

143 FERC ¶ 61,103
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

National Fuel Gas Supply Corporation

Docket No. RP13-189-000

ORDER APPROVING TARIFF RECORDS SUBJECT TO CONDITIONS

(Issued May 6, 2013)

1. On October 30, 2012, National Fuel Gas Supply Corporation (National Fuel) filed tariff records¹ to become effective November 28, 2012, to revise provisions pertaining to reservation charge credits to be consistent with Commission policy. A number of parties protested the filing and National Fuel filed an answer (November Answer). On November 28, 2012, the Commission issued an order,² which set forth the issues raised by protesters and National Fuel's response to these issues. The November 2012 Order accepted and suspended the tariff records, subject to refund and further Commission action, to become effective April 28, 2013, or an earlier date established by subsequent Commission order. The order further provided that parties could file responses to National Fuel's November Answer. A number of parties filed responses, and on December 28, 2012, National Fuel filed a motion to answer and answer to the responses. For the reasons discussed below, the Commission approves the revised tariff records effective April 28, 2013, subject to conditions.

¹ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [6.010: FT Rate Schedule, § 3 – Rates, 4.0.0](#); [6.020: FT-S Rate Schedule, § 3 – Rates, 4.0.0](#); [6.030: EFT Rate Schedule, § 3 – Rates, 5.0.0](#); [6.030: EFT Rate Schedule, § 6 – Reserved for Future Use, 1.0.0](#); [6.040: FST Rate Schedule, § 3 – Rates, 4.0.0](#); [39 – Discounted Agmts, 39 – Discounted Agreements, 1.0.0](#).

² *National Fuel Gas Supply Corp.*, 141 FERC ¶ 61,158 (2012) (November 2012 Order).

I. Background

2. On October 31, 2011, in Docket No. RP12-88-000 National Fuel filed a general base rate increase under NGA section 4 with a proposed effective date of December 1, 2011. Several parties protested the filing. In its protest, ExxonMobil requested the Commission establish a hearing, pursuant to section 5 of the NGA, to examine National Fuel's tariff provisions regarding reservation charge crediting for both *force majeure* and non-*force majeure* service interruptions. On November 30, 2011, the Commission issued an order³ directing National Fuel to file revised tariff records providing for reservation charge crediting provisions during *force majeure* and non-*force majeure* events consistent with its policy as detailed in *Natural Gas Supply Association, et al.*,⁴ or otherwise explain why it should not be required to do so.⁵

3. On May 22, 2012, National Fuel filed a Settlement resolving certain issues and establishing procedures for resolving the remaining issues including the tariff provisions concerning reservation charge crediting. The Commission approved the Settlement on August 6, 2012.⁶ With respect to the issue of reservation charge credits, Article VIII of the Settlement explains that National Fuel and the participants agreed to meet within 45 days following the Commission's order approving the Partial Settlement to attempt to resolve all remaining issues concerning these tariff provisions. Within 45 days of that meeting and regardless of whether all issues associated with reservation charge credits had been resolved, National Fuel agreed to file revised tariff records to amend the reservation charge crediting provisions of its tariff to become effective 30 days following such filing. This filing would reflect National Fuel's position and incorporate any agreements reached with the participants in those discussions. National Fuel and participants reserved their right to take any position with respect to all unresolved issues.

4. Consistent with Article VIII of the Settlement, National Fuel filed revised tariff records on October 30, 2012, it modified its firm transportation rate schedules to provide partial reservation charge credits to customers during instances of *force majeure*, and full credits during scheduled maintenance activities and other non-*force majeure* events.

³ *National Fuel Gas Supply Corp.*, 137 FERC ¶ 61,171 (2011) (November 30 Order).

⁴ 135 FERC ¶ 61,055, at P 2 (2011) (NGSA).

⁵ November 30 Order, 137 FERC ¶ 61,171 at P 12.

⁶ *National Fuel Gas Supply Corp.*, 140 FERC ¶ 61,114 (2012).

National Fuel also included various clarifications, limitations and exceptions on the applicability of its reservation charge crediting proposal.

5. In *NGSA*,⁷ the Commission encouraged interstate pipelines to review their tariffs to determine whether their individual tariff complies with the Commission's policy concerning reservation charge credits, and, if not, make an appropriate filing to comply. In general, the Commission requires all interstate pipelines to provide reservation charge credits to their firm shippers during both *force majeure* and non-*force majeure* outages. The Commission defined *force majeure* outages as events that are both unexpected and uncontrollable. The Commission previously held that routine, scheduled maintenance is not a *force majeure* event, even on "pipelines with little excess capacity"⁸ where such maintenance may require interruptions of primary firm service. That is because, even if one considers such outages as uncontrollable, they are expected. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed this policy in *North Baja Pipeline, LLC v. FERC*,⁹ stating:

Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipelines rates should incorporate the costs associated with a pipeline operating its system so that it can meet its contractual obligations.

