144 FERC ¶ 61,175
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.

TransColorado Gas Transmission Company LLC	Docket Nos. RP12-245-001 RP12-245-002

ORDER ON REHEARING AND COMPLIANCE

(Issued August 30, 2013)

1. On December 16, 2011, TransColorado Gas Transmission Company, LLC (TransColorado) filed to revise its tariff provisions pertaining to reservation charge credits, to be consistent with Commission policy. TransColorado's filing was protested and TransColorado filed an answer, including clarifications it agreed to make to its filing. On January 13, 2012, the Commission issued an order which accepted and suspended the referenced tariff records.[1] The order permitted protestors to respond to TransColorado's answer, which they did.

2. On June 21, 2012, the Commission issued a subsequent order, accepting the tariff records, subject to certain conditions.[2] The Commission approved a number of TransColorado's proposed tariff revisions. For example, the Commission approved its proposal that, when it posts a Monthly Maintenance Schedule listing the scheduled maintenance activities it anticipates conducting in the subsequent month, the credits for any resulting outage will be based on the shippers' 7-day average usage of primary firm service before the posting of the MMS. However, the Commission required TransColorado to make certain additional tariff changes. Specifically, the Commission directed TransColorado to file revised tariff records, including revisions it had agreed to

[1] *TransColorado Gas Transmission Co., LLC*, 138 FERC ¶ 61,023 (2012) (January 2012 Order).

[2] *TransColorado Gas Transmission Co., LLC*, 139 FERC ¶ 61,229 (2012) (the June 2012 Order).

in its answer, and to revise section 14 of the General Terms and Conditions (GT&C), *Force Majeure*, to exclude matters not consistent with Commission policy or explain why it should be permitted to include such provisions in its tariff.

3. On July 23, 2012, TransColorado filed a request for rehearing of the June 2012 Order and also made a compliance filing which was protested by Indicated Shippers.[3] TransColorado also filed an answer to the protest, and requested waiver of Rule 213, 18 C.F.R. § 385.213(a) (2013) to permit the answer.[4]

4. As detailed below, TransColorado's request for rehearing is denied, and its compliance filing is accepted effective June 16, 2012, subject to TransColorado's filing revised tariff records as discussed in this order.

I. Definition of *Force Majeure*

A. Background

5. The Commission requires interstate pipelines to provide partial reservation charge credits for outages due to *force majeure* events to share the risk of such events for which neither party is responsible. Partial credits may be provided pursuant to (1) the No-Profit method under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1, or (2) the Safe Harbor method under which the pipeline provides full credits after a short grace period when no credit is due (i.e., 10 days or less).[5]

6. The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. The Commission has held that routine, scheduled maintenance is not a *force majeure* event, even on "pipelines with little excess capacity"[6]

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[3] Indicated Shippers are comprised of Chevron U.S.A. Inc., Conoco Phillips Company, and Occidental Energy Marketing, Inc.

[4] The Commission accepts the answer since it clarifies the issues and assists the Commission in its decision-making.

[5] *See, e.g., Tennessee Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996) (Opinion No. 406), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997) (Opinion No. 406-A), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*). The Commission has also stated that pipelines may use some other method which achieves equitable sharing in the same ball park as the first two methods.

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

where such maintenance may require interruptions of primary firm service. That is because, even if such outages are reasonably considered not within the pipeline's control, they are to be 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*,[7] 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."

7. Section 8.4 of TransColorado's existing General Terms and Conditions of Service (GT&C) requires it to give full credits during *force majeure* outages after a 10-day grace period, consistent with the Safe Harbor Method. Section 14 of TransColorado's GT&C in its tariff provided defines *force majeure* as follows:

> **14. FORCE MAJEURE**
>
> 14.1 A force majeure event includes without limitation by this recital: acts of God, including fires, explosions, earthquakes or volcanic eruptions, storms, floods, washouts and extreme cold or freezing weather; necessity for compliance with any court order, law, regulation or ordinance promulgated by any government authority having jurisdiction, either federal, Indian, state or local, civil or military; acts of a public enemy; wars and civil disturbances; strikes, lockouts or other industrial disturbances; shutdowns for purposes of necessary repairs, relocations, or construction of facilities, breakage or accident to machinery or lines of pipe; the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party); inability to obtain necessary materials, supplies, permits, or labor to perform or comply with any obligation or conditions of this Tariff; inability to obtain rights of way; and any other causes that are not reasonably in the control of the party claiming suspension.

8. In its December 2011 filing, TransColorado proposed to continue to use the No-Profit Method to provide partial credits during *force majeure* outages. It also proposed no change in the GT&C Section 14 definition of *force majeure*.

