

144 FERC ¶ 61,195
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.

CenterPoint Energy Gas Transmission
Company, LLC

Docket Nos. RP12-498-002
RP12-498-001

ORDER ON REHEARING AND COMPLIANCE

(Issued September 11, 2013)

1. On April 23, 2012, the Commission issued an order accepting and suspending revised fuel use and lost and unaccounted-for gas (LUFG) percentages and electric power costs (EPC) filed by CenterPoint Energy Gas Transmission Company, LLC (CenterPoint).¹ The April 23 Order also directed CenterPoint to revise its liability and damages provisions or show cause why it should not be required to do so, and to explain or revise its reservation charge crediting provisions. On May 23, 2012, CenterPoint filed a request for rehearing of the April 23 Order, as well as a response to the show cause portion of that order. The Commission finds that CenterPoint's liability and damages provisions, as well as its reservation charge crediting provisions are unjust and unreasonable. CenterPoint is therefore directed to revise these portions of its tariff within 30 days of the date this order issues.

Background

2. CenterPoint's tariff requires it to adjust its fuel, LUFG and EPC Tracker on or before each April 1 and October 1, based on actual data for the twelve months ending December 31 and June 30, respectively. CenterPoint's filing proposed such revisions to the fuel and LUFG percentages and provided worksheets showing the derivation of its EPC Tracker.

¹ *CenterPoint Energy Gas Transmission Co., LLC*, 139 FERC ¶ 61,064 (2012) (April 23 Order).

3. Missouri Public Service Commission (MoPSC) protested the filing, arguing that CenterPoint failed to demonstrate that the level of LUFG it proposed to recover from its customers is just and reasonable. MoPSC argued that materials submitted to the United States Department of Transportation (DOT) show that CenterPoint has improperly included certain gas losses in its LUFG reimbursement percentages that are known and accounted for. Specifically, MoPSC objected to the inclusion of two events that were large enough to affect CenterPoint's LUFG percentage in this filing: (1) a January 11, 2011 leak near De Berry, Texas, that was due to a crack caused by axial stresses due to temperature changes and resulted in the unintentional release of 52,874 Mcf of gas (De Berry Loss); and (2) an August 16, 2011 gas valve failure that occurred near Amber, Oklahoma, when lightning caused a station malfunction and the station did not complete emergency shutdown procedures correctly, which resulted in the release of 47,000 Mcf of gas (Amber Loss).

4. In its protest, BP raised no objection to CenterPoint's proposed reimbursement percentages. Instead, BP asked the Commission to require CenterPoint to eliminate or modify existing tariff language. BP claimed that it was not clear from CenterPoint's tariff whether discount rate shippers are entitled to reservation charge credits in the event of a curtailment. BP argued that the Commission's reservation charge crediting policy should apply to discount rate shippers just as it applies to maximum rate shippers and urged the Commission to require CenterPoint to revise its tariff to clarify that both are entitled to reservation charge credits.

5. BP also argued that the liability provisions in CenterPoint's tariff are vague and could be interpreted to limit CenterPoint's liability for damages caused only by CenterPoint's "sole or gross negligence." BP claims that this interpretation would violate Commission policy that a tariff cannot immunize a pipeline from damages that are caused by the pipeline's simple negligence. BP further argued that the Commission has embraced a comparative negligence standard, and that CenterPoint's restriction of liability to damages caused solely by CenterPoint violates this policy. BP also argued that CenterPoint's tariff purports to immunize CenterPoint from, among other things, consequential damages, also in violation of Commission policy. Finally, BP argued that while CenterPoint's tariff purports to restrict a finding of negligence to situations where CenterPoint's action proximately caused a shipper's damages, such restrictions should not be made by CenterPoint's tariff, but instead should be reserved for a court.

6. On April 12, 2012, CenterPoint filed an answer, which the Commission rejected.

7. On April 23, 2012, the Commission issued an order accepting CenterPoint's revised tariff records, subject to conditions, to be effective May 1, 2012.² The Commission also found CenterPoint's liability and damages provisions to be unjust and unreasonable and directed CenterPoint to revise those provisions of its tariff or show cause why it should not be required to do so.³ The Commission also required CenterPoint to explain or revise its reservation charge crediting provisions.⁴

8. On May 1, 2012, CenterPoint filed revised tariff records in compliance with the April 23 Order's directive to remove the De Berry and Amber Losses from its LUGF percentages. On May 23, 2012, CenterPoint filed a request for rehearing of the April 23 Order (Rehearing Request). On the same day, CenterPoint also filed a response to the show cause portions of the April 23 Order (Response). CenterPoint states that the Response is subject to the outcome of the Commission's action on its request for rehearing of the April 23 Order. CenterPoint also incorporates its Rehearing Request into its Response.

Reimbursement Percentages

April 23 Order

9. In the April 23 Order, the Commission found that the De Berry Loss and Amber Loss were not the result of normal pipeline operations, and therefore were inappropriately included in CenterPoint's reimbursement percentages.⁵ Specifically, the Commission pointed to a previous order holding that losses resulting from a lightning strike, such as the Amber Loss, are not recoverable in a tracking mechanism.⁶ The Commission pointed to another order holding that losses resulting from pipe failures due to temperature variations, such as the De Berry Loss, are not recoverable in a tracking mechanism.⁷ Importantly, the Commission explained that "CenterPoint has provided no information

² April 23 Order, 139 FERC ¶ 61,064 at P 17.

³ *Id.* P 21.

⁴ *Id.* P 27.

⁵ *Id.* P 17.

⁶ *Id.* (citing *CenterPoint Energy Gas Transmission Co.*, 131 FERC ¶ 61,047, at P 12 (2010)).

⁷ *Id.* (citing *Southern Star Central Gas Pipeline, Inc.*, 138 FERC ¶ 61,222, at P 15 (2012) (*Southern Star*)).

regarding these losses that would persuade us to change course here.”⁸ Accordingly, the Commission directed CenterPoint to remove these losses from its reimbursement percentages.

Request for Rehearing

10. On rehearing, CenterPoint argues that the Commission’s decision to exclude the De Berry Loss and the Amber Loss as outside the scope of normal pipeline operations was arbitrary and capricious and was not supported by substantial record evidence. CenterPoint states that the incident at the Amber compression station is distinguishable from a loss resulting from a lightning strike which the Commission cited as support for disallowing recovery of the Amber loss.⁹ CenterPoint states that the loss of 47,000 Mcf of natural gas at the Amber station was not caused by a lightning strike, but rather was the result of the failure of the station’s back-up generator when power to CenterPoint’s Amber station was lost due to a lightning strike. CenterPoint argues that the Commission has not provided any reasoned basis or citation to precedent to support a ruling that a loss of gas attributable to a failure of emergency equipment during a power outage is not recoverable through a fuel tracker. CenterPoint states that power outages, regardless of their proximate cause, are a part of normal pipeline operations. Thus, CenterPoint contends that the Amber Loss is more closely analogous to the failure of a relief valve or a failed relay on a blowdown valve, incidents for which the Commission has allowed recovery of losses through a fuel tracker mechanism.¹⁰

11. In addition, CenterPoint argues that the De Berry Loss is distinguishable from a loss resulting from temperature variations which the Commission cited as support for disallowing recovery of the De Berry Loss.¹¹ CenterPoint states that metallurgical analysis performed after the De Berry incident indicated that the leak was the result of axial tensile stress causing a fracture in a buckled portion of the pipe and that the analysis was unable to determine how or when the buckle was formed. Thus, CenterPoint asserts that temperature variations were not the sole or primary cause of the failure.

⁸ *Id.*

⁹ CenterPoint Rehearing Request at 22 (citing *CenterPoint*, 131 FERC ¶ 61,047 at P 12).

¹⁰ CenterPoint Rehearing Request at 22 (citing *CenterPoint*, 131 FERC ¶ 61,047 at PP 7-13).

¹¹ CenterPoint Rehearing Request at 23-24 (citing *Southern Star*, 138 FERC ¶ 61,222 at P 4).

Commission Determination

12. We deny CenterPoint's request for rehearing on this issue. The Commission has held that fuel tracking mechanisms are appropriate for normal operating costs, but are not appropriate for the recovery of gas losses outside the scope of normal pipeline operations.¹²

13. Although CenterPoint contends that the Amber Loss resulted from the failure of emergency equipment during a power outage, CenterPoint does not dispute that the power outage and subsequent equipment failure is ultimately attributable to a lightning strike.¹³ The Commission has held that a loss resulting from a lightning strike is not related to routine operations so as to be recoverable through a pipeline's fuel and loss reimbursement percentages.¹⁴ CenterPoint does not challenge the Commission's policy prohibiting recovery of losses attributable to a lightning strike through the pipeline's reimbursement percentages. Instead, CenterPoint attempts to construe the lightning strike as a somehow distant event, unrelated to the power outage that caused the Amber Loss. CenterPoint, however, points to no intervening event or circumstance that would support this position. We therefore decline CenterPoint's invitation to view the Amber Loss in isolation from its context simply because CenterPoint can point to a number of system failures occasioned by the lightning strike.

14. Further, even if the Amber Loss is attributable to the failure of emergency shut-down equipment rather than the lightning strike, as CenterPoint maintains,¹⁵ it is nevertheless unrecoverable through a fuel tracking mechanism. CenterPoint argues that the failure of the Amber station's back-up generator is more closely analogous to the failure of a relief valve or a blowdown valve, for which the Commission allowed

¹² See, e.g., *CenterPoint*, 131 FERC ¶ 61,047 at P 12; *Colorado Interstate Gas Co.*, 121 FERC ¶ 61,161, at P 22 (2007), *order on reh'g*, 123 FERC ¶ 61,183 (2008), *aff'd Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698 (D.C. Cir. 2010) (*CIG*).

¹³ See CenterPoint Rehearing Request at 22 ("The fact that this particular power outage was caused by a lightning strike in the local area does not change the fact that power outages, regardless of their proximate cause, are a part of normal pipeline operations.").

¹⁴ See *CenterPoint*, 131 FERC ¶ 61,047 at P 12.

¹⁵ See CenterPoint Rehearing Request at 22 ("[T]he loss at the Amber station was the result of the failure of emergency shut-down equipment when power to [CenterPoint's] Amber station was lost.").

recovery of losses.¹⁶ However, the equipment failure at issue here is less analogous to the circumstances in *CenterPoint* than to those in *Cheyenne Plains*. In *Cheyenne Plains*, the Commission held that the failure of a flange connection associated with a relief valve, which resulted in gas escaping and igniting, was an unexpected, non-routine system failure such that the loss could not be construed to be a normal operating cost.¹⁷ Here, the total failure of the Amber station's emergency shut-down process during a power outage cannot reasonably be characterized as normal pipeline operations.¹⁸ Rather, as the Commission has previously held, losses resulting from the complete failure of some portion of a pipeline system are not appropriately recovered through a tracking mechanism.¹⁹ Accordingly, while we do not accept CenterPoint's attempt to isolate the power outage from its cause, even were we to accept this argument, CenterPoint would still be prohibited from recovering the Amber Loss in its reimbursement percentages.

