142 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rockies Express Pipeline LLC Docket Nos. RP13-423-000
RP12-765-001

ORDER ACCEPTING TARIFF RECORDS AND REQUIRING ADDITIONAL TARIFF REVISIONS

(Issued January 31, 2013)

1. On May 31, 2012, Rockies Express Pipeline LLC (Rockies Express) filed revised tariff records in Docket No. RP12-765-000 to revise certain reservation charge crediting provisions and the definition of *force majeure* to conform to Commission policy (May filing). On June 29, 2012, the Commission issued an order[1] accepting the tariff records, subject to certain conditions.[2] On July 30, 2012, Rockies Express made its compliance filing, which was protested.[3] On December 28, 2012, while the July 30 compliance filing was pending, Rockies Express filed tariff records to further modify its reservation charge crediting provisions to incorporate a Monthly Maintenance Schedule and an anti-gaming limitation.[4] As discussed below, the Commission accepts the proposed tariff records to

[1] *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275 (2012) (June 2012 Order).

[2] Rockies Express was also directed to file additional information concerning the invocation of *force majeure* on its system over the last three years.

[3] Rockies Express Pipeline LLC, FERC NGA Gas Tariff, Tariffs, Reservation Charge Credit, Section 7.14 - Reservation Charge Credits, 2.0.0; FORCE MAJEURE, Section 21 - Force Majeure, 2.0.0 (the July 30 compliance filing).

[4] Rockies Express Pipeline LLC, FERC NGA Gas Tariff, Tariffs, GT&C - DEFINITIONS, Section 1 - Definitions, 2.0.0; GT&C - DEFINITIONS, Section 1 - Definitions Option B, 2.0.1; Reservation Charge Credit, Section 7.14 - Reservation Charge Credits, 3.0.0; Reservation Charge Credit, Section 7.14 - Reservation Charge

(continued…)

be effective February 1, 2013, subject to Rockies Express making further revisions as set forth in this order.

I. Description of Rockies Express' Filings

2. The June 2012 Order directed Rockies Express to: (a) revise its tariff to comply with the Commission's policy as set forth in *Wyoming Interstate Company, Ltd. (WIC)*[5] to the extent Rockies Express interprets its tariff to only issue reservation charge credits after nominations in the Evening and Intraday Cycles;[6] (b) narrow the scope of section 7.14(D)(i) by making clear that in *force majeure* events Rockies Express is exempt from issuing reservation charge credits only when the failure to schedule or deliver gas was due solely to the conduct of the shipper or operating conditions on upstream or downstream facilities; (c) revise its tariff to eliminate the phrase "without liability to Shipper" from section 7.14(A) in order to avoid inconsistencies in Rockies Express' tariff concerning when it is required to provide reservation charge credits, and (d) revise its tariff so as to exclude under its definition of *force majeure* circumstances within its control which also would apply to actions in compliance with a governmental order.

3. Rockies Express' December 28, 2012 filing proposes to further modify its tariff's reservation charge crediting provisions to incorporate a Monthly Maintenance Schedule (MMS) and procedures for calculating the credits, which Rockies Express characterized as "an anti-gaming limitation."[7] Rockies Express states this limitation will be applicable when Rockies Express provides advance notice of an operational outage or *force majeure* event, or an update related thereto. Rockies Express states the changes proposed in the December filing are, with minor and non-substantive exceptions, identical to reservation

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Credits Option B, 3.0.1; OPERATIONAL PARAMETERS, Section 36 Operational Parameters, 1.0.0; OPERATIONAL PARAMETERS, Section 36 Operational Parameters Option B, 1.0.1.

[5] 130 FERC ¶ 61,091, at P 17 (2010).

[6] The North American Energy Standards Board (NAESB) standards currently provide shippers four nomination opportunities: the Timely Nomination Cycle (11:30 a.m. Central Clock Time (CCT) the day prior to gas flow); the Evening Nomination Cycle (6 p.m. CCT the day before gas flow); Intra-Day Cycle 1 (10 a.m. CCT the day of gas flow); and Intra-Day Cycle 2 (5 p.m. CCT the day of gas flow).

