

145 FERC ¶ 61,021
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.

Gulf Crossing Pipeline Company LLC

Docket Nos. RP12-814-002
RP12-814-001

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 7, 2013)

1. On June 20, 2012, Gulf Crossing Pipeline Company LLC (Gulf Crossing) filed revised tariff records¹ concerning reservation charge credits to conform to Commission policy. On July 31, 2012, the Commission accepted and suspended the tariff records, subject to refund and further Commission action.² On December 20, 2012, the Commission accepted the revised tariff records effective January 1, 2013, subject to conditions.³ Gulf Crossing filed revised tariff records to comply with the Commission's directives in the December 2012 Order (Compliance Filing).⁴ A request for rehearing of the December 2012 Order by Indicated Shippers (Request for Rehearing) and protests to

¹ Gulf Crossing Pipeline Company LLC, FERC NGA Gas Tariff, Tariffs; [Section 1, Table of Contents, 6.0.0](#); [Section 6.7, GT&C - Operating Conditions, 3.0.0](#); [Section 6.21.5, GT&C - Misc. Provisions - Force Majeure, 2.0.0](#); [Section 6.23, GT&C - Demand Charge Credits, 2.1.0](#); [Section 6.24, GT&C - List of Non-Conforming Service Agreements, 0.0.0](#).

² *Gulf Crossing Pipeline Co., LLC*, 140 FERC ¶ 61,082 (2012) (July 2012 Order).

³ *Gulf Crossing Pipeline Co., LLC*, 141 FERC ¶ 61,222 (2012) (December 2012 Order).

⁴ Gulf Crossing Pipeline Company LLC, FERC NGA Gas Tariff, Tariffs; [Section 1, Table of Contents, 5.1.0](#); [Section 6.21.5, GT&C - Misc. Provisions - Force](#)

(continued...)

the Compliance Filing were filed. As discussed below, the Commission denies the request for rehearing and accepts revised tariff records effective July 24, 2013,⁵ subject to conditions.

I. Background

2. The Commission generally requires that all interstate pipelines provide reservation charge credits to their firm shippers during *force majeure* and non-*force majeure* outages. The Commission requires full reservation charge credits for outages of primary firm service due to non-*force majeure* events and partial reservation charge credits for outages due to *force majeure* events to share the risk of such events for which neither party is responsible. Partial credits may be provided pursuant to: (1) the No-Profit method under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1, or (2) the Safe Harbor method under which the pipeline provides full credits after a short grace period when no credit is due (i.e., 10 days or less).⁶

3. The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. The Commission has held that routine, scheduled maintenance is not a *force majeure* event, even on “pipelines with little excess capacity,”⁷ where such maintenance may require interruptions of primary firm service. That is because, even if such outages are considered to be not reasonably within the pipeline’s control, they are expected. The U.S. Court of Appeals for the District of Columbia Circuit affirmed this policy in *North Baja Pipeline, LLC v. FERC*,⁸ stating:

[Majeure, 2.1.0; Section 6.23, GT&C - Demand Charge Credits, 2.1.0.](#)

⁵ On July 24, 2013, Gulf Crossing moved to place the revised tariff records listed in footnote n.1 into effect on that date.

⁶ See, e.g., *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *order on reh’g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*). The Commission has also stated that pipelines may use some other method which achieves equitable sharing in the same ball park as the first two methods.

⁷ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at 61,350 (2003).

⁸ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *aff’g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh’g*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

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.

4. As the Commission requested pipelines to do in *Natural Gas Supply Association, et al.*,⁹ Gulf Crossing reviewed the reservation charge crediting provisions in its tariff and proposed revised tariff records to bring both its *force majeure* and non-*force majeure* reservation charge crediting provisions into compliance with Commission policy. The filing included: (i) a proposed section 6.23 concerning reservation charge credits;¹⁰ (ii) a proposed modification to the definition of *force majeure* concerning new pipeline safety and integrity management obligations; and (iii) minor conforming changes.

5. Gulf Crossing proposed to provide reservation charge credits for *force majeure* events utilizing the Safe Harbor method. Following the ten-day grace period during which no credits are provided, Gulf Crossing would provide reservation charge credits for the "Force Majeure Average Usage Quantity" that Gulf Crossing failed to deliver to the customer's primary delivery point(s) due to the *force majeure* event, provided that the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf Crossing proposed to determine the Force Majeure Average Usage Quantity based upon primary firm nominations over the seven gas days prior to the first gas day of the *force majeure* event.

6. Gulf Crossing also proposed to provide full reservation charge credits for non-*force majeure* events, including maintenance events not included in the revised definition of *force majeure* described below. Gulf Crossing would provide reservation charge credits for any "Maintenance Average Usage Quantity" that it failed to deliver during a non-*force majeure* event provided the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf Crossing proposed to determine the Maintenance Average Usage Quantity based upon average primary firm nominations for the seven gas days prior to the first gas day of the outage, except that credits for the first day of the outage would be based on nominated service for that day.

⁹ 135 FERC ¶ 61,055 at P 2, *order on reh'g*, 137 ¶ FERC 61,051 (2011) (NGSA).

¹⁰ Gulf Crossing employs the term "demand charge credits" for reservation charge credits.

7. In addition, Gulf Crossing proposed to change its definition of *force majeure* in section 6.21.5(1) to address new pipeline safety and integrity management obligations resulting from the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act). Specifically, Gulf Crossing proposed to include in the definition of *force majeure* “any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, to comply with the [2011 Act] requirements issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) [of the United States Department of Transportation (DOT)] pursuant to the 2011 Act, [and] requirements resulting from PHMSA’s ongoing gas pipeline rulemaking proceedings.”

8. Gulf Crossing’s filing was protested, and Gulf Crossing filed an answer to those protests (answer to protests) and proposed several alternatives to its original proposal. The July 2012 Order conditionally accepted the revised tariff records and allowed the protestors an opportunity to respond to that answer. The responses generally argued that various aspects of Gulf Crossing’s proposal were in conflict with Commission policy, including the proposed change in the definition of *force majeure* related to new safety requirements that PHMSA may adopt. Gulf Crossing filed an answer to the responses.

9. In the December 2012 Order, the Commission approved the revised tariff records, subject to various revisions. The Commission found that Gulf Crossing’s proposal to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings was overbroad. With one exception, the Commission found that the nature and timing of any new safety requirements PHMSA may adopt pursuant to the 2011 Act and ongoing rulemakings was too speculative at that time to justify modifying Commission policy to treat any outages resulting from such new requirements as *force majeure* events. However, as described in more detail below, the Commission permitted Gulf Crossing to provide partial reservation charge credits for a two-year transitional period for outages due to orders PHMSA may issue pursuant to new requirements concerning Maximum Allowable Operating Pressure (MAOP) established by section 23(a) of the 2011 Act.

