

145 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ANR Pipeline Company

Docket No. RP14-75-000

ORDER ACCEPTING TARIFF RECORDS

(Issued November 27, 2013)

1. On October 28, 2013, ANR Pipeline Company (ANR) filed proposed tariff records¹ to revise its tariff provisions concerning reservation charge credits to be consistent with Commission policy. For the reasons discussed below, the Commission accepts the revised tariff records effective December 2, 2013, as requested.

2. In *Natural Gas Supply Association, et al.*,² the Commission encouraged interstate pipelines to review their tariffs to determine whether their individual tariff complies with the Commission's policy concerning reservation charge credits, and, if not, make an appropriate filing to comply. In general, the Commission requires all interstate pipelines to provide reservation charge credits to their firm shippers during both *force majeure* and non-*force majeure* outages. The Commission requires pipelines to provide full reservation charge credits for outages of primary firm service caused by non-*force majeure* events and partial reservation charge credits during *force majeure* outages to allow risk sharing for 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 of the outage, 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).³

¹ The revised tariff records are listed in the Appendix to this order.

² *Natural Gas Supply Ass'n, et al.*, 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051 (2011) (NGSA).

³ *See, e.g., Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996) (Opinion No. 406), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997) (Opinion No. 406-A) (*Tennessee*), as clarified by, *Rockies Express Pipeline LLC*, 116

3. As requested by the Commission in *NGSA*, ANR proposes reservation charge crediting provisions for outages of primary firm service caused by a *force majeure* event or a non-*force majeure* event to comply with Commission policy. ANR's reservation charge crediting provisions are proposed in a new section of its General Terms and Conditions (GT&C) of the Tariff, Section 6.36 - Reservation Charge Credits.

4. For *force majeure* outages, ANR proposes to use the Safe Harbor method with a ten day Safe Harbor period after which, beginning on the eleventh day of the outage, a customer will receive the applicable reservation charge credits as specified for non-*force majeure* events. ANR proposes to modify the definition of *force majeure* in GT&C section 6.7 so that outages for the purpose of making repairs or alterations to facilities will only be treated as *force majeure* events if the repairs are "unexpected and uncontrollable." In addition, ANR proposes to exclude testing "associated with normal and planned maintenance" from the definition of *force majeure*. Finally, ANR is modifying its *force majeure* definition to include outages resulting from "legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means ... which are not reasonably expected and within Transporter's control."

5. For non-*force majeure* outages, ANR proposes to provide full reservation charge credits starting on day one for any non-delivery of gas resulting from a non-*force majeure* outage up to a shipper's Firm Daily Volume. ANR proposes to define Firm Daily Volume as "the volume of gas which ANR is obligated to deliver on a firm basis at Shipper's Primary Delivery Point(s) on any day, based on confirmable nominations for firm service within Shipper's" contract demand. ANR further states that reservation charge credits shall not be provided to the extent that a shipper utilizes secondary service.

6. ANR also proposes to provide partial reservation charge credits for a two-year transitional period for outages that are required to comply with certain orders issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) which involved new pipeline safety regulations pursuant to section 60139(c) of Title 49 of the United States Code, Chapter 60. ANR proposes to use the Safe Harbor method for reservation charge crediting associated with such PHMSA outages for two-year period commencing with the proposed effective date tariff language, December 2, 2013.

7. Public notice of ANR's filing was issued on October 29, 2013. Interventions and protests were due as provided by section 154.210 (18 C.F.R. § 154.210 (2013)). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2013), all timely motions to intervene and any unopposed motions to intervene are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing

FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*). The Commission has stated that pipelines may also use some other method which results in an equitable sharing of the risk.

parties. Protests were filed by Indicated Shippers⁴ and Atmos Energy Corporation (AEC). Northern Illinois Gas Company d/b/a Nicor Gas Company (Nicor), DTE Gas Company (DTE), and Northern States Power Company-Minnesota (NSP-M) and Northern States Power Company-Wisconsin (NSP-W) (jointly, the NSP Companies) filed comments. SEMCO Energy Gas Company (SEMCO), an intervenor, filed late comments, supporting DTE's position. The protests and comments contend that ANR's proposal must be revised in certain aspects to be consistent with the Commission's policy and precedents. On November 20, 2013, ANR moved for leave to file an answer and answer. The Commission accepts the late filings as they assist the Commission in its decision making. We address the concerns and ANR's response below.

