of this language, GTN makes many of the same arguments that it raised in its rehearing request and that are summarized above.[11] In sum, GTN specifies that it will not enter into pressure commitments that impair its certificated capacity, but allows encroachment on available capacity that is not needed for its firm certificated obligations.

b. Public Notice, Intervention and Comments

10. Public notice of GTN's compliance filing was issued on December 14, 2011. Protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2012). Indicated Shippers filed a protest.

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waiver of its pressure commitment); *Transcontinental Gas Pipe Line Corp.*, 110 FERC ¶ 61,115, at P 17 (2005) (*Transco*) (stating that the pipeline did not have sufficient capacity to meet both pressure commitments and increased demand)).

[9] *Id.* at 4-5 (citing *Northern Natural Gas Co.*, 92 FERC ¶ 61,255, at 61,808 (2000); *Dominion Cove Point LNG, LP*, 117 FERC ¶ 61,289, at P 9 (2006) ("The Commission has encouraged pipelines to offer flexible, innovative services to maximize capacity utilization and throughput and give shippers the opportunity to select from a full array of services.")).

[10] Gas Transmission Northwest LLC, FERC NGA Gas Tariff, GTN Tariffs, 6.42 - GT&C, Pressure Commitments, 0.1.0.

[11] GTN, Pressure Commitments Filing at 2-4.

11. Indicated Shippers state that GTN's proposal fails to comply with the November 10 Order. First, Indicated Shippers object to GTN's argument that its proposal seeks to make use of its available capacity.[12] Indicated Shippers argue that this justification fails because GTN is not prevented from selling its capacity for a fee, only from pulling available capacity off of the market with no limit on its discretion to do so. Indicated Shippers characterize GTN's proposal as seeking the authority to unilaterally abandon available capacity on a temporary basis without Commission approval. Indicated Shippers also contend that GTN's proposal amounts to removing available capacity from the market in order to service a pressure commitment that exceeds a shipper's maximum daily quantity (MDQ), thereby giving away the use of available capacity for free and inhibiting the ability of other shippers to use and pay for that capacity.

12. Second, Indicated Shippers argue that existing customers may be adversely affected by GTN's proposal. Indicated Shippers contend that if GTN uses more compression to increase pressure to serve a specific contract without increasing its throughput, GTN's fuel rates would likely increase, thereby requiring existing shippers to subsidize GTN's unilateral decision to alter its available capacity due to a pressure commitment.[13]

13. Third, Indicated Shippers dispute GTN's contention that the Commission has effectively acknowledged that providing a pressure commitment to shippers may affect a pipeline's posted available capacity by an amount greater than the contract quantity. Indicated Shippers argue that the orders cited by GTN do not support its conclusion that GTN should be permitted to unilaterally alter its available capacity without prior Commission approval. Indicated Shippers emphasize that in none of these orders did the Commission grant a pipeline permission to alter its available capacity to serve a pressure commitment above a shipper's MDQ.[14]

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[12] Indicated Shippers Protest at 2.

[13] *Id.* at 3.

[14] *Id.* at 3-4.

4. **Commission Determination**

14. For the reasons discussed below, the Commission grants GTN's request for rehearing/clarification and accepts the tariff record contained in its Pressure Commitments Filing, to be effective November 11, 2011, subject to conditions.[15]

15. Upon further consideration, we find it reasonable for GTN to have the flexibility to enter into a service agreement with a pressure commitment that may reduce available unsubscribed capacity on a portion of its system by more than the contract demand of the service agreement, subject to the conditions discussed below.[16] GTN states that it currently has a significant amount of unsubscribed capacity on its system. Providing GTN the flexibility to negotiate pressure commitments on a non-discriminatory basis should enhance GTN's ability to market currently unsubscribed capacity to long-term firm shippers. If such a pressure commitment enables GTN to obtain a firm shipper it could not otherwise obtain, all of GTN's customers will be benefited because GTN will be able to spread its fixed costs over more units of service.