10. The December 2012 Order also required several revisions in Gulf Crossing’s proposal concerning how it would calculate the amount of credits to be provided during non-*force majeure* outages. The Commission required that Gulf Crossing clarify that, when it has not given advance notice of an outage, the credits must be based on the amount of primary firm service which the shipper nominated for scheduling, but the pipeline was unable to schedule or deliver.

11. The Commission also directed Gulf Crossing to limit the scope of its proposed reservation charge crediting exemptions by clarifying that Gulf Crossing is exempted from providing reservation charge credits only when its failure to deliver gas is due solely to the conduct of others or events not controllable by Gulf Crossing, i.e., operating

conditions on upstream or downstream facilities or a shipper's inability to obtain gas supplies or find a purchaser to take delivery of the supplies.

12. Pursuant to Natural Gas Act (NGA) section 5, the Commission required Gulf Crossing to eliminate its existing tariff language providing that "the necessity for testing or making repairs or alterations to machinery or lines of pipe" is a *force majeure* event or explain why it should not be required to do so. The Commission similarly also required Gulf Crossing to delete language authorizing curtailment of service to perform routine repair and maintenance in section 6.7(7) of its GT&C concerning interruptions of service as inconsistent with Commission policy. Finally, the Commission directed Gulf Crossing to make the several revisions to its original proposal to which it had agreed to in its answer to the protests.

13. Indicated Shippers filed a Request for Rehearing of the December 2012 Order.¹¹ On January 18, 2013, Gulf Crossing filed to comply with the December 2012 Order, and several parties protested that filing. On February 4, 2013, Gulf Crossing filed an answer to the protests (Answer).

II. Rehearing of the December 2012 Order

14. Indicated Shippers' rehearing request focuses on the Commission's rulings concerning Gulf Crossing's proposal to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings. In particular, it contends that the Commission erred in providing Gulf Crossing a blanket authorization to provide partial reservation charge credits for all outages resulting from PHMSA orders pursuant to the MAOP provisions of the 2011 Act, thus treating such outages similarly to *force majeure* outages. For the reasons discussed below, we deny Indicated Shippers' rehearing request.

A. Background

15. Section 23(a) of the 2011 Act added section 60139, Maximum Allowable Operating Pressure to Chapter 601 of Title 49 of the United States Code. Section 60139(a)(1) directed the Secretary of Transportation, by July 3, 2012, to require each owner and operator of a pipeline to conduct a verification of its records relating to

¹¹ For the purposes of this proceeding, the Indicated Shippers is comprised of BP Energy Company and Cross Timbers Energy Services, Inc., a subsidiary of Exxon Mobil.

pipeline segments in Class 1 and Class 2 High Consequence Areas (HCAs)¹² and Class 3 and Class 4 locations.¹³ Section 60139(a)(2) provides that the purpose of this verification is to ensure that the records accurately reflect the physical and operational characteristics of the subject pipelines and to confirm their established MAOP, and section 60139(a)(2) provides that the verification process shall include such elements as the Secretary deems appropriate. Section 60139(b) requires that, by July 3, 2013, each owner or operator of a pipeline facility identify and submit to PHMSA documentation relating to each pipeline segment for which its records are insufficient to confirm the established MAOP of the segment. Section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline owner or operator of a pipeline facility identified pursuant to section 60139(b) to reconfirm a MAOP “as expeditiously as economically feasible,” and PHMSA must determine what interim actions “are appropriate for the pipeline owner or operator to take to maintain safety until a [MAOP] is confirmed.” Section 60139(c)(2) requires that, in determining the interim actions for each pipeline owner or operator to take, PHMSA must take into account “potential consequences to the public safety and the environment, potential impacts on pipeline system reliability and deliverability, and other factors, as appropriate.”

16. The 2011 Act also requires the DOT to conduct studies and consider rulemakings on various other matters, including possible changes to the pipeline integrity management regulations of PHMSA. PHMSA had adopted its first integrity management regulations pursuant to the 2002 Act, which provided for PHMSA to issue regulations requiring pipelines to implement integrity management programs for pipeline segments in HCAs. Those regulations specify how pipeline operators must identify, prioritize, assess, evaluate, repair, and validate the integrity of gas transmission pipelines in HCAs as part of their routine, periodic maintenance activities.

17. Sections 5(a) and (b) of the 2011 Act require PHMSA to evaluate, by July 3, 2013, whether some or all of its integrity management regulations should be expanded beyond HCAs, taking into account various factors, including “the need to perform integrity management assessments and repairs in a manner that is achievable and sustainable, and that does not disrupt pipeline service,” and “the options for phasing in the extension of integrity management requirements beyond [HCAs], including the most effective and efficient options for decreasing risks to an increasing number of people living or working

¹² An HCA is a location which is defined in the pipeline safety regulations as an area where pipeline releases would have greater consequences to the health, safety, or environment.

¹³ Basically, these are areas with greater population density.

in proximity to pipeline facilities.” Section 5(c) of the Act requires PHMSA to submit a report to Congress by January 3, 2014, on the results of its evaluation of expanding integrity management requirements. In order to give Congress time to review the report, section 5(f) of the Act prohibits PHMSA from issuing any final rule expanding integrity management regulations beyond HCAs until the earlier of one year after completion of the report to Congress or January 3, 2015, unless PHMSA determines such a regulation is necessary to address a risk to public safety, property, or the environment or an imminent hazard exists.

18. Gulf Crossing proposed to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings. This proposal would have authorized Gulf Crossing to provide only partial reservation charge credits for any outages related to such activities. The December 2012 Order rejected this proposal, except with respect to the MAOP provisions in section 23(a) of the 2011 Act. The Commission found that Gulf Crossing had not shown that its proposal to provide only partial reservation charge credits for outages that may result from any changes in PHMSA’s integrity management regulations is just and reasonable. The Commission pointed out that shortly after PHMSA’s first integrity management regulations took effect in January 2004,¹⁴ the Commission rejected a pipeline’s proposal to treat outages resulting from those regulations as *force majeure* events.¹⁵ The Commission held that an outage due to periodic maintenance required by government regulations for the safe operation of the pipeline “is a necessary non-*force majeure* event within the control of the pipeline.”¹⁶

19. The December 2012 Order held that the nature and timing of any changes PHMSA may make to its integrity management regulations is too speculative at this time to justify modifying current policy to treat outages resulting from compliance with those regulations as *force majeure* events. The Commission explained that the 2011 Act does not require PHMSA to take any specific actions with respect to its integrity management regulations, apart from evaluating the need for expanding the existing requirements in its regulations and submitting a report to Congress by January 3, 2014. Moreover, the 2011

¹⁴ See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 FR 69778 (December 15, 2003).

¹⁵ See *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at PP 19 & 28-29 (2004) (*Florida Gas*).

¹⁶ *Id.* P 29.