[7] Rockies Express stated it was including two options - Option A includes the revisions submitted in the July 30 compliance filing and Option B, which does not. This order addresses Option A.

charge credit provisions approved by the Commission earlier this year in another proceeding.[8]

II. Public Notice and Intervention

4. Public notice of Rockies Express' filing in Docket No. RP12-765-001 was issued on July 31, 2012. Public notice of Rockies Express' filing in Docket No. RP13-423-000 was issued on December 31, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[9] Pursuant to Rule 214,[10] 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. Indicated Shippers[11] protest the July 30 compliance filing asserting that the proposed tariff changes do not fully resolve the concerns expressed in the June 2012 Order. In addition, Indicated Shippers request Rockies Express be directed to adopt the No Profit Method for *force majeure* outages instead of the Safe Harbor Method[12] that is in Rockies Express' existing tariff for granting reservation charge credits. On August 23, 2012, Rockies Express filed an answer to Indicated Shippers' protest in Docket No. RP12-765-001 and on January 17, 2013, Rockies Express filed an answer to the protests in Docket No. RP13-423-000. The Commission grants Rockies Express' request for waiver of Rule 213 as the answers assist the Commission in its decision-making process.

5. Indicated Shippers also protest the December 28, 2012 filing. Indicated Shippers object that the filing does not comply with the June 2012 Order for the same reasons expressed in its protest to the July 30 filing, and reiterate the request that the Commission

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[8] *TransColorado Gas Transmission Co. LLC*, 139 FERC ¶ 61,229 (2012) (*TransColorado*).

[9] 18 C.F.R. § 154.210 (2012).

[10] 18 C.F.R. § 385.214 (2012).

[11] Indicated Shippers for the purposes of this proceeding are BP America Production Company, BP Energy Company, Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Gas & Power Marketing Company, Marathon Oil Company, Shell Energy North America (US), L.P., and WPX Energy Marketing, LLC.

[12] Under the No Profit Method the pipeline provides for partial refunds starting on the first day of the interruption in service, covering the portion of the pipeline's reservation charge that represents the pipeline's return on equity and associated income taxes. Under the Safe Harbor Method reservation charges must be credited in full to the shippers after a short grace period when no credit is due the shipper (i.e., 10 days or less).

require Rockies Express to change from the Safe Harbor Method to the No Profit Method in order to prevent Rockies Express from gaming its routine maintenance activities as *force majeure* events.[13] Rockies Express Shippers[14] join Indicated Shippers' request to require a change to the No Profit method. Encana Marketing (USA) Inc. (Encana) protests Rockies Express' restriction of reservation charge credits to primary points.

III. <u>Discussion</u>

A. <u>Renomination Requirement</u>

6. The June 2012 Order stated that to the extent Rockies Express interprets its tariff as requiring a shipper which has been curtailed and has nominated on another pipeline to submit additional nominations in the Evening and Intraday nomination cycle in order to reserve reservation charge credits, Rockies Express must revise its tariff to comply with the Commission's policy as set forth in *Wyoming Interstate Company, Ltd. (WIC)* that when a shipper's nomination has been curtailed in the Timely Cycle and then it nominated on another pipeline, the shipper need not submit its nomination in the Evening Cycle. Rockies Express' compliance filing includes a new section 7.14(C) that provides shippers must nominate through the Evening Cycle in order to receive reservation charge credits, except that shippers who have nominated on another pipeline after being curtailed in the Timely Cycle do not have to re-submit their nomination to receive credits but they are required to provide confirmation that another pipeline has scheduled the nominations that had been curtailed. This information is required no later than the end of the gas day on the day curtailments are made.

7. Indicated Shippers protest that the compliance filing imposes significantly more onerous requirements than the Commission adopted in *WIC*. Indicated Shippers state *WIC* merely requires a shipper to represent that its nominated, confirmed and scheduled quantities on a third-party pipeline are the result of the transporter's inability to provide primary firm service. In contrast, Rockies Express' proposed language requires a shipper to submit written documentation no later than the end of the gas day on the day curtailments are made, rather than merely making that representation to transporter. Moreover, Indicated Shippers argue that requiring the documentation by the end of the curtailed gas day imposes a significant burden on a shipper that is trying to make other arrangements for the curtailed volumes. Indicated Shippers request that the Commission direct Rockies Express to change the language in the last sentence to add the phrase

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[13] SWEPI LP filed leave to intervene out-of-time and supports Indicated Shippers' protest.

[14] Rockies Express Shippers for the purposes of this proceeding are Ultra Resources, Inc., Berry Petroleum Company and Bill Barrett Corporation.

"nomination and Transporter schedules," to read as follows: "If the Shipper subsequently *nominates, and Transporter* schedules additional quantities on Transporter's pipeline in the Intra-Day 1 or Intra-Day 2 Nomination cycle its reservation charge credits may be reduced." The change would not require a firm shipper to take action to submit a nomination in the Intra-Day 1 or 2 Nomination Cycle, even when a shipper has scheduled service on an alternate pipeline.