16. However, because such a pressure commitment will reduce the amount of unsubscribed capacity available for sale to other shippers by more than the contract demand of the new shipper's service agreement, the Commission finds that such pressure commitments should only be offered in situations where the capacity at issue is truly unsubscribed, i.e., there is currently no other shipper who would take the affected capacity without such a pressure commitment. Accordingly, the Commission directs GTN to revise its proposed tariff language to include a requirement that, before executing a service agreement with such a pressure commitment, GTN must give notice that it is considering selling the affected capacity with a pressure commitment that will reduce unsubscribed capacity by an amount in excess of the contract demand, thereby giving other shippers an opportunity to obtain the capacity without such a pressure commitment. By making this amount of capacity generally available to potentially interested shippers,

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[15] Gas Transmission Northwest LLC, FERC NGA Gas Tariff, GTN Tariffs, 6.42 - GT&C, Pressure Commitments, 0.1.0.

[16] The Commission has recognized that in certain instances, pressure commitments may affect the capacity available on a pipeline's system. For example, in *Guardian*, the Commission addressed a pipeline proposal that allowed firm shippers who agreed to accept deliveries at pressures lower than those specified in their service agreements to have the first right to subscribe to new capacity that may be created as a result of the waiver of that pressure commitment. *Guardian*, 108 FERC ¶ 61,066 at P 3.

GTN will ensure that this excess capacity "is not currently desired on a long-term basis other than in conjunction with [the pressure commitment]."[17]

17. Furthermore, as GTN explains in its request for rehearing, its proposal is consistent with other Commission requirements concerning negotiated pressure commitments. First, GTN confirms that it will not agree to any pressure commitments that will alter its certificated capacity, which it would not be permitted to do without first obtaining Commission approval. Accordingly, Indicated Shippers' contention that GTN's proposal amounts to a temporary abandonment of capacity is incorrect.

18. Second, GTN expressly states that it will not agree to a minimum or maximum receipt or delivery pressure that will render it unable to meet its existing firm obligations. This commitment is consistent with *CIG*, in which the Commission accepted a pressure commitment proposal that committed the pipeline to deny minimum receipt or delivery pressures that would render it unable to meet its existing firm service obligations, finding that such commitments would ensure that the quality of service for the pipeline's existing customers will not be adversely affected by the new agreements.[18] Finally, Indicated Shippers expressed a concern that even if a pressure commitment does not affect existing firm obligations, it could result in higher fuel rates. We find this concern speculative at this point. Indicated Shippers may raise this issue in subsequent fuel rate adjustment filings, in which GTN's actual fuel rates are at issue.

19. Accordingly, we grant GTN's request for rehearing of the November 10 Order, with the understandings and conditions discussed above. Because we grant GTN's request for rehearing on this point, we reject the tariff records contained in GTN's Pressure Commitments Filing as moot. GTN must file, within 30 days of the date this order issues, revised tariff records including provisions for posting and non-discriminatory availability as clarified here, to be effective November 11, 2011.

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[17] *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,136, *order on compliance and reh'g*, 101 FERC ¶ 61,380 (2002), *order on compliance*, 103 FERC ¶ 61,160, at P 12 (2003) (addressing a pipeline's proposal to reserve capacity that is available for firm service for future expansion projects).

[18] *CIG*, 99 FERC at 61,132.

B. Reservation Charge Credits

1. Background

20. Prior to this proceeding, GTN's tariff provided for reservation charge credits based on whether the delivery point was at Malin, Oregon; it did not, however, consider whether or not the reservation charge credits were caused by a *force majeure* event . Specifically, GTN's tariff provided that if GTN fails to deliver 95 percent or more of aggregate confirmed daily nominations to either (1) the Malin, Oregon delivery point, or (2) all delivery points other than Malin, Oregon, for more than 25 days in any given contract year, then for each day in excess of 25 days, the shipper, as its sole remedy, was entitled to a reservation charge credit.[19]

21. Indicated Shippers raised the following objections to these tariff provisions in response to GTN's initial filing in this proceeding:

> First, the Indicated Shippers assert that the "aggregate of all deliveries" standard GTN uses in its tariff contravenes the Commission policy of issuing reservation charge credits when a pipeline is unable to provide the service requested to an individual firm shipper, regardless of whether the pipeline provides service to other shippers. Second, the Indicated Shippers state that GTN's tariff violates Commission policy because it limits reservation charge credits to the amount GTN is able to confirm, rather than the amount nominated by the shipper. Third, GTN's 95 percent reservation charge credit threshold violates the Commission policy mandating reservation charge credits for 100 percent of the firm service a shipper nominates. Fourth, the Indicated Shippers state that GTN's current system of limiting the reservation charge