Act requires PHMSA to wait until the earlier of one year after submitting the report or January 3, 2015, to issue any final rule expanding integrity management requirements beyond HCAs, unless such a regulation is necessary to address a risk to public safety, property, or the environment. It thus appears unlikely that any such final rule could take effect before 2015.¹⁷ Accordingly, the Commission concluded that, until there is some certainty as to what new integrity management requirements PHMSA may adopt for pipelines and when they will take effect, it is premature for the Commission to consider modifying its well established policy that pipelines must provide full reservation charge credits for outages of primary firm service due to scheduled maintenance and repairs performed as part of an integrity management program. That determination was without prejudice to future proposals to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.

20. However, the Commission stated that it would allow partial reservation charge crediting pursuant to the Safe Harbor method for outages due to orders PHMSA may issue pursuant to section 60139(c) of Chapter 601 of Title 49, as added by section 23(a) of the 2011 Act. Partial crediting was permitted for a transitional two-year period commencing on January 1, 2013, the date on which the tariff records would become effective. The Commission found that, unlike the other sections of the 2011 Act, PHMSA actions pursuant to section 23(c) of the 2011 Act are relatively imminent and could take place at any time without advance notice. The Commission explained that section 23(a), unlike section 5 concerning integrity management, does not require PHMSA to conduct rulemaking proceedings before it orders particular pipelines to reconfirm MAOP or take interim actions to maintain safety until MAOP is reconfirmed. Rather, PHMSA can simply issue an order to a particular pipeline tailored to the particular circumstances of its system.

¹⁷ Similarly, the Commission recognized that PHMSA had issued an Advanced Notice of Rulemaking (ANOPR), requesting comment on whether its integrity management regulations should be strengthened in various ways. However, PHMSA did not propose any specific changes in its integrity management regulations in the ANOPR. Before making any changes to its integrity management regulations in response to the comments received in response to the ANOPR, PHMSA must issue a notice of proposed regulations (NOPR), proposing specific changes to those regulations and requesting comment. PHMSA must then analyze those comments and issue a final rule adopting revised regulations. Thus, at the present time, there is no certainty as to whether and how PHMSA may modify its integrity management regulations in the rulemaking proceeding initiated by the ANOPR.

21. The Commission also found several important factors that distinguish any outages from actions PHMSA takes pursuant to section 23(a) of the 2011 Act from outages due to the routine, periodic scheduled maintenance for which full crediting is required. First, PHMSA actions under section 60139(c) would be one-time, non-recurring events. The Commission explained that section 60139(c) of Title 49, adopted by section 23(a) of the 2011 Act, does not create an ongoing requirement to reconfirm MAOP on a periodic basis comparable to ordinary integrity management programs. Rather, that section only authorizes PHMSA to require a one-time reconfirmation of MAOP. Second, the pipeline could have less discretion concerning the timing of testing to reconfirm MAOP or any interim measures to maintain safety until MAOP can be reconfirmed than it has concerning the timing and location of routine scheduled maintenance. Third, the costs of outages for such one-time testing or interim safety measures would generally not be recurring costs eligible for inclusion in the pipeline's rates in a general NGA section 4 rate case. The Commission also found that a blanket authorization of partial crediting for outages to reconfirm MAOP for a transitional period is consistent with Congress's determination that MAOP should be confirmed as expeditiously as economically feasible. The Commission concluded that equitable sharing of credits is appropriate for such outages because they are comparable to those required to comply with governmental actions which are treated as *force majeure* events.¹⁸ The Commission did not find that these outages were necessarily due to a *force majeure* event and allowed Gulf Crossing to include this partial crediting provision in its tariff only as a separate provision.¹⁹ The Commission also required that, when Gulf Crossing provides notice of such outages, the notice must identify the specific PHMSA order with which it is complying.²⁰

22. The Commission recognized that there could be circumstances in which a pipeline's inability to verify its records concerning the MAOP of a particular pipeline segment could arguably be attributable in part to the pipeline's failure to maintain adequate records. However, the Commission found, on balance, it is preferable to permit pipelines to include blanket authorization in their tariffs through a "bright-line" rule that the pipeline provide partial reservation charge credits consistent with Congress's determination that MAOP should be confirmed "as expeditiously as economically

¹⁸ December 2012 Order, 141 FERC ¶ 61,222 at P 42, n.24 (citing *Florida Gas*, 107 FERC ¶ 61,074 at P 32). *See also Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at n.25 (2012); *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at n.26 (2012).

¹⁹ December 2012 Order, 141 FERC ¶ 61,222 at P 45. *See also Dominion Transmission, Inc.*, 142 FERC ¶ 61,154, at P 18 (2013) (*Dominion*).

²⁰ December 2012 Order, 141 FERC ¶ 61,222 at P 45.

feasible.”²¹ The Commission noted that such a bright-line rule should minimize the need for the burdensome case-by-case consideration of whether a pipeline’s mismanagement may have contributed to its inability to verify its MAOP through its records, will expedite the resolution of the amount of any credits due shippers, and ensure that pipelines share the risk of all such outages.

B. Rehearing Request

23. Indicated Shippers contends that the Commission erred when it established a “bright-line” rule permitting partial crediting for all outages to comply with PHMSA orders pursuant to section 60139(c), instead of examining whether a pipeline’s mismanagement may have contributed to its inability to verify the records for a particular pipeline segment. Indicated Shippers asserts that the December 2012 Order violated the Commission’s policy of deciding reservation charge crediting issues on a case-by-case basis. It also states that in the context of determining which governmental actions would constitute a *force majeure* occurrence, the Commission has held that the answer to this determination depended on the particular circumstances of each case.²² Indicated Shippers argues the Commission should remedy this error by prohibiting Gulf Crossing and all pipelines from declaring actions taken under orders issued by PHMSA under section 60139(c) as *force majeure* events, unless the pipeline can demonstrate with verifiable evidence that each such declaration was both unexpected and not reasonably within the pipeline’s control.

24. Indicated Shippers states that pipelines have had 18 months since the January 3, 2012 effective date of the 2011 Act to reconfirm MAOP. Therefore, Indicated Shippers argues the Commission should establish a presumption against declaring actions taken pursuant to orders issued by PHMSA under section 60139(c) as *force majeure*, because such actions cannot be described as unexpected or not reasonably within the pipeline’s control. Indicated Shippers further argues that, if a pipeline seeks to rebut this presumption, the Commission must examine on a case-by-case basis whether the pipeline acted prudently and that its costs related to the outage were prudently incurred, and/or whether the action was outside the pipeline’s reasonable control (i.e., that pipeline imprudence did not contribute to the inability to confirm established MAOP and was unable to schedule its compliance to avoid and/or minimize the outages).

²¹ December 2012 Order, 141 FERC ¶ 61,222 at P 44.

²² Request for Rehearing at 8 & n.17 (citing, e.g., *TransColorado Gas Transmission Co. LLC*, 139 FERC ¶ 61,229, at P 58 (2012) (*TransColorado I*)).

