

150 FERC ¶ 61,184
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.

Portland Natural Gas Transmission System

Docket No. RP13-875-001

ORDER ON REHEARING

(Issued March 12, 2015)

1. On May 30, 2013,¹ the Commission accepted Portland Natural Gas Transmission System's (Portland) proposed tariff records² revising the Reservation Charge Reimbursement provision in its General Terms and Conditions (GT&C) to be consistent with Commission policy. Portland included a proposal to provide partial reservation charge credits for outages to comply with orders issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) pursuant to section 60139(c)(1) of Chapter 601 of Title 49 of the United States Code, added by section 23(a) of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act), for a two-year transitional period as consistent with recent Commission decisions.³ The Commission accepted the proposed tariff records as consistent with Commission policy. Hess Corporation (Hess) filed a request for rehearing of the May 2013 Order. For the reasons discussed below, the Commission denies the request for rehearing.

¹ *Portland Natural Gas Transmission Sys.*, 143 FERC ¶ 61,181 (2013) (May 2013 Order).

² The revised tariff records are listed in the Appendix to the May 2013 Order.

³ Portland also proposed to revise its tariff provisions governing available capacity, right of first refusal (ROFR), capacity for expansion projects, liabilities and remedies, and *pro forma* firm contracts.

I. Background

2. In *NGSA*,⁴ the Commission encouraged interstate pipelines 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 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. 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 such a *force majeure* event, even on "pipelines with little excess capacity"⁵ where such maintenance may require interruptions of primary firm service. The Commission's policy recognizes that even if such outages are considered to be uncontrollable, they are expected.⁶

3. The Commission requires that pipelines provide partial reservation charge credits during *force majeure* outages in order to share the risk of an event not in the control of the pipeline. 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).⁷ The Commission has stated that pipelines may also use some other method which achieves equitable sharing in the same ball park as the first two methods.⁸

⁴ *Natural Gas Supply Ass'n, et al.*, 135 FERC ¶ 61,055, at P 2, *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA*).

⁵ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at P 15 (2003).

⁶ *See 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*).

⁷ *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), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*).

⁸ *Northern Natural Gas Co.*, 141 FERC ¶ 61,221, at P 20 (2012) (*Northern*).

4. The 2011 Act requires the Department of Transportation to conduct studies and consider rulemakings on various matters, including possible changes to the pipeline integrity management regulations of the PHMSA. Significantly, 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) requires each owner or operator of a pipeline to conduct a verification of its records relating to pipeline segments so as to ensure that the records accurately reflect the physical and operational characteristics of the subject pipelines and to confirm their established MAOP. Section 60139(c)(1) provides that PHMSA must require the pipeline owner or operator to reconfirm a MAOP for each pipeline segment for which its records are insufficient as expeditiously as economically feasible, and PHMSA must determine what interim actions are appropriate to maintain safety until a MAOP may be reconfirmed. Section 60139(c)(2) requires PHMSA, in determining the interim actions for each pipeline owner or operator to take, to consider “potential consequences to the public safety and the environment, potential impacts on pipeline system reliability and deliverability, and other factors, as appropriate.”

5. In *Gulf South, et al.*,⁹ the Commission stated that it would allow partial reservation charge crediting for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) for a transitional two-year period. The Commission found that such outages are not the routine scheduled outages in the normal course of business for which full credits are required. Rather, such outages are one-time nonrecurring events comparable to those for which partial crediting is allowed as *force majeure* events.¹⁰ The Commission held that the nature and timing of any other new safety requirements PHMSA may adopt pursuant to the 2011 Act were too speculative to justify modifying Commission policy to treat any outages resulting from such new requirements similarly to *force majeure* events.

⁹ *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at P 40 (2012) (*Gulf South I*), *order on reh’g and compliance filing*, 144 FERC ¶ 61,215 (2013) (*Gulf South II*); *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222, at P 40 (2012), *order on reh’g and compliance filing*, 145 FERC ¶ 61,021 (2013) (*Gulf Crossing*); *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at P 39 (2012), *order on reh’g and compliance filing*, 145 FERC ¶ 61,100 (2013) (*Texas Gas*) (collectively referred to as *Gulf South, et al.*). See also *Dominion Transmission, Inc.*, 142 FERC ¶ 61,154 (2013), *order on reh’g and compliance filing*, 146 FERC ¶ 61,101 (2014) (*Dominion*).

