150 FERC ¶ 61,058
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

American Midstream (Midla), LLC Docket No. RP15-262-000

ORDER ON TARIFF RECORDS

(Issued January 29, 2015)

1. On December 11, 2014, American Midstream (Midla), LLC (Midla) filed revised tariff records[1] to include reservation charge crediting provisions in Rate Schedules NNS, FTS, and FTS-OSF of its FERC NGA Gas Tariff, consistent with Commission policy. For the reasons discussed below, the Commission accepts the revised tariff records effective February 1, 2015, as requested, subject to the condition that Midla make certain changes to its proposed tariff records. In addition, Midla is directed, pursuant to section 5 of the Natural Gas Act (NGA), to either modify certain existing tariff provisions which it did not propose to change in the instant filing or explain why it should be not be required to do so.

I. Background

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

[1] American Midstream (Midla), LLC, FERC NGA Gas Tariff, FERC Gas Tariff (Volume Nos. 1 and 2), 7-Rate Schedule NNS, 2.0.0, 8-Rate Schedule FTS, 2.0.0, 10-Rate Schedule FTS-OSF, 2.0.0.

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

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; 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]

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"[4] where such maintenance may require interruptions of primary firm service. Commission policy recognizes that even if such outages are considered to be uncontrollable, they are expected. The U.S. Court of Appeals for the District of Columbia Circuit affirmed this policy in *North Baja Pipeline, LLC v. FERC*,[5] stating:

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

II. Details of the Filing

4. Midla proposes to update its tariff records to be consistent with Commission policy relieving a firm shipper of its responsibility to pay reservation charges to the extent that Midla is not able to provide firm transportation service for *force majeure* and non-*force majeure* events. In its filing, Midla proposes to modify Rate Schedules NNS, FTS, and FTS-OSF to add a new section 4.6 "Suspension of Reservation Charges." Section 4.6(a) contains Midla's provisions for *force majeure* events and section 4.6(b) contains Midla's provisions for non-*force majeure* events. In section 4.6(a) of the respective rate schedules, Midla proposes to use the Safe Harbor method for

---

[3] *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). The Commission has stated that pipelines may also use some other method which results in an equitable sharing of the risk.

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

[5] *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).

force majeure events, under which it will provide reservation charge credits to customers after the tenth day of Midla's inability to provide service. In section 4.6(b), Midla proposes to provide full reservation charge credits to customers when the outage of primary service occurred due to non-*force majeure* events. Midla proposes to calculate the reservation charge credits based on the lesser of: (1) the nominated quantities which it fails to deliver to customer's primary delivery point(s) during any such outage period; and (2) the daily average quantity nominated by such customer for firm delivery at customer's primary delivery points during the seven-day period prior to the beginning of the outage.

III. Public Notice

5. Public notice of Midla's filing was issued on December 15, 2014. Interventions and protests were due as provided by section 154.210 (18 C.F.R. § 154.210 (2014)) of the Commission's regulations. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2014), all timely motions to intervene and any unopposed motions to intervene out-of-time filed before the date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests were filed. Atmos Energy Corporation filed comments requesting that the Commission engage in a thorough review of Midla's proposed tariff language.

IV. Discussion

A. Proposed Tariff Records

6. Sections 4.6(a) and 4.6(b) of Midla's proposed reservation charge crediting provisions uses the "lesser of" calculation method previously held by the Commission to be inconsistent with our reservation charge crediting policy.[6] Specifically, in section 4.6(a) with regard to *force majeure* outages, Midla proposes that reservation charge credits shall be *based on the lesser of*: (i) the nominated quantities which the pipeline fails to deliver to the shipper's primary receipt point of delivery during any such outage period; and (ii) the daily average quantity nominated by the shipper for firm delivery at the shipper's primary points of delivery during the seven day period prior to the beginning of such force majeure outage for each day of the pipeline's failure to perform its firm transportation obligation. Similarly, section 4.6(b), with regard to non-*force majeure* outages, provides in pertinent part:

---

[6] *See Southern Natural Gas Co.*, 135 FERC ¶ 61,056, at P 32, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*), *Dominion Transmission, Inc.*, 142 FERC ¶ 61,154 (2013), *order on reh'g*, 149 FERC ¶ 61,134 (2014) (*Dominion*).

> Customer shall, except as otherwise provided in this Section, be relieved of its obligation to make payments for reservation charges under such FTS Service Agreement applicable to the firm transportation for Customer's nominated quantities of gas which Pipeline is obligated to deliver at Customer's Primary Point(s) of Delivery that Pipeline fails to provide, from the inception of Pipeline's failure to so perform its firm transportation obligations until such failure is corrected, but for no longer period; provided, however, that if Pipeline's failure to deliver firm quantities is due to a non-force majeure cause of which Customer was provided with advance notice by Pipeline prior to scheduling quantities for the period of such service outage, the suspension of Customer's obligation to make reservation charge payments *shall be based on the lesser of: (i) the nominated quantities which Pipeline fails to deliver to Customer's Primary Point(s) of Delivery during any such outage period; and (ii) the daily average quantity nominated by such Customer for firm delivery at Customer's Primary Point(s) of Delivery during the seven (7) Day period prior to the beginning of such pre-scheduled service outage, for each Day of Pipeline's failure to perform its firm transportation obligation*. [emphasis added]

7. We determine that Midla must revise and clarify proposed sections 4.6(a) and 4.6(b) concerning the calculation of reservation charge credits in *force majeure* and non-*force majeure* situations as described below. The Commission has held that, when the pipeline gives advance notice of an outage before the first opportunity for shippers to submit scheduling nominations for the day, pipelines may calculate reservation charge credits based on the shipper's use of primary firm service during a representative historical period.[7] This calculation methodology minimizes the potential for gaming, where shippers would submit scheduling nominations for high amounts knowing that the scheduling nomination would be rejected, while ensuring that shippers who do not nominate will receive credits based on recent usage of the system. However, when the pipeline has not given advance notice of an outage before the first opportunity to nominate service for the day, the Commission requires that the shipper's credits be based on the quantities it nominated for scheduling which were not delivered, and not on any measure of historical usage.[8] Thus, the calculation of credits based on alternatives of: (1) nominated quantities; or (2) average usage during the preceding seven days are

[7] *Southern*, 135 FERC ¶ 61,056 at P 33.