25. Indicated Shippers contends that the Commission must require any partial credits for such outages to be paid under the No-Profit method rather than the Safe Harbor method. Finally, Indicated Shippers argues that Gulf Crossing must be required to file with the Commission the required notice identifying the specific order with which the pipeline is complying.

C. Commission Determination

26. The Commission denies Indicated Shippers' request for rehearing. For the reasons discussed below, the Commission reaffirms its determination permitting Gulf Crossing to implement a tariff provision providing for partial reservation charge credits pursuant to the Safe Harbor method for all outages to comply with PHMSA orders pursuant to section 60139(c) for a transitional period.

Equitable Sharing of Risk

27. As Indicated Shippers points out, the Commission has developed its reservation charge crediting policies in case-by-case adjudications.²³ Indicated Shippers contends that the December 2012 Order in this case permitting Gulf Crossing to include in its tariff a bright-line rule that it would provide only partial reservation charges for the subject outages for a two-year transitional period violated our case-by-case approach to determining reservation charge crediting policies. Instead, it argues that our case-by-case approach to these issues requires the Commission to make a separate determination whether to permit a pipeline to provide only partial credits for an outage resulting from a PHMSA order issued under section 60139(c) each time PHMSA issues such an order.

28. Contrary to Indicated Shippers' contention, the December 2012 Order followed the Commission's practice of developing its reservation charge crediting policies in case-by-case adjudications in this case. Gulf Crossing's initial tariff filing in this case raised a policy issue of first impression – whether outages resulting from the PHMSA actions pursuant to the newly adopted 2011 Act should be treated as *force majeure* events for which only partial credits need be provided. In response to that filing, the December 2012 Order established a Commission policy permitting partial reservation charge credits for outages resulting from the MAOP provisions of the 2011 Act in this individual adjudication concerning Gulf Crossing's proposed tariff provisions, in the same manner as the Commission has established all its other reservation charge crediting policies. The December 2012 Order also explained why it was premature to determine

²³ *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at P 24 (2012) (*Texas Eastern*); *Panhandle Eastern Pipeline Co., LP*, 143 FERC ¶ 61,041, at P 30 (2013).

Commission policy with respect to outages which might occur in the future as a result of other provisions of the 2011 Act.

29. Indicated Shippers contends that the bright-line rule permitting partial credits for outages to reconfirm MAOP, without examining the pipeline's fault in failing to maintain adequate records, is inconsistent with our statements in prior orders that whether actions by government agencies causing pipeline outages constitute *force majeure* events depends on "whether the required action was within the control of the pipeline."²⁴ Indicated Shippers suggests that this means that the Commission must examine the particular circumstances of each outage resulting from a government order before a pipeline may be permitted to treat it as a *force majeure* event for which only partial credits are required. On this basis, it argues that the Commission's current policy requires it to "review each declaration of *force majeure* by a pipeline under a PHMSA order issued pursuant to 60139(c) on a case-by-case basis, which will allow the Commission to review whether the event was truly 'not within the reasonable control of the pipeline and unexpected' (i.e., whether the pipeline could have scheduled the MAOP confirmation to avoid and/or minimize interruptions to primary firm service), and whether the inability to confirm established MAOP was due to the pipeline's imprudence."²⁵

30. It has never been Commission policy to review each and every individual declaration of a *force majeure* event by a pipeline in response to a government order in order to determine whether in fact the outage in question was outside the reasonable control of the pipeline or unexpected before the pipeline is permitted to provide only partial credits for that outage. Rather, the Commission has required pipelines to include in their tariffs a definition of *force majeure* setting forth the categories of events that constitute *force majeure* and the Commission has reviewed those tariff definitions to determine whether they are consistent with Commission policy. When a particular *force majeure* event occurs, the pipeline decides in the first instance whether that event fits its tariff definition of *force majeure*. The Commission only reviews the pipeline's decision if a party files a complaint that the pipeline violated its tariff definition. Therefore, we reject Indicated Shippers' contention that current Commission policy requires us to review each declaration of a *force majeure* as a result of a PHMSA section 60139(c) order on a case-by-case basis. Rather, permitting the pipeline to include in its tariff a

²⁴ Request for Rehearing at 8 & n.17 (citing, e.g., *TransColorado I*, 139 FERC ¶ 61,229 at P 58).

²⁵ Request for Rehearing at 7.

general standard concerning when such orders may be treated similarly to a *force majeure* event is consistent with Commission policy.

31. The issue then becomes whether the general standard the Commission has approved, i.e., permitting all outages as a result of PHMSA section 60139(c) orders to be treated similarly to *force majeure* events for a two year transitional period, is reasonable. Indicated Shippers contends that such a standard is inconsistent with the general principle we have stated in the past that *force majeure* events are limited to events which are “not reasonably within the pipeline’s control and are unexpected.”²⁶ In the discussion below, we first clarify the application of these criteria in the context of outages related to government action, and then discuss our reasons for reaffirming our decision to treat outages resulting from PHMSA section 60139(c) orders similarly to *force majeure* events.

32. The Commission has found it difficult to draw a clear distinction between government actions that satisfy these criteria for treatment as a *force majeure* event and which do not, as illustrated by our past orders on the subject. For example, in the rehearing order in *Tarpon Whitetail Gas Storage, LLC*,²⁷ the Commission stated that “the actions of an administrative or regulatory agency may support the declaration of a *force majeure* event.” The Commission therefore permitted the pipeline to include in its definition of *force majeure* “present and future valid orders, decisions, or rulings of any government or regulatory entity having proper jurisdiction.” On the other hand, the Commission also stated “an appropriately designed *force majeure* provision should complement a natural gas company’s regulatory obligations,” and therefore the pipeline could not include testing and maintenance required by governmental authority in the definition of *force majeure*.²⁸

33. Therefore, in the December 2012 Order in this case, and more recently on rehearing of the June 2012 *TransColorado I* order cited by Indicated Shippers, the Commission has sought to clarify further its policy concerning when pipelines must

²⁶ *Texas Eastern*, 140 FERC ¶ 61,216 at P 86.

²⁷ 125 FERC ¶ 61,050, at PP 5-6 (2008) (*Tarpon Whitetail*).

