167 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Transwestern Pipeline Company, LLC Docket No. RP15-23-000

ORDER ON RESERVED CAPACITY RELEASE ISSUE

(Issued April 18, 2019)

1. In this order, the Commission responds to briefs addressing an issue reserved for paper hearing by the uncontested Stipulation and Agreement of Settlement (Settlement) filed in this proceeding by Transwestern Pipeline Company, LLC (Transwestern).[1] The Settlement requests that the Commission resolve whether Transwestern's interpretation and implementation of General Terms & Conditions (GT&C) Section 30 of its tariff are in compliance with the Commission's capacity release policies. The Commission finds that Transwestern is not interpreting and implementing its tariff consistent with the Commission's capacity release policies. Therefore, pursuant to section 5 of the Natural Gas Act (NGA), the Commission directs Transwestern to revise its tariff to reflect the Commission's policies as discussed more fully below.

2. Several customers oppose Transwestern's practice of requiring replacement shippers to pay additional charges when they use secondary points outside the primary path of released capacity. These shippers contend that Transwestern must offer a replacement shipper the same discounted rates for use of secondary points outside the primary path that it has agreed to provide the releasing shipper for such service. Transwestern contends that the replacement shipper must negotiate the rate it will pay for use of secondary points outside the primary path directly with Transwestern,

[1] *See Transwestern Pipeline Co. LLC*, 153 FERC ¶ 61,039 (2015) (settlement order). A second reserved issue concerning Btu-heating values was addressed by the Commission in *Transwestern Pipeline Co. LLC*, 155 FERC ¶ 61,321, *clarified*, 157 FERC ¶ 61,076 (2016).

without regard to either the rate paid to Transwestern by the releasing shipper for such service or the rate in the release agreement between the releasing and replacement shippers.

3. Upon review of the briefs, the Commission finds that neither the shippers nor Transwestern have correctly interpreted the Commission's policy concerning the pricing of capacity releases. As discussed below, the rate paid by a replacement shipper for service within the rate zone or zones included in a release is established by the release agreement between the releasing shipper and the replacement shipper. Thus, the replacement shipper is not automatically entitled to pay a discounted rate included in the releasing shipper's contract with the pipeline, nor is Transwestern entitled to require the replacement shipper to pay a different rate than in the release agreement for service within the rate zone or zones included in a release. However, to the extent the replacement shipper uses a secondary point not covered by the releasing shipper's discount agreement, Transwestern may charge the releasing shipper additional reservation charges, but may not exceed the applicable maximum rate.

I. Background

4. On October 15, 2015, the Commission approved the Settlement, which resolved most of the issues in a general rate case filed by Transwestern pursuant to section 4 of the NGA. As relevant here, Article VI of the Settlement established procedures for the Commission to resolve issues concerning Transwestern's implementation of the capacity release procedures in GT&C Section 30 of its tariff. Specifically, Article VI asks the Commission to decide the following: "Is Section 30 of the GT&C of Transwestern's Tariff, as interpreted and implemented by Transwestern, in compliance with Commission policy governing capacity releases?" Article VI provided for all interested participants to file initial and reply briefs and for Transwestern to make any necessary filings to comply with any resulting Commission order within 30 days of such Commission order or as otherwise ordered by the Commission.

5. The issues briefed to the Commission pursuant to Article VI of the Settlement involve the rate paid by a replacement shipper when it uses secondary points[2] outside the path between the primary receipt and delivery points listed on its service

[2] Transwestern refers to secondary receipt and delivery points in its tariff as "alternate" receipt and delivery points. However, consistent with the terminology the Commission generally uses when discussing firm shippers' rights at points other than their primary points, we will refer to these points as secondary points.

agreement (primary path). The parts of GT&C Section 30 relevant to this issue are Sections 30.7(B) and 30.8(B). Those sections read as follows:

> Section 30.7(B): Service Agreement Amendments: No amendments may be made to the Service Agreement except that: 1) a Replacement Shipper, to the extent not restricted under the terms of its Service Agreement, shall have the same right to change Primary Receipt and Delivery Points as any other FTS-1, LFT, FTS-3 or FTS-5 Shipper; and 2) upon mutual agreement of the Releasing Shipper and the Replacement Shipper/bidder prior to amending any such offer/bid,
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> Section 30.8(B): Alternate Points: Alternate Receipt Points and Alternate Delivery Points may be utilized by a Replacement Shipper as described in Section 22 of the General Terms and Conditions of this Tariff.

6. Transwestern's firm rate schedules each contain a Section 3.1(b), providing that, if the shipper uses a secondary receipt or delivery point outside its primary path (i.e., the path from its primary receipt point to its primary delivery point), the shipper will pay "an additional Reservation Charge, not to exceed the maximum applicable tariff rate, as negotiated between Shipper and Transporter."[3] That rate applies on a daily basis while the shipper uses the secondary point.