6. As an exception to the Commission's *NGSA* policy, National Fuel would only provide for partial credits when it must interrupt service to perform work under its integrity management program or other action required to address specific safety requirements. For example, this would include new safety-related legislation and initiatives originating from the U.S. Department of Transportation Pipeline Hazardous Materials and Safety Administration (PHMSA). According to National Fuel, this language clarifies that interruption of firm service to perform safety-related work does not constitute a breach of firm service obligations and as a result, full credits would be inappropriate in these circumstances.

⁷ 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051 (2011).

⁸ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at 61,350 (2003).

⁹ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *affg.*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

7. The proposal also provides for several exceptions and clarifications limiting the pipeline's obligation to provide reservation charge credits. These include instances when: (1) a *force majeure* event affects both National Fuel and an upstream or downstream pipeline; (2) National Fuel and a Shipper have mutually scheduled maintenance-related service interruptions; and (3) a Shipper voluntarily elects not to receive quantities at its primary point.

8. Finally, National Fuel stated it will implement the new reservation charge crediting provisions as soon as it implements necessary programming changes to its billing and reporting systems. According to National Fuel, it will complete the modifications approximately three months after Commission approval of its proposal.

9. A number of parties submitted protests to the October 30 filing.¹⁰ The protests generally argued that National Fuel's proposal conflicted with the Commission's policy and precedent regarding reservation charge crediting. On November 19, 2012, National Fuel filed its November Answer.

10. The November 2012 Order stated that, because the protestors raised a number of issues that warranted further consideration, and National Fuel had filed a detailed answer and also proposed various modifications to its original proposal, the protestors would be afforded an opportunity to respond. Statoil, ConEd, and Indicated Shippers filed responses to National Fuel's November Answer. National Fuel filed an answer (December Answer) to the responses on December 28, 2012.¹¹

II Discussion

11. The Commission approves the revised tariff records listed in footnote 1 to become effective April 28, 2013, subject to conditions. As discussed below, the Commission requires National Fuel, pursuant to NGA section 5, to file revised tariff records

¹⁰ These parties were Statoil Natural Gas LLC (Statoil), Consolidated Edison Company of New York (ConEd), and Indicated Shippers. For the purposes of this proceeding, the Indicated Shippers are: BP Energy Company; Chevron U.S.A. Inc.; ConocoPhillips Company; Cross Timbers Energy Services, Inc.; Hess Corporation; Shell Energy North America (US), L.P.; SWEPI LP; and WPX Energy Marketing, LLC.

¹¹ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)(2) (2012)) prohibits answers unless ordered by the decisional authority. In this case, the Commission will accept National Fuel's December answer because it may assist the Commission in its decision-making process.

modifying its proposed reservation charge crediting provisions, as further discussed below.

A. Force Majeure and Safety-Related Service Interruptions

1. National Fuel's Proposal

12. National Fuel proposes to provide partial reservation charge credits for firm service interruptions caused by instances of *force majeure* or for safety-related work.¹² The credit would equal 28 percent of the reservation charge, which represents the percentage of the reservation charge derived from the return on equity and related income taxes associated with its recent base rate case settlement in Docket No. RP12-88-000 multiplied by the quantity of gas to which the credit applies.

2. Positions of the Parties

13. In its transmittal letter and its November Answer, National Fuel argues its proposal to provide only partial reservation charge credits in instances of service interruptions associated with its Integrity Management Program or other safety-related work is just and reasonable. National Fuel asserts its proposal reasonably balances the interests of impacted shippers and National Fuel's obligations to maintain its system in compliance with applicable safety regulations.

14. National Fuel states that, due to the recent introduction of new safety-related legislation and initiatives originating from, for example PHMSA, the scope of integrity management assessments and testing will only increase in the future.¹³ As a result, the

¹² In instances of *force majeure* firm service interruptions, the Commission permits pipelines to credit under two methods, the Safe Harbor method, and the No-Profit method. Under the Safe Harbor method reservation charges must be credited in full to the shippers after a short grace period, 10 days or less, when no credit is due the shipper. Under the No-Profit method the pipeline provides for partial refunds starting on the first day of the interruption in service, covering the portion of the pipeline's reservation charge that represents the pipeline's return on equity and associated income taxes. *See, e.g., Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006).

¹³ National Fuel cites the Advanced Notice of Rulemaking (ANOPR) issued by PHMSA in *Pipeline Safety: Safety of Gas Transmission Pipelines*, 76 Fed. Reg. 53,086 (Aug. 25, 2011). In addition, on January 3, 2012, the President signed into law the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act), requiring

(continued...)

interruption of service to firm shippers may be unavoidable absent the construction of new and otherwise unnecessary facilities. National Fuel states its proposal provides adequate financial incentive for it to minimize interruptions to firm service and schedule work on its system in a diligent manner. Furthermore, if National Fuel fails to exercise due diligence in its scheduling of safety related work to minimize service interruptions to its shippers, shippers would be entitled to full reservation charge credits.