[19] Gas Transmission Northwest LLC, FERC NGA Gas Tariff, GTN Tariffs, 5.1.3.9- Rate Sched FTS-1, Reservation Charge Credit - Malin Primary Delivery Point, 3.0.0; 5.1.3.10-Rate Sched FTS-1, Reservation Chg. Credit-Other than Malin Primary Del. Point, 3.0.0 (defining "confirmed daily nominations as "the lesser of (1) Shipper's Maximum Daily Quantity or (2) the quantity of gas that the connecting downstream pipeline(s), local distribution company pipeline(s), or end-user(s) is/are capable of accepting for Shipper's account at Shipper's point(s) of primary delivery on GTN or (3) the quantity of gas that the connecting pipeline upstream of GTN is capable of delivering to GTN for Shipper's account to GTN at Shipper's primary point of receipt(s) on GTN less Shipper's requirement to provide compressor fuel and line losses").

> credit to the lesser of the shipper's maximum contract quantity, the amount GTN can deliver on its own system, or the amount GTN is able to confirm with an interconnected downstream or upstream service provider, further violates the Commission's policy of issuing reservation charge credits for 100 percent of the firm service a shipper nominates.[20]

2. November 10 Order

22. The Commission found that GTN's existing reservation charge credit provisions were not in compliance with Commission policy and therefore directed GTN to revise its tariff pursuant to section 5 of the Natural Gas Act (NGA).[21] Specifically, the Commission found that GTN's tariff fails to make the distinction between *force majeure* and non-*force majeure* events.[22] The Commission emphasized that its policy requires crediting when the pipeline fails to deliver the entire amount nominated by that shipper, not any lesser amount, and therefore objected to GTN's tariff provision allowing for reservation charge credits for non-*force majeure* events only when the pipeline fails to deliver 95 percent or more of the aggregate confirmed daily nominations.[23] The Commission found that this provision's reference to the amount other shippers receive has no application to the required credit to the curtailed shipper. Agreeing with Indicated Shippers' objections to the existing tariff language, the Commission required GTN to revise its reservation charge crediting provisions consistent with Commission policy or explain why it should not be required to do so.

3. GTN's Reservation Charge Filing

23. On January 4, 2012, GTN filed revisions to its reservation charge crediting provisions, seeking an effective date of January 12, 2012.[24] GTN proposes to implement

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[20] November 10 Order, 137 FERC ¶ 61,115 at P 6.

[21] *Id.* P 9.

[22] *Id.* P 11.

[23] *Id.*

[24] GTN initially made this compliance filing on December 12, 2011, in Docket No. RP12-235-000. GTN subsequently requested to withdraw that filing and resubmitted it on January 4, 2012, in Docket No. RP12-15-003 in order to maintain the continuity of issues in the root docket and to ensure that all issues resulting from the November 10 Order are resolved in this proceeding.

the Safe Harbor Method[25] for *force majeure* outages, providing full reservation charge credits after a safe harbor of ten days. GTN states that reservation credits would be limited to confirmable nominations for firm service within a shipper's maximum daily quantity.[26] GTN further proposes to retain language from the existing section stating that the reservation charge crediting provision will be a shipper's sole remedy for any failure to deliver gas.

24. With respect to non-*force majeure* events, GTN proposes to provide full reservation charge credits for any non-delivery of gas resulting from a non-*force majeure* outage starting on day one of the outage. GTN states that reservation credits would be limited to confirmable nominations for firm service within a shipper's maximum daily quantity. GTN further proposes to retain language from the existing section stating that the reservation charge crediting provision will be a shipper's sole remedy for any failure to deliver gas.

4. <u>Public Notice, Intervention and Comments</u>

25. Public notice of GTN's reservation charge filing was issued on January 6, 2012. Protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2012). Sierra Pacific Power Company (Sierra), Indicated Shippers, and IGI Resources, Inc. and BP Canada Energy Marketing Corp. (collectively, BP) filed protests.

26. Sierra argues that GTN's reservation charge crediting proposal is inconsistent with the November 10 Order and Commission policy. Sierra objects to GTN's use of "confirmable nominations" as the basis for calculating reservation charge credits in both *force majeure* and non-*force majeure* situations. Sierra contends that the *Tuscarora* case relied on by GTN no longer reflects Commission policy. Sierra claims that the starting point for determining whether GTN's Reservation Charge Filing is consistent with

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[25] The Commission allows two different methods for pipelines to provide reservation charge credits due to *force majeure* events—either full reservation credits after ten days (Safe Harbor Method) or partial crediting starting at day one of a *force majeure* event (No Profit Method). *Natural Gas Supply Assoc*., 135 FERC ¶ 61,055, at P 17, *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA*).