[8] *Id.* P 32.

mutually exclusive options, and there is never a situation where either alternative could apply depending upon which option produces the least credits.[9]

8. Therefore, Midla must modify proposed sections 4.6(a) and 4.6(b) to clarify that, if it has not given advance notice of an outage before the first opportunity to nominate service for the day, Midla will provide reservation charge credits based upon the amount nominated by the shipper up to its contract demand, but not scheduled by Midla. Midla must also clarify that, in situations where it has given notice of an outage before the first opportunity to schedule service for a gas day, the credits for that day will be based solely on each shipper's usage of primary firm service during the preceding seven days up to their contract demand.

9. Accordingly, we accept the revised tariff records listed in footnote 1 to this order effective February 1, 2015, as requested, subject to the condition that Midla makes the edits to its tariff records discussed above.

B. Existing Definition of *Force Majeure*

10. Midla has not proposed to change the definition of *force majeure* in section 13 of the General Terms and Conditions (GT&C) of its tariff. However, in our review of Midla's reservation charge crediting proposal, the Commission examined Midla's definition of *force majeure* in its tariff to ensure that it also complies with our policy on *force majeure* events. Specifically, section 13.1 states:

> The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, hurricanes or threats of hurricanes, fires, storms, floods, washouts, arrests, and *restraints of the Government, either Federal or State, including* both *civil* and military, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of Natural Gas wells, curtailment on other pipelines, inability of any party hereto to obtain necessary materials, supplies, or permits due to existing or future rules, regulations, orders, laws or proclamations of governmental authorities, both Federal and State, including both civil and military, and any other causes, whether of the kind herein enumerated or otherwise not reasonably within the control of the party claiming suspension; provided, however, that said term shall not mean or include any such cause within the control of the party claiming suspension, nor any cause which by the exercise of due diligence such party

[9] *Dominion*, 142 FERC ¶ 61,154 at P 41.

> is able to overcome. The settlement of strikes or lockouts, however, shall be entirely within the discretion of the party having the difficulty, and the requirement in Paragraph 13.2 hereof that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty. [emphasis added]

11. The italicized portion of Midla's existing definition of *force majeure* is overly broad and thus inconsistent with Commission policy. The Commission has considered similar existing tariff provisions which included in the definition of *force majeure* all interruptions of service required by governmental actions in several cases. The Commission explained that outages resulting from governmental actions may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and *are unexpected*.[10] As the Commission has recently clarified,[11] outages of primary firm service resulting from one-time, non-recurring government requirements may be considered outside the pipeline's control and thus eligible for treatment as *force majeure* events. However, 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 are reasonably within the pipeline's control and thus cannot be treated as *force majeure* events. Accordingly, to the extent a pipeline's existing tariff language treats all outages for testing, repair, and maintenance to comply with governmental orders as *force majeure* events it is over-inclusive and in conflict with Commission policy.[12]

12. The general reference in section 13.1 of Midla's GT&C to "restraints of Government, either Federal and State, including . . . civil" can be interpreted as extending to all outages attributable to government requirements, including outages necessitated by

---

[10] *See, e.g.*, *Equitrans, L.P.*, 148 FERC ¶ 61,250, at PP 42-44, *order on compliance filing*, 149 FERC ¶ 61,204, at PP 7-8 (2014), *Iroquois Gas Transmission System, L.P.*, 145 FERC ¶ 61,233, at PP 85-86 (2013), *Algonquin Gas Transmission, LLC*, 143 FERC ¶ 61,082, at PP 24-25 (2013); *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at PP 82-88 (2012) (*Texas Eastern*); *Gas Transmission Northwest LLC*, 141 FERC ¶ 61,101, at PP 47-49 (2012) (*GTN*).

[11] *TransColorado Gas Transmission Co.*, 144 FERC ¶ 61,175, at PP 35-44 (2013) and *Gulf South Pipeline Co.*, 144 FERC ¶ 61,215, at PP 31-34 (2013).

[12] *GTN*, 141 FERC ¶ 61,101 at P 49; *Texas Eastern*, 140 FERC ¶ 61,216 at P 88.

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. Such an interpretation is contrary to Commission policy that outages attributable to government action may only be treated as *force majeure* events if the government action is both outside the pipeline's control and unexpected.

13. Accordingly, the Commission finds that Midla's existing tariff provision defining *force majeure* events to include, among other things, "restraints of the Government, either Federal or State, including . . . civil" to be unjust and unreasonable. Therefore, pursuant to section 5 of the NGA, Midla is directed, within 21 days of the date of this order, either to: (1) revise this provision to clarify that it only applies to regulatory requirements that are both outside the pipeline's control and unexpected; or (2) show cause why it should not be required to do so.

The Commission orders:

(A) The tariff records listed in footnote 1 to this order are accepted to become effective February 1, 2015, as requested, subject to conditions as discussed in this order and the ordering paragraph below.

(B) Within 21 days of the date of this order, Midla is directed to file a revised tariff record and either a modification of its tariff provisions on the definition of *force majeure* or show cause why it should not be required to do so consistent with the discussion in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.