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

9. Although no protester objected to section 14, the June 2012 Order found that the definition of *force majeure* was not consistent with the Commission's policy because it is "overbroad" and includes matters that might not be *force majeure* events. In particular, the Commission had concerns with the following clauses: (i) necessity for compliance with any court order, law, regulation or ordinance promulgated by any government authority having jurisdiction …; and (ii) the necessity for testing (as required by government authority or as deemed necessary for safe operation by the testing party). The Commission's concern with the first clause was that it could include compliance with all government regulations regardless of whether they involve matters within the control of the pipeline. With respect to testing, the concern was that the language could refer to routine testing which is within the pipeline's control and thus not a *force majeure* event. The Commission therefore directed TransColorado to either "revise [s]ection 14 to exclude from the definition of *force majeure* matters that are not consistent with Commission policy or explain why its tariff should be permitted to include such provisions."[8]

B. TransColorado's Rehearing Request and Compliance Explanation

1. Request for rehearing

10. In its rehearing request, TransColorado contends that the Commission failed to satisfy the requirements of NGA section 5 in order to modify its existing tariff definition of *force majeure*.

11. TransColorado first contends that the June 2012 Order did not correctly interpret the section 14 definition of *force majeure*. TransColorado asserts that contrary to the Commission's finding, TransColorado's definition clearly limits *force majeure* events to matters that are outside of TransColorado's control, consistent with Commission precedent. This is obvious, TransColorado asserts, because section 14 concludes with the catch-all phrase "any other causes not reasonably in control of the party claiming suspension." The inclusion of this qualifying language mandates that the only proper interpretation of this provision, i.e., that all *force majeure* events contemplated by this section, including the specific events that the Commission took issue with in the June 2012 Order, are limited to events not reasonably within control of TransColorado. Therefore, TransColorado asserts that the Commission erred in interpreting the subject clauses as including in the definition of *force majeure* both routine testing and compliance with government regulations that is within the control of the pipeline. TransColorado asserts that it has always interpreted the subject clauses of its *force*

[8] June 2012 Order, 139 FERC ¶61,229 at P 59.

majeure definition to be limited to events not reasonably within the control of the pipeline.

12. TransColorado also contends that the June 2012 Order erroneously deemed all compliance with government pipeline testing to be routine in nature and thus within the pipeline's control even when performed in compliance with unknown future governmental orders and regulations. It asserts that the Commission failed to explain how compliance with new and unknown governmental regulations, particularly if they require outages for testing, are matters within the pipeline's control. It asserts that there may be situations where pipeline testing arises out of extraordinary circumstances or unforeseen events that are clearly outside of the pipeline's control.

13. As an example, TransColorado argues that when a pipeline experiences a failure (a *force majeure* event), it is possible that the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) may require additional testing on segments of pipeline not directly affected by the failure. Such testing could be quite extensive, especially if the additional portions of pipe are not piggable and hydrostatic testing is required. Similarly, where a pipeline failure is associated with pipe of a certain vintage, PHMSA may require pipelines to perform additional testing on other pipeline segments of the same vintage located throughout the pipeline's system. TransColorado contends that its current definition of *force majeure*, as properly interpreted, ensures a proper sharing of risk between the pipeline and its customers when unexpected compliance and testing events occur, pursuant to the 10-day Safe Harbor period, and therefore it is unfair for the Commission to require TransColorado to remove such provisions from its definition of *force majeure*.

14. TransColorado next contends that the Commission has not met its dual burden under NGA section 5 to show that the existing definition of *force majeure* is unjust or unreasonable and that the required changes are just and reasonable. TransColorado states the tariff provision at issue here was approved as just and reasonable when TransColorado began service in December of 1996. Subsequently, when GT&C Section 14 was modified in other respects, the Commission approved that section as modified as consistent with Commission policy, including the existing definition of *force majeure*. TransColorado asserts that there is no evidence in the record that the provision in question has resulted in any unjust or unreasonable outcome or that the Commission's previous acceptance of the provision is no longer applicable. TransColorado asserts that without evidence of changed circumstances, the holdings in TransColorado's previous proceedings – that the tariff provision is just and reasonable – remain valid. In fact,

TransColorado adds, the Commission has approved as just and reasonable both clauses that it has taken issue with here in numerous other pipeline tariffs.[9]

15. TransColorado also contends that the Commission has not shown that the required changes to TransColorado's tariff are just and reasonable. TransColorado argues that the removal of the tariff language at issue would cause TransColorado to shoulder the full risk of *force majeure* events that are not included in its existing rates. Further, the Commission failed to take into account the significant and unanticipated new pipeline safety regulatory and policy changes that are currently underway. TransColorado argues that these new requirements will likely lead to significant new compliance and testing obligations that are completely outside of TransColorado's control.

16. TransColorado also argues that the June 2012 Order failed to take into consideration the significant, new pipeline safety regulatory and policy changes that are currently underway which will go far beyond routine maintenance and testing. TransColorado states that the pipeline industry is facing new pipeline safety and integrity management obligations resulting from the recently-enacted Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act), and the regulations that PHMSA will issue to implement that legislation. The 2011 Act includes numerous new requirements addressing pipeline damage prevention, maximum allowable operating pressure (MAOP), public awareness, and accident and incident notification. In addition, the 2011 Act requires PHMSA to study whether to expand upon existing regulatory programs to cover additional pipeline facilities. TransColorado also cites to Advance Notice of Proposed Rulemaking (ANOPR) issued by PHMSA. TransColorado asserts that the ANOPR proposes wide-ranging changes in gas pipeline safety regulations. Moreover, the rulemaking proposes to expand upon current integrity management requirements, including new requirements for corrosion control, weld seams, MAOP, and the use and location of certain mainline valves and revised requirements for data collection.