[26] GTN, Reservation Charge Filing at 3 (citing *Tuscarora Gas Transmission Co.*, 123 FERC ¶ 61,109 (2008) (*Tuscarora*)).

Commission policy should instead be the Commission's 2011 policy statement on reservation charge crediting[27] as well as subsequent orders implementing that policy.

27. Sierra argues that the Commission has addressed whether the amount of reservation charge credits must be based on scheduled volumes or nominations. In support of its position, Sierra cites the following language from *Southern*: "the amount of reservation charge credits a pipeline must give in the non-*force majeure* situation is measured by the amount of service which the shipper nominated to be scheduled by the pipeline but the pipeline was unable to schedule or deliver."[28] Sierra notes that the Commission has expressed the same principle in the November 10 Order and subsequent cases.[29] Indicated Shippers concur, arguing that Commission policy requires a pipeline to base reservation charge credits on the amount a shipper nominates, but that the pipeline is unable to deliver.[30]

28. Sierra distinguishes *WIC*,[31] a case relied on by GTN, by arguing that it is outdated given the Commission's subsequent policy statement and that it ignores that the Commission expressly addressed the gaming issue discussed in *WIC* in the policy statement and subsequent orders.[32] Sierra argues that while the Commission has authorized pipelines to calculate reservation charge credits based on historical average usage in non-*force majeure* situations where the pipeline provides advance notice of an outage, GTN's proposal to base credits on "confirmable nominations" would allow GTN to "game" its obligation to provide credits by simply refusing to confirm a shipper's full nomination. With respect to *force majeure* situations, Sierra contends that GTN's proposal to base credits on "confirmable nominations" is also inconsistent with

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[27] *NGSA*, 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051.

[28] GTN, Reservation Charge Filing at 3 (citing *Southern Natural Gas Co.*, 137 FERC ¶ 61,050, at P 19 (2011) (*Southern*)).

[29] *Id.* at 3-4 (citing *Dominion Cove Point LNG, LP*, 137 FERC ¶ 61,158, at P 41 (2011); *Northern Natural Gas Co.*, 137 FERC ¶ 61,202, at P 30 (2011); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257, at P 16 (2011) (*Midwestern*)).

[30] Indicated Shippers Protest at 2.

[31] *Wyoming Interstate Company, Ltd.*, 130 FERC ¶ 61,091, at P 4 (2010) (*WIC*).

[32] Sierra Protest at 4-5 (citing *NGSA*, 135 FERC ¶ 61,055 at P 25; *Southern*, 137 FERC ¶ 61,050 at P 17).

Commission policy, which requires credits to be "based upon the amount of service the shipper requested for that day which the pipeline failed to deliver."[33]

29. On January 17, 2012, BP filed a protest and requested to intervene in this proceeding. BP argues that GTN's proposed tariff change does not address the applicability of the curtailment credit to the daily nomination cycles and urges the Commission to require GTN to adopt tariff language that requires GTN to grant a reservation charge credit when the shipper responds to the curtailment by nominating the curtailed volume on a different pipeline in the Evening Cycle. Citing *WIC*, BP argues that such a requirement reflects the fact that a shipper cannot wait until the Evening Cycle to see if the curtailing pipeline has resolved the problem such that it can schedule the shipper's nomination.[34]

30. BP also objects to language in GTN's tariff that makes the curtailment credit the shipper's sole remedy for non-delivery of gas by GTN. BP asserts that this "sole remedy standard" is inconsistent with Commission policy that pipelines should be liable for their own negligence. BP argues that the sole remedy standard unduly limits the financial protection for a shipper when a curtailment is caused by GTN's negligence. BP further contends that by not being liable for negligence, GTN would have a reduced incentive to ensure that it can satisfy firm service commitments. BP therefore argues that the Commission should require GTN to eliminate the sole remedy standard.

31. On January 30, 2012, GTN filed an answer to the above-described protests. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, (18 C.F.R. § 385.213(a)(2) (2012)), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept GTN's answer because it has provided information that assisted us in our decision-making process.