15. In addition, CenterPoint argues that the De Berry Loss was not caused by temperature variations and is therefore distinguishable from the circumstances in *Southern Star*. In *Southern Star*, the Commission held that a loss resulting from the complete failure of a portion of a pipeline system due to temperature variations was not recoverable through a tracking mechanism.²⁰ In its Incident Reports submitted to the Department of Transportation regarding the Amber and De Berry incidents, CenterPoint states that the failure was caused by a buckle forming in the pipe wall and axial stresses due to extreme cold temperature changes acting on the buckled pipe and resulting in rupture.²¹ CenterPoint again seeks to cast doubt on the exact cause of the loss in its request for rehearing, indicating that "temperature fluctuations or extreme cold

¹⁶ CenterPoint Rehearing Request at 22 (citing *CenterPoint*, 131 FERC ¶ 61,047 at PP 7-13).

¹⁷ See *Cheyenne Plains Gas Pipeline Co., L.L.C.*, 123 FERC ¶ 61,220, at P 10 (2008) (*Cheyenne Plains*).

¹⁸ We note that, on rehearing, CenterPoint states that power outages "are a part of normal pipeline operations." Even if this were so, it is certainly not reasonable to classify the failure of emergency shut-down equipment during such a power outage as normal or routine.

¹⁹ *CIG*, 123 FERC ¶ 61,183 at P 16.

²⁰ *Southern Star*, 138 FERC ¶ 61,222 at P 15.

²¹ See Missouri Public Service Commission Protest, Attachment A; CenterPoint Answer, Attachment A.

temperatures were not the sole or primary cause of the loss.”²² However, given CenterPoint’s conflicting statements as to the cause of the De Berry Loss, and its failure to reconcile the two, we find that CenterPoint has not supported its request for rehearing. We therefore affirm the April 23 Order’s determination that the incident at issue here is most analogous to the pipeline failure due to a frozen relief valve in *Southern Star*.²³

Reservation Charge Credits

16. CenterPoint’s firm rate schedule provides for reservation charge credits pursuant to section 5.2(a), which states the following:

Failure to Deliver Contract Demand: If during one or more Days in the Service Month Transporter is unable to deliver to a Shipper which is paying the maximum rate, including a Reservation Charge, Gas scheduled and received by Transporter for the account of Shipper, up to the Contract Demand, consistent with other Contract Limitations, established for the Service Month, then, for Shippers paying the maximum rate, the total applicable Reservation Charge shall be reduced by subtracting the product of the quantity of such Gas in Dth which Transporter did not deliver and the applicable currently effective Reservation Charge Adjustment Rate. For Shippers paying less than the maximum rate, the amount of the adjustment, if any, shall be consistent with the discount agreement between Shipper and Transporter.²⁴

17. In addition, section 8.2 of the CenterPoint’s GT&C states:

Repair and Maintenance. Transporter shall have the right to curtail, interrupt or discontinue service in whole or in part on all or part of its system from time to time in order to perform repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable

²² CenterPoint Rehearing Request at 24.

²³ April 23 Order, 139 FERC ¶ 61,064 at P 17 (citing *Southern Star*, 138 FERC ¶ 61,222 at P 15).

²⁴ CenterPoint Energy Gas Transmission Company, LLC, FERC Gas Tariff, Rate Schedule FT, § 5.2(a), Original Sheet Nos. 56-57.

governmental regulations and shall not be liable to Shippers therefor. Transporter shall exercise due diligence to schedule such activities so as to minimize interruptions or disruption of services and shall provide reasonable advance notice of same.

April 23 Order

18. The Commission found that it is unclear whether CenterPoint's reservation charge crediting provisions comply with Commission policy. The Commission explained that it had developed its reservation charge crediting policy in a series of individual adjudicatory proceedings.²⁵ That policy differentiates between the credits a pipeline is required to give firm shippers depending upon whether the outage is caused by a *force-majeure*²⁶ event or a non-*force majeure* event.

19. With respect to non-*force majeure* outages, where the curtailment occurred due to circumstances within a pipeline's control, including planned or scheduled maintenance, the Commission requires the pipeline to provide firm shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver. Commission policy also requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event in order to share the risk of an event not in the control of the pipeline. In that event, the Commission allows two different methods for the credit, either full reservation credits after a short grace period (i.e., ten days or less) (Safe Harbor Method) or partial crediting starting on the first day of a *force majeure* event (No Profit Method).²⁷

²⁵ Citing, as examples, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005), *aff'd*, *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007) (*North Baja*); *S. Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *N. Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 (2011); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*).

²⁶ The Commission explained that *force majeure* events are "unexpected and uncontrollable events," (citing *Tenn. Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,088 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997)).

²⁷ April 23 Order, 139 FERC ¶ 61,064 at P 23 (internal footnotes omitted).

20. The Commission found that CenterPoint's reservation charge crediting provisions were unclear on a number of key points and potentially inconsistent with Commission policy.²⁸ Specifically, the April 23 Order found that those provisions appeared to be inconsistent with Commission policy with respect to the manner in which reservation charge credits are calculated. The April 23 Order explained that in non-*force majeure* situations, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service the shipper nominated, but that the pipeline was unable to schedule or deliver.²⁹ Similarly, the Commission requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event in order to share the risk of an event not in the control of the pipeline. In that event, the Commission allows two different methods for the credit, either full reservation credits after a short grace period (i.e., ten days or less) (Safe Harbor Method) or partial crediting starting on the first day of a *force majeure* event (No Profit Method).³⁰ The April 23 Order pointed out that, in *North Baja Pipeline, LLC v. FERC*,³¹ the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

21. However, the Commission stated that section 5.2(a) of CenterPoint's firm rate schedule provides reservation charge credits only for the amount of gas "scheduled and received by" CenterPoint which it does not deliver. That language can be read as providing that CenterPoint will not provide reservation charge credits in situations where, for example, it does not schedule primary firm service because it is conducting routine maintenance or because a *force majeure* outage has occurred. If so, the Commission found that the provision is contrary to Commission policy requiring that credits be measured by the amount of gas *nominated* by the shipper which the pipeline did not schedule.³² On the other hand, the Commission recognized that the amount a shipper nominates to be scheduled by the pipeline is sometimes referred to as the amount the shipper "scheduled," despite the fact that technically only the pipeline "schedules" service.³³ Therefore, the Commission stated that it was not certain if CenterPoint

²⁸ *Id.* PP 26-27.

²⁹ Citing *Southern*, 137 FERC ¶ 61,050 at P 19.

³⁰ Citing *Midwestern*, 137 FERC 61,257 at PP 19-20.

³¹ *North Baja*, 483 F.3d 819.

³² *Id.*

³³ *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 74 (2011) (*Tennessee*).

intended to limit reservation credits solely to situations where it actually scheduled the service nominated by the shipper, received the gas, and then was unable to deliver the scheduled amount.³⁴

22. Accordingly, the Commission required CenterPoint to explain whether it interprets its reservation charge crediting provision as consistent with Commission policy and, if not, to either revise its tariff provisions concerning reservation charge crediting to conform to Commission policy, or explain why it should not be directed to do so.³⁵ Additionally, in order to better understand the extent to which CenterPoint individually negotiates reservation charge credits in discount rate agreements, the Commission required CenterPoint to describe any reservation charge crediting provisions contained in its discount rate agreements that vary from the default provision for maximum rate shippers.³⁶

Request for Rehearing and Response to April 23 Order

23. CenterPoint objects to the April 23 Order's requirement for CenterPoint to explain whether it interprets its reservation charge crediting provisions to be consistent with Commission policy.³⁷ CenterPoint contends that the Commission has the burden of proof under section 5 of the NGA and is therefore required to produce evidence necessary to support a *prima facie* case that CenterPoint's tariff is unjust and unreasonable. CenterPoint asserts that the April 23 Order inappropriately shifts the burden to CenterPoint by requiring CenterPoint to produce evidence to defend its existing tariff based on nothing more than the conclusory statement that the tariff might be inconsistent with the Commission's reservation charge crediting policy.³⁸ CenterPoint further contends that the Commission cannot require the target of a section 5 investigation to file "evidence" before first seeing the evidence submitted by the proponent of the change.³⁹

³⁴ *Id.* P 26.

³⁵ *Id.* P 27.

³⁶ *Id.*

³⁷ Because CenterPoint provides substantially the same (and for the most part, verbatim) information in its request for rehearing and its response to the April 23 Order, we summarize them here together.

³⁸ CenterPoint Request for Rehearing at 6.

³⁹ CenterPoint Request for Rehearing at 6-7 (citing *Bear Creek Storage Co. L.L.C.*, 137 FERC ¶ 61,134, at P 9 (2011); *Natural Gas Pipeline Co. of Am. LLC*, (continued...))

24. CenterPoint states that its reservation charge crediting provisions provide credits only when CenterPoint is unable to deliver gas that has been “scheduled and received by [CenterPoint] for the account of Shipper[.]”⁴⁰ CenterPoint further explains that it will not schedule gas that is affected by a *force majeure* event or by a scheduled service interruption. CenterPoint argues that the Commission previously found these reservation crediting charges to be just and reasonable,⁴¹ and that neither the Commission nor BP has submitted evidence showing that such provisions have become unjust and unreasonable. CenterPoint also contends that forcing CenterPoint to defend itself before any party has submitted record evidence against it is unfair and inconsistent with basic tenets of due process.

25. CenterPoint acknowledges that the April 23 Order’s ruling was limited to finding that it is unclear as to whether CenterPoint’s tariff complies with the Commission’s policy on reservation charge crediting.⁴² CenterPoint states that the implication of the April 23 order is that any inconsistency would result in the relevant tariff provisions being declared unjust and unreasonable. CenterPoint argues that the Commission cannot satisfy its burden of proof under section 5 of the NGA by relying on a general statement of policy.⁴³ CenterPoint contends that while the Commission articulated its reservation charge crediting policy in *NGSA*, it did not establish a substantive rule and instead elected to apply its policy in the context of individual pipeline tariff proceedings.⁴⁴ Accordingly, CenterPoint contends that it is unlawful for the Commission to simply point to its “holding” in *NGSA* as if it carries with it the force of a mandatory administrative requirement that applies to all pipelines. CenterPoint further argues that even if the Commission has a policy requiring a specific approach when evaluating a pipeline’s

129 FERC ¶ 61,158, at P 8 (2009); *Pub. Serv. Comm’n of the State of New York v. Nat’l Fuel Gas Supply Corp.*, 115 FERC ¶ 61,368, at P 6 (2006)).

⁴⁰ CenterPoint Request for Rehearing at 7 (quoting section 5.2(a) of Rate Schedule FT of CenterPoint’s tariff).

⁴¹ CenterPoint Request for Rehearing at 7 (citing *Arkla Energy Resources Co.*, 62 FERC ¶ 61,076, *order on reh’g*, 64 FERC ¶ 61,166, at 62,491-93, *order on reh’g*, 65 FERC ¶ 61,343 (1993) (*Arkla*)).

⁴² CenterPoint Request for Rehearing at 8.