17. TransColorado asserts that these significant and unanticipated new governmental actions are likely to lead to testing, repair, and replacement projects, many of which could result in service disruptions and significantly increased costs. Such disruptions and costs will result from government-initiated actions that are not reasonably in the control of pipelines.

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[9] Citing *Wyoming Interstate Co., LLC*, FERC Gas Tariff, Third Revised Volume No. 2, GT&C Section 11.2; *Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶61,074, at P 139 (2006); and *Center Point Energy*, Docket No. RP12-14 (Letter order, April 25, 2012).

18. TransColorado asserts that the continued inclusion of compliance with government actions and necessity for testing in TransColorado's definition of *force majeure* is just and reasonable when such events are outside of the pipeline's control. TransColorado's existing definition of *force majeure* does not result in total avoidance of reservation charge crediting but results in equitable sharing of risk, contemplated by the *North Baja* decision and Commission orders. In *North Baja*, the court stated that "a cost-sharing mechanism should be reserved for uncontrollable and unexpected events." Specifically, the Commission has explained that, "[w]hen an interruption is the result of a *force majeure* event, Commission policy requires that the pipeline provide partial reservation charge credits during the outage in order to share equitably the risk of an event not in control of the pipeline or the shippers." TransColorado's existing language incorporates the well-established Safe Harbor method, which provides that within the first 10 days of a *force majeure* event, no reservation charge credits are owed, but full credits commence after the first ten days. Thus, TransColorado states that its existing Tariff reserves cost-sharing for unexpected and unprecedented testing and governmental compliance activities that may be imposed upon the pipeline industry and would be completely outside of the pipeline's control.

19. Accordingly, TransColorado argues that the Commission should grant rehearing of the June 2012 Order, and accept GT& C section 14 as is.

2. Compliance Filing

20. In its July 23, 2012 compliance filing, TransColorado did not revise Section 14, *Force Majeure*, but instead contended that the existing provision was consistent with Commission policy because compliance with governmental action and testing is "not always a matter within the pipeline's control."[10] TransColorado's explanation of why existing section 14 was consistent with Commission policy basically repeats the same arguments TransColorado urged in its request for rehearing. Among other things, TransColorado reiterated that it interprets its existing tariff as limiting *force majeure* events to matters that are not within its control. However, it stated that "while TransColorado does not believe a clarification is necessary to its force majeure provisions and subject to its request for rehearing, TransColorado would be willing to clarify its tariff provisions to specify that these events are *force majeure* events only to the extent that they are not reasonably within the control of TransColorado."[11]

[10] Transmittal Letter at p. 4.

[11] Transmittal Letter at p. 6.

21. In their protest of the compliance filing, Indicated Shippers argue that as the June 2012 Order stated, the existing provision is overbroad, and that all pipeline testing is routine and thus cannot be a *force majeure* event. It argues that although certain testing may be required as a result governmental action, that does not change this conclusion because the pipeline's timing of compliance with that requirement is within the control of the pipeline.

22. In its response, TransColorado contended that Indicated Shipper's protest ignores the fact that unforeseen pipeline testing requirements may arise out of extraordinary circumstances beyond TransColorado's control, or as a result of unanticipated governmental rules and regulations. Moreover, TransColorado adds, the issue here is whether the outage should be considered a *force majeure* event, not whether there is total exemption from crediting. TransColorado asserts that the events included in the *force majeure* definition in section 14 describe actions required of TransColorado outside of its control, and accordingly, it is appropriate that the event be viewed as *force majeure* events, where it will apply the Safe Harbor method of crediting.

C. Discussion

23. For the reasons discussed below, the Commission denies rehearing of the June 2012 Order. The Commission also requires TransColorado to modify the definition of *force majeure* in GT&C section 14 consistent with its explanation of the intended meaning of that section.

1. Initiation of section 5 investigation of GT&C section 14.1

24. TransColorado contends that the June 2012 Order violated NGA section 5, because the Commission failed to satisfy its burden under section 5 to show that TransColorado's existing definition of *force majeure* is unjust and unreasonable and that its required changes to GT&C section 14.1 are just and reasonable. However, the June 2012 Order did not find that GT&C section 14.1 is unjust and unreasonable or require any specific change in that section. Rather, the Commission simply initiated an investigation under NGA 5 section to determine whether GT&C section 14.1 should be modified.