15. In addition, National Fuel contends its tariff currently provides that its firm contractual obligation to schedule receipts and deliveries is limited in defined circumstances: for example, when it must conduct maintenance, repair or replacement activities or PHMSA compliance activities.¹⁴ According to National Fuel, this language clarifies that interruption of firm service to perform safety-related work does not constitute a breach of its firm service obligations and therefore, full credits would be inappropriate in these circumstances.

16. In their responses, Statoil and Indicated Shippers generally argue that National Fuel failed to provide adequate justification supporting its contention that the work performed pursuant to its Integrity Management Program or other safety-related work will result in “unavoidable” firm service interruptions. Further, the parties contend that National Fuel’s attempt to distinguish potential safety-related work from other scheduled maintenance and its reliance on its General Terms and Conditions (GT&C) section 13.2 to properly address the Commission’s prior holding in *Texas Eastern*,¹⁵ wherein, the Commission rejected a similar attempt to treat firm service interruptions resulting from maintenance activities in compliance with government orders as *force majeure* events.

3. Commission Determination

17. The Commission finds that National Fuel has not shown that its proposal to provide only partial reservation charge credits in all instances of firm service interruptions “caused by work performed . . . pursuant to Transporter’s Integrity Management Program or other safety-related work” is just and reasonable. The Commission will permit National Fuel to include in its tariff a more limited provision allowing partial reservation charge crediting for certain outages related to Maximum

the Department of Transportation to conduct studies and consider rulemakings on various matters concerning pipeline safety.

¹⁴ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; 13 – Noms & Scheduling, 13.2 – Scheduling, 0.0.0.

¹⁵ *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216 (2012) (*Texas Eastern II*).

Allowable Operating Pressure (MAOP) for a transitional two-year period as described below.

18. The Commission has held that outages due to scheduled or routine maintenance necessary to comply with regulatory requirements are not *force majeure* events, and thus the pipeline must provide full reservation charge credits for any such outages.¹⁶ The Commission explained that government required “testing and maintenance are a part of the service provider’s duties under a certificate of public convenience and necessity that are not appropriately considered a *force majeure* event.”¹⁷ The Commission recognizes that compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform to ensure the safe operation of its system may require interruptions of service. However, as the Commission held in *North Baja*,¹⁸ the pipeline has some degree of control over when it conducts these activities on particular facilities, and in any event the need to conduct such regular, periodic activities cannot be considered “unexpected.”

19. PHMSA adopted its first integrity management regulations pursuant to the Pipeline Safety Improvement Act of 2002 (2002 Act), which provided for PHMSA to issue regulations requiring pipelines to implement integrity management programs for

¹⁶ *Natural Gas Pipeline Co. of America*, 106 FERC ¶ 61,310, at P 15, *order on reh’g*, 108 FERC ¶ 61,170 (2004) (*Natural*); *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at PP 28-29 (2004) (*Florida Gas*); *Tennessee Gas Pipeline Co.*, 139 FERC ¶ 61,050 at P 81. *See also El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at PP 6 and 11 (2003) (holding that scheduled maintenance is within the control of the pipeline despite El Paso Natural Gas Company’s contention that such maintenance may be required by government agencies).

¹⁷ *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009) (*Orbit*); *see also Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*).

¹⁸ 111 FERC ¶ 61,101 at P 18.

pipeline segments in HCAs.¹⁹ Those regulations took effect on January 14, 2004,²⁰ and specify how pipeline operators must identify, prioritize, assess, evaluate, repair, and validate the integrity of gas transmission pipelines in HCAs as part of their routine, periodic maintenance activities. Shortly after those regulations took effect, the Commission rejected a pipeline's proposal to treat outages resulting from PHMSA's integrity management regulations as *force majeure* events.²¹ The Commission held that an outage due to periodic maintenance required by government regulations for the safe operation of the pipeline "is a necessary non-*force majeure* event within the control of the pipeline."²² In subsequent orders, the Commission has explained that testing and maintenance required by government regulation are a part of the service provider's duties under a certificate of public convenience and necessity and thus are not appropriately considered a *force majeure* event or otherwise exempted from the requirement for full reservation charge crediting.²³ Accordingly, National Fuel's proposal to treat all outages resulting from its Integrity Management Program as *force majeure* events is inconsistent with Commission precedent.

20. As National Fuel points out, PHMSA is currently considering whether its integrity management regulations should be strengthened, both pursuant to its ANOPR and the

¹⁹ HCAs are defined as "High Consequence Areas" for natural gas transmission pipelines that focus solely on populated areas. (Environmental and ecological consequences are usually minimal for releases involving natural gas.) Identification of HCAs for hazardous liquid pipelines focus on populated areas, drinking water sources, and unusually sensitive ecological resources.