8. Indicated Shippers state in its protest in Docket No. RP13-423-000 that the question of whether quantities curtailed on Rockies Express were confirmed and/or scheduled on an alternate pipeline is not relevant to whether a shipper should have to submit nominations in the Evening Cycle on Rockies Express to receive reservation charge credits. Rather, they contend the relevant question is whether a shipper submitted nominations on an alternate pipeline in the Evening Cycle for the quantities curtailed on Rockies Express, in lieu of submitting nominations to Rockies Express in the Evening Cycle. Indicated Shippers request the Commission require Rockies Express to eliminate the proposed tariff language that would require that nominations on an alternate pipeline also be confirmed and scheduled in order for a shipper to receive reservation charge credits for curtailed quantities.

9. Rockies Express states in its August answer that its proposed tariff provisions are consistent with the requirements approved by the Commission in WIC's tariff, which requires that a shipper provide "a representation to Transporter that its nominated, confirmed and scheduled quantities on a third-party pipeline are the result of Transporter's inability to provide primary firm service." Rockies Express states the only practical way to implement a "representation" is via a writing of some sort confirming that curtailed volumes have been scheduled on an alternate pipeline. Rockies Express also states Indicated Shippers concern about the proposed timing of this submission is misplaced because under Rockies Express' proposed language the shipper's confirmation must be submitted no later than the end of the Gas Day on the day curtailments are made, which is the day after the shipper has made its alternative arrangements.

10. The Commission agrees with Indicated Shippers that requiring a shipper to provide evidence that volumes have actually been scheduled on another pipeline in the Evening Cycle potentially puts the shipper at risk of not being able to obtain its reservation charge credits on Rockies Express. If the shipper submits a nomination to another pipeline in the Evening Cycle but that pipeline does not schedule the nominated service, the shipper will not be able to transport its gas through no fault of its own and will have missed the opportunity on Rockies Express to nominate for reservation charge credits. Therefore, Rockies Express is directed to revise section 7.14(C) so that reservation charge credits are provided to shippers that provide evidence to Rockies Express of having submitted nominations to another pipeline for volumes Rockies Express is unable to schedule.

11. The Commission finds that requiring a shipper to provide written confirmation of nominations on another pipeline is an appropriate mechanism for conveying that information to Rockies Express. This confirmation must be provided no later than the end of the gas day on the day curtailments are made, which is the day after the shipper has made alternative arrangements. The Commission considers this sufficient time to provide notice of other arrangements to Rockies Express, even if nominating in the Intra-Day 2 Nomination Cycle. Finally, the Commission will not require further changes to the last sentence as requested by Indicated Shippers because their concerns are misplaced in that this provision only refers to shippers that do not schedule service on another pipeline, not shippers that have scheduled service on an alternate pipeline.

B. Conditions on Upstream and Downstream Pipelines

12. The June 2012 Order directed Rockies Express to narrow the scope of section 7.14(D)(i) by making clear that Rockies Express is exempted from issuing reservation charge credits only when Rockies Express' failure to schedule or deliver gas was limited to events not within its control. The order explained that in a *force majeure* event, when the facilities of both Rockies Express and others may be affected, the tariff should be clarified to provide that the exception from crediting applies when the failure was due "solely" to the conduct of the shipper or operating conditions on upstream or downstream facilities. Rockies Express revised section 7.14(E)(i) (previously numbered 7.14(D)(i)) to state that Rockies Express will be exempted from issuing reservation charge credits when its failure to schedule or deliver gas "is the result of the conduct of shipper or the upstream or downstream operator of the facilities at the Receipt or Delivery Point respectively, *not controlled by Transporter*; or the upstream/downstream operator of facilities." Rockies Express states its proposed revision averts any ambiguity that might be created by the use of the term "solely," which could be interpreted to require reservation charge credits when none are appropriate.

13. Indicated Shippers object that Rockies Express' compliance filing does not include "solely," which is the word the Commission, for emphasis, specifically underlined in the June 2012 Order. Indicated Shippers argue that the tariff provision as written could provide Rockies Express an exemption from reservation charge crediting if a *force majeure* situation on Rockies Express' system also extended to a downstream system not controlled by Rockies Express. Indicated Shippers assert that with "solely" in the tariff section Rockies Express would only be exempted from reservation charge crediting when it was ready and able to provide service but the downstream/upstream system or a shipper alone caused the curtailment.

14. In its August answer, Rockies Express states its proposed language reflects the intent of the Commission that the exemption from crediting only applies when the pipeline is ready and able to effectuate the transportation on its system, but is precluded from doing so by the actions of another party that are outside of the pipeline's control.