25. The Commission reviewed the language of GT&C 14.1 and found that the following two clauses in that section appeared to be inconsistent with Commission policy as established in various individual adjudications: (1) necessity for compliance with any court order, law, regulation or ordinance promulgated by any government authority having jurisdiction …; and (2) the necessity for testing (as required by government authority or as deemed necessary for safe operation by the testing party). The Commission found that the first clause appeared to treat compliance with all government regulations as *force majeure* events, regardless of whether they involve matters within the

control of the pipeline. The Commission stated that this would be inconsistent with it holdings in a recent adjudication in *Tennessee Gas Pipeline Co., LLC* (*Tennessee*).[12] The Commission explained that *Tennessee* held that whether a service interruption as a result of "corrective action orders or other imposition of government agencies" was a *force majeure* event depended on whether the required action was within the control of the pipeline. *Tennessee* recognized that, where the governmental directive required the pipeline to take certain action so the curtailment was "not reasonably within the control of the pipeline," it could be considered a *force majeure* event.[13] For example, in *Tennessee*, the Commission explained that a government order requiring a pipeline to be relocated for highway construction could be treated as a *force majeure* event.[14] However, the Commission in *Tennessee* held that routine testing maintenance and repairs events are not *force majeure* events because such actions "to ensure safe and reliable operations of a pipeline are within the pipeline's control including when performed in compliance with governmental orders and regulations."[15] Thus, the June 2012 Order held that, to the extent the first clause quoted above was intended to treat *all* service interruptions resulting from government actions as *force majeure* events, that clause was inconsistent with Commission precedent.

26. Similarly, the second clause quoted above appeared to be inconsistent with the same precedent, because it appeared to treat all service interruptions for testing as *force majeure* events, contrary to the Commission's policy that routine testing is a matter within the control of the pipeline and thus not a *force majeure* event. Accordingly, the June 2012 Order directed TransColorado to either "revise [s]ection 14 to exclude from the definition of *force majeure* matters that are not consistent with its policy or explain why its tariff should be permitted to include such provisions."[16]

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[12] *Tennessee*, 139 FERC ¶ 61,050 (2012).

[13] *Tennessee*, 139 FERC ¶ 61,050 at P 80.

[14] *Tennessee* at P 81 (citing at n.89 *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at P 32 (2004) (*Florida Gas*); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*); *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126, at P 12 (2012) (*Texas Eastern*)).

[15] *Tennessee*, 139 FERC ¶ 61,050 at P 82.

[16] June 2012 Order, 139 FERC ¶ 61,229 at P 59.

27. As the Commission has explained at length in *Texas Eastern*[17] and *Panhandle*,[18] the individual adjudications on reservation charge credits relied on by the June 2012 Order, including *Tennessee*, have the force of law. As the court held in *PG&E v. FPC*:[19]

> An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedent.

28. The Commission has formulated its reservation charge crediting policy through a series of adjudications concerning the reservation charge crediting tariff provisions of particular pipelines, including the cases cited in the June 2012 Order. The D.C. Circuit affirmed the major elements of that policy in *North Baja*, including the policy that service interruptions for routine maintenance do not constitute *force majeure* events. Therefore, consistent with *PG&E v. FPC*, the Commission's orders in those adjudications constitute "binding precedents" which establish "binding policy" that has "the force of law." Similarly, in *Michigan Wis. Pipe Line Co*., 520 F.2d 84, 89 (D.C. Cir. 1975), the court stated:

> There is no question that the Commission may attach precedential, even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a *stare decisis* manner.[20]

29. Accordingly, the June 2012 Order's finding that TransColorado's tariff definition of *force majeure* was potentially in conflict with Commission precedents having force of law sufficiently sets forth a *prima facie* showing that this aspect of TransColorado's tariff

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[17] *Texas Eastern*, 140 FERC ¶ 61,216 at PP 24-25.

[18] *Panhandle Eastern Pipe Line Co*., 142 FERC ¶ 61,041, at PP 29-30 (2013) (*Panhandle*).

[19] 506 F.2d 33, 38 (D.C. Cir. 1974) (footnote and citations omitted). *See also, e.g.*, *Consolidated Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency may "change the established law and apply newly created rules . . . in the course of an adjudication.").

[20] *See Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 61 (D. C. Cir. 1999), holding that to the extent "arguments reflect efforts to skirt or modify, rather than comply" with current Commission policy, the Commission may reject them.

is unjust and unreasonable. Therefore, the Commission reasonably provided TransColorado an opportunity to revise that section to exclude from the definition of *force majeure* matters that are not consistent with its policy or explain why its tariff should be permitted to include such provisions.