A. Confirmable Nominations

8. ANR's proposed Section 6.36 paragraph 1 provides:

As used in this Section 6.36, Firm Daily Volume shall mean the volume of gas which ANR is obligated to deliver on a firm basis at Shipper's Primary Delivery Point(s) on any Day, based on **confirmable nominations** (emphasis added) for firm service within Shipper's MDQ.

9. The NSP Companies seek clarification on the meaning of "confirmable nominations." They state that reservation charge credits are based on the quantity of gas not delivered by ANR within the Shipper's Firm Daily Volume and therefore, the meaning of confirmable nominations is critical to determining the credits that are due. NSP Companies request that ANR clarify the meaning of "confirmable nominations" to ensure that ANR properly calculates any reservation charge credits that may be due.

10. DTE states that it believes that ANR's reliance on confirmable nominations to determine the amount of reservations charge credits for all outages, including those for which the pipeline gave advance notice before the first opportunity to schedule service for the day in question, is inferior to the more balanced approach the Commission has approved in cases such as *Southern Natural Gas Co. (Southern)*.⁵ DTE states that the Commission explained in *Southern* that when a pipeline provides shippers with advance notice of an outage before shippers have submitted nominations, the nominations "may not accurately reflect what they would have scheduled without advance knowledge that

⁴ For the purposes of this proceeding, the Indicated Shippers are Anadarko Energy Services Company, Apache Corporation, ExxonMobil Gas & Power Marketing Company, and Hess Corporation.

⁵ Order Accepting Tariff Records Subject to Conditions, *Southern*, 135 FERC ¶ 61,056 (2011).

the scheduling nominations would not be accepted.” DTE further states that in *Southern*, the Commission found it appropriate to differentiate between outages where advance notice was given and outages where no advance notice was provided and found that in cases where advance notice of an outage was provided, it was reasonable for Southern to use the shipper’s prior seven-days’ utilization for firm capacity to calculate the reservation charge credit. DTE believes that the approach adopted in *Southern* is also appropriate for ANR’s tariff, and that an on-going *force majeure* event on the ANR system highlights the need for a historical, rather than scheduled, basis for determining the amount of reservation charge credits when advance notice of the outage is given.

11. Nicor also states that it is concerned that reservation charge credits based on “confirmable nominations” would unfairly deprive shippers of credits in instances of outages that are planned or long-term in duration and where a reduction or unavailability of service on the pipeline is known in advance. Nicor states that ANR should be required to incorporate an alternative arrangement, similar to ones previously approved by the Commission. Nicor provides as an example the current ANR outage previously mentioned by DTE and states that it would be unreasonable to require shippers to submit redundant nominations for service when the shippers may have made arrangements to seek alternative supplies. Nicor states that ANR should modify its proposed tariff revisions to make clear that “confirmable nominations” are not required to the extent that the pipeline has notified its shippers that service is being curtailed.

12. Nicor states that there are various alternatives to the “confirmable nominations” requirement as a measure to calculate appropriate reservation charge credits when the parties have advance notice that service will be unavailable. Nicor proposes that ANR base the reservation charge credits in advance circumstances, such as in its example, on either (1) the average of the immediately preceding seven days of service received by the shipper under its affected contract,⁶ or (2) the historical volume actually delivered under the affected contract between the affected part of receipt and delivery points during the same period in the immediately preceding year(s) (assuming there was no service interruption on that day, and that the shipper’s MDQ was the same).⁷ Nicor states that either of these alternatives would more reasonably and fairly approximate the service that the shipper would have nominated but for the outage, and would be a more appropriate measure for the calculation of reservation credits.

13. ANR states that it has included a definition of “confirmable nominations” in proposed section 6.36 (5) of its GT&C, and the Commission accepted use of that term in

⁶ See *Texas Gas Transmission, LLC*, 145 FERC ¶ 61,100, at P 55 (2013); *Gulf Crossing Pipeline Co. LLC*, 145 FERC ¶ 61,021, at P 55 (2013); and *Gulf South Pipeline Co., LP*, 144 FERC ¶ 61,215, at P 55 (2013).