⁴³ CenterPoint Request for Rehearing at 8 (citing *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991); *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

⁴⁴ CenterPoint Request for Rehearing at 9 (referencing *Natural Gas Supply Assoc.*, 135 FERC ¶ 61,055, *order on reh’g*, 137 FERC ¶ 61,051 (2011) (*NGSA*)).

proposal on reservation charge crediting, that is not the same as the Commission ruling that there can be only a single way to address service interruption in a pipeline's tariff.

26. CenterPoint next contends that the April 23 Order errs to the extent that it would require CenterPoint to credit reservation charges for interruptions in service necessary to maintain operational capability or comply with applicable governmental regulations. CenterPoint asserts that in the past, the Commission has not required reservation charge crediting when a pipeline must interrupt service to perform maintenance necessary maintain operational capability or comply with applicable regulations. CenterPoint notes that in *Arkla*, the Commission previously approved section 8.2 of its GT&C, which states:

Transporter shall have the right to curtail, interrupt or discontinue service in whole or in part on all or part of its system from time to time in order to perform repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable governmental regulations and shall not be liable to Shippers therefore. Transporter shall exercise due diligence to schedule such activities so as to minimize interruptions or disruption of service and shall provide reasonable advance notice of same.⁴⁵

27. CenterPoint argues that this provision remains just and reasonable because it requires CenterPoint to evaluate its operational capability and compliance with government requirements to assess whether it is necessary to interrupt service, and to use due diligence to schedule such activities in a way that minimizes interruptions. CenterPoint further argues that this provision gives it no financial incentive to artificially extend service disruptions. CenterPoint asserts that before the Commission can require CenterPoint to modify section 8.2, the Commission must adduce evidence showing that CenterPoint is violating the requirement that it exercise due diligence so as to minimize interruptions.⁴⁶

28. Additionally, CenterPoint contends that the Commission's reservation charge crediting policy is arbitrary and capricious. CenterPoint contends that while the stated purpose of the policy is to give pipelines the financial incentive to avoid or shorten

⁴⁵ CenterPoint Request for Rehearing at 13 (quoting section 8.2 of the GT&C of CenterPoint's tariff).

⁴⁶ CenterPoint Request for Rehearing at 14-15.

service interruptions,⁴⁷ there is no record evidence that natural gas companies are failing to keep such service interruptions to a minimum and therefore in need of such an incentive. Moreover, CenterPoint argues that the Commission's reservation charge crediting policy cannot be implemented without a contemporaneous adjustment in billing determinants.⁴⁸ CenterPoint argues that changes to billing determinants are necessary because the pipeline would now need to estimate the amount of capacity that will be subject to interruption each year and factor that estimate into its rates.

29. CenterPoint next addresses the April 23 Order's directives regarding the manner in which CenterPoint negotiates reservation charge credits in discount rate agreements. CenterPoint states that its default position—reflected in section 4(d)(i) of its *pro forma* service agreement—is that discount rate shippers will not receive reservation charge credits unless CenterPoint agrees otherwise.⁴⁹ CenterPoint notes that it filed the *pro forma* service agreement containing section 4(d)(i) as a result of: (1) a Commission investigation to determine if CenterPoint had filed all non-conforming terms and conditions in its negotiated rate contracts; and (2) a Commission requirement that CenterPoint modify its tariff to ensure that rights extended to certain customers were available to all customers.⁵⁰ CenterPoint states that the Commission expressly addressed section 4(d)(i) in accepting the *pro forma* service agreement,⁵¹ and it has provided no evidence in this proceeding to support a finding that the provision has become unjust and unreasonable.

30. CenterPoint argues that the Commission has allowed pipelines and shippers to negotiate the provisions of a discount rate agreement, including provisions related to the provision of credits. CenterPoint argues that in *Kern River*, the Commission held that a pipeline and a shipper may agree in an individually negotiated agreement that the

⁴⁷ CenterPoint Request for Rehearing at 15 (citing *NGSA*, 135 FERC ¶ 61,055 at P 20).

⁴⁸ CenterPoint Request for Rehearing at 15 (citing *Northern Natural Gas Co.*, 137 FERC ¶ 61,202, at P 34 (2011)).

⁴⁹ CenterPoint Request for Rehearing at 16 (citing section 4(d)(i) of CenterPoint's *pro forma* service agreement).

⁵⁰ CenterPoint Request for Rehearing at 16-17 (citing *CenterPoint Energy Gas Transmission Co.*, 104 FERC ¶ 61,281 (2003)).

⁵¹ CenterPoint Request for Rehearing at 17 (citing *CenterPoint Energy Gas Transmission Co.*, 106 FERC ¶ 61,213, at P 15 (2004)).

pipeline will not provide full reservation charge crediting.⁵² CenterPoint also contends that changes to reservation charge crediting provisions of a pipeline tariff are to be prospective only, and that existing contracts should not be disturbed.⁵³ CenterPoint argues that under the *Mobile-Sierra* doctrine, these freely negotiated contracts are presumed just and reasonable. CenterPoint further argues that neither BP nor the Commission has offered any support to justify upsetting these contracts.

31. Finally, CenterPoint argues that the Commission should not have acted on BP's concerns about its reservation charge crediting provisions in the context of this limited section 4 proceeding. CenterPoint notes that the Commission has previously stated that if a shipper believes that a pipeline's tariff does not comply with the Commission's reservation charge crediting policy, then that shipper can file a complaint alleging non-compliance, or raise the issue in any section 4 filing by that pipeline.⁵⁴ However, CenterPoint argues that the Commission established this policy in a policy statement, not in a substantive rulemaking. Moreover, CenterPoint argues that this policy is inconsistent with the Commission's normal practice of rejecting requests to use the protest of a limited section 4 tariff filing as a vehicle to modify other parts of a pipeline's existing tariff.⁵⁵ CenterPoint argues that the Commission erred by departing from this practice and that it cannot rely on the policy statement allowing shippers to raise concerns about its reservation charge crediting provisions in a limited section 4 filings.

32. CenterPoint emphasizes that its semi-annual fuel tracker filing is a limited section 4 proceeding designed to be routine and promptly addressed. CenterPoint contends that while questions germane to the fuel tracker filing are appropriate, the limited nature of such filings are defeated if intervenors are allowed to raise ad hoc issues not germane to the filing.

⁵² CenterPoint Request for Rehearing at 17 (citing *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050, at P 33 (2011)).

⁵³ CenterPoint Request for Rehearing at 18 (citing *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050, at P 33).

⁵⁴ CenterPoint Request for Rehearing at 19 (citing *NGSA*, 135 FERC ¶ 61,055 at P 28).

⁵⁵ CenterPoint Request for Rehearing at 19 (citing *Trailblazer Pipeline Co. LLC*, 136 FERC ¶ 61,146, at P 30 (2011); *El Paso Natural Gas Co.*, 134 FERC ¶ 61,245, at P 8 (2011); *Cheyenne Plains Gas Pipeline Co., L.L.C.*, 132 FERC ¶ 61,206, at P 17 (2010); *CenterPoint Energy Gas Transmission Co.*, 131 FERC ¶ 61,175, at P 10 (2010); *El Paso Natural Gas Co.*, 121 FERC ¶ 61,219, at P 13 (2007), *reh'g denied*, 128 FERC ¶ 61,205 (2009)).

Commission Determination

33. We reject CenterPoint's request for rehearing on this issue. Furthermore, we find that CenterPoint's reservation charge crediting provisions are inconsistent with Commission policy and are unjust and unreasonable. Accordingly, pursuant to section 5 of the NGA, CenterPoint is directed to file revised reservation charge crediting tariff records in conformance with Commission policy.

34. In *Texas Eastern*, the Commission discussed, at length, the procedures associated with initiating an investigation under section 5 of the NGA. The Commission responded to challenges to its determinations that a pipeline's reservation charge crediting provisions did not conform to Commission policy and that the pipeline was therefore required, pursuant to section 5 of the NGA, to file revised tariff provisions or show cause why it should not be required to do so.⁵⁶ The Commission's finding in the April 23 Order was slightly different. There, the Commission found only that CenterPoint's reservation charge crediting provisions were unclear, directing CenterPoint to explain whether it interprets its reservation charge crediting provision as consistent with Commission policy and, if not, to either revise such tariff provisions to conform to Commission policy, or explain why it should not be directed to do so.⁵⁷

35. In this order, we affirm the April 23 Order's initiation of an investigation under section 5 of the NGA and find that CenterPoint's reservation charge crediting provisions are unjust and unreasonable. Accordingly, CenterPoint is directed to file revised reservation charge crediting tariff records in conformance with Commission policy.

Initiation of Section 5 Investigation

36. The April 23 Order initiated an investigation under NGA section 5 to determine whether CenterPoint's existing reservation charge crediting provisions are unjust and unreasonable and must be modified. In order to modify CenterPoint's reservation charge crediting provisions under NGA section 5, the Commission has the burden of persuasion to demonstrate both that CenterPoint's existing tariff provisions are unjust and unreasonable and that any replacement tariff provisions we impose are just and

⁵⁶ *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126, *order on reh'g and compliance*, 140 FERC ¶ 61,216, at PP 6-11 (2012) (*Texas Eastern*).

⁵⁷ April 23 Order, 139 FERC ¶ 61,064 at P 27. Additionally, the Commission directed CenterPoint to file additional information in order to get a better understanding of the extent to which CenterPoint individually negotiates reservation charge credits in discount rate agreements.

reasonable.⁵⁸ The April 23 Order did not make any final merits decision on either of those issues. Rather, the April 23 Order established procedures in order to develop a record upon which the Commission can decide those issues. CenterPoint contends that those procedures violate section 5 of the NGA by placing upon it the initial burden to produce evidence that its reservation charge crediting provisions remain just and reasonable. The Commission disagrees.

37. In response to concerns raised by BP, the Commission reviewed CenterPoint's tariff, finding that section 5.2(a) of CenterPoint's Rate Schedule FT is unclear and could be read as being inconsistent with Commission policy with respect to the manner in which reservation charge credits are calculated.⁵⁹ Specifically, the Commission determined that language in section 5.2(a) could be read to mean that CenterPoint will not provide reservation charge credits in situations where, for example, it does not schedule primary firm service because it is conducting routine maintenance or because a *force majeure* outage has occurred.⁶⁰ The Commission explained that if this interpretation is correct, the provision is contrary to Commission policy requiring that credits be measured by the amount of gas *nominated* by the shipper which the pipeline did not schedule.⁶¹ On the other hand, the Commission recognized that in some cases, the amount a shipper nominates to be scheduled by the pipeline is sometimes referred to as the amount the shipper "scheduled," despite the fact that technically only the pipeline "schedules" service.⁶² In light of this uncertainty, the Commission initiated its investigation under section 5 of the NGA, providing CenterPoint with an opportunity to resolve this ambiguity by explaining how it interprets its tariff on this point.⁶³

38. This ambiguity in section 5.2(a) of CenterPoint's Rate Schedule FT in tandem with the risk that such ambiguity could be read in a way that, on its face, violates Commission policy—which the Commission clearly described in the April 23 Order—

⁵⁸ *Texas Eastern*, 140 FERC ¶ 61,216 at P 19 (citing *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (*Western Resources*)).