30. TransColorado suggests that this directive improperly imposed on it the burden of producing evidence that its tariff is just and reasonable. However, as discussed in *Texas Eastern* and *Panhandle*, the Commission's authority to require a pipeline to provide information in a section 5 proceeding investigating compliance with Commission policies having the force of law is well established.[21] Those orders also explained that the Commission may, consistent with its burden of persuasion under section 5, impose on a pipeline the burden of producing evidence justifying a tariff provision, once a *prima facie* showing is made that the provision is unjust and unreasonable.[22] The Commission further explained that a showing that a pipeline's reservation charge crediting provisions are not consistent with the Commission's reservation charge crediting policies is sufficient to establish a *prima facie* case that the provisions are unjust and unreasonable.[23]

31. Therefore, consistent with *Texas Eastern* and *Panhandle*, we find that the June 2012 Order properly initiated an investigation under NGA section 5 to determine whether to require TransColorado to revise section 14 of its GT&C to be consistent with Commission policy and precedent.

2. Whether TransColorado's existing definition of *force majeure* must be modified under NGA section 5

[21] *Texas Eastern*, 140 FERC ¶ 61,216 at 27, and *Panhandle*, 143 FERC ¶ 61,041 at PP 31-32 (citing *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*)).

[22] *Texas Eastern*, 140 FERC ¶ 61,216 at P 28, and *Panhandle*, 143 FERC ¶ 61,041 at P 33 (citing *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 938 (D.C. Cir. 1988) (*East Tennessee*) (finding that the Commission may, consistent with it burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill, once a *prima facie* showing is made that the minimum bill is anticompetitive and therefore *prima facie* unlawful)).

[23] *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

32. The Commission recognizes that, even though the June 2012 Order reasonably initiated a section 5 investigation of GT&C section 14 of TransColorados's tariff and imposed a burden of producing evidence on TransColorado, the Commission continues to have the burden of persuasion under NGA section 5 to demonstrate both that (1) TransColorado's tariff definition of *force majeure* is unjust and unreasonable, and (2) any replacement tariff provisions the Commission imposes are just and reasonable.[24] In this section, we find that TransColorado's explanation of the intended meaning of GT&C section 14 is generally consistent with Commission policy concerning the definition of *force majeure*. However, in order to eliminate any ambiguity as to the meaning of that section, the Commission will require that it be modified, consistent with the clarification TransColorado stated it was willing to make in its compliance filing.

33. In both its rehearing request and its response to the June 2012 Order, TransColorado points out that, after listing various specific events that constitute *force majeure*, section 14.1 concludes with the catch-all phrase "any other causes not reasonably in control of the party claiming suspension." TransColorado asserts that this phrase limits all the listed events, including those that the Commission took issue with in the June 2012 Order, to matters arising out of circumstances not reasonably within TransColorado's control. Thus, TransColorado asserts, it does not interpret the phrase "necessity for compliance with any court order, law, regulation or ordinance promulgated by any government authority having jurisdiction …" as including compliance with all regulations regardless of whether they involve matters within the control of the pipeline. Similarly, TransColorado states that it does not interpret the phrase "the necessity for testing (as required by government authority or as deemed necessary for safe operation by the testing party" to include routine testing of the type the Commission has held here is not a *force majeure* event. TransColorado concludes that its "definition of *force majeure* represents a just and reasonable cost-sharing mechanism that is 'reserved for uncontrollable and unexpected events that temporarily stall service.'"[25]

34. We agree with TransColorado that, to the extent GT&C section 14.1 may be interpreted in the manner it describes, that section is consistent with the Commission's policy that *force majeure* events are limited to events which are outside the pipeline's control and that such events do not include routine, periodic testing and maintenance activities as may be required by government regulation. However, the final phrase in section 14.1 relied on by TransColorado is not directly connected to the two earlier

[24] *East Tennessee*, 863 F.2d 932, 938 ("FERC nonetheless retained the ultimate burden of persuasion."); *Western Resources*, 9 F.3d 1568, 1578.

[25] Rehearing Request at 14 (quoting *North Baja*, 483 F.3d at 823).

clauses with their broad references to compliance with any government regulation and the necessity for testing. This creates an ambiguity as to whether the final clause of section 14.1 in fact limits the earlier clauses in the manner claimed by TransColorado.[26] The Commission finds such an ambiguity to be unjust and unreasonable. Therefore, the Commission requires TransColorado to modify section 14.1 in order to clarify that the events described in the two clauses related to compliance with government regulations and testing must be outside the control of TransColorado in order to qualify as *force majeure* events.

35. In this connection, it appears that TransColorado's concerns about the June 2012 Order arise largely from its interpretation of that order as holding that all testing in compliance with government orders must be treated as within the pipeline's control, including all testing which PHMSA may require pursuant to the 2011 Act or other future rulemaking proceedings. For example, in its rehearing request, TransColorado asserts that the June 2012 Order "incorrectly deems all compliance with government pipeline testing to be routine in nature and within the pipeline control, even when performed in compliance with unknown future government orders and regulations."[27] TransColorado's rehearing request also asserts that the June 2012 Order required it "to remove from its definition of force majeure all references to compliance with government actions and the necessity for testing."[28] Similarly, in its response to the June 2012 Order, TransColorado asserts that that order "can be read to mean that all pipeline testing is routine in nature and within the pipeline's control, including when performed in compliance with governmental orders and regulations and, thus, should not be considered a force majeure event."[29]

36. The Commission did not intend in the June 2012 Order to find that all testing required by government order is routine and within the control of the pipeline. In orders following the June 2012 Order, the Commission has further clarified its position on these matters, particularly with respect to the effect of the 2011 Act and future PHMSA rulemakings.[30] Those following orders, and our earlier precedent, distinguish between

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[26] *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275, at P 19 (2013).