⁷ *Northern Natural Gas Co.*, 144 FERC ¶ 61,194 (2013).

Gas Transmission Northwest LLC.⁸ ANR also contends that confirmable nominations are a more accurate basis for determining reservation charge credits than the suggested alternative methods because a shipper nomination “accurately measures, at the time of the outage, the shipper’s intention and actual ability to take capacity absent the outage.”⁹ Accordingly, ANR asserts the Commission should accept its proposal.

Commission Ruling

14. The Commission finds that ANR’s proposed definition of the Firm Daily Volumes qualifying for reservation charge credits is reasonable. With regard to the use of the term “confirmable nominations,” ANR’s proposed section 6.36(5) clarifies that “[a]ny exemption from crediting for nominated amounts not confirmed...is limited to events caused solely by the conduct of others, such as Shipper or upstream or downstream facility operators not controlled by ANR.” We find that, with the clarification in section 6.36 (5), ANR’s use of the term “confirmable nominations” is consistent with Commission policy. As ANR notes, the Commission accepted the term “confirmable nominations” in *GTN* stating that the “proposal to base reservation charge credits on ‘confirmable nominations,’ is consistent with Commission policy.”¹⁰ In *GTN*, the Commission required the pipeline to narrow the scope of its proposed tariff language to specify that any exemption from crediting for nominated amounts not “confirmed” is limited to events not within a pipeline’s control, i.e., due to the conduct of the shipper or an upstream or downstream facilities operator. ANR’s proposed section 6.36 (5) does this.

15. With regard to the protesters’ concern about the calculation of reservation charge credits when advance notice of an outage has been given, the protesters are correct that the Commission has accepted proposals by pipelines to calculate reservation charge credits in such circumstances based on some measure of historical usage. As discussed in *Southern*, pipeline proposals to use historical usage to calculate credits when advance notice of an outage is given have arisen out of a concern that shippers could game the pipeline’s reservation charge crediting provisions. Specifically, pipelines have been concerned that with advance notice of an outage shippers could submit scheduling nominations for high amounts knowing that the scheduling nomination will be rejected. To address that issue, the Commission has accepted the historical average approach to determine the proper crediting volume, as proposed by the pipeline in *Southern*. However, the Commission has not required pipelines to include such a provision in their

⁸ 141 FERC ¶ 61,101 (2012) (*GTN*).

⁹ Answer at 4.

¹⁰ *GTN*, 141 FERC ¶ 61,101 at P 39.

tariffs. Rather, pipelines are free to do so, if they are concerned about such potential gaming.

16. Although the use of historical usage to determine credits when advance notice of an outage is given is primarily for the protection of the pipeline to prevent shipper gaming, ANR has indicated its preference for not using historical usage. ANR has explained that it believes shipper nominations provide the most accurate indication of the capacity a shipper would have used absent the outages. Under these circumstances, we will not require ANR to include a provision for the use of historical usage in its tariff and will accept its tariff record as proposed. Under ANR's proposed tariff provisions, whenever credits are due, ANR must calculate those credits based on the amount of service which a shipper nominates but ANR is unable to schedule, regardless of whether the shipper had advance notice of the outage when it submitted its scheduling nomination. This enables the shipper to control the level of credits it receives in such circumstances, and therefore ANR's proposal should not harm its shippers.

B. Secondary Points

17. ANR's proposal provides in section 6.36 (2) that reservation charge credits shall not be provided to the extent that a shipper utilizes secondary service. DTE recommends that ANR clarify its language limiting reservation charge credits to the extent a shipper uses secondary receipt or delivery point service due to a firm service outage. DTE acknowledges that the Commission's policy concerning reservation credits relates only to primary path service, and DTE also accepts that to the extent that it is using secondary receipt points to transport gas on a portion of its contracted-for pipeline path, it should not receive credits for the reservation charges applicable to that portion. However, DTE states that it pays a discounted rate for its primary transportation path, and it may be forced to pay a higher rate to use secondary receipt points during an outage than it pay for service from its primary receipt point. DTE requests that ANR revise this provision to clarify that if a shipper is able to use only a portion of its contracted-for primary path via secondary points, it will still receive reservation charge credits for the portion of the contracted-for primary path it was not able to use as a result of the outage.