²⁸ See also *Florida Gas*, 107 FERC ¶ 61,074 at PP 27-33, and *Tennessee Gas Pipeline Co., LLC*, 139 FERC ¶ 61,050, at PP 81-82 (2012) (*Tennessee*), in which the Commission also stated that some government actions could qualify as *force majeure* events, but testing and maintenance in order to ensure safe and reliable operation of a pipeline performed in compliance with government orders and regulations are matters within the pipeline’s control.

provide full reservation charge credits for outages caused by compliance with government requirements and when only partial reservation charge credits are required. As explained in *TransColorado II*,²⁹ the basic distinction is between (1) outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, and (2) outages resulting from one-time, non-recurring events. Thus, the Commission has consistently treated outages related to compliance with PHMSA's integrity management regulations as non-*force majeure* events, which are reasonably within the control of the pipeline and expected, and therefore the Commission has required full credits for those outages. However, one-time, non-recurring testing required by government order, may qualify as a *force majeure* event outside the pipeline's control. For example, in *TransColorado II*, the Commission clarified that if PHMSA requires special, one-time tests after a pipeline failure, including on parts the system not affected by the failure, that testing requirement may be treated as a *force majeure* event for which partial reservation charge crediting is reasonable. Such testing is not part of the regular periodic maintenance activities the pipeline must perform in the ordinary course of its business, and thus is not "expected" in the same sense as outages related to an ongoing integrity management program. The Commission noted that the pipeline could have less discretion concerning the timing of such special tests than it has concerning the timing and location of routine scheduled maintenance. Also, the costs of outages for such one-time testing would generally not be recurring costs eligible for inclusion in the pipeline's rates in a general NGA section 4 rate case.

34. While our earlier orders on these issues, such as *Florida Gas*, *Tarpon Whitetail*, and *Tennessee*, did not clearly draw above distinction between regular, periodic maintenance activities performed in the ordinary course of business in compliance with government regulations and government orders requiring one-time, non-recurring testing or other actions, the Commission finds that distinction to be an important factor in deciding whether partial or full credits are required. First, as explained in both the December 2012 Order and *TransColorado II*, the pipeline is likely to have greater discretion as to when it performs regular, periodic maintenance on particular pipeline segments, than when the government orders special one-time testing. In fact, the PHMSA integrity management regulations generally provide for a basic seven-year schedule for reassessing the integrity of pipeline segments in HCAs.³⁰ Second, and of at least equal importance, the recurring costs of regular, periodic maintenance performed in

²⁹ *TransColorado Gas Transmission Co. LLC*, 144 FERC ¶ 61,175 (2013) (*TransColorado II*).

³⁰ See 49 C.F.R. § 192.939 (2013).

the ordinary course of business may be included in a pipeline's rates in a general NGA section 4 rate case. However, as explained in the December 2012 Order and *TransColorado II*, and not disputed by Indicated Shippers, the costs of special, one-time tests are generally not eligible for inclusion in a pipeline's rates in a general section 4 rate case.

35. In *North Baja*, the court affirmed our policy requiring full credits for "scheduled" maintenance based on a finding that "there is nothing unreasonable about FERC's policy that pipeline's rates should incorporate costs associated with a pipeline 'operating its system so that it can meet its contractual obligations.'"³¹ Consistent with policy, the Commission has held that pipelines may reflect the costs of providing full reservation charge credits for non-*force majeure* outages in their rates.³² For example, this could be accomplished by a reduction in the billing determinants used to design their rates or including the cost of the full credits as an item in their cost of service. Given that the full crediting policy is premised on the ability of the pipeline to recover the costs associated with that policy through its rates, it follows that eligibility for such cost recovery must be an important factor in distinguishing between the types of government testing and maintenance requirements which trigger the full crediting requirement and those which only trigger a partial crediting requirement. Thus, as we clarified in *TransColorado II*, in the context of government actions, the full crediting requirement generally applies only to regular, periodic maintenance required in the ordinary course of business by government regulation, and special one-time testing required by an individual government order may be treated as a *force majeure* event even when the pipeline has some ability to schedule the required maintenance. To the extent this clarification were to reduce the situations where full credits are required with respect to government actions, it would also correspondingly reduce the pipeline's ability to seek cost recovery in a rate case.

36. With this clarification of our general policy concerning when government actions trigger a full crediting requirement, we now turn to Indicated Shippers' specific contentions with respect to outages caused by PHMSA orders pursuant to section 60139(c). Indicated Shippers does not contest that the 2011 Act created a one-time obligation on pipelines to reconfirm MAOP and any costs pipelines incurred as a result of a PHMSA order pursuant to section 60139(c) would be non-recurring costs not eligible for inclusion in the pipeline's rates. Thus, under the general principles discussed above, such PHMSA orders would only trigger a partial crediting requirement.

³¹ *North Baja*, 483 F.3d 819, 823.

³² See, e.g., *Northern Natural Gas Co.*, 141 FERC ¶ 61,221, at PP 46-50 (2012) (*Northern*).

37. However, Indicated Shippers focuses on the fact that the Commission has described *force majeure* events as “no-fault” occurrences, not attributable to the pipeline’s mismanagement. Indicated Shippers accordingly argues that a case-by-case review is required to determine whether each outage resulting from a PHMSA section 60139(c) order was outside the control of the pipeline and unexpected, including the issues of whether the pipeline could have scheduled the MAOP confirmation to avoid or minimize interruptions and if the outage was due to the pipeline’s imprudence. Indicated Shippers points to Opinion No. 406 where the Commission stated that:

because 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.³³

Indicated Shippers concludes that the Commission may only permit partial crediting with respect to an outage caused by a PHMSA section 60139(c) order if the pipeline demonstrates that its failure to confirm MAOP prior to that specific PHMSA order was not the product of its imprudence, for example by failing to properly manage its records.

38. While we generally limit a pipeline’s declaration of a *force majeure* to situations which it could have avoided with exercise of due diligence, we find that a tariff provision providing partial reservation credits for all outages resulting from orders by PHMSA pursuant to section 60139(c), without a case-by-case determination of fault, to be just and reasonable for a two-year transitional period. Reservation charge credits are an equitable remedy. The 2011 Act created a new requirement in section 60139 of title 49 of the U.S. Code, which did not previously exist, for pipelines to verify their records to ensure that they accurately reflect the physical and operational characteristics of pipeline segments in HCAs and confirm their established MAOP, and submit documentation concerning the segments whose MAOP could not be confirmed by July 3, 2013.

39. Indicated Shippers contends that the 18 month-period from the effective date of the 2011 Act until the July 3, 2013 deadline in Section 60139(b)(1) for pipeline operators to submit documentation relating to each pipeline segment for which there are insufficient records to confirm the established MAOP gave pipelines sufficient time to

³³ Request for Rehearing at 11 & n.23 (quoting Opinion No. 406, 76 FERC 61,086) (also cites portions of cases which generally address Commission policy regarding *force majeure* and non-*force majeure* events in contrast with the circumstances of these outages to comply with PHMSA orders).

schedule any necessary testing to reconfirm MAOP so that they could have avoided or minimized any curtailments. It therefore argues that the Commission should establish a presumption against declaring as *force majeure* any actions taken pursuant to orders issued by PHMSA pursuant to section 60139(c). However, the 2011 Act did not require pipelines to conduct testing by that date to reconfirm the MAOP of all pipeline segments for which existing documentation was insufficient. Instead, the 2011 Act established a process under which the pipelines would submit to PHMSA documentation relating to each pipeline segment for which the records are insufficient to confirm MAOP by July 3, 2013, and then provides for PHMSA thereafter to require the pipeline to reconfirm MAOP as expeditiously as economically feasible and determine what interim actions are necessary to maintain safety. We do not find a pipeline's failure to conduct testing necessary to reconfirm MAOP on a faster schedule than required by the 2011 Act, or by PHMSA, to indicate a lack of due diligence.