²⁰ See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 FR 69778 (December 15, 2003).

²¹ See *Florida Gas*, 107 FERC ¶ 61,074 at PP 19 and 28-29.

²² *Id.* P 29.

²³ *Orbit*, 126 FERC ¶ 61,095 at P 68; see also *Natural*, 106 FERC ¶ 61,310 at P 15; *Tarpon Whitetail*, 125 FERC ¶ 61,050, at P 5; *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011), *order on reh'g*, 139 FERC ¶ 61,050, at PP 80-82 (2012) (*Tennessee*); *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126, at P 82 (*Texas Eastern I*), *order on reh'g*, 140 FERC ¶ 61,216 at P 88 (identified in n.15 above as *Texas Eastern II*); and *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275, at P 19 (2012) (*Rockies Express*).

2011 Act. However, in the recent decisions in *Gulf South, et al.*,²⁴ with one exception, the Commission stated that the nature and timing of any new safety requirements PHMSA may adopt is too speculative at this time to justify modifying Commission policy to treat any outages resulting from such new requirements as *force majeure* events. For example, in the ANOPR cited by National Fuel, PHMSA requested comment on whether the definition of a HCA should be modified to include more miles of pipeline; whether some integrity management requirements should be imposed on pipelines outside of HCAs; whether repair criteria for both HCA and non-HCA areas should be strengthened; whether in-line inspection methods, including pigging, should be required whenever possible; revising the requirements for collecting, validating, and integrating pipeline data; requiring the use of automatic and remote controlled shut off valves; and valve spacing. However, as the Commission explained in *Gulf South, et al.*, PHMSA did not propose any specific changes in its integrity management regulations in the ANOPR. Before making any changes to its integrity management regulations in response to the comments received in response to the ANOPR, PHMSA must issue a notice of proposed regulations (NOPR), proposing specific changes to those regulations and requesting comment. PHMSA must then analyze those comments and issue a final rule adopting revised regulations. Thus, at the present time, there is no certainty as to whether and how PHMSA may modify its integrity management regulations in the rulemaking proceeding initiated by the ANOPR.

21. In addition to the integrity management issues raised by the ANOPR, sections 5(a) and (b) of the 2011 Act require PHMSA to evaluate, by July 3, 2013, whether some or all of its integrity management requirements should be expanded beyond HCAs, taking into account various factors including “the need to perform integrity management assessments and repairs in a manner that is achievable and sustainable, and that does not disrupt pipeline service,” and “the options for phasing in the extension of integrity management requirements beyond [HCAs], including the most effective and efficient options for decreasing risks to an increasing number of people living or working in proximity to pipeline facilities.” Section 5(c) of the Act requires PHMSA to submit a report to Congress by January 3, 2014 on the results of its evaluation of expanding integrity management requirements. In order to give Congress time to review the report, section 5(f) of the Act prohibits PHMSA from issuing any final rule expanding integrity management requirements beyond HCAs until the earlier of one year after completion of

²⁴ *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at P 40 (2012) (*Gulf South*); *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222, at P 40 (2012) (*Gulf Crossing*); *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at P 39 (2012) (*Texas Gas*) (collectively referred to as *Gulf South, et al.*). See also *Dominion Transmission, Inc.*, 142 FERC ¶ 61,154 (2013).

the report to Congress or January 3, 2015, unless PHMSA determines such a regulation is necessary to address a risk to public safety, property, or the environment or an imminent hazard exists.

22. Thus, as the Commission discussed in *Gulf South, et al.*, the 2011 Act does not require PHMSA to take any specific actions with respect to its integrity management regulations, apart from evaluating the need for expanding the existing requirements in its regulations and submitting a report to Congress by January 3, 2014. Moreover, the 2011 Act requires PHMSA to wait until the earlier of one year after submitting the report or January 3, 2015, to issue any final rule expanding integrity management requirements beyond HCAs, unless such a regulation is necessary to address a risk to public safety, property, or the environment. It thus appears unlikely that any such final rule could take effect before 2015.

23. Accordingly, in *Gulf South, et al.*, the Commission concluded that, until there is some certainty as to what new integrity management requirements PHMSA may adopt for pipelines and when they will take effect, it is premature for the Commission to consider modifying its well established current policy that pipelines must provide full reservation charge credits for outages of primary firm service due to scheduled maintenance and repairs performed as part of an integrity management program.

