

157 FERC ¶ 61,161  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Destin Pipeline Company, L.L.C.

Docket No. RP17-49-000

ORDER ACCEPTING TARIFF RECORDS SUBJECT TO FURTHER REVISION

(Issued November 30, 2016)

1. On October 24, 2016, Destin Pipeline Company, L.L.C. (Destin) filed tariff records<sup>1</sup> in response to recommendations in an audit report by the Commission's Office of Enforcement, Division of Audits and Accounting, dated March 30, 2016, in Docket No. FA15-1-000 (audit report). We accept the proposed tariff records to be effective on December 1, 2016 as requested, subject to conditions. In addition, pursuant to section 5 of the Natural Gas Act (NGA), we also direct Destin to revise its definition of the term *force majeure* in section 8.3 of the General Terms and Conditions (GT&C) of its tariff.

**I. Background**

2. The audit report recommended that Destin either revise its tariff concerning reservation charge credits for service interruptions to conform to Commission policy, or show cause why it should not be required to do so. The audit report noted that Destin's tariff lacks any explicit language that satisfies Commission policy requiring pipelines to provide shippers with a reservation charge credit for service interrupted due to a *force majeure* event.<sup>2</sup> The audit report also noted that the tariff includes an exception from providing full reservation charge credits for non-*force majeure* events. Specifically,

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<sup>1</sup> Destin Pipeline Company, L.L.C., FERC NGA Gas Tariff, Gas Tariff, GT&C Section 8., Liability of Shipper and Company, 1.0.0; GT&C Section 19., Company Facility Maintenance, 1.0.0; GT&C Section 24., Fuel Retention Adjustment, 1.0.0.

<sup>2</sup> Audit report at 17.

Destin's existing tariff does not provide shippers full reservation charge credits for the amount of service interrupted due to a non-*force majeure* event unless transportation service is curtailed in excess of 240 hours per calendar year. The audit report stated that this exception "is not consistent with Commission precedent, which requires pipelines to provide full reservation charge credits for all outages to conduct routine maintenance."<sup>3</sup> Therefore, the audit report recommended that Destin either revise its tariff concerning reservation charge credits for service interruptions to conform to Commission policy, or show cause why it should not be required to do so.<sup>4</sup>

## II. Notice & Responsive Pleadings

3. Public notice of Destin's filing was issued on October 25, 2016, with interventions and protests due on November 7, 2016. Pursuant to Rule 214,<sup>5</sup> all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance 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. Indicated Shippers filed a protest concerning the proposed reservation charge crediting provisions, and Destin's existing tariff definition of the term *force majeure*.

4. On November 17, 2016, Destin filed an answer to the protest. Rule 213(a)(2) prohibits answers to protests unless otherwise ordered by a decisional authority.<sup>6</sup> We accept Destin's answer as it aided in our decision-making process.

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<sup>3</sup> Audit report at 18 (citing *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,143 (2014) (*Texas Eastern*)).

<sup>4</sup> The audit report also recommended that Destin amend its tariff to incorporate a true-up provision for differences between fuel retained from shippers, and actual gas used for compressor fuel and gas otherwise used, lost, or unaccounted for based on a monthly tracking and allocation to shippers. Destin is filing a revised true-up provision that it claims is based on provisions that the Commission has accepted for other pipelines, such as Gulf South Pipeline Co., LP. We accept Destin's revised true-up provision, which is unopposed, and which conforms to Commission policy.

<sup>5</sup> 18 C.F.R. § 385.214 (2016).

<sup>6</sup> 18 C.F.R. § 385.213(a)(2) (2016).

### III. Discussion

#### A. Calculation of Credits

5. Destin proposes to add a new section 8.4 to the GT&C of its tariff, under which it would provide reservation charge credits to a shipper when Destin's failure to either schedule or deliver the shipper's properly nominated quantity for service between primary points is caused by either a *force majeure* event or a non-*force majeure* event. If the service interruption is caused by a *force majeure* event, section 8.4 of its GT&C purports to provide full credits, using the Safe Harbor method, after a grace period of 10 days. If the service interruption is caused by a non-*force majeure* event, section 8.4 of its GT&C purports to provide full crediting beginning on the first day of the interruption.

6. Indicated Shippers protest the method proposed in section 8.4(c) of Destin's GT&C by which Destin would calculate the quantities to which reservation charge credits would be applied in both *force majeure* and non-*force majeure* scenarios. Section 8.4(c) provides, in relevant part:

(c) Quantities to Which Reservation Charge Credits Apply.  
Reservation charge credits shall apply to quantities nominated, under SHIPPER's Firm Service Agreement from a primary Receipt Point to a primary Delivery Point up to SHIPPER's Transportation Demand and that COMPANY has been unable to schedule or deliver due to a Force Majeure event or Non-Force Majeure Event. Notwithstanding the foregoing:

(i) The maximum potential quantity to which reservation charge credits may apply is the average of the quantities, not exceeding SHIPPER's Transportation Demand, that were scheduled and delivered to SHIPPER under the affected Firm Service Agreement for the affected pair of Primary Receipt and Primary Delivery Points over the seven (7) Days of service immediately preceding the event causing service curtailment.