¹⁰ *Gulf South I*, 141 FERC ¶ 61,224 at n.25; *Gulf Crossing*, 141 FERC ¶ 61,222 at n.24; *Texas Gas*, 141 FERC ¶ 61,223 at n.26 (citing *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at P 32 (2004)).

6. On May 1, 2013, in response to the Commission's request in *NGSA*, Portland proposed to revise section 6.21.4 (Reservation Charge Reimbursement) of its GT&C to provide reservation charge credits consistent with the Commission policy set forth in *NGSA*. Proposed GT&C section 6.21.4(c) provides partial reservation charge credits for outages to comply with orders issued by PHMSA pursuant to section 60139(c)(1) for a two-year transitional period consistent with the *Gulf South, et al.*, decisions. For outages resulting from *force majeure* events and the PHMSA section 60139(c) outages which receive the same treatment, Portland proposed to use the Safe Harbor method approved for outages treated as resulting from *force majeure* events. Under the Safe Harbor method, beginning on the eleventh day of a *force majeure* outage, a customer will receive the applicable reservation charge credits as specified for non-*force majeure* events.

7. In the May 2013 Order, the Commission rejected the limited protest by Hess arguing that proposed section 6.21.4(c) should provide full crediting of outages to comply with section 60139(c) PHMSA orders and the No-Profit method should be used for *force majeure* outages. The Commission accepted Portland's filing effective June 1, 2013, including its proposal to provide partial reservation charge credits for outages to comply with orders issued by PHMSA pursuant to section 60139(c)(1) for a two-year transitional period as consistent with recent Commission decisions,¹¹ and use of the approved Safe Harbor method for *force majeure* outages.¹²

II. Request for Rehearing

8. On July 1, 2013, Hess filed a request for rehearing of the May 2013 Order. For the reasons detailed below, we deny rehearing.

A. Partial Credits for PHMSA Compliance

9. Hess argues that the Commission erred by establishing a bright-line rule that all service interruptions under section 60139(c) should be treated as *force majeure* events for which only partial reservation charge credits are required. Hess asserts that the Commission failed to distinguish service interruptions to comply with PHMSA section 60139(c) orders from other service interruptions due to other PHMSA actions that the Commission regards as non-*force majeure* events that require full crediting, such as compliance with PHMSA's integrity management regulations. Hess further asserts that

¹¹ May 2013 Order, 143 FERC ¶ 61,181 at PP 19-24 (citing *Gulf South, et al.*, and *Dominion*, 142 FERC ¶ 61,154).

¹² May 2013 Order, 143 FERC ¶ 61,181 at PP 25-27 (citing, *e.g.*, *Dominion*, 142 FERC ¶ 61,154).

section 60139(c) outages do not have the essential characteristics of *force majeure* events, including that they be unexpected. Finally, Hess contends that this ruling conflicts with the risk-sharing principle underlying the *NGSA* policy.

10. Hess raises similar arguments that the Commission considered and rejected in detail in *Gulf South, et al.*¹³ and *Dominion*.¹⁴ As explained in *Gulf South II*, the Commission in *TransColorado*,¹⁵ clarified its general policy concerning when pipelines must provide full reservation charge credits for outages caused by compliance with government requirements and when only partial reservation credits are required:

[T]he 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*], the Commission clarified that if PHMSA requires special, one-time tests after a pipeline failure, including on parts of 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

¹³ *Gulf South II*, 144 FERC ¶ 61,215 at PP 26-46; *Gulf Crossing*, 145 FERC ¶ 61,021 at PP 27-46; *Texas Gas*, 145 FERC ¶ 61,100 at PP 27-45.

¹⁴ *Dominion*, 142 FERC ¶ 61,154 at PP 20-21, 146 FERC ¶ 61,101 at PP 16-24.

¹⁵ *TransColorado Gas Transmission Co., LLC*, 144 FERC ¶ 61,175 (2013) (*TransColorado*).

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 pipelines rates in a general NGA section 4 rate case.¹⁶

11. Consistent with these general principles, a PHMSA order pursuant to section 60139(c) would only trigger a partial crediting requirement. The 2011 Act created a one-time obligation on pipelines to reconfirm MAOP, and any costs pipelines incur as a result of a PHMSA order pursuant to section 60139(c) would be non-recurring costs not eligible for inclusion in a pipeline's rates. Hess does not contest that costs resulting from PHMSA section 60139(c) orders will be one-time non-recurring costs ineligible for inclusion in the pipeline's rates. As a result, service interruptions to comply with PHMSA section 60139(c) orders are distinguishable from service interruptions related to the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business, including compliance with PHMSA's integrity management regulations, for which full reservation charge credits are required.