32. GTN argues that its proposal to limit credits during outages to those based on confirmable nominations is appropriate and consistent with *Tuscarora*. GTN argues that *Tuscarora* was not superseded, at least with respect to this issue, by the Commission's policy statement in *NGSA*. GTN contends that while the Commission allowed pipelines to base credits on historical scheduled amounts to prevent gaming where the pipeline gives advanced notice of an outage, it did not conclude that this was the only appropriate mechanism to avoid shipper gaming of reservation charge credits. GTN emphasizes that the Commission did not disavow *Tuscarora* in the *NGSA* decisions. In contrast, GTN claims that the Commission affirmed *Tuscarora* in a recent *WIC* case, in which the

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[33] *Id.* at 5 (citing *Midwestern*, 137 FERC ¶ 61,257 at P 17).

[34] BP Protest at 3-4 (citing *WIC*, 130 FERC ¶ 61,091 at PP 16-17).

Commission accepted WIC's proposal to provide full reservation charge credits for primary firm quantities that were nominated and confirmed but unable to be scheduled by WIC during the regular nominations cycles.[35]

33. Moreover, GTN contends that basing credits on confirmed nominations is a more accurate basis for calculating credits because they measure, at the time of the outage, the shipper's intention and actual ability to take capacity absent the outage. GTN states that a nomination confirmed by both upstream and downstream operators reflects the capacity the shipper would have otherwise been able to schedule, based on what GTN would have been able to receive and deliver for the account of a shipper on a particular day. Accordingly, GTN contends that its proposal effectively prevents shipper gaming in a way that is consistent with Commission policy.

34. GTN next objects to BP's contention that GTN should revise its tariff to state that shippers need not re-nominate on GTN in the Evening Cycle and can instead qualify for a reservation charge credit if they nominate on another pipeline in the Evening Cycle. GTN argues that this request is unnecessary because GTN does not require shippers to re-nominate on another pipeline in order to qualify for the credit.

35. Finally, GTN contends that BP's protest and intervention are out-of-time and should be rejected. GTN contends that BP should have filed its protest by October 24, 2011, the comment date established after GTN's initial filing in this proceeding.

36. On February 14, 2012, Indicated Shippers filed an answer to GTN's answer. We are not persuaded to accept Indicated Shippers' answer and will, therefore, reject it.

5. <u>Commission Determination</u>

37. The Commission accepts the tariff records contained in GTN's Reservation Charge Filing, subject to GTN revising these tariff records in the manner discussed below.[36] These tariff records will have an effective date of January 12, 2012, as requested by GTN.

38. BP filed its motion to intervene and protest on January 17, 2012. BP states that because GTN's compliance filing responds to a directive by the Commission that GTN

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[35] *WIC*, 130 FERC ¶ 61,091 at P 4.

[36] Gas Transmission Northwest LLC, FERC NGA Gas Tariff, GTN Tariffs, 5.1.3.9- Rate Sched FTS-1, Reservation Charge Credit - Force Majeure Event, 5.0.0; 5.1.3.10-Rate Sched FTS-1, Reservation Chg. Credit - Non-Force Majeure Event, 5.0.0.

propose tariff language to comply with the Commission's policy on curtailment credits, this is BP's first opportunity to address the proposed tariff language. Accordingly, for good cause shown, we will grant late intervention to BP pursuant to Rule 214(d).[37] Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. However, pursuant to Rule 214(d), late interveners must accept the record as it was developed prior to the late intervention. Accordingly, BP's protest is accepted.

a. <u>Confirmable Nominations</u>

39. As a general matter, GTN's proposal to base reservation charge credits on "confirmable nominations" is consistent with Commission policy. Although GTN does not define the term "confirmable nominations" in its proposed tariff provisions, GTN's answer clarifies that its proposal relates to nominations confirmed by both upstream and downstream operators, arguing that the use of these "confirmable nominations" as the basis for calculating reservation charge credits reflects the capacity the shipper would have otherwise been able to schedule, based on what GTN would have been able to receive and deliver for the account of a shipper on a particular day.