18. In its answer ANR "confirms that if shippers use only a portion of their contracted-primary service via secondary points, the shipper will receive reservation charge credit for the net remaining portion of service at primary points based upon confirmable nominations at those primary points."¹¹

¹¹ Answer at 5.

Commission Ruling

19. The Commission will not require ANR to modify its proposal in the manner requested by DTE. The Commission has consistently approved tariff provisions exempting pipelines from paying reservation charge credits to the extent a shipper uses secondary firm service to obtain service during a period when the pipeline is unable to provide primary firm service to the shipper. A shipper need not use secondary firm service on the pipeline during an outage, and, if it does not, ANR will be required to provide reservation charge credits for primary firm service which the shipper nominates and ANR cannot provide (subject to the 10-day Safe Harbor for *force majeure* outages). However, if a shipper chooses to nominate secondary firm service during a service outage and the pipeline schedules that service, then the shipper is receiving service pursuant to its firm service agreement with the pipeline. Therefore, it is reasonable for the shipper to continue to pay the applicable reservation charges required by its service agreement for the secondary firm service provided by the pipeline. The secondary service DTE may use in an outage to replace the primary service it did not receive may have a higher rate has no bearing on what credits it will receive for the primary service that it did not replace with secondary point service. Moreover, ANR's answer confirms that if a shipper uses secondary service for only a portion of its contracted-for capacity, it will be eligible for credits based on its nominations for the net remaining portion of its capacity which ANR was unable to schedule.

C. Force Majeure

20. AEC notes that ANR is proposing to modify its definition of *force majeure* in Section 6.7 of its Tariff to include:

Any other causes, whether of the kind herein enumerated or otherwise, including legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means, all of which are not reasonably expected and within Transporter's control.

21. AEC opposes and protests ANR's proposed revisions as contrary to Commission precedent. AEC states that while ANR asserts its proposal is identical to tariff language approved in *GTN*,¹² ANR omits the requirement that the pipeline exercise due diligence to prevent the occurrence of a *force majeure* event as set forth in *GTN*'s tariff. AEC acknowledges that ANR's existing tariff language requires the exercise of due diligence to remedy a *force majeure* situation,¹³ but states that ANR's tariff, as proposed, does not require that ANR exercise due diligence to prevent a *force majeure* situation. AEC

¹² 141 FERC ¶ 61,101.

¹³ See ANR FERC Gas Tariff at Section 6.10(3).

requests that the Commission direct ANR to revise Section 6.7(1) to specify that ANR must exercise due diligence to prevent a *force majeure* situation, in order to mirror tariff language previously approved by the Commission in *GTN*. Accordingly, AEC requests that, if ANR seeks to include in its definition of *force majeure* outages caused by legislative, administrative or judicial actions, it also specify that it must exercise reasonable due diligence to prevent such outages.

22. Indicated Shippers seek clarification of ANR's proposed addition of the term "uncontrollable" to its definition of *force majeure* in Section 6.7. Indicated Shippers state that it seeks clarification that the term "uncontrollable" is intended to mean that it is outside of the pipeline's control and that the phrase "unexpected and uncontrollable," which ANR proposes to add before the phrase "repairs, relocation, or construction of facilities," modifies the entire phrase, and not just the word "repairs." Indicated Shippers further state that if the phrase "unexpected and uncontrollable" only modifies "repairs," the proposed revision would not be consistent with the Commission's *force majeure* policy as it would allow ANR to declare a *force majeure* for a relocation or construction of facilities that is not unexpected or uncontrollable.

23. ANR asserts that it is not covering any new ground in the revised definition of *force majeure* in its filing, and all the revisions have been previously approved by the Commission.

Commission Ruling

24. The Commission finds unnecessary the modifications AEC and Indicated Shippers seek to ANR's proposed revisions to its *force majeure* definition. We find that GT&C section 6.7(1)'s requirement that the various causes which constitute *force majeure* must be events "which are not reasonably expected and within Transporter's control" reasonably encompasses the requirement - such events could not be avoided by the exercise of due diligence. We also find that the punctuation in GT&C section 6.7(1) makes it sufficiently clear that the words "unexpected and uncontrollable," which ANR proposes to insert before the phrase "repairs, relocation, or construction of facilities"; modify that entire phrase and not just the word "repairs." Section 6.7(1) sets forth the various separate categories of events that constitute *force majeure* with semi-colons. There is no semi-colon to indicate that "repairs" is in a separate category from "relocation, or construction of facilities," and thus the words "unexpected and uncontrollable" are reasonably read as applying to relocation or construction, as well as to repairs.