⁵⁹ April 23 Order, 139 FERC ¶ 61,064 at PP 25-26.

⁶⁰ April 23 Order, 139 FERC ¶ 61,064 at P 26.

⁶¹ April 23 Order, 139 FERC ¶ 61,064 at P 26 (citing *Southern*, 137 FERC ¶ 61,050 at P 19).

⁶² April 23 Order, 139 FERC ¶ 61,064 at P 26 (citing *Tennessee*, 135 FERC ¶ 61,208 at P 74).

⁶³ April 23 Order, 139 FERC ¶ 61,064 at P 26.

sufficiently sets forth a *prima facie* showing that CenterPoint's existing reservation charge crediting provisions are unjust and unreasonable. The Commission therefore appropriately required CenterPoint to explain whether it interprets its tariff to be consistent with Commission policy, and if not to revise it or show cause why it should not be required to do so.

39. CenterPoint also contends that the Commission relied on the general statement of policy set forth in *NGSA*, arguing that the Commission cannot satisfy its burden by relying on a policy statement. In *Texas Eastern*, the Commission considered and rebuffed identical arguments to those raised by CenterPoint. The Commission determined that the pipeline's contention was "fatally flawed" because it mischaracterized the Commission's basis for initiating the section 5 investigation. In both the April 23 Order and *Texas Eastern*, the Commission did not rely on, or cite, *NGSA*. Instead, in both cases, the Commission relied on the reservation charge crediting policy that it had developed "in a series of individual adjudicatory proceedings."⁶⁴

40. Specifically, in the April 23 Order, the Commission relied on *Southern* for the proposition that "[i]n non-*force majeure* situations, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service the shipper nominated, but that the pipeline was unable to schedule or deliver."⁶⁵ As the Commission explained in *Texas Eastern*⁶⁶ and *Panhandle*,⁶⁷ *Southern* and other individual adjudications on reservation charge credits relied on by the April 23 Order have the force of law. While the court held in *PG&E v. FPC*⁶⁸ that policy statements do

⁶⁴ April 23 Order, 139 FERC ¶ 61,064 at P 23 (citing *North Baja*, 109 FERC ¶ 61,159, *order on reh'g*, 111 FERC ¶ 61,101, *aff'd*, *North Baja*, 483 F.3d 819; *Southern*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050; *N. Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 (2011); *Midwestern*, 137 FERC ¶ 61,257). *See also Texas Eastern*, 140 FERC ¶ 61,216 at P 22 (noting that the pipeline's tariff provisions were inconsistent with Commission policy as established in previously litigated adjudications).

⁶⁵ April 23 Order, 139 FERC ¶ 61,064 at P 25 (citing *Southern*, 137 FERC ¶ 61,050 at P 19).

⁶⁶ *Texas Eastern*, 140 FERC ¶ 61,216 at PP 24-25.

⁶⁷ *Panhandle Eastern Pipe Line Co.*, 142 FERC ¶ 61,041, at PP 29-30 (2013) (*Panhandle*).

⁶⁸ 506 F.2d 33, 38 (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").

not establish a “binding norm,” the court also stated that, in contrast to a policy statement:

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.

41. The Commission has formulated its reservation charge crediting policy through a series of adjudications concerning the reservation charge crediting tariff provisions of particular pipelines. The D.C. Circuit affirmed the major elements of that policy in *North Baja*. 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.⁶⁹

42. The Commission recognizes that in the *NGSA Rehearing Order*, we stated that the reservation charge crediting policy included in the April 2011 *NGSA Order* was a policy statement, which was not finally determinative of any issue concerning the justness and reasonableness of any pipeline’s reservation charge crediting provisions.⁷⁰ As such, the *NGSA* policy statement does not itself have the force of law, unlike the precedents established in the series of orders in the individual adjudications discussed above. However, the Commission also stated in the October 2011 *NGSA Rehearing Order*:

While [the April 2011 *NGSA order*] is itself a policy statement, the Commission may in future cases treat its decisions in the adjudications described in [*NGSA*] as binding precedent. In *PG&E v. FPC*, 506 F.2d at 38, the court recognized that an ‘agency may establish binding policy... through adjudications which constitute binding precedents.’ The Commission precedents described in the

⁶⁹ 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.

⁷⁰ See *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26.

[April 2011 *NGSA*] Order were established in adjudications concerning the justness and reasonableness of the reservation charge crediting tariff provisions of specific pipelines.

Therefore, our reliance in the April 23 Order in this case on binding precedents established in prior individual adjudications on similar issues to establish a *prima facie* case that *Panhandle*'s definition is unjust and unreasonable is consistent with our statements in the October 31, 2011 *NGSA Rehearing Order*.

43. Accordingly, having found that CenterPoint's reservation charge crediting provisions are ambiguous and potentially in direct conflict with Commission precedents having force of law, the Commission reasonably provided CenterPoint an opportunity to: (a) clarify its tariff provisions; or (b) if CenterPoint itself interprets its tariff provisions in a manner inconsistent with Commission policy, either revise them or show cause why it should not be required to do so. *Texas Eastern* and *Panhandle* discuss, at length, the Commission's well-established authority to require a pipeline to provide information in a section 5 proceeding investigating compliance with Commission policies having the force of law.⁷¹ 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.⁷² 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.⁷³

44. Therefore, consistent with *Texas Eastern* and *Panhandle*, we find that the April 23 Order properly initiated an investigation under NGA section 5 based on a *prima facie* showing that CenterPoint's reservation charge crediting provisions are inconsistent with Commission policy and therefore unjust and unreasonable.

⁷¹ *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*)).

⁷² *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 its burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill, once a *prima facie* showing is made that the minimum bill is anticompetitive and therefore *prima facie* unlawful)).

⁷³ *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

Whether CenterPoint's Reservation Charge Credit Provisions are Unjust and Unreasonable

45. The Commission recognizes that, even though the April 23 Order reasonably initiated a section 5 investigation of CenterPoint's tariff and imposed a burden of producing evidence on CenterPoint, the Commission continues to have the burden of persuasion under NGA section 5 to demonstrate both that: (1) the lack of reservation charge crediting provisions in CenterPoint's tariff and CenterPoint's tariff definition of *force majeure* are unjust and unreasonable; and (2) any replacement tariff provisions the Commission imposes are just and reasonable.⁷⁴ As stated earlier, the April 23 Order only established procedures for developing a record to enable the Commission to determine whether its burden of persuasion can be satisfied. For the reasons discussed below, we now find that the record does justify a finding that CenterPoint's reservation charge crediting provisions are unjust and unreasonable. The Commission therefore will require CenterPoint to make a compliance filing proposing just and reasonable replacement tariff provisions, and will determine just and reasonable replacement tariff provisions when addressing the compliance filing required by this order

46. In both its rehearing request and compliance filing, CenterPoint clarifies that section 5.2(a) of its GT&C provides credits only when CenterPoint is unable to deliver natural gas that has been "scheduled and received by [CenterPoint] for the account of Shipper[.]"⁷⁵ CenterPoint further explains that it will not schedule natural gas that is affected by a *force majeure* event or by a service interruption to perform repairs or maintenance as authorized by GT&C section 8.2. Given this clarification, we find that CenterPoint's reservation charge crediting provisions are inconsistent with Commission policy set forth in *Tennessee* and *Southern*, which requires that credits be measured by amount of natural gas *nominated* by the shipper which the pipeline did not schedule.⁷⁶ As discussed below, CenterPoint's own explanation of how it implements section 5.2(a) demonstrates that limiting credits to situations where it is unable to deliver natural gas

⁷⁴ *East Tennessee*, 863 F.2d 932, 938 ("FERC nonetheless retained the ultimate burden of persuasion."); *Western Resources*, 9 F.3d 1568, 1578.

⁷⁵ CenterPoint Request for Rehearing at 7 (quoting section 5.2(a) of Rate Schedule FT of CenterPoint's tariff).

⁷⁶ *Tennessee*, 135 FERC ¶ 61,208 at P 74, and *Southern*, 137 FERC ¶ 61,050 at P 19. See *Kern River Gas Transmission Co.*, 140 FERC ¶ 61,146, at PP 23-24 (2012) (*Kern River*).

that it has scheduled causes its tariff to violate the Commission's policies concerning crediting during both *force majeure* and non-*force majeure* outages.⁷⁷

Credits During Force Majeure Outages

47. The Commission requires that pipelines provide partial reservation charge credits during *force majeure* outages in order to share the risk of an event for which no party is at fault, 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; (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); or (3) some other method which provides for equitable sharing of the risk of such outages in the same ball park as the first two methods.⁷⁸ As part of clarifying that section 5.2(a) only requires it to provide credits when it fails to deliver gas that it has scheduled, CenterPoint states that it does not schedule gas if a *force majeure* event prevents it from providing service. As this clarification makes clear, under CenterPoint's existing tariff, it does not provide any reservation charge credits during *force majeure* outages, except possibly on the first day of a *force majeure* outage if the outage occurs after CenterPoint has scheduled service for that day. If the *force majeure* event extends beyond the first day, CenterPoint would not provide any credits during subsequent days of a *force majeure* outage, because it would not schedule service on such subsequent days. CenterPoint makes no attempt to argue that this limited possibility of credits would provide crediting in the same ballpark as either the Safe Harbor or No Profit Methods. CenterPoint argues only that the Commission approved this aspect of section 5.2(a) of its tariff during its Order No. 636 restructuring proceeding.⁷⁹

48. While the current language of section 5.2(a) appears to predate CenterPoint's Order No. 636 restructuring proceeding, the portion of the *1993 Restructuring Order* cited by CenterPoint contains no discussion of that section of its GT&C. However, we recognize that, in the course of discussing CenterPoint's definition of *Force Majeure* in

⁷⁷ See *Kern River*, 140 FERC ¶ 61,146 at PP 23-24 (referencing *Southern*, 137 FERC ¶ 61,050 at P 19).

⁷⁸ See, e.g., Opinion No. 406, 76 FERC ¶ 61,022, *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070, *as clarified by*, *Rockies Express*, 116 FERC ¶ 61,272 at P 63. The Commission has also stated that pipelines may use some other method that achieves equitable sharing reasonably equivalent to the two specified methods.

⁷⁹ Rehearing Request at 8 n.20 (citing *Arkla Energy Resources Co.*, 64 FERC ¶ 61,166, at 61,491-3, *reh'g*, 65 FERC ¶ 61,343 (1993) (*1993 Restructuring Order*)). At the time of the restructuring proceeding, CenterPoint was named Arkla Energy Resources.

section 8 of CenterPoint's GT&C, the *1993 Restructuring Order* stated, "[t]he payment of reservation charges by shippers is not excused in a force majeure situation."⁸⁰ However, this statement by the Commission twenty years ago during CenterPoint's Order No. 636 restructuring proceeding does not justify CenterPoint's retention in its tariff today of a provision placing almost all the risk of *force majeure* outages on its shippers in direct contravention of longstanding Commission policy.