12. The Commission has also explained that outages due to PHMSA orders pursuant to section 60139(c) differ from outages that may arise due to PHMSA actions under other sections of the 2011 Act because:

unlike the other sections of the 2011 Act, all of which require PHMSA to conduct rulemaking proceedings before modifying current requirements, section 60139(c) does not require PHMSA to conduct any rulemaking proceeding before it orders particular pipelines to reconfirm MAOP and take interim actions to maintain safety until MAOP is reconfirmed. Rather, PHMSA may simply issue an order to a particular pipeline tailored to address the specific circumstances of its system. Thus, unlike the non-MAOP provisions of the 2011 Act, PHMSA actions pursuant to section 60139 are relatively imminent and could take effect at any time without the need for notice, such as that required for a rulemaking, in contrast with

¹⁶ *Gulf South II*, 144 FERC ¶ 61,215 at P 32. *See also Dominion*, 146 FERC ¶ 61,101 at P 16.

other provisions of the 2011 Act.¹⁷ Particularly in light of Congress's concern that MAOP be reconfirmed as expeditiously as economically feasible in order to ensure public safety, the Commission finds it reasonable to provide upfront certainty concerning the pipeline's obligation to provide reservation charge credits during any resulting outages and to minimize any disincentives to expeditious compliance.¹⁸

13. Hess argues that it violates the principle of equitable sharing to allow outages to comply with PHMSA section 60139(c) orders the same partial crediting treatment as *force majeure* events, asserting that outages to comply with PHMSA section 60139(c) orders are both foreseeable and controllable by the pipeline. Hess contends that the enactment of the 2011 Act gave advance notice of the need to identify the segments for which MAOP must be reconfirmed through service interruptions. Hess contends that such service interruptions are not necessarily outside of Portland's control because Portland has not provided the scope of the activity, if any, it will need to undertake to reconfirm MAOP. Hess argues that because it is a relatively new pipeline,¹⁹ Portland's inability to confirm MAOP should raise questions regarding the adequacy of Portland's recordkeeping procedures. Hess asserts that granting *force majeure* treatment for all such outages before PHMSA has issued any order and Portland has disclosed whether it will need to reconfirm MAOP through testing because it lacks records, is contrary to the shared risk principle.

14. The Commission rejected similar contentions in *Gulf South II*. In that order, the Commission explained that the 2011 Act only required pipelines to:

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

¹⁷ *Dominion*, 142 FERC ¶ 61,154 at P 21 (citing *Gulf South I*, 141 FERC ¶ 61,224 at P 41; *Gulf Crossing*, 141 FERC ¶ 61,222 at P 41; *Texas Gas*, 141 FERC ¶ 61,223 at P 40).

¹⁸ *Dominion*, 142 FERC ¶ 61,154 at P 21.

¹⁹ Hess states that Portland commenced service on February 11, 1999 (citing *Portland Natural Gas Transmission Sys.*, 133 FERC ¶ 61,050, at P 4 (2010)).

faster schedule than required by the 2011 Act, or by PHMSA, to indicate a lack of due diligence.²⁰

15. The Commission also found that the fact a pipeline's existing records are insufficient to satisfy PHMSA's requirements for confirming MAOP does not necessarily demonstrate a lack of due diligence by the pipeline in its past recordkeeping. As the Commission explained in detail in *Gulf South II*:

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.²¹

16. Accordingly, the Commission concluded in *Gulf South II*:

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.²²

17. The fact we have limited the blanket partial crediting authorization to a two-year transitional period will permit reconsideration of this issue at the end of that period in light of circumstances then present, including what policies PHMSA has developed concerning the MAOP reconfirmation process.²³ Therefore, in accord with Commission

²⁰ *Gulf South II*, 144 FERC ¶ 61,215 at P 38.

²¹ *Id.* P 39.

²² *Id.* P 44.

²³ *Dominion*, 146 FERC ¶ 61,101 at P 18.

policy, which has been consistently applied to all pipelines, we reaffirm our acceptance of Portland's proposal to provide partial reservation charge credits for outages required to comply with PHMSA orders issued pursuant to section 60139(c) for a two-year transitional period.