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[3] *See*, *e.g.*, Rate Schedule FTS-1, Section 3.1(b):

> Additional Reservation Charge for Alternate Point(s): If a Shipper nominates and transports using Alternate Receipt Point(s) or Alternate Delivery Point(s) that are outside the Shipper's Primary Path, then Shipper will pay an additional Reservation Charge, not to exceed the maximum applicable tariff rate, as negotiated between Shipper and Transporter, applicable to such service outside the Primary Path. Such rate will apply on a daily basis for as long as any alternate point outside the Primary Path is utilized.

Rate Schedule LFT, Section 3.1(b) contains the same language; while Rate Schedules FTS-3 and FTS-5 incorporate Rate Schedule FTS-1, section 3 by reference.

7. On February 6, 2013, Transwestern posted a notice clarifying how it intended to apply Section 3.1(b) of its firm rate schedules, including in the context of capacity release (February 2013 Notice). The February 2013 Notice stated:

> **Clarification of Alternate Points Outside Shipper's Path/Rate Area**
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> In response to several questions that Transwestern has received, and to ensure the consistent application of relevant tariff provisions, Transwestern wishes to clarify the use of alternate points outside a Shipper's path/rate area, for all capacity release or other bid solicitation activities.
>
> Shippers that acquire capacity through capacity release, or directly from Transwestern in a bid solicitation for available capacity, are not entitled to use alternate points outside the awarded path/rate area at the bid rate. Moreover, any offers to pay incremental charges for use of alternate points outside the offered path/rate area are not considered in the bid evaluation.
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> Consistent with Section 3.1(b) of Transwestern's firm transportation rate schedules, the acquiring Shipper and Transwestern must agree to the rate for usage of any alternate points located outside the Shipper's path. Such rate will apply on a daily basis for as long as any alternate point outside the path is utilized.[4]

8. Section 3.1(b) of Transwestern's firm rate schedules was approved as part of the "Global Settlement" of Transwestern's general NGA section 4 rate case in Docket No. RP95-271-000 and various other proceedings.[5] Subsequently, when Transwestern proposed to include this same provision in its Rate Schedule LFT for a new limited firm service, a shipper protested that this provision was contrary to the Commission's policy that firm shippers may use all points in the rate zones for which they are paying, including points outside the shipper's primary path. Transwestern responded that the protest should be denied, because "Commission policy does not prohibit Transwestern from discounting a shipper's Primary Path transportation but collecting an additional

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[4] The Indicated Shippers provide a copy of the February 2013 Notice in their Initial Brief, Appendix A.

[5] *Transwestern Pipeline Co*., 72 FERC ¶ 61,085 (1995).

charge – capped by the maximum rate – if the shipper elects to use [secondary] points outside that path."[6] The Commission found that the provision is consistent with Commission policy, "so long as it is applied, as described in Transwestern's answer, to permit Transwestern to discount a shipper's primary path transportation, but collect an additional, negotiable charge if the shipper elects alternate points outside the path, as long as the total charge is not more than the maximum applicable rate."[7]

9. In the briefs described below, Transwestern contends that the practice described in the February 2013 Notice is consistent with Commission policy, while other parties contend that it violates Commission policy.

II. Briefs

10. On November 16, 2015, initial briefs on the reserved issue were submitted by Indicated Shippers,[8] Southwest Gas Corporation (Southwest Gas), and TECO Companies.[9] Reply briefs were submitted by Transwestern, Indicated Shippers, Southwest Gas, and Salt River Project Agricultural Improvement and Power District (Salt River) on December 16, 2015, consistent with the briefing schedule established in the Settlement. Thereafter, Indicated Shippers submitted a "motion to respond" on January 14, 2016, including an affidavit seeking to introduce additional information outside the briefing schedule provided for in the settlement. The Commission rejects this pleading as inconsistent with the Settlement briefing schedule and rejects any responsive pleadings as a consequence.

A. Shippers' Initial Briefs

11. Indicated Shippers argue that restrictions in the terms and conditions of capacity releases on Transwestern's system are inconsistent with the Commission's capacity release regulations. Indicated Shippers argue that, in early 2013, Transwestern interpreted its tariff so that provisions in the releasing shippers' contracts do not flow

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[6] Transwestern, Answer, Docket No. RP99-456-000, at 5 (filed August 23, 1999) (citing ANR Pipeline Co., 64 FERC ¶ 61,140, at 62,042 (1993) (ANR I)).

[7] *Transwestern Pipeline Co*., 88 FERC ¶ 61,206, at 61,703 (1999) (*Transwestern I*).

[8] Indicated Shippers consist of BP Energy Company, Chevron U.S.A. Inc., ConocoPhillips Company, Cross Timbers Energy Services, Inc., Shell Energy North America (US), L.P. and Shell affiliate SWEPI LP

[9] TECO Companies consist of TECO Energy, Inc., New Mexico Gas Co., Inc., Peoples Gas System, a Division of Tampa Electric Co. and Tampa Electric Co.

to replacement shippers in a capacity release. In particular, Indicated Shippers object to Transwestern's failure to allow replacement shippers to inherit rights contained in the releasing shipper's contract in two instances: (1) where a firm contract allows discounted reservation charges at secondary points outside of the transportation path and (2) where a firm contract allows the shipper to change its primary points outside of the original contract path under the same reservation charge.