49. The same *1993 Restructuring Order* relied on by CenterPoint also stated with respect to *force majeure* events, "[i]t has always been the Commission's view that, as no fault could be attached to such events, the risk should be shared by all parties,"⁸¹ and the Commission indicated no intent to change that fundamental policy. It was only after the Commission issued its orders in CenterPoint's Order No. 636 restructuring proceeding that the Commission considered the issue of how Order No. 636's requirement that pipelines adopt a Straight Fixed Variable (SFV) rate design should affect its reservation charge crediting policy. During the restructuring proceedings, the Commission focused on the fundamental requirements of Order No. 636, including the unbundling of the pipeline's transportation services from their sales services, the adoption of capacity release and flexible point rights, and the shift to an SFV rate design. After the Commission had completed processing the pipeline filings to comply with Order No. 636 and pipelines had gained some experience with their restructured operations, that the Commission confronted the issue of reservation charge crediting in the post-Order No. 636 world.

50. In July 1996, in Opinion No. 406,⁸² the Commission recognized that Order No. 636's requirement that pipelines shift to an SFV rate design had the effect of shifting the risk of *force majeure* outages entirely to the shippers. The Commission explained that under an SFV rate design in which all of the pipeline's fixed costs are included in the pipeline's reservation charge, the pipeline continues to recover its entire cost of service, including its return on equity, during a *force majeure* outage, while its shippers fail to receive access to the capacity assured them by their payment of reservation charges. Therefore, Opinion No. 406 found that Tennessee Gas Pipeline Company's (Tennessee) existing tariff provision excusing it from providing any reservation charge credits during *force majeure* outages placed all the risk of *force majeure* outages on its shippers. By contrast, under the Modified-Fixed Variable (MFV) rate design in effect before Order No. 636, in which return on equity and associated income taxes were included in the

⁸⁰ *Id.* 61,493.

⁸¹ *Id.*, (citing *Northern Natural Gas Co.*, 59 FERC ¶ 61,379, at 62,461 (1992)).

⁸² Opinion No. 406, 76 FERC at 61,088-89.

usage charge, “there was a built-in sharing of the risk because the pipeline’s recovery of its return on equity and taxes was dependent on its throughput.”⁸³

51. Citing the same *Northern Natural Gas Co.* order cited in the *1993 Restructuring Order* in CenterPoint’s Order No. 636 compliance filing, Opinion No. 406 stated that the Commission had “previously recognized that a *force majeure* interruption is a no-fault occurrence, by ruling in prior cases that all parties should bear the risk of *force majeure* events.”⁸⁴ The Commission concluded that, because the shift from an MFV to an SFV rate design had shifted the entire risk of *force majeure* outages to Tennessee’s shippers, its existing tariff provision excusing it from providing any reservation charge credits during *force majeure* outages was no longer just and reasonable. For that reason, the Commission affirmed the ALJ’s requirement that Tennessee provide partial credits equal to Tennessee’s return on equity and associated income taxes. The Commission observed that this requirement “returns the balance of risk back to the *status quo* before the Commission mandated the use of the SFV rate design.”⁸⁵ The Commission also stated that, in addition to the No Profit Method adopted by Opinion No. 406, other risk sharing methods such as the Safe Harbor Method approved in *Texas Eastern Transmission Corp.*⁸⁶ could also be reasonable. As described above, in *North Baja*, the court affirmed the Commission order requiring a pipeline to modify its tariff to provide partial reservation charge credits during *force majeure* outages pursuant to the No Profit Method, the Safe Harbor Method, or some other method which achieves equitable sharing in the same ball park as the first two methods.

52. The Commission concludes that the operation of CenterPoint’s existing tariff provision in GT&C section 5.2(a) to excuse it almost entirely from providing reservation charge credits during *force majeure* outages is unjust and unreasonable for the same reasons Opinion No. 406 held that Tennessee’s similar provision was unjust and unreasonable. Because CenterPoint uses an SFV rate design, that tariff provision places the entire risk of *force majeure* outages on its shippers. That is not only contrary to the Commission’s current policy requiring a sharing of the risk of *force majeure* outages, but also contrary to the same risk sharing policy in effect before Order No. 636 required a shift to an SFV rate design, as reflected in the *Northern Natural Gas Company* order cited by the *1993 Restructuring Order* on CenterPoint’s filing to comply with Order

⁸³ *Id.* 61,089.

⁸⁴ *Id.* 61,088.

⁸⁵ *Id.* 61,089.

⁸⁶ 62 FERC ¶ 61,015, at 61,089-61,091, *reh’g*, 63 FERC ¶ 61,100, at 61,433-61,435 (1993).

No. 636. That the Commission's orders in CenterPoint's Order No. 636 restructuring proceeding failed to recognize this fact is no reason why CenterPoint should be permitted, twenty years later, to retain a tariff provision that is plainly contrary to the policy set forth in Opinion No. 406, several years after the restructuring orders relied on by CenterPoint. Nor has CenterPoint provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the policy we have applied consistently and uniformly to other pipelines.

Credits During non-Force Majeure Outages

53. In non-*force majeure* situations, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service the shipper nominated, but that the pipeline was unable to schedule or deliver. The Commission has held that routine, scheduled maintenance is not a *force majeure* event, even on "pipelines with little excess capacity"⁸⁷ where such maintenance may require interruptions of primary firm service. Commission policy recognizes that even if such outages are considered to be uncontrollable, they are expected. The U.S. Court of Appeals for the District of Columbia Circuit affirmed this policy in *North Baja*,⁸⁸ 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.

54. In its clarification of section 5.2(a) of Rate Schedule FT, CenterPoint states that it will not schedule natural gas that is affected by a service interruption scheduled pursuant to section 8.2 of its GT&C. That section authorizes CenterPoint to interrupt service in order to perform "repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable governmental regulations." CenterPoint states that, because section 5.2(a) only requires it to provide reservation charge credits when it fails to deliver scheduled natural gas, it does not provide reservation charge credits for any such scheduled repairs or maintenance. Moreover, CenterPoint points out that GT&C section 8.2 requires it to exercise due diligence to schedule maintenance so as to minimize service interruptions and to provide reasonable advance notice of such activities. Given these requirements, CenterPoint contends that it is reasonable for it not to provide reservation charge credits

⁸⁷ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at P 15 (2003).

⁸⁸ *North Baja*, 483 F.3d at 823.

when it determines that service must be interrupted to maintain operational capability or comply with applicable government regulations.

55. CenterPoint thus concedes that section 5.2(a) of its FT Rate Schedule is contrary to the Commission's policy requiring pipelines to provide full reservation charge credits during non-*force majeure* outages for routine scheduled maintenance. In contending that it should not be required to provide such credits, CenterPoint relies on the fact that the Commission approved both Rate Schedule FT section 5.2(a) and GT&C section 8.2 in the *1993 Restructuring Order*. CenterPoint also contends that, as it relates to service interruptions of the type authorized by GT&C section 8.2 to maintain operational capability or comply with governmental regulations, the Commission's policy requiring full reservation charge credits is arbitrary and capricious. CenterPoint suggests this approach equates pipeline safety compliance work with mismanagement and that this is unreasonable at a time when Federal safety requirements are expanding.⁸⁹

56. CenterPoint's failure to provide any reservation charge credits during non-*force majeure* outages is unjust and unreasonable and contrary to longstanding Commission policy. Accordingly, we find section 5.2(a) of its FT Rate Schedule to be unjust and unreasonable. For the reasons discussed below, the Commission concludes that the fact section 5.2(a) was approved in CenterPoint's Order No. 636 restructuring proceeding does not justify CenterPoint's retention of a tariff provision contrary to current Commission policy. In addition, we reject its contention that our existing reservation charge crediting policy is unreasonable.

57. When the Commission processed the pipelines' filings to restructure their services in compliance with Order No. 636, the Commission had no stated policy requiring reservation charge credits during non-*force majeure* outages. However, as experience was gained with pipelines' restructured operations, the Commission moved toward requiring pipelines to provide full reservation charge credits for non-*force majeure* interruptions of a shipper's primary firm service. In June 1995, the Commission rejected a proposal by Tennessee under which Tennessee would not provide reservation charge credits for scheduled maintenance conducted during the off-peak period from May 1 through November 1. The Commission reasoned that "pipelines should be able to provide the service that they have contracted to perform," absent a *force majeure* event.⁹⁰ In that proceeding, the Commission also recognized pipelines' contracts with firm shippers only require them to provide guaranteed firm service at the shipper's primary

⁸⁹ Rehearing Request at 14-15 and n.30 (citing a March 29, 2012 letter to the Commission filed by the Interstate Natural Gas Association of America).

⁹⁰ *Tennessee*, 71 FERC at 62,580.

points.⁹¹ Accordingly, the Commission limited the pipeline's obligation to provide reservation charge credits to situations where the pipeline failed to satisfy its contractual obligation to provide nominated primary firm service.

58. A year later, the Commission again considered this issue in Opinion No. 406, and held that a pipeline should provide full reservation charge credits if the pipeline is required to interrupt primary firm service due to an event within its control or maintenance, explaining:⁹²

[b]ecause a pipeline is responsible for operating its system so that it can meet its contractual obligations, if the pipeline must curtail firm service due to an event within its control, or management, the Commission finds it inequitable for the pipeline's customers to bear the risk associated with such mismanagement. Thus, the Commission generally requires a pipeline to provide reservation charge credits to compensate its customers for the interruption in service. The reservation charge credits also provide an incentive for the pipeline to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system.

59. Since Opinion No. 406, the Commission has consistently treated outages due to scheduled or routine maintenance as *non-force majeure* events for which the pipeline must give full reservation charge credits. In several of those cases, the pipelines contended that the reasoning in Opinion No. 406 was inapplicable to the facts of their systems. Those pipelines argued that, contrary to Opinion No. 406's assumption that planned maintenance is within the pipeline's control and may be managed so as to avoid interruptions of service, such maintenance is a non-discretionary activity required for the safe operation of the pipeline and inevitably requires service outages on pipelines with little or no excess capacity.

60. For, example, in *El Paso*, the pipeline contended that it operates at a very high annual load factor in certain parts of its system and therefore it has little flexibility to schedule maintenance required for the safe operation of its pipeline in a manner that would limit service interruptions. The Commission responded by recognizing that

⁹¹ *Tennessee*, 73 FERC at 61,206 (“The reservation charge a customer pays is based on its contract with the pipeline for receipt and delivery of gas at particular primary points, and corresponding reservation charge credits should ordinarily be given when the pipeline fails to provide service to those particular points. The contract does not guarantee the same level of security if other points are used.”).