15. The intent of the June 2012 Order was to require Rockies Express to revise its tariff to make clear that Rockies Express would be exempted from issuing reservation charge credits only when its failure to schedule or deliver gas was due solely to the conduct of the shipper or operating conditions on upstream or downstream facilities, and it was ready to perform the requested service. However, if Rockies Express, as well as the other parties were unable to perform, then *force majeure* credits would be due to the shipper because Rockies Express was not ready to perform regardless of the condition on the upstream or downstream pipeline. Rockies Express' compliance filing does not comply with the June 2012 Order. The inclusion of the phrase "not controlled by Transporter" does not resolve the problem highlighted in the June 2012 Order that Rockies Express is exempt from issuing reservation charge credits only if it was ready to perform, and its failure to schedule or deliver gas is due solely to the conduct of the shipper or upstream/downstream operator not controlled by Rockies Express.[15] Therefore, Rockies Express is directed to revise its tariff to include the word "solely" in new section 7.14(E)(i).

C. Liability

16. Section 7.14(A) of Rockies Express' tariff provides that transporter shall have the right, without liability to shipper, to interrupt or curtail service for reasons of *force majeure*. The June 2012 Order directed Rockies Express to revise its tariff to eliminate the phrase "without liability to Shipper" in order to eliminate inconsistencies in Rockies Express' tariff concerning when it is required to provide reservation charge credits. Rockies Express states in its compliance filing that eliminating the phrase "without liability to Shipper" in its entirety is overly broad and could potentially expose Rockies Express to additional, unintended liability. Rockies Express states it therefore has modified section 7.14(A) to add the word "further" so it now provides that Rockies Express has the right, without "further" liability to Shipper, to interrupt or curtail the transportation of gas for Shipper for reasons of *force majeure*.

17. Indicated Shippers state Rockies Express has failed to comply with the June 2012 Order, which clearly directed Rockies Express to eliminate the phrase "without liability to Shipper." Indicated Shippers state Rockies Express' addition of the word "further" to the phrase "without liability to Shipper" does not cure the problem since without additional clarification or context the term "further" as a modifier for "liability" has no meaning.

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[15] *See Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at P 83 (2012).

18. To address Indicated Shippers' concern, Rockies Express proposes in its August answer to further clarify section 7.14(A) by adding the following language (underlined):

> Transporter shall have the right, without further liability, <u>except as to reservation charge credits in 7.14 (C) below, to Shipper,</u> to interrupt or curtail the transportation of Gas….

19. Rockies Express states this proposed modification clarifies that Rockies Express' liability under this section for failure to deliver shipper quantities is limited to providing reservation charge credits. The Commission finds that this modification addresses the concerns raised by Indicated Shippers and the June 2012 Order, and directs Rockies Express to revise its tariff accordingly.

D. <u>Scheduled Maintenance to Comply with a Governmental Order</u>

20. The June 2012 Order addressed Indicated Shippers' request that the Commission affirm that scheduled maintenance, alterations, and/or repairs done in order to comply with a governmental order are not *force majeure* events. The June 2012 Order cited to the order in *Tennessee Gas Pipeline Co.,* 139 FERC ¶ 61,050 (2012) (*Tennessee)* where the Commission held that Commission policy is that routine testing, maintenance and repairs events are not *force majeure* events because such actions "to ensure safe and reliable operations of a pipeline are within the pipeline's control including when performed in compliance with governmental orders and regulations."[16] The order directed Rockies Express to revise its tariff so as not to include under its definition of *force majeure* circumstances within its control.

21. Rockies Express' transmittal states that it has modified section 21.2 to clarify that the term "*force majeure*" does not include events within the control of Rockies Express. However, the only change in section 21.2 was to add the words "Transporter or" in the ending clause so that it reads that *force majeure* covers "and any other cause whether of the kind enumerated or otherwise not within the control of Transporter, or the party claiming suspension…".

22. Indicated Shippers object that this change does not go far enough to comply with the June 2012 Order. Indicated Shippers state that section 21.2(A) still contains a reference to "interruptions by government or court orders, present or future orders of any regulatory body having proper jurisdiction." This, it contends violates the Commission's *force majeure* policy because it would include "routine testing, maintenance, and repairs" necessary "to ensure safe and reliable operations, even when performed in compliance with governmental orders and regulations."

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[16] *Tennessee,* 139 FERC ¶ 61,050 at P 82.

23. Indicated Shippers argue that adding "Transporter" after "not within the control of" is insufficient because the question is not whether compliance with a governmental order is within the control of a party, but whether Rockies Express can schedule its compliance work to avoid, or minimize, curtailments that makes compliance either within, or not within, the control of Transporter. In support of this position Indicated Shippers refer to a notice by Rockies Express on September 8, 2010, for a forthcoming maintenance on October 25, 2010, to comply with a governmental order. That order required Rockies Express to reduce the noise level at compressors to the level in the certificate order. When done the resulting outage was treated by Rockies Express as a *force majeure* event. Indicated Shippers argue that this was an event within Rockies Express' control, even if the action was in compliance with a government order.