24. However, in *Gulf South, et al.*, the Commission stated that it would allow partial reservation charge crediting for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) of Chapter 601 of Title 49, as added by section 23 of the 2011 Act, for a transitional two-year period. Section 60139(a) required each owner and operator of a pipeline to conduct a verification of its records relating to pipeline segments in Class 1 and Class 2 HCAs and Class 3 and Class 4 locations²⁵ by July 3, 2012. The purpose of this verification is to ensure the records accurately reflect the physical and operational characteristics of the subject pipelines and to confirm their established MAOP. Section 60139(b) requires each owner or operator of a pipeline facility to identify and submit to PHMSA documentation relating to each pipeline segment for which its records are insufficient to confirm the established MAOP of the segment by July 3, 2013. Section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline owner or operator of a pipeline facility identified pursuant to section 60139(b) to reconfirm a MAOP “as expeditiously as economically feasible,” and PHMSA must determine what interim actions “are appropriate for the pipeline owner or operator to take to maintain safety until a [MAOP] is confirmed.” Section 60139(c)(2) requires that, in determining the interim actions for

²⁵ Basically, these are densely populated areas.

each pipeline owner or operator to take, PHMSA must take into account “potential consequences to the public safety and the environment, potential impacts on pipeline system reliability and deliverability, and other factors, as appropriate.”

25. In recent decisions, the Commission has ruled such outages under section 60139(c) are comparable to those for which it allows partial crediting as *force majeure* events.²⁶ As the Commission explained in *Gulf South, et al.*, section 60139(c)(1) provides that, after receiving information identifying segments with insufficient records to confirm their MAOP, PHMSA must require the pipeline owner or operator identified pursuant to section 60139(b) to reconfirm a MAOP “as expeditiously as economically feasible.” PHMSA must determine what interim actions “are appropriate for the pipeline owner or operator to take to maintain safety until a [MAOP] is confirmed” taking into account “potential consequences to the public safety and the environment, potential impacts on pipeline system reliability and deliverability, and other factors, as appropriate.” Therefore, the Commission stated that it would allow partial reservation charge crediting for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) for a transitional two-year period commencing January 1, 2013.

26. The Commission noted that several factors distinguish outages resulting from orders issued by PHMSA pursuant to section 60139(c) from the routine, periodic maintenance which the Commission previously held are within the control of the pipeline and therefore require treatment as non-*force majeure* events deserving full reservation charge credits. First, PHMSA actions under section 60139(c) would be one-time, non-recurring events. Second, the pipeline could have less discretion concerning the timing of testing to reconfirm MAOP or any interim measures to maintain safety until MAOP can be reconfirmed than it has concerning the timing and location of routine scheduled maintenance. Third, the costs of outages for such one-time testing or interim safety measures would generally not be recurring costs eligible for inclusion in the pipeline’s rates in a general NGA section 4 rate case. The Commission also found that a blanket authorization of partial crediting for outages to reconfirm MAOP for a transitional period is consistent with Congress’s determination that MAOP should be confirmed as expeditiously as economically feasible. Accordingly, the Commission will permit National Fuel to modify its reservation charge crediting proposal consistent with *Gulf South, et al.* and as discussed further above.

²⁶ *Gulf South*, 141 FERC ¶ 61,224 at n.25; *Gulf Crossing*, 141 FERC ¶ 61,222 at n.24; *Texas Gas*, 141 FERC ¶ 61,223 at n. 26 (citing *Florida Gas*, 107 FERC ¶ 61,074 at P 32).

27. In addition, the Commission is not persuaded by National Fuel's reliance on its GT&C section 13.2 as justification for a more limited or lower obligation to provide firm service without interruption, and consequently, a more limited liability standard as applicable to reservation charge crediting. As the parties correctly noted, the tariff language relied upon by National Fuel only authorizes it to interrupt service as necessary to perform maintenance and does not serve to exempt it from the Commission's reservation charge crediting policies when it is unable to perform primary firm service. These policies address the allocation of monetary risk in instances of *force majeure* and non-*force majeure* firm service interruptions. The Commission finds that National Fuel's tariff does not currently conform to these policies and that nothing in National Fuel's tariff, including GT&C section 13.2, would serve to supersede these policies.

B. Outages Due to Operating Conditions on Upstream or Downstream Pipeline

1. National Fuel's Proposal

28. Pursuant to GT&C section 3.6(a), National Fuel would calculate reservation charge credits based on the quantities nominated by the shipper and confirmed by its supplier or upstream pipeline which National Fuel failed to deliver, provided that National Fuel would not be relieved of its obligation to provide credits when it fails to confirm a nomination for reasons within its control. In addition, GT&C section 3.6(b)(iv) provides that National Fuel shall not be obligated to provide credits when it is unable to schedule or deliver gas "due to a failure or inadequacy of supply, transportation or markets upstream or downstream of its system."