⁹² Opinion No. 406, 76 FERC at 61,086.

maintenance is an important and necessary function. However, the Commission emphasized that “the pipeline should have an incentive to perform maintenance with minimal service disruptions,” and full reservation charge credits provide that incentive.⁹³ The Commission also stated that its policy on this issue is not dependent upon the specific operating conditions on the pipeline.⁹⁴ In *Florida Gas*, the pipeline asserted that planned maintenance is a non-discretionary activity necessary to comply with regulatory requirements, and, because it operates at a high annual load factor, it cannot guarantee that there will be no service interruptions as a result of such planned maintenance. The Commission nevertheless required the pipeline to treat scheduled maintenance as a non-*force majeure* event, again finding that “full reservation charge crediting is an incentive to perform maintenance with minimal service disruption.”⁹⁵

61. Finally, in *North Baja*, the pipeline similarly contended that, on its system, outages for planned maintenance are unavoidable and should not be treated as non-*force majeure* events requiring full credits. As summarized by the Commission, North Baja argued that “the foundation of the Commission’s policy regarding reservation charge credits has always been control – when the pipeline is not at fault for the interruption and has not mismanaged its pipeline, the Commission has required only partial credits.”⁹⁶ North Baja contended that some planned repair and maintenance, such as periodic “pigging,” create unavoidable service interruptions through no fault of the pipeline. The Commission nevertheless required North Baja to provide full reservation charge credits for outages due to planned maintenance, explaining,

Furthermore, we do not agree with North Baja that “planned” maintenance is “uncontrollable”. While we agree that certain planned maintenance, such as “pigging,” may be necessary and unavoidable to preserve the safety and integrity of the pipeline facilities, we do not agree that the pipeline has no “control” over how and when it performs such maintenance. . . . These are activities over which North Baja exercises a degree of control, unlike acts of God in typical *force majeure* situations. Accordingly, this control warrants that the pipeline provide full credits to shippers for all such scheduled gas not delivered. Furthermore, since such maintenance is

⁹³ *El Paso*, 105 FERC ¶ 61,262 at P 14.

⁹⁴ *Id.* P 15.

⁹⁵ *Florida Gas Transmission Company*, 107 FERC ¶ 61,074, at P 29 (2004) (*Florida Gas*).

⁹⁶ *North Baja*, 111 FERC ¶ 61,101 at P 15.

planned, the pipeline should have provided for such maintenance interruptions in its rates. . . . [A]lthough control is an important principle, it is not the Commission's only consideration in such circumstances. The Commission also has an important goal of providing the pipeline, the entity in the best position to cure the non-*force majeure* interruption, in this case planned maintenance, with an incentive to resolve the interruption as quickly as possible.⁹⁷

62. Thus, in cases after Opinion No. 406, the Commission has expressly held that the reservation charge credit policy set forth in that opinion applies to situations where some interruptions of primary firm service may be necessary and unavoidable to preserve the safety and integrity of the pipeline facilities and thus do not arise from mismanagement. Moreover, the Commission has applied that policy to outages required to comply with PHMSA's current integrity management regulations. As the Commission explained in *North Baja*, while "control is an important principle, it is not the Commission's only consideration."⁹⁸ The Commission's reservation charge crediting policy also has the important goal of providing pipelines an incentive to minimize any interruptions to their shippers' primary firm service which may be necessary to perform planned maintenance. Firm shippers pay reservation charges for a guaranteed firm right to ship gas, throughout the year, up to their mainline contract demand using the primary receipt and delivery points in their contracts.⁹⁹ Therefore, they should be able to rely on the availability of that service whenever they request it to the maximum extent possible, consistent with safe operation of the pipeline. While some service disruptions may be unavoidable, the pipeline still exercises a "degree of control" over when it performs such maintenance, thus enabling it to minimize any necessary disruptions in response to the incentives created by the Commission's reservation charge crediting policy. When the pipeline is unable to satisfy its contractual obligation to provide the primary firm service for which the shippers pay reservation charges, it is reasonable to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided.

63. The D.C. Circuit approved this policy when it reviewed the Commission's *North Baja* orders, rejecting North Baja's contention that Opinion No. 406 emphasized "control" and therefore the opinion was inapplicable to a pipeline where outages for planned maintenance are uncontrollable because it operates at full capacity. The court

⁹⁷ *Id.* PP 18-19.

⁹⁸ *Id.* P 14.

⁹⁹ *North Baja*, 111 FERC ¶ 61,101 at P 18.

recognized that the Commission's reservation charge crediting policy extended to scheduled maintenance interruptions that are not controllable, holding as follows:

Although some scheduled maintenance interruptions may be uncontrollable, they are certainly not unexpected.¹⁰⁰

The D.C. Circuit then concluded that “[t]here is nothing unreasonable about FERC’s policy that pipelines’ rates should incorporate costs associated with a pipeline ‘operating its system so that it can meet its contractual obligations, and that a cost-sharing mechanism should be reserved for uncontrollable *and unexpected* events that temporarily stall service.” As the Commission stated recently in *Texas Eastern*, the Commission sees no reason to modify the policy concerning reservation charge credits for routine maintenance, affirmed by the court.¹⁰¹ The Commission continues to find that the policy reasonably: (1) provides pipelines a financial incentive to manage maintenance of their systems so as to minimize primary service interruptions as much as possible; (2) provides shippers relief from paying reservation charges for primary firm service not provided; and (3) allows pipelines to include in their cost of service prudently incurred costs associated with routine and regulatory maintenance necessary for a pipeline’s safe and proper functioning.

64. CenterPoint contends that the Commission’s reservation charge crediting policy is arbitrary and capricious as it relates to service interruptions necessary to maintain operational capability or comply with governmental regulations. It argues that, while the purpose of the policy is to give pipelines the financial incentive to avoid or shorten service disruptions, there is no record evidence that pipelines are failing to keep service disruptions to a minimum. CenterPoint also states that there is no evidence that pipelines without reservation charge crediting provisions interrupt service any more frequently than pipelines with such tariff provisions. However, the Commission has held that, regardless of whether the pipelines have a past history of service disruptions for routine maintenance or complaints about such disruptions, the requirement to provide credits will provide the pipeline an important additional financial incentive to minimize outages of primary firm service for maintenance outages and to complete regulatory requirements in an expeditious manner.¹⁰² In addition, regardless of the goal of providing incentives to minimize outages, the Commission has found it unjust and unreasonable to require shippers to pay reservation charges for primary firm service, when routine maintenance prevents them from obtaining the service they have paid for.

¹⁰⁰ *North Baja*, 483 F.3d at 823.

¹⁰¹ *Texas Eastern*, 140 FERC ¶ 61,216 at P 58.

¹⁰² *Id.* P 70.

65. Shippers contract for primary firm service to guarantee their ability to obtain natural gas during periods of peak demand for natural gas. For example, LDCs contract for primary firm service in order to be able to serve residential consumers and other high priority users during the winter heating season. Natural gas is also increasingly used for gas-fired electric generation. A pipeline's failure to provide reliable primary firm service when needed by its firm shippers thus entails a serious risk of harm to the public. In these circumstances, it is entirely reasonable to provide pipelines a financial incentive to keep interruptions of primary firm service to the absolute minimum. When a pipeline fails to provide the primary firm service on which its shippers rely to serve their high priority needs, it is reasonable to relieve those shippers their obligation to make payments to reserve the capacity which the pipeline now cannot provide.¹⁰³

66. In recent orders, the Commission has recognized that pipelines may face increased regulatory requirements as a result of the Pipeline Safety, Regulatory and Job Creation Act of 2011 (2011 Act) and other initiatives of the Pipeline and Hazardous Safety Administration (PHMSA) of the United States Department of Transportation. In particular, the Commission has held that pipelines may include in their tariffs a provision permitting partial reservation charge crediting for a transitional period of two years for outages resulting from orders issued by the Pipeline and Hazardous Safety Administration (PHMSA) of the United States Department of Transportation pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code added by section 23 of the Pipeline Safety, Regulatory and Job Creation Act of 2011.¹⁰⁴ As explained in those orders, such outages are distinguishable from the routine, periodic maintenance which the Commission has held are within the control of the pipeline and therefore must be treated as non-*force majeure* events for which full reservation charge credits must be given. Accordingly, when CenterPoint files to comply with this order, it may include in that filing provisions permitting partial reservation charge credits for such outages.¹⁰⁵ In addition, our holdings in this order are without prejudice to CenterPoint'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

¹⁰³ *Id.* P 71.

¹⁰⁴ *Gulf South Pipeline Co. LP*, 141 FERC ¶ 61,224 at P 40; *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222, at P 40 (2012); and *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at P 39 (2012).

¹⁰⁵ *Panhandle*, 143 FERC ¶ 61,041 at P 68.

becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.¹⁰⁶

67. Additionally, we reject CenterPoint's contention that the Commission's reservation charge crediting policy cannot be implemented without a contemporaneous adjustment in billing determinants. If CenterPoint is concerned that Commission action under NGA section 5 requiring it to revise its tariff to be consistent with Commission policy will result in the pipeline's rates being too low to recover its overall cost of service, CenterPoint may present evidence in its filing to comply with this order to show why the pipeline believes that would be the consequence of that action.¹⁰⁷ The Commission has described the information to be included in such a filing as follows:

To enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the pipeline would have to provide evidence of the number of non-*force majeure* outages it experienced during a past representative period, and the dollar amount of the additional credits it would have had to give. In addition, the pipeline would have to provide the Commission with the information necessary to determine whether the pipeline's existing rates are insufficient to recover any additional costs resulting from compliance. For example, the pipeline could file a full cost and revenue study consistent with what we have required in recent section 5 investigations of the justness and reasonableness of a pipeline's overall rates.

Alternatively, the pipeline could also file a general section 4 rate case to increase its rates to recover the increased costs from compliance with that policy.¹⁰⁸

Section 8.1 of the GT&C

68. Section 8.1 of CenterPoint's tariff defines *force majeure* to include "tests, maintenance, or repairs to machinery, equipment, lines of pipe or other facilities. . . ." The Commission finds that this language unreasonably treats as *force majeure* events situations that are part of routine and scheduled maintenance of the pipeline.

¹⁰⁶ *Id.* P 69.

¹⁰⁷ *See ANR Pipeline Co. v. FERC*, 863 F.2d 959, 962-64 (D.C. Cir. 1988).

¹⁰⁸ *N. Natural*, 137 FERC ¶ 61,202 at P 36.

69. The Commission has held that outages for routine or scheduled maintenance do not constitute *force majeure* events which are both outside the pipeline's control and unexpected.¹⁰⁹ The D.C. Circuit affirmed this policy in *North Baja v. FERC*. The court referred to Opinion No. 406 where the Commission defined *force majeure* events as events that are not only uncontrollable but also unexpected and to subsequent Commission decisions to the same effect, citing the rehearing order in *Florida Gas*,¹¹⁰ and *Alliance* cases.¹¹¹ The court then stated that “[i]n its orders here, FERC expressly relied on these precedents and applied its well-established and reasonable definition of a *force majeure* event to the case before it.”¹¹² The court held that, while some scheduled maintenance interruptions may be “uncontrollable,” they are not “unexpected.” In this case, we again rely on these precedents to require CenterPoint to revise GT&C section 8.1 to be consistent with our “well-established and reasonable definition a *force majeure* event.”