24. In its August answer, Rockies Express states that Indicated Shippers' protest is misleading because nowhere in its definition of *force majeure* in section 21 is there a reference to "routine testing and repair." Rockies Express state the June 2012 Order specified that Rockies Express could not include under its definition of *force majeure* circumstances within its control but did not specify particular provisions be removed, as suggested by Indicated Shippers. Rather, Rockies Express contends that its proposed revision contemplates that there are instances where compliance with governmental directives arising out of unforeseen events are outside of its control. In addition, Rockies Express states that contrary to Indicated Shippers' contention, because compliance work can be scheduled in advance does not render such work "scheduled maintenance" and thus a non-*force majeure* event. It is the outage that results from the governmental action or order that may be beyond Rockies Express' control, and that is what constitutes the *force majeure* event, not whether the pipeline has control over the scheduling of the compliance work.

25. The June 2012 Order stated that whether a pipeline is required to grant reservation charge credits where a service interruption is the result of "corrective action orders or other imposition of government agencies" depends on whether the required action is in the control of the pipeline. Thus, where a governmental directive requires the pipeline to take certain action so the curtailment is "not reasonably within the control of the pipeline," it could be considered a *force majeure* event.[17] However, routine testing maintenance and repairs events are not *force majeure* events because such actions are "within the pipeline's control including when performed in compliance with governmental orders and regulations."[18] Rockies Express' tariff in its definition of *force majeure* in Section 21.2(A) includes "interruptions by government or court orders, present or future orders of any regulatory body having proper jurisdiction and any other

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[17] *Tennessee Gas Pipeline Co.,* 139 FERC ¶ 61,050, at P 80 (2012) (*Tennessee).*

[18] *Tennessee,* 139 FERC ¶ 61,050 P 82.

cause whether of the kind enumerated or otherwise not within the control of Transporter, or the party claiming suspension…". As Indicated Shippers note, the fact that there is a governmental directive requiring the pipeline to act does not automatically make the pipeline's action a *force majeure* event if the action was in compliance with the pipeline's responsibility.

26. The modification by Rockies Express at the end of the section is not an adequate response to the directive in the June 2012 Order because the phrase "not within the control" is not directly connected to the governmental directive phrase. Thus Section 21.2(A) can still be read as defining all interruptions by government or court addressing present or future orders of any regulatory body having proper control as *force majeure* events without regard to whether the interruption was within the control of the pipeline. However, as discussed in the June 2012 Order some outages required by governmental orders or regulations, such as compliance with regulations concerning the routine maintenance a pipeline must conduct as part of its ordinary course of business, are within the control of the pipeline, and thus would not fall within the definition of *force majeure*. Therefore, Rockies Express is directed to revise its tariff to either remove the provisions described above or clarify that these provisions result in *force majeure* events only when the actions by Rockies Express to address the governmental directive are matters that are not reasonably within the control of Rockies Express.

27. In several recent decisions, the Commission addressed the issue of whether pipelines should be permitted to provide partial reservation credits for outages related to compliance with the requirements of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act).[19] In those orders, the Commission stated it would allow partial reservation charge crediting for a transitional two-year period, for outages due to orders the Pipeline and Hazardous Materials Safety Administration (PHMSA) may issue pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code, as added by the 2011 Act, concerning the verification and confirmation of pipelines' maximum allowable operating pressure (MAOP). However, the Commission held that the nature and timing of any other new safety requirements PHMSA may adopt pursuant to the 2011 Act or ongoing PHMSA rulemakings is too speculative at this time to justify modifying Commission policy to treat any outages resulting from such new requirements similarly to *force majeure* events at this time. The Commission added that the pipeline could file to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements

[19] *See Gulf South Pipeline Co. L.P.*, 141 FERC ¶ 61,224, at PP 14-47 (2012) *Gulf South*), *Gulf Crossing Pipeline L.L.C.*, 141 FERC ¶ 61,222 (2012), and *Texas Gas Transmission LLC*, 141 FERC ¶ 61,223 (2012).

becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.[20]

28. If Rockies Express intends its tariff to be consistent with those decisions it must file revised tariff records to reflect this position.

E. Use of "Lesser of" MDQ, Nominated Quantity or Seven-Day Average

29. Rockies Express proposes revisions to section 7.14(D) which governs how Rockies Express calculates reservation charge credits during non-*force majeure* and *force majeure* events (extending beyond 10 calendar days) to eliminate shippers' ability to engage in gaming activities. To prevent gaming, particularly related to information posted in the proposed MMS, Rockies Express proposes to base reservation charge credits on a seven-day historical average that reasonably estimates the service a shipper would have used during the period of curtailment. Rockies Express states the changes will ensure that once a shipper is aware of a pending curtailment, the shipper will not be able to knowingly make nominations that would not be effective in order to increase its potential reservation charge credit.