2. Protestors' Position

29. Statoil and Indicated Shippers oppose National Fuel's proposed tariff language because it does not clearly specify that National Fuel will not be responsible for providing reservation charge credits only in instances where an interruption of firm service is due solely to the operating conditions of an up- or downstream pipeline. They argue if a *force majeure* event affects firm service on both National Fuel and an up- or downstream pipeline simultaneously, then the Commission should require both pipelines to provide reservation charge credits.²⁷ The parties therefore request the Commission to direct National Fuel to modify its tariff language by clarifying that it must provide

²⁷ See Indicated Shippers Protest at 12; see also Statoil Protest at 6 (citing *Paiute Pipeline Co.*, 139 FERC ¶ 61,089, at PP 31-32 (2012); see also *TransColorado Gas Transmission Co., LLC*, 139 FERC ¶ 61,229, at P 50 (2012)).

reservation charge credits if it fails to provide service due to events not solely caused by an up- or downstream pipeline.

30. National Fuel states in its November Answer that its proposed tariff language requiring it to provide credits when it fails to confirm nominations for “reasons within its control” is appropriate and should be approved. Furthermore, National Fuel argues the Commission previously approved similar tariff language.²⁸

3. Commission Determination

31. The Commission finds that National Fuel’s proposed crediting exemption in GT&C section 3.6(b)(iv) must be revised to be consistent with Commission policy. As Statoil and Indicated Shippers contend, that section does not accurately reflect the Commission’s precedent concerning *force majeure* events affecting service on both an interconnecting pipeline and National Fuel, as set forth in *Paiute*. As the Commission stated in *Paiute*:

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 majeure* or non-*force majeure* events affecting the pipeline’s own facilities render it unable to provide primary firm service to a shipper.²⁹ 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.’³⁰ When *force majeure* events prevent pipelines from providing service, the Commission requires those

²⁸ See National Fuel November Answer at 5 (citing *Tennessee Gas Pipeline Co., L.L.C.*, delegated letter order issued August 28, 2012 in Docket No. RP11-1566-012).

²⁹ See *Tennessee Gas Pipeline Co.*, 139 FERC ¶ 61,050, at PP 100-101 (2012).

³⁰ Opinion No. 406, 76 FERC ¶ 61,022 at 61,088.

pipelines to provide partial reservation charge credits to shippers in order to share the risk of an event for which neither party is responsible.³¹

The Commission required the same clarification to nearly identical tariff language proposed by the pipeline in *Gulf South*.³²

32. Therefore, the Commission directs National Fuel to revise section 3.6(b)(iv) to further clarify its obligation to provide credits for *force majeure* events affecting National Fuel and an up- or downstream pipeline consistent with the Commission's finding in *Paiute*.

C. Basing Credits on “Lesser of” of Various Quantities

33. GT&C section 3.6(a) requires that credits be calculated based on “the lesser of” the following quantities (reduced by the quantity the pipeline delivers to the shipper's primary delivery point): (i) the quantity the shipper has nominated; (ii) if advance notice of the unavailability of service has been given at least 24 hours before the 11:30 a.m. deadline for nominations in the Timely Nomination cycle, the average of the previous seven days usage; or (iii) the shipper's Maximum Daily Transportation Quantity.

34. The Commission finds that National Fuel's use of the “lesser of” phrase in GT&C section 3.6(a) is ambiguous and misleading. National Fuel's proposed subsections (a)(i) and a(ii) are mutually exclusive options based on when the pipeline provides notice of the outage, and thus there should never be a situation, where either one of those alternatives could apply, depending upon which alternative provides the least credits.³³ As discussed in *Southern*,³⁴ if a pipeline has not given advance notice of an outage before the first

³¹ *Id.* See also *North Baja*, 483 F.3d. 819.

³² See 141 FERC ¶ 61,224 at P 83. In addition, while the unopposed tariff language accepted by the delegated letter order in *Tennessee* cited by National Fuel contains language similar to National Fuel's proposed GT&C section 3.6(a), it does not contain the express exemption set forth in National Fuel's proposed GT&C section 3.6(b)(iv), which we are requiring National Fuel to modify in this order.

³³ *Rockies Express Pipeline LLC*, 142 FERC ¶ 61,075, at P 32 (2013) (*Rockies Express II*).

³⁴ *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, at P 32, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*).

opportunity to nominate service for the day, the shipper's credits must be based on the quantities it nominates for scheduling which were not delivered, as provided in subsection (a)(i), and not on any measure of historical usage. Similarly, the Commission has required that, when a pipeline uses historical usage to calculate credits for periods after advance notice of an outage, then the shipper must be given credits based upon the appropriate historical usage, and not on the shipper's scheduling nominations.³⁵ Otherwise, the shipper could be required to submit scheduling nominations unnecessarily so as to ensure that it would receive credits at the level of its average usage during the preceding seven days. Accordingly, the Commission directs National Fuel to revise GT&C section 3.6(a) consistent with the above discussion.³⁶

D. GT&C Section 3.6(b)(vi): Election Not to Receive Service

1. National Fuel's Proposal

35. When a shipper elects not to receive gas at its primary delivery point, National Fuel proposed tariff language exempting it from providing the shipper with reservation charge credits.