40. Indicated Shippers also argues that, as the December 2012 Order recognized, a pipeline's need to reconfirm its MAOP could be attributable, at least in part, to the pipeline's failure to maintain adequate records in the past.³⁴ However, PHMSA has established more stringent and detailed requirements concerning the records necessary to confirm MAOP than existed before 2011. Therefore, the pipeline may have followed all existing applicable recordkeeping requirements, and nevertheless be unable to verify its records pursuant to the 2011 Act.

41. On January 4, 2011, to enhance safety efforts and implement the January 3, 2011 recommendations issued by the National Transportation Safety Board (NTSB) following the September 9, 2010, pipeline rupture in San Bruno, California, PHMSA issued an Advisory Bulletin (ADB-2011-01)³⁵ concerning, among other things, establishing MAOP using record evidence. That Advisory Bulletin required that records used to establish MAOP must be traceable, verifiable, and complete.³⁶ On May 27, 2012, as provided in section 60139(a)(3), PHMSA issued Advisory Bulletin (ADB-2012-06).³⁷ In that bulletin, PHMSA provided guidance as to what is necessary for a record to comply with the requirements that MAOP must be supported by "records that are traceable, verifiable,

³⁴ Request for Rehearing at 13; *see also* December 2012 Order, 141 FERC ¶ 61,222 at PP 41-46.

³⁵ 76 FR 1504 (January 10, 2011).

³⁶ *Id.* at 1506.

³⁷ 77 FR 26822 (May 7, 2012).

and complete.”³⁸ PHMSA stated that traceable records are those which can be clearly linked to original information about a pipeline segment. Traceable records might include pipe mill records, purchase requisition, or as-built documentation indicating minimum pipe yield strength, pipe yield strength, seam type, wall thickness and diameter. PHMSA stated that verifiable records are “those in which information is confirmed by other complementary, but separate documentation. Verifiable records might include contract specifications for a pressure test of a line segment complemented by pressure charts or field logs.”³⁹ PHMSA further stated that complete records are those in which the record is finalized as evidenced by a signature, date, or other appropriate marking. An incomplete record might reflect that a pressure test was initiated, failed, and restarted with conclusive indication of a successful test. A record that cannot be specifically linked to an individual pipe segment is not a complete record for that segment.

42. These advisory bulletins establish new more detailed and stringent requirements concerning the records necessary for verifying MAOP than previously set forth in PHMSA’s regulations.⁴⁰ PHMSA has not previously set forth the specific requirements concerning traceable, verifiable, and complete records in those bulletins. It follows that a pipeline’s current records may not be sufficient to satisfy the new requirements, although the pipeline reasonably considered sufficient before the issuance of the bulletins. Therefore, the fact a pipeline’s existing records may fail to fully satisfy the requirements first set forth and explained in the January 2011 and May 2012 Advisory Bulletins does not demonstrate a lack of due diligence by the pipeline in its past recordkeeping.

43. Moreover, the request by Indicated Shippers that we presume that any failure by the pipeline to keep sufficient records to confirm MAOP was imprudent is inconsistent with our ordinary practice of presuming that a pipeline has conducted its business activities prudently.⁴¹ As we stated in *New England Power Co.*,⁴² “managers of a utility

³⁸ *Id.* at 26823.

³⁹ *Id.*

⁴⁰ See 49 C.F.R. § 192.601, *et seq.* (2013).

⁴¹ *Iroquois Gas Transmission Corp.*, 145 F.3d 398, 399-400 (D.C. Cir. 1998) (*Iroquois*).

⁴² 31 FERC ¶ 61,047, at 61,084 (1985). See also *Dakota Gasification Co.*, 77 FERC ¶ 61,271, at 62,154 (1996) and *Entergy Services, Inc.* 130 FERC ¶ 61,023 at P 51-54 and n.69 (“Flawed or even wrong decision-making does not equate to imprudence.”) While Indicated Shippers points out that Opinion No. 406 described a pipeline’s failure to operate its system so that it can meet its contractual obligations as

(continued...)

have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers.” In fact, in *Iroquois*, the U.S. Court of Appeals for the District of Columbia Circuit held that the fact a pipeline has violated environmental and safety laws is not sufficient, by itself, to reverse the ordinary presumption of prudence and create a presumption of imprudence. Indicated Shippers has not provided any indication that Gulf Crossing has not operated safely in the past. In fact, Gulf Crossing asserts that its pipeline system has operated safely since long before the first gas pipeline safety requirements were promulgated by DOT in 1970.⁴³

44. In these circumstances, we find that the most reasonable approach is to require an equitable sharing of the burden of the one-time MAOP reconfirmation process required by the 2011 Act for a two-year transitional period. This will provide upfront certainty concerning the pipeline’s obligation to provide reservation charge credits during any resulting outages, without the need for time-consuming litigation concerning the prudence of pipelines’ past recordkeeping practices in which the prospects of a finding of imprudence would be uncertain at best. This approach is also consistent with Congress’ concern that pipelines reconfirm the MAOP of segments with insufficient documentation as expeditiously as economically feasible in order to ensure public safety, after completion of the records verification process.

45. We reject Indicated Shippers’ contention that this approach absolves Gulf Crossing from any responsibility for its past recordkeeping practices. Gulf Crossing will be required to provide full reservation charge credits for any outage of primary service due to a PHMSA testing requirement or interim order lasting more than 10 days. In addition, as Gulf Crossing recognizes, it will not be able to reflect the costs of any such reservation charge credits in a future rate case, because they will be related to a one-time non-recurring event. Moreover, the Commission’s action here does not authorize Gulf Crossing to increase its current rates to include any increased operational and maintenance costs for conducting whatever tests or repairs PHMSA may require.⁴⁴ The

“mismanagement,” the Commission has subsequently clarified that it does not regard outages due to regular, periodic maintenance activities performed in the ordinary course of business as necessarily the result of mismanagement. *Texas Eastern*, 140 FERC ¶ 61,216 at PP 55-59. In any event, Opinion No. 406 was not addressing the situation here of a special, one-time testing requirement imposed by Congress.

⁴³ Gulf Crossing’s Answer to Protests at 10.

⁴⁴ See, e.g., *CenterPoint Energy – Mississippi River Transmission, LLC*, 140 FERC ¶ 61,253, at PP 63-65 (2012).