D. PHMSA

25. The Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act) enacted new pipeline safety requirements. Section 23(a) of the 2011 Act, added section 60139, Maximum Allowable Operating Pressure [MAOP] to Chapter 601 of Title

49 of the United States Code. Section 60139(a) required each owner and operator of a pipeline to conduct a verification of its records relating to various pipeline segments. Section 60139(b) requires each owner or operator of a pipeline facility to identify and submit to PHMSA documentation relating to each pipeline segment for which its records are insufficient to confirm the established MAOP of the segment by July 3, 2013. Section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline owner or operator of a pipeline facility identified pursuant to section 60139(b) to reconfirm a MAOP “as expeditiously as economically feasible,” and PHMSA must determine what interim actions “are appropriate for the pipeline owner or operator to take to maintain safety until a [MAOP] is confirmed.” Section 60139(c)(2) requires that, in determining the interim actions for 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.”

26. In *Gulf South, et al.*,¹⁴ the Commission found that it is just and reasonable for the pipeline to provide partial reservation charge credits for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) in its tariff for a transitional two-year period commencing on January 1, 2013, on the ground such outages are comparable to those for which partial crediting is allowed as *force majeure* events.

27. Nicor questions ANR’s proposal to adopt partial, instead of full, reservation charge crediting for a full two years commencing as of its proposed effective date of December 2, 2013, when this regulatory process has been known to the industry since 2011. Nicor also states that it takes issue with ANR’s proposal to begin the transitional period on December 2, 2013, nearly a year after the Commission allowed the first transition periods to begin on January 1, 2013. Nicor suggests that if the December 2, 2013 date is accepted by the Commission, ANR should be required to implement a shorter transition period so that ANR can be on a comparable footing with the other pipelines that proposed partial crediting for comparable MAOP-testing outages.

28. In its answer ANR states that the PHMSA transitional period was in no way tied to a January 1, 2013 date- that date happened to be the effective date of the tariffs at issue in those proceedings.

Commission Ruling

¹⁴ *Gulf South Pipeline Co. LP*, 141 FERC ¶ 61,224 (2012); *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222, at 40 (2012) (*Gulf Crossing*); and *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at P 39 (2012) (*Texas Gas*) (collectively referred to as *Gulf South, et al.*).

29. In *Gulf South, et al.*, we authorized a two-year transition period commencing on January 1, 2013, and terminating on January 1, 2015.¹⁵ The January 1, 2013 commencement date was chosen in order to allow a full two-year transitional period from the January 1, 2013 effective date of the tariff records in those proceedings. If ANR's proposal was revised to require the beginning date requested by Nicor, it would have a shorter period of effectiveness than the full two-year period found to be reasonable in *Gulf South, et al.* Therefore, we accept ANR's proposed two-year transition period commencing with the effective date of its proposed tariff revision, December 2, 2013. However, we clarify that this authorization for partial crediting pursuant to the Safe Harbor method includes outages to comply with the interim PHMSA orders issued within the two-year transitional period. Thus, ANR will not be required to provide reservation charge credits during the full ten-day Safe Harbor period, even if the outage begins less than 10 days before December 2, 2015. This clarification applies only to pipelines utilizing the Safe Harbor method. Pipelines using the No-Profit method or other appropriate method, which is not limited to a ten-day period, may file for authorization to permit partial crediting for outages extending beyond the two-year transitional period pursuant to section 4 of the Natural Gas Act.

The Commission orders:

The tariff records listed in the Appendix to this order are accepted to become effective December 2, 2013.

By the Commission.

(S E A L)

¹⁵ *Gulf South*, 141 FERC ¶ 61,224 at P 45; *Gulf Crossing*, 141 FERC ¶ 61,222 at P 45; *Texas Gas*, 141 FERC ¶ 61,223 at P 44.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

ANR Pipeline Company
ANR Tariffs, FERC NGA Gas Tariff

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