[27] TransColorado Rehearing Request at 9.

[28] *Id.* at 14.

[29] July 23, 2012 Response at 4.

[30] *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*);

(continued…)

(1) outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform to ensure the safe operation of the pipeline, and (2) outages resulting from one-time, non-recurring events. These orders make clear that the first type of outage must be considered a matter within the pipeline's control and therefore does not qualify as a *force majeure* event. However, the Commission recognized that the second type of event, including one-time, non-recurring testing required by government order, may qualify as a *force majeure* event outside the pipeline's control.

37. In *Gulf South, et al*., the pipelines proposed to include in the definition of *force majeure* "any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, to comply with the [2011 Act], requirements issued by [PHMSA] pursuant to the 2011 Act [and] requirements resulting from PHMSA's ongoing gas pipeline rulemaking proceedings." They contended, as does TransColorado here, that the new safety requirements likely to emerge from PHMSA's ANOPR and the 2011 Act represent a sea change for the natural gas industry. They contended that more stringent safety requirements resulting from these initiatives will likely require more primary service outages than pipelines previously anticipated and so would not be reflected in their current rates. They further contended that any such outages should be considered outside the control of the pipeline and thus qualify as *force majeure* events for which cost sharing is appropriate, contending that the costs of such outages are not currently included in their rates.

38. In *Gulf South, et al.*, the Commission summarized its existing precedent holding that the currently effective integrity maintenance regulations of PHMSA fall into the category of regular periodic maintenance activities within the control of the pipeline, such that any resulting outages are not *force majeure* events. The Commission pointed out that 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 pipeline segments in HCAs.[31] Those regulations took effect on January 14, 2004,[32] and

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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) (*Dominion*), and *National Fuel Gas Supply Corporation*, 143 FERC ¶ 61,103 (2013) (*National Fuel*).

[31] 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,

(continued…)

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.[33] 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."[34] In subsequent orders, the Commission has explained that routine testing and maintenance required by government regulation, such as the PHMSA integrity management regulations, 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.[35]

39. In *Gulf South, et al.,*[36] the Commission recognized that PHMSA may adopt changes to its integrity management regulations pursuant to its ANOPR or the 2011 Act, but the Commission held that the nature and timing of any such changes is too

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and unusually sensitive ecological resources.

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

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

[34] *Id*. P 29.

[35] *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009); *see also Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, at P 15 (2004); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008); *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; and *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275, at P 19 (2012) (*Rockies Express*).

[36] *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).

speculative at this time to justify modifying Commission policy to treat outages in connection with revised integrity management regulations as *force majeure* events. The Commission explained that PHMSA has not yet proposed any specific changes to those regulations, and section 5(f) of the 2011 Act prohibits PHMSA from issuing any final rule expanding integrity management requirements until the earlier of one year after completion of 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.

40. However, the Commission stated in *Gulf South, et al.*, that it would allow partial reservation charge crediting for outages of primary firm service required to comply with orders PHMSA issues 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 densely populated areas by July 3, 2012. The purpose of this verification was to ensure the records of the subject pipelines are accurate and to confirm their established MAOP. Section 60139(b) requires each pipeline to 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."

41. In *Gulf South, et al*., the Commission held that outages under section 60139(c) are comparable to those for which it allows partial crediting as *force majeure* events.[37] The Commission explained several factors distinguish outages resulting from orders issued by PHMSA pursuant to section 60139(c) from the routine, periodic maintenance which the Commission has 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

[37] *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).

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.[38]

42. In arguing that the June 2012 Order improperly deems all compliance with government pipeline testing to be routine in nature and within the pipeline's control, TransColorado provides several examples of situations in which it asserts that pipeline testing would be outside the pipeline's control. In one example it states that, after a pipeline experiences a failure due to a *force majeure* event, PHMSA may require additional one-time testing on segments of the pipeline not directly affected by the failure. In addition, if a pipeline failure is associated with pipe of a certain vintage, PHMSA may require the pipeline to perform additional testing on other pipeline segments of the same vintage elsewhere on the pipeline's system. TransColorado states that this type of testing cannot be reasonably anticipated in the ordinary course of business and therefore it is outside the control of the pipeline and cannot reasonably be considered to be routine.