Commission's decision only concerns the equitable sharing of the reservation charge credits for these outages. Shippers, in individual rate cases, are free to oppose any proposal by the pipeline to include any costs related to PHMSA orders pursuant to section 61139(c) in its jurisdictional rates. Therefore, Indicated Shippers' assertion that, in some manner, the Commission has created the potential for imprudent costs to be included in jurisdictional transportation rates is incorrect.

46. After full consideration of the circumstances of these outages, the Commission has determined that that an equitable sharing of the risk for all these outages similar to that with respect to *force majeure* outages is appropriate. The Commission's decision will ensure that pipelines share the risk for these outages regardless of fault and expedite resolution of the amount of credits due consistent with the Congressional requirement that MAOP be confirmed as expeditiously as economically feasible.⁴⁵

Safe Harbor Method

47. Indicated Shippers argues that, if the Commission permits partial crediting for these outages, it should require any partial credits to be made under the No-Profit method. Indicated Shippers contends that, even assuming the return and taxes portion of Gulf Crossing's reservation rates equaled only 33 percent of the total reservation rate, an outage related to a PHMSA order issued under section 60139(c) would need to last at least 15 days before there was an equivalent "sharing" of the risk of the curtailment under the Safe Harbor method, as opposed to immediate sharing under the No-Profit method. Indicated Shippers further contends that, therefore, since MAOP confirmation is likely to take less than 15 days, it would be unjust, unreasonable, and inequitable to allow Gulf Crossing to provide partial reservation charge credits under the Safe Harbor method and instead the No-Profit method should be required so that Gulf Crossing and its shippers would "truly" share the risk of the curtailment from Day One of the curtailment event.

48. In the December 2012 Order, the Commission allowed partial crediting through the Safe Harbor method as consistent with the established Commission policy approving use of that method as just and reasonable. Indicated Shippers provides an example of the reservation charge credits that might result from use of the Safe Harbor method.⁴⁶

⁴⁵ As discussed below, we will require Gulf Crossing to set forth the provision for partial crediting during outages resulting from PHMSA section 60139(c) orders in a separate tariff provision and not include such outages in its definition of *force majeure*.

⁴⁶ Indicated Shippers provides no support for its assumption that Gulf Crossing's return and taxes constitute only 33 percent of the costs included in its reservation rates.

However, Indicated Shippers has failed to support its claim that the Safe Harbor method does not “truly” share the risk of outages and that only the No-Profit method may be utilized. As the Commission stated in *Dominion*:

Commission policy permits a pipeline to choose which crediting method to adopt for outages due to *force majeure* events.⁴⁷ In *North Baja*,⁴⁸ the court found that the Safe Harbor method, as one of the methods approved by the Commission, “incorporate[s] a careful balancing of risk between shippers and pipelines.”⁴⁹

49. As the Commission explained in *Northern*, while both the Safe Harbor and the No-Profit methods achieve an equitable sharing of the risks of *force majeure* outages, they allocate the risks of short and long-term outages in different ways.⁵⁰ The Safe Harbor method allocates the entire risk of *force majeure* outages of 10 days or less to the firm shippers. However, the requirement that the pipeline provide full credits after Day 10 of the outage then allocates to the pipeline a progressively greater share of the risk from the *force majeure* outage the longer the outage continues. By contrast, the No-Profit method allocates the same proportionate risk to the pipeline regardless of the length of the *force majeure* outage because beginning on Day One of the outage, and continuing until the outage ends, the pipeline must provide a credit to shippers equal to its return on equity and associated income taxes. Unlike the Safe Harbor method, the No-Profit method requires the pipeline to bear some of the risk of short duration *force majeure* outages. However, because a pipeline’s return on equity and associated income taxes in almost all cases constitute less than 50 percent of the pipeline’s fixed costs, for long term *force majeure* outages the No-Profit method allocates less of the risk to the pipeline than does the Safe Harbor method.

50. Indicated Shippers suggests that outages from orders issued by PHMSA pursuant to section 60139(c) are likely to be less than 15 days in length. However, the Commission has no basis to assume that all such outages will be of such short duration. For example, PHMSA could take interim action requiring a pipeline to operate a portion

⁴⁷ (Citing, e.g., *NGSA*, 135 FERC ¶ 61,055 at P 17; 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.).

⁴⁸ *North Baja*, 483 F.3d 819, 822.

⁴⁹ *Dominion*, 142 FERC ¶ 61,154 at P 22.

⁵⁰ *Northern*, 141 FERC ¶ 61,221.

of its facilities at a reduced MAOP for a relatively extended period until all testing and necessary pipeline repairs are made to ensure safe operation at a higher MAOP. As PHMSA has explained:

Although hydrostatic testing is recognized to be the most direct and effective methodology for validating a MAOP or MOP, its implementation requires that operating lines be shut down, which may adversely affect customers dependent on the natural gas supplied by the pipeline, particularly if the pipe fails during the test, which could necessitate a protracted shutdown.⁵¹

Even if the pipeline had a number of other short-term outages of less than ten days, the higher level of credits for even one extended outage of primary firm service required by the Safe Harbor method could provide shippers greater overall relief than would the No-Profit method.⁵²

Notice of Outage

51. Indicated Shippers argues that the identification of the specific PHMSA order in the outage notice required pursuant to the December 2012 Order must not only be posted on Gulf Crossing's web site, but also filed with the Commission. Indicated Shippers contends that Gulf Crossing must be required to file this notice with the Commission so that all interested parties have the opportunity to examine the notice and provide comments on the reasonableness of Gulf Crossing's proposal to issue partial reservation charge credits.

52. Indicated Shippers' request is denied as unnecessary. In the December 2012 Order, the Commission stated that Gulf Crossing's notice of an outage required to comply with an order issued by PHMSA pursuant to section 60139(c) must identify the specific PHMSA order with which [Gulf Crossing] is complying.⁵³ A pipeline's posting of notices on its web site is its ordinary way of communicating with its shippers,

⁵¹ PHMSA ADB-2011-01, 76 FR 1504 at 1505.

⁵² See *Natural Gas-Gulf South Pipeline Company, LP*, 144 FERC ¶ 61,215 (2013); *Natural Gas-Rockies Express Pipeline LLC*, 144 FERC ¶ 61,216 (2013).

⁵³ December 2012 Order, 141 FERC ¶ 61,222 at P 45.

particularly with respect to their ability to schedule service. Therefore, the Commission sees no reason to require Gulf Crossing to file a special notice with the Commission.⁵⁴

III. Gulf Crossing's Compliance Filing

Compliance Filing

53. In its Compliance Filing, Gulf Crossing filed revised tariff records. Gulf Crossing proposes to modify section 6.21.5(1) to include only events required to comply with PHMSA orders pursuant to section 60139(c) in the definition of *force majeure* limited to a two-year transitional period ending on December 31, 2014. Gulf Crossing also proposes to add a new section 6.21.5(7) providing that the notice of *force majeure* for such outages will identify the specific PHMSA order with which it is complying in its notification of the outage.