B. Use of the Safe Harbor Method

18. Hess argues that, if the Commission declines to grant rehearing, Portland should be required to use the No-Profit method because the Safe Harbor method fails to adequately balance the equities between the pipeline and the firm shipper. Hess contends that the Commission failed to distinguish between the vastly different effects of Safe Harbor and No-Profit crediting methods. Hess asserts that outages resulting from orders issued by PHMSA pursuant to section 60139(c) will rarely, if ever, exceed the 10-day period after which full crediting begins under the Safe Harbor method. Hess further asserts that, although the Commission stated that the treatment of such outages as *force majeure* events does not constitute a waiver of the revenue crediting requirement, it may have the same practical effect and previous orders and court decisions do not support the holding that the Safe Harbor method adequately balances risks related to this new category service interruptions which has not been specifically addressed. Hess concludes that the Safe Harbor method would provide little or no incentive to avoid or minimize such interruptions, and Portland would not share the risk of primary firm outages as required by Commission policy.

19. Hess fails to support its position that the No-Profit method must be utilized because the Safe Harbor method does not equitably share the risks of outages. Commission policy permits a pipeline to choose which of those methods to use for outages for which partial *force majeure* crediting treatment is permitted.²⁴ As the court found in *North Baja*,²⁵ the Safe Harbor method, as one of the two methods approved by the Commission, "incorporate[s] a careful balancing of the risk between shippers and pipelines," and, therefore, a pipeline could reasonably adopt this method of equitable sharing. The Commission has accordingly found that partial crediting pursuant to the

²⁴ See, e.g., *Dominion*, 142 FERC ¶ 61,154, at P 22 (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).

²⁵ *North Baja*, 483 F.3d 819, 822.

Safe Harbor method for outages to comply with PHMSA section 60139(c) orders was consistent with Commission policy.²⁶

20. As the Commission explained in *Gulf South, et al.*, while the Safe Harbor and the No-Profit methods both achieve an equitable sharing of the risks of *force majeure* outages, they allocate the risks of short and long-term outages in different ways.²⁷ 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.

21. Hess asserts that the Safe Harbor method only begins to provide credits on the eleventh day of the outage and nothing in the record indicates the likely duration of outages due to PHMSA Section 60139(c) orders. 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 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

²⁶ See, e.g., *Dominion*, 142 FERC ¶ 61,154 at P 22; *Gulf South II*, 144 FERC ¶ 61,215 at PP 48-50.

²⁷ See, e.g., *Gulf South II*, 144 FERC ¶ 61,215 at P 49; See also *Northern*, 141 FERC ¶ 61,221 at PP 20-28 and *Dominion*, 142 FERC ¶ 61,154 at P 21.

pipe fails during the test, which could necessitate a protracted shutdown.²⁸

22. 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 the No-Profit method.²⁹

23. Hess further argues that the Commission erroneously relies on unsupported speculation that PHMSA will “probably” issue section 60139(c) orders “with little notice and require immediate action.” Hess asserts that, if that speculation is accurate, then Portland and other pipelines may seek to use their tariff authority to declare *force majeure* on short notice, and interrupt firm services without warning, yet continue to collect reservation charges.

24. The Commission has reasonably concluded that it is probable that a pipeline would have less discretion concerning the timing of these one-time non-recurring interim measures required to ensure safe operation of a pipeline than the routine, scheduled maintenance for which full reservation credits are required.³⁰ Hess suggests that, if such short notice is given under the Safe Harbor method, then the pipeline may continue to collect reservation charges. However, when an outage is required to comply with a PHMSA 60139(c) order, as explained above, the allocation of the risk of such outages under either of the approved crediting methods is dependent on the duration of the outage not the amount of notice of the outage.

25. Accordingly, the Commission will not prohibit Portland from using the previously approved Safe Harbor method to fulfill its obligation to provide partial reservation charge credits during outages resulting from PHMSA section 60139(c) orders.

²⁸ [Pipeline Safety](#), PHMSA ADB-11-01, 76 Fed. Reg. 1504 at 1505 (2011).

²⁹ See *Rockies Express Pipeline LLC*, 144 FERC ¶ 61,216 (2013).

³⁰ May 2013 Order, 143 FERC ¶ 61,181 at PP 21-24.

The Commission orders:

The request for rehearing of the May 2013 Order is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.