30. Specifically, Rockies Express proposes to revise section 7.14(D) to specify that a reservation charge credit will be granted under a firm agreement based on the lesser of a shipper's: i) maximum daily quantity (MDQ); ii) the quantity of gas nominated at primary points but not scheduled for delivery; or iii) the average of the daily usage by shipper at primary points in a seven-day period preceding the announcement of a non-*force majeure* outage or the seven-day period prior to the declaration of a *force majeure* outage. *Force majeure* outages extending beyond the ten-day safe harbor period would utilize the seven-day average of shipper usage prior to the declaration of the *force majeure.*

31. Indicated Shippers state Rockies Express' proposal in section 7.14(D) to base reservation charge credits on the lesser of i) a shipper's MDQ; ii) the amount nominated; or iii) the average daily usage in a seven-day period places undue burdens on shippers and should be eliminated or clarified. Indicated Shippers argue that since reservation charge credits are based upon a shipper's primary firm entitlements, the Commission must require Rockies Express to explain why the MDQ limitation needs to be listed in the tariff. Second, Indicated Shippers state that when Rockies Express posts a notice prior to the Timely Nomination Cycle that service will be cut, under the "lesser of" language a primary firm shipper would be required to reserve supply in order to make phantom nominations on Rockies Express, as well as on upstream/downstream pipelines, when all

[20] *Gulf South,* 141 FERC ¶ 61,224 at P 47.

parties to the transaction know that there is a significant likelihood that the gas on Rockies Express will not flow. Indicated Shippers state if the shipper does not submit a phantom nomination, under the "lesser of" language the shipper would not be entitled to any reservation charge credits for Rockies Express' failure to provide service. Therefore, Indicated Shippers request the Commission require Rockies Express to use either the seven-day average, if advance notice is provided; or use the amount nominated (but Rockies Express failed to schedule) if no advance notice is provided in calculating reservation charge credits.

32. The Commission agrees with Indicated Shippers and finds that Rockies Express must revise and clarify proposed section 7.14(D) concerning the calculation of reservation charge credits in *force majeure* and non-*force* majeure situations as described below. The use of the "lesser of" tariff language would unnecessarily require shippers to submit scheduling nominations in the situation where the pipeline has given advance notice of an outage so as to ensure that it would receive credits at the level of its average usage during the preceding seven days. As the Commission stated in *Southern*, a benefit of the use of the seven-day average is that it ensures that shippers who do not nominate service when they have advance notice that service cannot be provided will nevertheless receive credits based on their recent usage of the system.[21] Therefore, consistent with this finding, Rockies Express must revise section 7.14(D) to provide 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 during the preceding seven days up to their contract demand, and not on shippers' nominations.

33. In addition, the Commission finds that Rockies Express' proposed section 7.14(D) concerning credits during *force majeure* outages improperly permits credits to be based on the seven-day average in situations where there was no advance notice that the outage would continue on the day in question. Consistent with precedent,[22] Rockies Express' proposed language in section 7.14(D)(iii) should provide that for each day after the 10th day, Rockies Express must use the amount nominated by the shipper up to its contract demand, but not scheduled by Rockies Express, if there was no advance notice the *force majeure* outage would continue for the day in question. Section 7.14(D)(iii) should also state that Rockies Express will only use the seven-day average usage during the period before the *force majeure* outage when there is advance notice that the *force majeure* outage will continue.[23]

[21] *Southern Natural Gas Company*, 135 FERC ¶ 61,056, at P 33 (2011).

[22] *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257, at P 22 (2011).

[23] Section 7.14(D)(iii)(d) properly provides that the seven-day average will not be used when Rockies Express has given advance notice of a non-*force majeure* outage.

34. Although reservation charge credits are based upon a shipper's utilization of its primary firm entitlements, Rockies Express' MDQ limitation provision makes clear that no credits will be provided with respect to nominations of authorized overrun service, for example. Therefore, the Commission will not require any further explanations from Rockies Express on its usage.

F. Addition of Monthly Maintenance Schedule

35. Rockies Express has proposed, citing *TransColorado*, to create a Monthly Maintenance Schedule (MMS) that it will post on its web site prior to bid-week for the subsequent month that contains a list of scheduled maintenance activities which are likely to result in curtailment or outages on the pipeline. Curtailments from these activities will result in reservation charge credits based on the customer's average usage over a seven-day period immediately preceding the posting where a non-*force majeure* curtailment is announced with the MMS posting. Where a non-*force majeure* curtailment is announced after the MMS posting but prior to the Timely Cycle deadline for the day of the curtailment, reservation charge credits will be based on average usage over the seven days immediately preceding the curtailment.