40. This clarification is important. The Commission has explained that:

> Commission policy is to require the pipeline to grant credits for non-*force majeure* outages where the failure to deliver is due to events within the pipeline's control such as scheduled maintenance of its own facilities. It follows that if a pipeline cannot deliver the service because of non-*force majeure* events not within the pipeline's control, i.e., due to the conduct of the shipper or the operator of upstream or downstream facilities, the pipeline should not be required to grant credits. [38]

In light of this policy, the Commission found that it is reasonable for a pipeline to include an exemption from providing full reservation charge credits due to non-*force majeure* events, where its failure to provide service is due to the conduct of the upstream or

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[37] 18 C.F.R. § 214(d) (2012).

[38] *TransColorado Gas Transmission Co., LLC*, 139 FERC ¶ 61,229, at P 50 (2012) (*TransColorado*) (citing *Natural Gas Pipeline Co. of America*, 106 FERC ¶ 61,310, at P 15, n.10 (2004); *Tennessee Gas Pipeline, LLC*, 139 FERC ¶ 61,050, at PP 100-01 (2012)).

downstream operator of the facilities at the receipt or delivery point, if those operators are outside of the control of the pipeline.[39]

41. A slightly different issue is presented by *force majeure* events that could affect the facilities of GTN *and* upstream or downstream 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." 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.[40] Accordingly, when both the pipeline's facilities and the facilities of other pipelines are affected, then the traditional *force majeure* rule applies and the pipeline must give partial credits.[41]

42. In light of this policy, we find that it is acceptable for GTN to base reservation charge credits in both *force majeure* and non-*force majeure* situations on "confirmable nominations." However, consistent with the Commission policy articulated above,[42] GTN must narrow the scope of its proposed tariff language to specify that any exemption from crediting for nominated amounts not "confirmed" is limited to events not within a pipeline's control, *i.e.*, due to conduct of the shipper or by an upstream or downstream facilities operator. Such revisions will prevent GTN from being able to "game" situations in which it would be required to provide reservation charge credits in the manner suggested by Sierra.

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[39] *Id.*

[40] *Paiute Pipeline Co.*, 139 FERC ¶ 61,089, at P 31 (2012) (*Paiute*) (internal citations omitted).

[41] *TransColorado*, 139 FERC ¶ 61,229 at P 51 (citing *Paiute*, 139 FERC ¶ 61,089).

[42] While GTN argues that its proposal is supported by *Tuscarora*, the Commission has provided greater clarity on the extent to which a pipeline may base reservation charge credits on confirmable nominations, rather than scheduled quantities, in both the *Paiute* and *TransColorado* cases cited above. Because these cases together reflect Commission policy, one cannot look solely to *Tuscarora* to evaluate GTN's proposal, as GTN suggests. Instead the Commission evaluates GTN's proposal in light of current policy as it exists now, giving consideration to all of the relevant cases on this point.

b. <u>Obligation to re-nominate in the Evening Cycle</u>

43. We next address BP's contention that the Commission should require GTN to adopt tariff language that requires GTN to grant a reservation charge credit when the shipper responds to the curtailment by nominating the curtailed volume on a different pipeline in the Evening Cycle. We find BP's suggestion is unrelated to the instant proposal. As noted by GTN in its answer, the case cited by BP in support of its proposed revision is distinguishable from the instant proposal. In *WIC*, the Commission addressed a proposal in which a shipper was required to re-nominate curtailed volumes in order to qualify for a reservation charge credit.[43] The Commission held that the proposal in that case needed "to make clear that in the limited case where a shipper nominates on another pipeline after being curtailed by WIC, the shipper should receive reservation charge credits for the curtailed amount without having to re-submit a now unnecessary nomination to WIC in the Evening cycle."[44] Because GTN's proposal contains no analogous requirement to re-nominate in the Evening Cycle, we find no need to require GTN to make the revisions suggested by BP.

c. <u>Sole Remedy Provision</u>

44. We next address BP's objection to language in GTN's tariff that makes reservation charge credits the shipper's sole remedy for non-delivery of gas by GTN. The relevant tariff language currently exists in GTN's tariff, but prior to the changes proposed in the instant proceeding, it applied in a different context. As GTN explains in its transmittal letter, GTN's proposed reservation charge crediting provisions are being inserted into existing tariff sections that govern reservation charge credits at the Malin delivery point and at other non-Malin delivery points.[45] Although GTN seeks to apply the sole remedy provision in the context of this altogether new tariff section, it provides no support for doing so. Other than stating that it is retaining the sole remedy provision in its transmittal letter, GTN does not provide any just and reasonable basis for making reservation charge credits the sole remedy for the non-delivery of gas.