7. Indicated Shippers assert that proposed section 8.4(c)(i) violates Commission precedent because it proposes to use a seven-day historical average to calculate reservation charge credits in all circumstances, including when Destin "gives notice of the curtailment after shippers have already scheduled shipments for the curtailment period," rather than limiting the use of a historical average to situations when Destin

provided advanced notice of the interruption before the first opportunity to schedule service for the day in question.<sup>7</sup>

8. In its answer, Destin acknowledges that its proposed tariff misstates Commission policy, and that the seven-day average calculation should apply only when advance notice of an outage is provided. Destin agrees to amend its filing to add a notice requirement before the seven-day average calculation is used.

9. Therefore, Destin must modify proposed section 8.4(c) of its GT&C to clarify that, in scenarios when it has not given advance notice of a *force majeure* or non-*force majeure* outage before the first opportunity to nominate service for the applicable gas day, Destin will provide reservation charge credits based upon the amount nominated by a shipper up to its contract demand which the pipeline has not scheduled or delivered (absent any allowed exception to crediting described in Destin's tariff).<sup>8</sup> Destin must also clarify that, only when it has given notice of an outage before the first opportunity to nominate service for the gas day, will the credits for that day be based on each shipper's usage of primary firm service during the seven days immediately preceding the *force majeure* event or non-*force majeure* event up to the shipper's contract demand. With this change, the Commission finds that Destin's proposed provisions concerning reservation charge credits are consistent with the Commission policy requiring pipelines to provide full reservation charge credits during non-*force majeure* outages of primary firm service and partial credits during *force majeure* outages.<sup>9</sup>

#### **B. Definition of Force Majeure**

10. The audit report made recommendations regarding reservation charge credits for both *force majeure* and non-*force majeure* situations, but did not recommend any changes to Destin's definition of *force majeure*. Accordingly, Destin did not modify the definition of *force majeure* in section 8.3(a) of its GT&C. As discussed above, Destin

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<sup>7</sup> Indicated Shippers Protest at 6 (*Southern Natural Gas Co.*, 135 FERC ¶ 61,056, at PP 32-33 (2011) (*Southern*)).

<sup>8</sup> *Southern*, 135 FERC ¶ 61,056 at P 32, clarified in *Southern Natural Gas Co.*, 137 FERC ¶ 61,050, at P 19 (2011).

<sup>9</sup> *Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,038 (2015) (*Algonquin*).

proposed a new section 8.4 of its GT&C applying its existing definition of *force majeure* to reservation charge crediting.

11. Indicated Shippers object to an illustrative example of the term *force majeure* in existing section 8.3(a) of Destin's GT&C:

the necessity for maintenance of or making repairs or alterations to machinery, facilities or lines of pipe

Indicated Shippers assert that this language violates Commission precedent because it does not exclude planned or scheduled maintenance from the definition of a *force majeure* event.<sup>10</sup>

12. Indicated Shippers also protest proposed section 8.4(a)(iii) of Destin's GT&C, which provides:

Outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are Force Majeure events requiring only partial crediting.

Indicated Shippers assert that proposed section 8.4(a)(iii) of the GT&C violates Commission precedent because it does not limit the definition of a *force majeure* to compliance-related outages that are outside of the pipeline's control.<sup>11</sup> Indicated Shippers argue that, according to precedent, an outage related to a government order is only a *force majeure* event when the pipeline does not have control over the compliance actions required by the government order (e.g., when the pipeline does not have control over the timing, nature, and/or location of the work performed and the associated outages).<sup>12</sup>

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<sup>10</sup> Indicated Shippers Protest at 2 (citing *CenterPoint Energy Gas Transmission Co., LLC*, 144 FERC ¶ 61,195, at PP 58-62 (2013) (*CenterPoint*)).

<sup>11</sup> Indicated Shippers Protest at 3.

<sup>12</sup> Indicated Shippers Protest at 3 (citing *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at P 85 (2012)).

13. In its answer, Destin states that Indicated Shippers are quoting selectively, and in particular are ignoring the catch-all clause at the end of section 8.3(a), which states:

... not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome.