2. Positions of the Parties

36. ConEd objects to National Fuel's proposed exception at GT&C section 3.6(b)(vi), arguing the provision is overly broad, and otherwise unjust and unreasonable. ConEd states National Fuel's tariff includes several unrelated provisions that permit a shipper to refuse the delivery of gas tendered by National Fuel. For example, ConEd cites to GT&C section 2.2 which provides a shipper the option to refuse gas with a total heating value below 967 Btu per cubic foot. According to ConEd, in these circumstances, it would be inappropriate to exempt National Fuel from providing reservation charge credits. Therefore, to make this provision more consistent with other provisions of National Fuel's tariff, ConEd proposes National Fuel amend GT&C section 3.6(b)(vi) to state "except when otherwise permitted by Transporter's FERC Gas Tariff, that Shipper elected not to receive at a primary delivery point."

37. National Fuel did not address ConEd's objection to GT&C section 3.6(b)(vi) in its answer.

³⁵ *Rockies Express II*, 142 FERC ¶ 61,075 at P 32.

³⁶ GT&C section 3.6(a)(iii) reasonably limits a shipper's credits to its MDTQ. *See Rockies Express II*, 142 FERC ¶ 61,075 at P 34.

3. Commission Determination

38. The Commission agrees with ConEd that, if a firm shipper refuses to accept deliveries at its primary point because National Fuel has failed to make deliveries consistent with its obligations under its tariff, the shipper should be entitled to reservation charge credits. For example, GT&C section 2.2 provides that gas delivered by National Fuel to its shippers shall have a total heating value at the point of delivery of not less than 967 Btu per cubic foot and gives the shipper the option to refuse to accept gas that does not have the required heat content. If a shipper exercises its option not to accept gas that fails to contain the required heat content, it is reasonable to require to National Fuel to provide reservation charge credits. Accordingly, the Commission directs National Fuel to amend GT&C section 3.6(b)(vi) so that that the exemption does not apply when a shipper refuses to accept deliveries because of a failure by National Fuel to comply with its obligations under its tariff.

E. GT&C Section 3.6(b)(vii): Mutually Scheduled Maintenance

1. National Fuel's Proposal

39. National Fuel proposes to limit its obligation to provide reservation charge credits in instances where National Fuel and a shipper have coordinated scheduled maintenance on their respective systems. Specifically, National Fuel's proposed GTC section 3.6(b)(vii) provides as follows:

(vii) Not delivered at a primary delivery point due to scheduled work on Transporter's facilities if Transporter and Shipper have mutually coordinated the timing of the scheduled work and the work is performed in accordance with that schedule.

2. Position of the Parties

40. Statoil, ConEd and Indicated Shippers object to National Fuel's proposed "mutually scheduled maintenance" exception. The parties contend this language could actually serve to hinder a shipper's cooperation in coordinating maintenance activity as it would require the shipper to waive its right to reservation charge credits; whereas, if it didn't coordinate maintenance activity with National Fuel, it would be eligible for credits. In addition, Indicated Shippers argue National Fuel could use this provision to require a shipper to waive its rights to credits as a precondition for National Fuel undertaking scheduled maintenance.

41. In its November Answer, National Fuel clarified this provision was only meant to address situations where National Fuel "works with a shipper to time an outage on its facilities to coincide with an outage on upstream or downstream facilities." National Fuel argues this provision is reasonable because it would prevent a shipper from nominating

service on the system, and therefore, effectively qualify for reservation charge credits, even though National Fuel coordinated the timing of its scheduled maintenance to coincide with the maintenance activities already scheduled on the upstream or downstream facilities. To further clarify the intent of this provision National Fuel proposed to modify the language as follows (emphasis added):

(vii) Not delivered at a primary delivery point due to scheduled work on Transporter's facilities and other work on facilities utilized by Shipper if Transporter and Shipper have mutually coordinated the timing of the scheduled work and the work on Transporter's facilities is performed in accordance with that schedule.

42. In their response to National Fuel's November Answer, Indicated Shippers continue to raise objections to the proposed language. They argue that to ensure a shipper is fully aware that it will waive its right to reservation charge credits if it agrees to coordinate scheduled maintenance activities, National Fuel should add additional language to GT&C section 3.6(b)(vii). Specifically, Indicated Shippers propose to add "...and Shipper agrees in writing in advance to forego reservation charge crediting for that time period" to the end of the section.

43. ConEd noted in its response to National Fuel's answer that it agrees with National Fuel's interpretation of the applicability of reservation charge credits in instances of mutually scheduled maintenance activities, and supports the tariff language modifications proposed by National Fuel.