43. The Commission agrees that special, one-time tests required by PHMSA because of a specific pipeline failure, which are not part of the pipeline's routine, periodic integrity management program, may qualify as a *force majeure* event for which partial reservation crediting is reasonable. As with the testing PHMSA requires to reconfirm MAOP pursuant to section 5 of the 2011 Act discussed above, the pipeline could have less discretion concerning the timing of such special tests than it has concerning the timing and location of routine scheduled maintenance. Also, the costs of outages for such one-time testing would generally not be recurring costs eligible for inclusion in the pipeline's rates in a general NGA section 4 rate case. In short, special, one-time tests required to be conducted within a short period of time would not constitute the *routine* testing, maintenance, and repair events,[39] which the June 2012 Order stated "are not *force*

[38] The Commission limited any authorization for partial crediting for outages resulting from section 60139(c) to a transitional period of two years. This two-year transitional period is consistent with the fact that actions by PHMSA pursuant to section 60139(c) are only temporary in nature to reconfirm MAOP and require interim safety measures until MAOP is reconfirmed. After MAOP is reconfirmed, there should no longer be a need for such a special partial crediting provision. At the end of the transitional period, the Commission will reexamine whether there is any need to extend this tariff provision.

[39] June 2012 Order, 139 FERC ¶ 61,229 at P 58 (emphasis supplied).

majeure events because such actions 'to ensure safe and reliable operations of a pipeline are within the pipeline's control including when performed in compliance with governmental orders and regulations.'"[40]

44. As discussed above, TransColorado must revise section 14.1 in order to clarify that the events described in the two clauses related to compliance with government regulations and testing must be outside the control of TransColorado in order to qualify as *force majeure* events. This revision will ensure that routine, periodic testing performed as part of TransColorado's integrity management program may not be treated as *force majeure* events. However, where the circumstances of a particular case justify treating special, one-time testing required by a government order as outside the control of the pipeline, such testing may be a *force majeure* event.

45. In addition, consistent with *Gulf South et al*., TransColorado may include in its tariff a provision permitting partial reservation charge crediting, for a transitional period of two years commencing on January 1, 2013, for outages resulting from orders issued by PHMSA pursuant to section 60139(c) of the 2011 Act. That tariff provision should include a requirement that, when TransColorado provides notice of an outage required to comply with an order issued by PHMSA pursuant to section 60139(c), that notice shall identify the specific PHMSA order with which it is complying. Finally, our holdings in this order are without prejudice to TransColorado's filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.

II. Other Issues

46. The June 2012 Order required TransColorado to make certain revisions to the revised reservation charge crediting provisions it proposed in section 8 of its GT&C. These revisions included changes TransColorado agreed to make in its answer to the protests to its section 4 filing. In its July 23, 2012 Compliance Filing, TransColorado stated that it had made all the revisions to GT&C section 8 required by the June 2012 Order. In their protest of the Compliance Filing, Indicated Shippers contend that TransColorado failed to comply fully with two of the requirements of the June 2012 Order. These two aspects of the Compliance Filing are discussed below.

[40] *Id.* (quoting *Tennessee*, 139 FERC ¶ 61,050 at P 82).

A. Documentation

47. GT&C section 8.4(b) provides that TransColorado will provide reservation charge credits when TransColorado fails to schedule a shipper's nominated primary firm service in both the Timely and Evening Nomination cycles. Section 8.4(c) provides that, if a shipper whose nominated amount is not fully scheduled in the Timely Nomination Cycle nominates on another pipeline in the Timely or Evening Nomination Cycle, it need not re-submit its nomination to TransColorado in the Evening Nomination Cycle in order to receive reservation charge credits. As proposed, section 8.4(c) further required that such a shipper provide documentation to TransColorado no later than the nomination deadline on for the Intra-day 1 Nomination Cycle that it has scheduled and confirmed the curtailed quantities on an alternate pipeline.

48. In their protest to TransColorado's original section 4 filing, Indicated Shippers sought clarification of what documentation would be necessary when a shipper claimed it used an alternate pipeline after TransColorado announced an outage. TransColorado responded that a shipper should provide written evidence to TransColorado, but such evidence need not contain commercially sensitive information. The June 2012 Order required TransColorado revise section 8.4(c) to include this clarification.

49. In the compliance filing TransColorado revised Section 8.4(c) so that shipper must provide:

> no later than the nomination deadline for the Intra-Day 1 Nomination Cycle, documentation that it has scheduled and confirmed the curtailed quantities on an alternate pipeline. Such documentation shall be in writing and consist of a representation to TransColorado of the quantities nominated, confirmed and scheduled on a third-party pipeline as a result of TransColorado's inability to provide primary firm service.

50. In their protest, Indicated Shippers object to both the deadline as well as the material to be forwarded. Indicated Shippers refer to Wyoming Interstate Company, LLC's (WIC) tariff which formed the basis of the Commission's policy in this area[41] which contains no documentation requirement and no deadline for when a shipper must submit its "representation." The tariff merely requires the shipper "to provide a representation" that it has used an alternate pipeline.

[41] *See Wyoming Interstate Company, Ltd.*, 130 FERC ¶ 61,091 (2010).

51. Indicated Shippers further contend that since reservation charge credits are calculated as part of an end-of-month invoice there is no need for such a quick deadline for the shipper to furnish the documentation.