36. Indicated Shippers state that while the Commission permitted TransColorado to use a seven-day average method for issuing reservation charge credits prior to the issuance of a Monthly Maintenance Schedule, the Commission should deny Rockies Express' proposal to implement a similar process due to the significant operational differences between TransColorado and Rockies Express and the lack of evidence of the need for Rockies Express' proposal. Indicated Shippers state that in approving TransColorado's proposal the Commission balanced on the one hand the fact that usage may vary significantly over time and usage during a period significantly removed from a curtailment may be less representative of the service a shipper may have nominated during a period closer to the curtailment with, on the other hand, TransColorado's need to minimize opportunities for "gaming" the reservation charge crediting process. Indicated Shippers state Rockies Express has provided no evidence of shipper "gaming activities" on its system, even though it has been issuing monthly maintenance schedules for at least the past year.

37. Indicated Shippers add that Rockies Express is distinguishable from TransColorado due to the frequency of maintenance activities on Rockies Express, where primary firm service is routinely curtailed, a situation that does not occur on TransColorado. Indicated Shippers state a comparison of maintenance postings over the past year shows that TransColorado rarely needs to cut customer capacity due to maintenance activities; whereas Rockies Express must cut capacity in many months due to maintenance. Therefore, where TransColorado would be required to use its seven-day average infrequently, Rockies Express would do so in many months throughout the year. In addition, Indicated Shippers state there are operational reasons why Rockies Express should be treated differently than TransColorado. Indicated Shippers state Rockies

Express has nearly four times as much capacity as TransColorado and is more than four times longer. Moreover, Rockies Express serves multiple markets in different regions and shippers use multiple receipt and delivery point combinations to access these markets, whereas TransColorado serves only the Rockies and San Juan Basin and is a production-area only pipeline.

38. We shall accept Rockies Express' proposal since it is similar to provisions proposed in *TransColorado* for providing reservation charge credits based on an MMS.[24] As the Commission held in *TransColorado,* advance notice of maintenance projects gives shippers and others time to plan for each outage and make alternative arrangements to obtain needed gas supplies during the period of the outage. Use of the seven-day period before the MMS is posted minimizes opportunities for shippers to engage in gaming based on the information in the MMS and thus avoids any disincentive for Rockies Express to provide the most accurate information possible in its MMS. Although Rockies Express may have provided no direct evidence of shippers currently "gaming" its current maintenance schedules, the Commission has acknowledged the potential for "gaming" when advanced notice of maintenance is provided and found that basing reservation charge credits on the seven-day average of usage when implementing a monthly maintenance schedule provides a reasonable method of estimating the service a shipper would have used during the curtailment, while minimizing opportunities for "gaming".[25] The Commission finds no merit in Indicated Shippers argument that Rockies Express should not be able to implement an MMS due to the amount of capacity it has or the type of markets served since it has not shown why these factors make this type of process not just and reasonable for Rockies Express. In addition, section 7.14(D)(iii)(d) provides that the seven-day average will not be used if the seven day period for measurement of shipper usage is limited by pre-existing firm service curtailments. However, it is not clear in this circumstance how Rockies Express will determine the reservation charge credits if a shipper's nominations have been limited by pre-existing curtailments. Therefore, Rockies Express is directed to further clarify how it will calculate reservation charge credits if the seven day period for measurement of shipper usage is limited by pre-existing firm service curtailments.

G. <u>Reservation Charge Credits at Secondary Points</u>

39. Encana states the Commission is obligated to consider the specific factual circumstances of the Rockies Express system in evaluating the pipeline's proposal, and the fact that the Commission has permitted certain other pipelines to limit reservation charge credits to their failure to provide primary firm service does not, in and of itself,

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[24] *TransColorado,* 139 FERC ¶ 61,229 (2012).

[25] *TransColorado,* 139 FERC ¶ 61,229 at P 39.

provide adequate justification for adoption of the same methodology on Rockies Express. Encana states Rockies Express has historically employed a more flexible approach to reservation charge crediting under which credits were provided regardless of whether service employed use of secondary points. Encana states Rockies Express has failed to demonstrate that it is reasonable to limit reservation charge credits to gas nominated to primary points on its system, and under its proposed tariff language shippers that have historically received reservation charge credits for gas nominated but not delivered to secondary points within their path will no longer receive any reservation charge credits for such quantities. Encana states Rockies Express has not provided any justification for this change beyond vague, unsupported suggestions of the possibility of "gaming" in its transmittal letter.