3. Commission Determination

44. The Commission will accept National Fuel's proposed GT&C section 3.6(b)(vii), as modified in its November Answer and will not require further modification as proposed by Indicated Shippers.

45. National Fuel's proposal reasonably provides shippers an opportunity to agree with National Fuel as to the timing of maintenance activities, so that such maintenance can be conducted at a time that is least disruptive to the shipper. Moreover, such an agreement can give the shipper an opportunity to make alternative arrangements to obtain needed gas supplies.³⁷ The language proposed by National Fuel clearly states any agreement between National Fuel and a shipper will be mutual and the timing coordinated. In these instances, it is not an unreasonable expectation that a shipper

³⁷ See *TransColorado Gas Transmission Co., LLC*, 139 FERC ¶ 61,229, at P 36, 39 (2012).

mutually agreeing to coordinate activities with National Fuel would not be eligible for reservation charge credits. Furthermore, as with any pipeline providing service under a FERC gas tariff, if a shipper believes National Fuel acted in bad faith, it may always seek further recourse at the Commission.

F. GT&C Section 3.6(c)(iii): Credits Due After Contract Expiration

1. National Fuel's Proposal

46. National Fuel proposed tariff language that would require it to reflect reservation charge credits on a shipper's monthly billing invoice, with the credits reducing any amounts owed by that shipper. Specifically, National Fuel's proposed GT&C section 3.6(c)(iii) provides as follows:

(iii) Any reservation charge credit will be reflected on the Shipper's monthly invoice and will be applied first to any balances owed by Shipper.

2. Position of the Parties

47. Indicated Shippers argue the Commission should direct National Fuel to modify the proposed language to clarify that it is required to refund any reservation charge credits determined to be owed a shipper even if that shipper's service agreement has terminated and there no longer exist any outstanding amounts due from that shipper. Specifically, Indicated Shippers propose the follow changes (emphasis added):

(iii) Any reservation charge credit will be reflected on the Shipper's monthly invoice and will be applied first to any balances owed by Shipper. Reservation charge credits applicable to service agreements that are not in effect due to termination or expiration will be paid by Transporter to Shipper in dollars no later than the 15th Day of the second Month following the Month the credit was generated, net of any amount(s) owed to Transporter.

48. In its December Answer, National Fuel states that it does not believe the change requested by Indicated Shippers is necessary. National Fuel argues its standard business practice is to calculate any adjustments to a customer's invoice and then process such adjustments in its next regularly scheduled monthly billing cycle; even if such adjustment is necessary after the termination of the underlying service agreement.

3. Commission Determination

49. The Commission will not require National Fuel to modify its current proposal. As National Fuel notes in its December Answer, there are many instances where a prior

period adjustment associated with a customer's terminated service agreement could result in additional liabilities or credits. Consistent with its tariff, National Fuel is obligated to provide reservation charge credits under specified circumstances. If it owes a customer a credit with respect to a period when a service agreement was in effect, the fact said service agreement may have subsequently terminated does not relieve National Fuel of its obligation to refund that credit to the customer.

G. Implementation

1. National Fuel's Proposal

50. National Fuel states it will need substantial programming changes to incorporate and otherwise automate the new reservation charge crediting mechanisms into its current business systems. National Fuel estimates the changes will require three months to complete. In order to recognize the anticipated delay in the applicability of its revenue crediting provisions, National Fuel included language in GT&C section 3.6(a) that provides, "[f]ollowing the implementation of the necessary changes to Transporter's business system...." This language clarifies that National Fuel will only implement revenue crediting upon the successful modification of its various business systems.

2. Position of the Parties

51. ConEd and Indicated Shippers object to National Fuel's proposed implementation delay of reservation charge crediting. The parties assert that National Fuel failed to provide adequate justification for delaying the effectiveness of the new crediting mechanism.

3. Commission Determination

52. The Commission does not believe National Fuel has justified the proposed implementation delay of its reservation charge crediting proposal. As National Fuel concedes in its December Answer, it is possible for National Fuel to make manual billing adjustments to its customer's invoices. Furthermore, the Commission does not anticipate that manual billing adjustments would be burdensome or otherwise onerous for National Fuel. In fact, to the contrary, if National Fuel's actual experience requires that it calculate reservation charge credits on a recurring and/or widespread monthly basis, then an earlier implementation of the Commission's policy in *NGSA* is even more imperative. Accordingly, the Commission directs National Fuel to modify its tariff language to remove any references to a potential delay in implementation.

The Commission orders:

(A) The tariff records listed in footnote 1 are approved to become effective April 28, 2013, subject to conditions, as discussed in this order.

(B) Within thirty (30) days of the date this order issues, we direct National Fuel to file revised tariff records, to become effective April 28, 2013, modifying the tariff changes it filed pursuant to NGA section 4.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.