70. Routine and scheduled maintenance may include tests, maintenance and repairs to machinery, equipment, facilities and lines of pipe. While some outages to make scheduled and planned repairs of pipelines may be “uncontrollable,” they are not “unexpected.” Insofar as the need to make such repairs has been anticipated, so that the repairs can be planned and scheduled, the repairs are not *force majeure* events. By contrast, unscheduled maintenance and repairs generally result from an operational problem and are therefore appropriately treated as no-fault, *force majeure* events.¹¹³

71. Therefore, the existing language in GT&C section 8.1 that defines all service interruptions for tests, maintenance and repairs of certain pipeline facilities as *force majeure* events, is overbroad and thus contrary to Commission policy. Accordingly, pursuant to section 5 of the NGA, CenterPoint is directed to file revised tariff records clarifying that planned and scheduled tests, maintenance and repairs of pipelines are excluded from its definition of *force majeure*.

¹⁰⁹ See, e.g., *Southern*, 135 FERC ¶ 61,056 at PP 24-27; see also similar cases cited *supra*.

¹¹⁰ 107 FERC ¶ 61,704 at PP 28-29.

¹¹¹ 483 F.3d at 822-823.

¹¹² 483 F.3d at 823.

¹¹³ *El Paso*, 105 FERC at 62,351; *Natural Gas Pipeline Co. of America*, 108 FERC ¶ 61,170 at P 7.

Section 8.2 of the GT&C

72. As described above, section 8.2 of CenterPoint's GT&C authorizes it to "curtail, interrupt or discontinue service" in order to perform repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable governmental regulations. It also provides CenterPoint shall not be liable to its shippers for such service interruptions and that it shall exercise due diligence to schedule such activities so as to minimize interruptions or disruption of services.

73. CenterPoint contends that the Commission cannot find section 8.2 to be unjust and unreasonable unless it adduces evidence that CenterPoint has been violating the requirement that it exercise due diligence to minimize service interruptions. Consistent with *Texas Eastern*¹¹⁴ and *Algonquin Gas Transmission, LLC*,¹¹⁵ the Commission finds that GT&C section 8.2 does not violate the Commission's reservation charge crediting policies. Accordingly, the Commission is not requiring CenterPoint to modify that section, except in the one respect discussed below.

74. Section 8.2 is limited to: (1) authorizing CenterPoint to interrupt or curtail service in order to perform repairs and maintenance to maintain the operational capability of the system or to comply with applicable regulations; (2) providing CenterPoint will not be liable to its shippers for such interruptions; and (3) requiring CenterPoint to exercise due diligence to schedule such repair, construction, and maintenance so as to minimize disruptions of service and provide reasonable notice to shippers. Section 8.2 contains no provision concerning the issue of when CenterPoint must provide reservation charge credits for failure to schedule primary firm service. The authorization to interrupt service to perform maintenance is a standard provision in pipeline tariffs that does not address how such interruptions will affect shippers' obligations to pay for their service. Similarly, the provision concerning liability only concerns CenterPoint's liability to pay damages to shippers or others because of failure to make deliveries because of compliance with governmental directives. That provision also does not address the issue of limiting CenterPoint's ability to collect reservation charges from shippers during service interruptions. Finally, the provision requiring CenterPoint to exercise due diligence to minimize service disruptions is reasonable and consistent with Commission policy. Accordingly, because section 8.2 does not concern the issue of when CenterPoint must provide reservation charge credits for a failure to schedule primary firm service,

¹¹⁴ 140 FERC ¶ 61,216 at P 33.

¹¹⁵ 143 FERC ¶ 61,082, at PP 29-30 (2013) (*Algonquin*).

there is nothing in those sections contrary to Commission policy concerning reservation charge credits.

75. However, consistent with *Texas Eastern*,¹¹⁶ the Commission finds that section 8.2 currently contains a provision regarding CenterPoint's curtailment of service which does not comply with Commission policy. The Commission finds that the reference to curtailment in this provision is unjust and unreasonable. The Commission has found that pipelines may only "curtail" service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled. The term "repair, maintenance or improvements" is not limited to an emergency situation or an unexpected loss of capacity, and the pipeline should take outages required for routine repair, maintenance, and improvements into account when it is scheduling service, rather than curtailing service after it is scheduled. If an interruption of service is required for routine repair, maintenance or improvements, then the pipeline should not confirm shipper nominations to schedule service that it will not be able to provide for the period of the outage. For that reason, the Commission has held that pipelines should plan routine repair, maintenance, and improvements through the scheduling process and should not curtail confirmed scheduling nominations in order to perform routine repair, maintenance, and improvements. Therefore, CenterPoint is directed, pursuant to NGA section 5, to modify section 8.2 to remove the authorization to "curtail" service to perform any repair, maintenance, and improvements consistent with Commission policy.

Discount Agreements

76. Section 5.2(a) of CenterPoint's GT&C provides that, "[f]or Shippers paying less than the maximum rate, the amount of the adjustment, if any, shall be consistent with the discount agreement between Shipper and Transporter." Similarly, section 4(d)(i) of CenterPoint's *pro forma* service agreement provides, with respect to service agreements at rates other than the maximum rate:

Consideration for Rate Granted: Transporter agrees to the rates specified herein or on Attachment A in exchange for Shipper's agreement to forego credits or other benefits to which Shipper would otherwise be entitled, but only to the extent such credits or benefits would result in a greater economic benefit over the applicable term than that represented by the agreed-upon rate. Accordingly, unless Transporter otherwise agrees, Shipper will not receive credits

¹¹⁶ *Id.*

(with the exception of (1) penalty revenue credits provided pursuant to Section 31 of the General Terms and Conditions of Transporter's Tariff, and (2) capacity release credits) from rates, refunds or other revenues collected by Transporter or Shipper if to do so would effectively result in a lower rate or greater economic benefit to Shipper; provided, however, that [for a Shipper taking service under a discount or recourse rate agreement, the rate in any month shall never be above Transporter's applicable maximum Tariff rate] [for a Shipper taking service under a Negotiated Rate agreement, Transporter and Shipper can agree pursuant to Section 19.8 of the General Terms and Conditions of Transporter's Tariff that Transporter will retain some or all of the capacity release credits to the extent those credits exceed the amount of the Shipper's invoiced demand component.] If the parties' agreement to the foregoing is determined invalid or if Shipper seeks to obtain credits or benefits inconsistent therewith, unless Transporter otherwise agrees, it will have the right to immediately terminate or modify any provisions herein or of Attachment A that would allow Shipper to pay amounts less than the maximum applicable Tariff rate.

77. The Commission is satisfied with CenterPoint's response to the manner in which CenterPoint individually negotiates reservation charge credits in discount rate agreements. In *Kern River Gas Transmission Co.*, the Commission found that while firm service agreements must generally follow the Commission's reservation charge crediting policy, an exception exists where the pipeline and the shipper agree to a provision that deviates from that policy.¹¹⁷ CenterPoint's tariff provides that where a shipper and the pipeline agree to a discounted rate, the shipper agrees to forgo all credits (which would include reservation charge credits), unless CenterPoint agrees otherwise. Of course, the shipper remains entitled to take service at the maximum rate and receive reservation charge credits in a manner consistent with Commission policy. In light of our decision to require CenterPoint to modify its reservation charge crediting provisions to conform to Commission policy, we find that no changes are necessary to CenterPoint's tariff regarding the manner in which reservation charge credits are addressed in discount rate agreements.

¹¹⁷ *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050 at P 33.

78. The tariff places shippers on notice that credits will not be provided under discount rate agreements, unless CenterPoint agrees to include a reservation charge crediting provision in the discount agreement. We find it reasonable for reservation charge credits to be a subject of negotiation in discount agreements, because those credits relate to the rate paid for the service, rather than the quality of the service. CenterPoint may be more willing to provide a discount if the shipper agrees to forgo or limit reservation charge credits during outages. A shipper can decide whether it is willing to trade limits on reservation charge credits for a lower rate. If not, the shipper has the right to take service at the maximum rate and receive reservation charge credits in a manner that is consistent with Commission policy.

Limited Section 4

79. Finally, CenterPoint objects to the fact that the Commission addressed CenterPoint's reservation charge crediting provisions in the context of a limited section 4 proceeding addressing unrelated issues. The Commission has addressed and rebutted this argument many times before.¹¹⁸ “[W]hile we generally discourage parties from raising unrelated issues in section 4 proceedings, the Commission may use its discretion to act under section 5 of the NGA when it is made aware of a tariff provision that is clearly contrary to Commission policy.”¹¹⁹ Consistent with this policy, we again use our discretion to remedy unjust and unreasonable provisions in CenterPoint's tariff, even where they are not directly related to the subject matter of the instant proceeding.

Liability and Damages Provisions

April 23 Order

80. In the April 23 Order, the Commission summarized its existing policy regarding liability and damages provisions. The Commission explained:

As the Commission has previously noted, it applies two general principles to the issue of liability: there should be no liability without fault; and a pipeline or shipper should not be able to avoid all liability caused by its own gross negligence or intentional actions. The Commission has prohibited pipelines from limiting their liability in a way that would

¹¹⁸ See *Southern*, 135 FERC ¶ 61,056 at P 13 (citing *Tuscarora Gas Transmission Co.*, 120 FERC ¶ 61,022 (2007); *Wyoming Interstate Co., Ltd.*, 129 FERC ¶ 61,022, at P 11 (2009); *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,262 (2009)).

¹¹⁹ *Id.*

immunize them from direct damages resulting from simple negligence. Specifically, the Commission has explained that “a simple negligence standard gives service providers a powerful incentive to operate their systems in a reasonable and prudent manner.” Moreover, the Commission has prohibited pipelines from limiting liability due to their “sole” negligence because such a limitation would rule out a situation where the pipeline and another party are both negligent.¹²⁰

81. In light of this policy, the Commission held that by limiting its liability to “sole or gross negligence, bad faith or willful misconduct,” CenterPoint’s liability provision is inconsistent with Commission policy, and is therefore unjust and unreasonable.¹²¹ The Commission further found that by limiting its liability in situations of gross negligence, bad faith and willful misconduct only to general damages, and excluding liability for “special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits or other such elements of damage,” CenterPoint’s tariff was inconsistent with Commission policy prohibiting pipelines from insulating their exposure to indirect damages resulting from their gross negligence, bad faith or willful misconduct.¹²² The Commission therefore found CenterPoint’s liability and damages provisions to be unjust and unreasonable, and required CenterPoint to revise its tariff or show cause why it should not be required to do so.¹²³

Request for Rehearing and Response to April 23 Order

82. CenterPoint argues that the Commission’s action under section 5 of the NGA is unsupported by record evidence.¹²⁴ CenterPoint contends that the April 23 Order simply recites Commission policy and concludes that CenterPoint’s tariff is inconsistent with

¹²⁰ April 23 Order, 139 FERC ¶ 61,064 at P 19 (citing *Discovery Gas Transmission LLC*, 133 FERC ¶ 61,264, at P 9 (2010); *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 58 (2009) (*Orbit*)).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Because CenterPoint provides substantially the same (and for the most part, verbatim) information in its request for rehearing and its response to the April 23 Order, we summarize them here together.

that policy, without giving CenterPoint an opportunity to respond.¹²⁵ CenterPoint argues that *Arkla*—one of the orders cited by the Commission in support of its decision—approved the exact liability language contained in CenterPoint’s tariff.¹²⁶ CenterPoint contends that the Commission presented no evidence that the application of the liability provisions have become unjust and unreasonable or that circumstances have changed in a way that renders these provisions unjust and unreasonable. CenterPoint further argues that the Commission cannot assess whether CenterPoint’s liability and damages provisions are unjust and unreasonable unless it evaluates the relationship between these tariff provisions and other aspects of CenterPoint’s rates and services.