40. Commission policy requires a pipeline to provide reservation charge credits for the pipeline's failure to provide primary firm service. A firm shipper has a guaranteed firm contractual right to service only at its primary points, not secondary points. Pipelines design their systems in order to have the capacity to satisfy their primary firm obligations, and the Commission has never required pipelines to maintain sufficient capacity to give firm shippers a guaranteed right to service at secondary points.[26] The required reservation charge credit is based on the amount of primary firm service the shipper nominated for scheduling but the pipeline is unable to deliver. Whether or not Rockies Express may have in the past provided reservation charge credits at secondary points, the tariff change it is proposing here is in compliance with Commission policy, and the Commission will not require any change.

H. Rockies Express *Force Majeure* Events

41. The June 29 Order expressed concern about the large number of *force majeure* events on Rockies Express' system and the contention that Rockies Express is utilizing the Safe Harbor Method to avoid paying reservation charge credits. In order to gather more information the order directed Rockies Express to provide the Commission with further information detailing the number of *force majeure* events on its system since 2010, the reason for invocation of *force majeure*, the length of the *force majeure* event, the impact on the pipeline's capacity, and whether any reservation charge credits were provided to shippers.

42. Rockies Express filed the information which set forth the nineteen *force majeure* events on Rockies Express' system. Indicated Shippers state that Rockies Express' filing clearly demonstrates the problem with Rockies Express' use of the No Profit method on its system. Indicated shippers state that in the nineteen *force majeure* events that were reported, Rockies Express paid reservation charge credits for only one event, i.e., only

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[26] *Southern Natural Gas Co.,* 137 FERC ¶ 61,050 (2011).

one event went beyond the 10-day safe harbor. Indicated Shippers do not challenge any of these events as *force majeure*. Rather, Indicated Shippers note that the Commission's reservation charge crediting policy during *force majeure* events calls for pipelines and shippers to share the burden of the event because it is a no-fault occurrence. However, Indicated Shippers argue that on Rockies Express, due to the frequency and shortened duration of 18 of the 19 *force majeure* outages, Rockies Express' firm shippers alone have borne the burden of paying for capacity that was not available due to *force majeure* events. Indicated Shippers state that if the No Profit Method had been in place Rockies Express would have borne some of the burden of the *force majeure* outages, while firm shippers would have received a portion of their reservation charges as a credit for capacity that was not available for which the shipper had paid. Therefore, Indicated Shippers requests the Commission require Rockies Express to implement the No Profit Method for reservation charge credits to ensure that Rockies Express bears some portion of the burden of short-term *force majeure* outages.

43. In its answer, Rockies Express states Indicated Shippers have not demonstrated that Rockies Express' tariff method is unjust and unreasonable because under the Commission's reservation charge crediting policy, pipelines have the option to either use the No Profit Method or the Safe Harbor Method to credit shippers in *force majeure* events. Rockies Express adds that its use of the Safe Harbor Method was approved by the Commission as just and reasonable, and Indicated Shippers has not provided sufficient evidence to justify a departure from the currently approved tariff provision.

44. No party challenged the description of the events in the information submitted by Rockies Express as *force majeure*. However, in the protests to the December filing, protestors reiterate the objection to permitting Rockies Express to use the Safe Harbor Method for providing reservation charge credits. They assert that where nineteen *force majeure* outages have been invoked on Rockies Express, under the Safe Harbor Method in Rockies Express' tariff shippers have received reservation charge credits in only one instance and there is not a "sharing of the burden" for *force majeure* outages that the Commission's policy is designed to accomplish. Thus, they argue, Rockies Express' tariff with the Safe Harbor Method for calculating reservation charge credits is unjust and unreasonable and must be changed to the No Profit Method.

45. The Commission will not require Rockies Express to change its tariff to use the No Profit Method in calculating reservation charge credits for *force majeure* events. Commission policy permits a pipeline to choose which method to adopt, and in *North Baja*,[27] the court relied on the pipeline's ability to choose how to share the risk in approving Commission policy. While an overwhelming number of *force majeure* outages on Rockies Express have been resolved in less than ten days, the Commission

[27] *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007).

does not find that sufficient to require a change of Rockies Express' tariff under section 5 of the NGA. The Commission will, however, be responsive to shippers who raise credible concerns about a pipeline's exercise of discretion in declaring an outage as a *force majeure* event.

The Commission orders:

(A) The proposed tariff records in Docket No. RP12-765-001 are accepted effective August 29, 2012, subject to the conditions of this order.

(B) The proposed tariff records filed as Option A are accepted effective February 1, 2013, subject to the conditions of this order.

(C) Within 15 days Rockies Express is directed to revise its tariff, as discussed in the body of this order.

(D) The proposed tariff records filed as Option B are rejected.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.