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[43] *WIC*, 130 FERC ¶ 61,091 at PP 4, 15.

[44] *Id.* P 17.

[45] GTN, Reservation Charge Filing at 3 (explaining that the Malin primary delivery point distinction is no longer relevant).

45. The Commission finds that such a sole remedy provision would not be just and reasonable. The Commission has prohibited pipelines from limiting their liability in a way that would immunize them from direct damages resulting from simple negligence.[46] By restricting shippers to reservation charge credits as a remedy for GTN failing to deliver gas, GTN's tariff is at odds with this policy. While the Commission might entertain such a restriction in the case of *force majeure* events—because by definition, such events took place despite the due diligence of the pipeline—such a restriction is inappropriate in the context of non-*force majeure* events, where pipeline negligence could be a cause of the outage. Because GTN provides none, we will accept GTN's reservation charge credits provisions subject to GTN's removing these "sole remedy" provisions.

C. ***Force Majeure* Definition**

46. In reviewing GTN's tariff provisions, the Commission has become aware that GTN includes in its definition of *force majeure*, among other things, "legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means."[47] We find this language over-inclusive with respect to events that can be legitimately described as *force majeure* events consistent with Commission policy. Accordingly, we find this language to be unjust and unreasonable and will require GTN to file revised tariff records consistent with Commission policy or show cause why it should not be required to do so.

47. In *Texas Eastern*, the Commission summarized its existing policy regarding the extent to which governmental actions can be classified as *force majeure* events.[48] The Commission explained that outages resulting from governmental actions "may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and are unexpected."[49] As an example of an uncontrolled and unexpected event that could reasonably be described

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[46] *See, e.g.*, *CenterPoint Energy Gas Transmission Company, LLC*, 139 FERC ¶ 61,064, at P 19 (2012) (citing *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 58 (2009)).

[47] GTN, FERC Gas Tariff, General Terms and Conditions § 6.10.

[48] *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at PP 82-88 (2012).

[49] *Id.* P 86.

as a *force majeure* event, the Commission cited a government order requiring a pipeline to be relocated for highway construction.[50]

48. In *Texas Eastern*, the Commission reviewed a tariff provision that included as a *force majeure* event "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means."[51] The Commission held "[t]o the extent that this provision is intended to treat all service interruptions for testing, repair and maintenance in compliance with government orders as *force majeure* events, this provision is contrary to Commission policy."[52] Specifically, the Commission held as follows:

> Accordingly, the Commission also requires Texas Eastern to modify section 17.1 of its GT&C to exclude outages resulting from regulatory requirements which are within the pipeline's control or expected. However, consistent with the discussion above, Texas Eastern may propose to include in the definition of *force majeure* outages to comply with government requirements which are both outside the pipeline's control and unexpected.[53]

49. Consistent with our determination in *Texas Eastern*, we find that the portion of GTN's tariff defining *force majeure* events to include, among other things, "legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means" is unjust and unreasonable. Therefore, pursuant to section 5 of the NGA, we direct GTN, within 30 days of the date this order issues, to revise section 6.10 of its GT&C to exclude outages that are within the pipeline's control or expected to result from regulatory requirements, or show cause why it should not be required to make this change.

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[50] *Id.* (citing *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at P 32 (2004)).

[51] *Id.* P 88 (quoting Texas Eastern, FERC Gas Tariff, General Terms and Conditions § 17.1).

[52] *Id.*

[53] *Id.*

<u>The Commission orders</u>:

(A) GTN's request for rehearing of the November 10 Order is granted, consistent with the discussion in the body of this order.

(B) The tariff records contained in the Pressure Commitments Filing are rejected as moot; GTN must file revised Pressure Commitments tariff records, to be effective November 11, 2011, as discussed in the body of this order, within 30 days of the date this order issues.

(C) The tariff records contained in the Reservation Charge Filing are accepted, to be effective January 12, 2012, subject to conditions, as discussed above; GTN must file revised tariff records related to the Reservation Charge Filing, also to be effective January 12, 2012, as discussed in the body of this order, within 30 days of the date this order issues.

(D) GTN must file revised tariff records related to its definition of *force majeure* events, or show cause why it not be required to do so, within 30 days of the date this order issues.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.