83. CenterPoint contends that the Commission has not explained: (1) why the allocation of liability and risk is now unjust and unreasonable; (2) why pipelines should procure insurance for losses for which they previously had no risk of liability, and whether such insurances is available; and (3) why it is now deemed preferable to allocate these risks to pipelines rather than shippers. CenterPoint therefore contends that the lack of analysis on these points in the April 23 Order is arbitrary and capricious. CenterPoint asserts that the April 23 Order is “Kafkaesque” insofar as the party with the burden of proof is requiring it to explain why, in the face of no proof, a tariff provision should not be stricken.¹²⁷

84. CenterPoint also objects to the Commission’s addressing CenterPoint’s liability and damages provisions in the context of the instant section 4 proceeding.¹²⁸ CenterPoint argues that addressing the liability and damages provisions in this proceeding is even less justifiable than addressing the reservation charge crediting provisions because the Commission has not invited intervenors to raise issues related to liability and damages in any section 4 filing (as it has done for reservation charge crediting provisions). CenterPoint contends that by addressing liability and damages provisions in this proceeding, the Commission has effectively ended its policy supporting the use of limited section 4 filings without giving a rationale. Moreover, CenterPoint contends that it did not have an opportunity to reply to arguments raised by protestors that were beyond the scope of the limited section 4 filing.

¹²⁵ CenterPoint Request for Rehearing at 10.

¹²⁶ CenterPoint Request for Rehearing at 11 (referencing *Arkla*, 64 FERC ¶ 61,166 at 62,490-62,491 (1993)).

¹²⁷ CenterPoint Request for Rehearing at 12.

¹²⁸ CenterPoint Request for Rehearing at 20.

Commission Determination

85. CenterPoint’s request for rehearing is denied. As discussed above, the Commission is entitled to rely on “binding precedents” that establish “binding policy” that has the force of law.¹²⁹ As set forth in the April 23 Order and quoted at length above, the Commission’s “binding policy” with respect to the parameters of pipelines’ liability and damages provisions is clear and has been set forth in individual adjudications.¹³⁰ The Commission relied on this policy in reaching its determination: (1) that by limiting its liability to “sole or gross negligence, bad faith or willful misconduct,” CenterPoint’s liability provision is inconsistent with Commission policy; and (2) CenterPoint’s tariff violates Commission policy by limiting its liability in situations of gross negligence, bad faith and willful misconduct only to general damages, and excluding liability for other damages, such as special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits or other such elements of damage.¹³¹ The fact that the Commission may have approved the existing liability provision in the *Arkla* case cited by CenterPoint only reflects the fact that the liability provision was consistent with then current Commission policy. However, as stated in the April 23 order and above, the part of the tariff limiting CenterPoint’s liability for consequential damages even in cases of gross negligence is inconsistent with current Commission policy and must be revised.

Rejection of CenterPoint Answers

April 23 Order

86. CenterPoint filed an answer responding to the issues raised by protesters on April 12, 2012—eleven days prior to the date CenterPoint sought a Commission order (April 23, 2012). Citing rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), which prohibits an answer to a protest unless otherwise ordered by the decisional authority, the Commission rejected CenterPoint’s answer.

¹²⁹ *Texas Eastern*, 140 FERC ¶ 61,216 at P 24 (citing *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); *Michigan Wis. Pipe Line Co.*, 520 F.2d 84, 89 (D.C. Cir. 1975)).

¹³⁰ April 23 Order, 139 FERC ¶ 61,064 at P 19 (citing *Discovery Gas Transmission LLC*, 133 FERC ¶ 61,264, at P 9 (2010); *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095 at P 58).

¹³¹ April 23 Order, 139 FERC ¶ 61,064 at PP 19-20.

Request for Rehearing

87. CenterPoint argues that the Commission erred in rejecting its answer to BP's protest. CenterPoint contends that BP's filing was not, in fact, a protest because the filing did not object to CenterPoint's fuel tracker filing and instead raised new issues unrelated to CenterPoint's filing.¹³² CenterPoint further states that because BP's pleading requested action under section 5 of the NGA regarding issues unrelated to CenterPoint's filing, CenterPoint was permitted by Rule 213 of the Commission's Rules of Practice and Procedure to answer BP's request for affirmative relief.¹³³ CenterPoint argues that it is unfair and violates of due process to allow a party to raise a totally new issue in a case and then deny the other party the opportunity to respond. CenterPoint states that the Commission regularly allows answers to protest if the answer helps in the decision-making process.¹³⁴ CenterPoint asserts that because its answer contributed to a more complete record regarding the unrelated issues raised by BP, the Commission should have accepted it.

88. CenterPoint also contends that the Commission erred in rejecting its answer to MoPSC's protest. CenterPoint argues that rejecting the answer is inconsistent with Commission practice of generally accepting answers and points out that since 2003, the Commission has accepted each of CenterPoint's answers responding to protests of CenterPoint's fuel tracker filings. CenterPoint argues that because its answer corrected MoPSC's mischaracterizations of the cause of fuel losses, the Commission should have accepted the answer.

¹³² CenterPoint Request for Rehearing at 24 (citing Rule 211(a) of the Commission's Rules of Practice and Procedure, which states that any person may file a protest to object to any application, complaint, petition, order to show cause, not of tariff or rate examination, or tariff or rate filing).

¹³³ CenterPoint Request for Rehearing at 24-25 (citing 18 C.F.R. § 385.213(a)(3) (2012); *Richmond Power Enterprise, L.P.*, 69 FERC ¶ 61,142, at 61,511 (1994), *reh'g denied*, 70 FERC ¶ 61,313 (1995); *Williams Natural Gas Co.*, 69 FERC ¶ 61,384, at 62,450 (1994), *reh'g denied*, 72 FERC ¶ 61,101 (1995), *on reh'g*, 74 FERC ¶ 61,103 (1996)).

¹³⁴ CenterPoint Request for Rehearing at 25 (citing *Sea Robin Pipeline, Co., LLC*, 134 FERC ¶ 61,262, at P 10 (2011); *Northern Natural Gas Co.*, 103 FERC ¶ 61,266, at P 11 (2003); *Kinder Morgan Interstate Gas Transmission, LLC*, 94 FERC ¶ 61,078, at 61,357 (2001); *Connecticut Light & Power Co.*, 94 FERC ¶ 61,073, at 61,341 (2001)).

Discussion

89. CenterPoint's request for rehearing is denied. Notwithstanding CenterPoint's reference to instances where the Commission has accepted answers in the past, the Commission's regulations state that "[a]n answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing unless otherwise ordered by the decisional authority."¹³⁵ As the text of the rule indicates, the Commission has discretion as to whether or not to accept an answer. As the orders cited by CenterPoint indicate, the Commission exercises this authority where the answers provide information that provides information that assists the Commission in its decision-making process.

90. Here, the Commission properly exercised its broad discretion to reject CenterPoint's answers consistent with Rule 231(a)(2) because the answers did not assist the Commission in its decision-making process. First, the Commission properly rejected the portion of CenterPoint's answer addressing the proposed reimbursement percentages. While CenterPoint did provide additional information in its answer, its failure to address this issue in its case-in-chief does not justify the Commission exercising its discretion to accept an answer providing information after the fact. Second, the Commission properly rejected the portion of CenterPoint's answer addressing its liability and damages provisions and reservation charge crediting provisions. As the Commission explained in the April 23 Order, these provisions appeared to be inconsistent with Commission policy. The April 23 Order therefore established procedures through which CenterPoint would be able to show cause why it should not be required to revise these provisions. CenterPoint was therefore free to raise any and all concerns with the arguments set forth in BP's protest through these supplemental procedures.¹³⁶

Directions for Compliance

91. In the preceding sections of this order, the Commission has found that CenterPoint's existing tariff is unjust and unreasonable because it violates the Commission's policies concerning crediting during both *force majeure* and non-*force majeure* outages. In addition, section 8.1 of CenterPoint's GT&C concerning *force majeure* is unjust and unreasonable because it defines all repairs, testing and maintenance of equipment, machinery, facilities or lines of pipe in the definition, without excluding from the definition those situations that are part of routine and scheduled maintenance.

¹³⁵ 18 C.F.R. § 385.213(a)(2) (2012).

¹³⁶ We further note that CenterPoint's rehearing request and its response to the April 23 Order raise substantially the same issues that CenterPoint raised in its rejected answers. Because we address those issues here, we disagree with CenterPoint's contention it has somehow been aggrieved by the Commission's rejection of its answers.

92. In this order, we are not fixing just and reasonable replacement tariff provisions providing for reservation charge credits pursuant to the second prong of NGA section 5. As described above, Commission policy provides pipelines various options as to how to provide for reservation charge credits. For example, the Commission permits pipelines to provide partial reservation charge credits during *force majeure* outages under either the No Profit or Safe Harbor methods or another method that provides for risk sharing in the same ball park as the first two methods. Similarly, the Commission gives pipelines some flexibility concerning the measurement of the full reservation charges to be provided during non-*force majeure* outages. For example, in order to avoid discouraging pipelines from giving detailed advance notice of the timing of future outages for maintenance activities, the Commission permits pipelines to base credits on a shipper's historical usage of the subject facilities during a representative period before the pipeline gave such notice of the maintenance activity.¹³⁷ Therefore, before fixing just and reasonable reservation charge crediting tariff provisions to be included in CenterPoint's tariff, the Commission will first give CenterPoint an opportunity to propose how it desires to provide such credits consistent with Commission policy. Therefore, pursuant to NGA section 5, the Commission requires that, within 30 days of this order, CenterPoint must file revised tariff records providing for full reservation charge credits when primary firm service is interrupted by a non-*force majeure* event, consistent with Commission policy. CenterPoint must also revise its tariff to provide for partial reservation charge credits during *force majeure* outages and modify its tariff definition of *force majeure* so that planned and scheduled maintenance is not included as a *force majeure* event.

93. CenterPoint is directed, pursuant to NGA section 5, to modify section 8.2 to remove the authorization to "curtail" service to perform any repair, maintenance, and improvements consistent with Commission policy.

94. Finally, CenterPoint is directed to revise Section 9 of its tariff consistent with this order, to remove limits on its liability in situations of gross negligence, bad faith and willful misconduct only to general damages, and is directed to remove the current language excluding liability for other damages, such as special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits or other such elements of damage, insofar as these other damages arise from gross negligence, bad faith, or willful misconduct.

¹³⁷ See *TransColorado Gas Transmission Co., LLC*, 139 FERC ¶ 61,229, at PP 35-42 (2012).

The Commission orders:

(A) CenterPoint's request for rehearing is denied with the exception of the issue related to section 8.2 of its tariff, which is granted in part.

(B) Within 30 days of the date of this order CenterPoint is directed to file a revised tariff consistent with the discussion above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.