52. In its answer, TransColorado states that the representation can be satisfied via email, the standard mode of communication in the gas industry. As to the deadline, TransColorado states that it will provide additional time so the representation can be furnished, i.e., until the end of the Gas Day on the day the curtailments are effective, which would give shippers until 8:59 a.m. on the following day.

53. We find that as clarified in its answer the documentation requirement is reasonable and should not present a problem for a shipper seeking reservation charge credits.

B. Conduct of others affecting crediting

54. TransColorado's December filing in Section 8.(e)(ii) provided that no reservation charge credits would be required "when TransColorado's failure to schedule nominated and confirmed quantities is the result of the conduct of Shipper or the upstream or downstream operator of the facilities at the Receipt or Delivery Point, respectively." The Commission found that this proposal was basically consistent with Commission policy but required further refinement in two respects. [42]

55. First, the Commission addressed the application of this provision in the context of non-*force majeure* outages. The Commission found that it is reasonable for TransColorado's tariff to include an exemption from providing full reservation charge credits, where its failure to provide service during a non-*force majeure* outage is due to the conduct of the upstream or downstream operator of the facilities at the Receipt or Delivery Point, if those operators are outside of the control of TransColorado. However, proposed GT&C section 8(e)(ii) does not clearly limit the exemption from crediting to point operators who are outside TransColorado's control. Therefore, the June 2012 Order, at P 50, required TransColorado to modify that section to specify that it only applies when the point operator is outside its control.

56. Second, the Commission addressed the application of GT&C section 8.4(e)(ii) during *force majeure* outrages. The Commission stated that a *force majeure* event presents a different issue, because the event causing the failure could affect both TransColorado and the interconnecting pipeline. The Commission agreed that when a *force majeure* event only affects the connecting pipeline and TransColorado is ready and able to deliver nominated volumes but for the inability of the connecting pipeline to

[42] June 2012 Order, 139 FERC ¶ 61,229 at P 58.

provide service, TransColorado should not be required to grant credits. However, when both its facilities and the facilities of others are affected, then TransColorado could not have provided service regardless of the situation on interconnecting facilities. Since *force majeure* events are events that are not only uncontrollable but unexpected, the pipeline must give partial credits in order to share the risk of an event for which neither party is responsible. The Commission explained that in a *force majeure* event, when both the pipeline's facilities and the facilities of others are affected, then the traditional *force majeure* rule applies and the pipeline must give partial credits. Therefore, the June 2012 Order, at P 52, required TransColorado to clarify section 8.4(e)(ii) "to provide that it need not grant credits when the failure to deliver is solely due to the conduct of others not controlled by TransColorado."

57. In its July 23, 2012 compliance filing, TransColorado revised section 8.4(e)(ii) to add the italicized phrase at the end of the exemption: ". . . when TransColorado's failure to schedule nominated and confirmed quantities is the result of the conduct of Shipper or the upstream or downstream operator of the facilities at the Receipt or Delivery Point, respectively, *that is not operated or controlled by TransColorado*."

58. In their protest, Indicated Shippers assert that this does not fully comply with the Commission's requirements because it does not include the term "solely." In support, Indicated Shippers cite to the Commission's explanation in the June 2012 Order that when both TransColorado's facilities and the facilities of others are affected, then TransColorado could not have provided service regardless of the situation on interconnecting facilities, and some credits would be due the shipper. In its answer, TransColorado refers to the Commission's directive at P 50 but does not discuss the Commission's explanation in P 52. Rather, it argues that the Commission only reference the term "solely" was in P 52, and the word, "solely" was not a word the Commission required TransColorado to include in Section 8.4(e).

59. We do not agree. The June 2012 Order addressed two different situations. In P 50, the Commission addressed the non-*force majeure* situation, and TransColorado revised section 8(e)(ii) to limit the exemption when its failure to deliver was due to conduct of "others outside its control." In P 52 the Commission addressed the *force majeure* situation. In that situation, as Indicated Shippers note, the order explained that where the facilities of others were affected by the event, but TransColorado was ready to perform, no credits would be due from TransColorado because the failure to deliver was not its fault in any way. However, if both TransColorado's facilities and others' facilities were affected, then *force majeure* would apply to Transcolorado because it was not ready to perform, and partial credits would be due to shipper from TransColorado. The

June 2012 Order cited *Paiute Pipeline Company (Paiute*)[43] where the Commission explained that in a *force majeure* event, when both the pipeline's facilities and the facilities of others are affected, then the traditional *force majeure* rule applies and the pipeline must give partial credits. Therefore, TransColorado must include the word "solely" in section 8(e)(ii), and revise that section accordingly.

The Commission orders:

(A) TransColorado's Request for Rehearing is denied.

(B) TransColorado's compliance filing is accepted, effective June 16, 2012, subject to TransColorado filing, within thirty (30) days of the date of this order, revised tariff records as directed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[43] *Paiute*,139 FERC ¶ 61,089 (2012).