54. Gulf Crossing has also eliminated the existing language in its definition of *force majeure* in section 6.21.5(1) that includes “the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party)” as an instance of *force majeure*.

55. Gulf Crossing included the following revisions to which it agreed in its answer to the protests to its application and the Commission found, in the December 2012 Order, to be reasonable: (1) the addition of tariff language in section 6.23(2)(b) clarifying that reservation charge credits will only be based on the previous seven days' average daily usage if Gulf Crossing has posted notice prior to the Timely Cycle nomination deadline that the capacity will be unavailable for the day in question; (2) a corresponding revision to section 6.23(2)(b)(i) to provide credits based on quantities nominated for scheduling but not delivered if notice of the outage was not provided before the Timely Cycle nomination deadline; and (3) the deletion of both proposed sections 6.23(1)(c) and 6.23(2)(c) because they are redundant. Finally, Gulf Crossing revises section 1, Version 5.1.0, to update the Table of Contents to reflect changes approved by the Commission during the suspension period in this proceeding.

56. Public notice of Gulf Crossing's Compliance Filing was issued on January 18, 2013, allowing parties to file comments on or before January 30, 2013. Indicated Shippers and Process Gas Consumers Group (PGC) filed protests to the Compliance Filing. Gulf Crossing filed an Answer to the protests to the Compliance Filing.⁵⁵ The

⁵⁴ Further, such notices may also be posted on the PHMSA website.

⁵⁵ The Commission's Rules of Practice and Procedure do not permit answers to protests or answers unless otherwise ordered by the decisional authority.

protests to the Compliance Filing and Gulf Crossing's Answer are discussed in detail below.

Commission Determination

57. The Commission accepts the Compliance Filing and the revised tariff records to be effective July 24, 2013, subject to conditions, as discussed below.

Force Majeure

Gulf Crossing's Proposal

58. Gulf Crossing proposes to modify section 6.21.5(1), its definition of *force majeure*, to include events stemming from compliance with section 60139(c) to include:

any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, that is commenced prior to December 31, 2014, to comply with Section 60139(c) of Chapter 601 of Title 49, as added by section 23 of the [2011 Act] or requirements issued by the [PHMSA] pursuant to Section 60139(c);

59. Gulf Crossing also proposes to add a new section 6.21.5(7) concerning notices of *force majeure* stating that:

To the extent that Gulf Crossing declares *force majeure* associated with repair, replacement, refurbishment, or maintenance activity related to Section 60139(c), Gulf Crossing's notice will identify the specific PHMSA order or requirement with which Gulf Crossing is complying.

Commission Determination

60. In the December 2012 Order, the Commission allowed Gulf Crossing to include a provision in its tariff permitting the partial crediting of outages resulting from orders issued by PHMSA pursuant to section 60139(c) of the 2011 Act. However, while the Commission has permitted partial crediting for such outages, it has not found that every such outage is necessarily a *force majeure* event which could have been avoided with the exercise of due diligence. Moreover, the Commission is only allowing this provision for

18 C.F.R. § 385.213(a)(2) (2013). However, the Commission finds good cause to accept Gulf Crossing's Answer as it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record.

a transitional two-year period, unlike the *force majeure* provisions in Gulf Crossing's tariff. Therefore, the December 2012 Order contemplated that Gulf Crossing would file a separate tariff provision permitting partial crediting for such outages which is not part of its *force majeure* provisions. Accordingly, Gulf Crossing is directed file revised tariff records to move the provision allowing partial crediting of these outages to a separate provision of its tariff which is not part of its *force majeure* provisions.

61. For the same reasons, Gulf Crossing is also directed to file a revised tariff record consistent with the direction in the December 2012 Order to identify the specific PHMSA order with which it is complying in its notice of these outages in a separate provision of its tariff which is not part of its *force majeure* provisions and not limited to *force majeure* outages.

Crediting Exemption

Gulf Crossing's Proposal

62. Gulf Crossing proposed, in section 6.23(4), an exemption that includes any outage that:

is solely *the result of events not controllable by Gulf Crossing*, the conduct of Customer, the conduct of the upstream or downstream operator of the facilities at the receipt or delivery point respectively, *or* the conduct of others not controllable by Gulf Crossing. (emphasis added).

Commission Determination

63. In the December 2012 Order, the Commission expressly directed Gulf Crossing to clarify that it is exempt from providing reservation charge credits only when an outage is "due solely to the conduct of others or events not controllable by Gulf Crossing, i.e., operating conditions on upstream or downstream facilities or a shipper's inability to obtain gas supplies or find a purchaser to take delivery of the supplies."⁵⁶ That requirement did not allow the exemption of all outages that are uncontrollable by Gulf Crossing. An event outside Gulf Crossing's control resulting in an outage may require full credits if it is an expected non-*force majeure* event or partial credits if it is an unexpected *force majeure* event.⁵⁷ Gulf Crossing must file a revised provision which is

⁵⁶ December 2012 Order, 141 FERC ¶ 61,224 at P 70.

⁵⁷ See, e.g., the court's discussion in *North Baja*, 483 F.3d 819, 823.

consistent with the Commission's directive and does not exempt all outages due to events not controlled by it to comply with the December 2012 Order.

Curtailment

Positions of the Parties

64. Indicated Shippers and PGC argue that Gulf Crossing did not propose to remove the authorization to curtail service to perform routine repair and maintenance as required by the December 2012 Order from its tariff. Gulf Crossing states that it inadvertently omitted this modification and offers to revise this provision to remove references to curtailment from its provision concerning the interruption of service in section 6.7(7) of its GT&C as follows:

Service may be interrupted ~~or curtailed~~ due to scheduled routine repair, and maintenance. Gulf Crossing shall give Customer(s) reasonable notice of such interruption ~~or curtailment~~ and shall endeavor to coordinate such interruption ~~or curtailment~~ with Customer(s). Gulf Crossing shall not be required to make alternate arrangements for receipt or delivery of Gas during these periods. If Gulf Crossing is unable to transport Gas as a result of any non-Force Majeure event, then Gulf Crossing shall credit Customer's account for the appropriate portion of the reservation charge based on the portion of Customer's MDQ affected by the interruption.

Commission Determination

65. Gulf Crossing's proposed language removes the reference to curtailment in its existing provision in compliance with the December 2012 Order. Accordingly, Gulf Crossing's proposed revised language is accepted, and Gulf Crossing is directed to file revised tariff records containing its proposed revised language.

The Commission orders:

- (A) Gulf Crossing's Request for Rehearing in this proceeding is denied, as discussed in the body of this order.
- (B) Gulf Crossing's Compliance Filing is accepted subject to the conditions set forth in this order.
- (C) The revised tariff records listed in footnote n.4 of this order are accepted to be effective on July 24, 2013, subject to the conditions set forth in this order

(D) Gulf Crossing is directed, within 30 days of the date of this order, to file revised tariff records consistent with the discussion in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.