Destin claims that the Commission has rejected protests that similarly failed to consider the effect of catch-all clauses in *Texas Eastern* and in *ANR Pipeline Company*.<sup>13</sup>

14. In its answer, Destin also defends the proposed section 8.4(a)(iii) of its GT&C. Destin notes that “the language proposed by Destin, to which Indicated Shippers object, is taken verbatim from a recent Commission order” clarifying its policy on the circumstances in which outages to comply with governmental regulations may be treated as resulting from a *force majeure* event.<sup>14</sup> Destin notes that other recent orders have also used nearly identical language.<sup>15</sup>

15. The Commission has previously found it unjust and unreasonable to define *force majeure* to include routine and scheduled maintenance.<sup>16</sup> The cases cited by Destin do not support its argument because the tariff records of both ANR and Texas Eastern (both at the time, and currently) define a *force majeure* event to exclude “normal and planned maintenance” (ANR) and “scheduled or routine maintenance” (Texas Eastern) from the definition. Therefore, contrary to Destin’s assertion, the Commission did not rule that a catch-all clause such as Destin’s is adequate, *on its own*, to distinguish between *force majeure* and non-*force majeure* outages due to maintenance. Furthermore,

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<sup>13</sup> Destin answer at 3 (citing *Texas Eastern*, 149 FERC ¶ 61,143 at P 205; *ANR Pipeline Co.*, 145 FERC ¶ 61,182, at P 24 (2013) (*ANR*)).

<sup>14</sup> Destin answer at 4-5 (quoting *Algonquin*, 153 FERC ¶ 61,038 at P 103).

<sup>15</sup> Destin answer at 5 (quoting *Sabine Pipe Line LLC*, 154 FERC ¶ 61,089, at P 9 (2016) (*Sabine*); citing *Kinder Morgan Louisiana Pipeline LLC*, 154 FERC ¶ 61,145, at P 30 (2016)).

<sup>16</sup> *Panhandle Eastern Pipe Line Co., LP*, 143 FERC ¶ 61,041, at P 15 (2013) (*Panhandle*).

Destin acknowledges in its own answer that it does not intend to cover planned or scheduled maintenance as *force majeure*.<sup>17</sup> Given that acknowledgement, it does not seem reasonable to retain tariff language that could be misread as covering planned or scheduled maintenance.

16. We find that the portion of section 8.3(a) of its GT&C quoted above is unjust and unreasonable because it can be interpreted to include planned and scheduled maintenance, contrary to Commission precedent. Therefore, pursuant to section 5 of the Natural Gas Act, the Commission directs Destin revise section 8.3(a) of its GT&C to conform to the Commission policy by adding the phrase “but not including planned or scheduled maintenance,” after the word “pipe,” quoted above, or by making a revision to the same effect.<sup>18</sup>

17. We accept proposed section 8.4(a)(iii) of Destin’s GT&C, and reject Indicated Shippers’ protest regarding that section. The Commission has recognized that there are limited circumstances in which an outage caused by a pipeline’s compliance with governmental requirements may be treated as though it resulted from a *force majeure* event for which partial reservation charge credits are required.<sup>19</sup> Such outages 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.<sup>20</sup> Moreover, as noted by Indicated Shippers, the Commission has held that routine, periodic testing performed as part of a pipeline’s integrity management program may not be treated as *force majeure* events. However, where the circumstances of a particular case justify treating special, one-time testing required by a government order as outside the control of the pipeline, such testing may be a *force majeure* event.<sup>21</sup>

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<sup>17</sup> Destin answer at 3.

<sup>18</sup> *Colo. Interstate Gas Co.*, 122 FERC ¶ 61,256, at P 88 (2008) (initiating a proceeding under NGA section 5 to modify a previously approved unauthorized overrun penalty).

<sup>19</sup> *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216 at P 85.

<sup>20</sup> *Id.* P 86.

<sup>21</sup> *TransColorado Gas Transmission Co., LLC*, 144 FERC ¶ 61,175, at P 44 (2013).

Although the Commission has described such circumstances as “outages resulting from one-time, non-recurring government requirements,” it also clarified that the description refers not to whether the *government’s* action is non-recurring, but whether the *pipeline’s* actions required by the government action are non-recurring.<sup>22</sup> Therefore, contrary to Indicated Shippers’ contention, the generic description of “one-time, non-recurring government requirements” does refer to events which are both uncontrollable and unexpected by the pipeline. Finally, the phrase “special, one-time testing requirements after a pipeline failure” appropriately illustrates the characteristic degree of uncontrollability and unexpectedness implicit in service provider actions generally described as “one-time, non-recurring government requirements.” As Destin notes, its tariff provision is a direct quote from a line of consistent Commission orders directly addressing this question,<sup>23</sup> and it is only reasonable to read Destin’s tariff as incorporating our policy. We conclude that proposed section 8.4(a)(iii) of Destin’s GT&C is a just and reasonable restatement of existing policy.

The Commission orders:

(A) The tariff records listed in footnote 1 are accepted to be effective December 1, 2016, subject to Destin filing tariff records containing the revisions discussed herein, within 30 days of this order.

(B) Pursuant to section 5 of the Natural Gas Act, Destin must revise section 8.3(a) of its GT&C to conform to the Commission policy as discussed in this order, within 30 days of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>22</sup> *Sabine*, 154 FERC ¶ 61,089 at P 9.

<sup>23</sup> *E.g., Algonquin*, 153 FERC ¶ 61,038 at P 103.