12. In the first instance, Indicated Shippers object to use of a separate "Additional Reservation Charge" provided for in Rate Schedule FTS-1, which is to be applied when a replacement shipper uses secondary receipt and delivery points outside the shipper's primary path. Indicated Shippers object to imposing the charge on replacement shippers when Transwestern has eliminated the charge in the releasing shippers' contract. As for the second instance, Indicated Shippers object to Transwestern allowing changes in delivery and receipt points as part of discounted rates in the releasing shippers' contract, but not also permitting a replacement shipper to use secondary delivery and receipt points at a discounted rate, or without additional charge.

13. Indicated Shippers assert that Transwestern's procedures undermine the Commission's policy to permit the replacement shipper to acquire capacity without restriction on the terms or conditions of the release.[10] Furthermore, according to Indicated Shippers, section 284.8(f) of the Commission's regulations provides that unless changes to the contract are agreed to by the pipeline, the "contract of the shipper releasing capacity will remain in full force and effect."[11] Indicated Shippers characterize the requirement to enter into a new contract as an administrative requirement in order to assure privity of contract.

14. Indicated Shippers state that there is only one limited exception to the practice of permitting a replacement shipper to receive service under the same terms and conditions as the releasing shipper. In *Texas Eastern Transmission LP*, the Commission held that only usage and fuel rates could be negotiated between the pipeline and the replacement shipper.[12] Indicated Shippers assert that all other terms and conditions of the original contract, which the releasing shipper designates for the release, must be honored. However, even with usage and fuel rates, according to Indicated Shippers, these rates

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[10] Indicated Shippers Initial Brief at 7 (citing 18 C.F.R. § 284.8(b)(1)).

[11] *Id.* (citing 18 C.F.R. § 284.8(f)).

[12] *Texas Eastern Transmission LP*, 129 FERC ¶ 61,031, at PP 19-25 (2009) (*Texas Eastern Flow-Through Order*).

must be honored by the pipeline in the replacement shipper contract, in instances where the replacement shipper is similarly-situated to the releasing shipper.[13]

15. Indicated Shippers assert that the current dispute over Transwestern's capacity release practices has roots in Transwestern's February 2013 Notice reinterpreting its tariff to disallow the flow-through of discounts to replacement shippers for the use of secondary points outside the primary path.[14] According to Indicated Shippers, there has been no change to the Transwestern tariff that would signal the new interpretation of its capacity release mechanism.[15] Indicated Shippers state that they are not aware of any other pipeline that interprets the Commission's capacity release rules in a manner as restrictive as Transwestern, including certain of Transwestern's pipeline affiliates.

16. According to Indicated Shippers, because the secondary market competes with Transwestern's own marketing efforts, Transwestern is reducing competition to the extent its actions devalue shippers' capacity. Indicated Shippers claim that Transwestern's interpretation gives an advantage to Transwestern's marketing arm, not only in its own market, but also as compared to pipelines that comply with Commission rules.

17. Southwest Gas Corporation (Southwest Gas) asserts that replacement shippers "stand in the shoes" of the releasing shipper when entering into a new contract with a pipeline[16] and that, by limiting the contract rights that may be transferred to the replacement shipper, these practices devalue releasing shippers' contracts. Southwest

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[13] Indicated Shippers Initial Brief at 8.

[14] *Id.* at 2 (discussing February 2013 Notice in Shippers' Appendix A).

[15] *Id.* at 2 & n.3.

[16] Southwest Gas Initial Brief at 2 (citing *El Paso Natural Gas Co.*, 64 FERC ¶ 61,265, at 62,818-19 (1993) ("a replacement shipper . . . should have the same rights as any other firm shipper – both with respect to obtaining primary points as well as with respect to all other matters concerning scheduling priorities"); *ANR Pipeline Co.; Phillips Petroleum Co. v. ANR Pipeline Co.*, 65 FERC ¶ 61,162, at 61,804 (1993) (*Phillips v. ANR*) ("we clarify that the replacement shipper, if it changes to secondary points, is responsible for any additional payments to ANR that the releasing shipper would have paid if it had made the same change. On the other hand, if the releasing shipper, whether paying a discounted rate or not, has the right to transfer to a secondary point without making additional payment to ANR, then the replacement shipper has the same right, unless prohibited in the release agreement")).

Gas concludes that Transwestern's capacity release mechanism is unduly discriminatory and inconsistent with replacement shippers' rights under Commission policy.

18. TECO Companies refrain from taking a formal position on this issue.[17]

B. <u>Transwestern's Initial Brief</u>

19. Transwestern defends its practices, stating that GT&C Section 30 meets the requirements of section 284.8 of the Commission's regulations permitting a shipper to release firm capacity to a replacement shipper.[18] Transwestern cites Commission orders approving Section 30, as revised from time to time,[19] as in full compliance with the Order No. 636 capacity release regulations.[20]

20. Transwestern asserts that the Commission expressed its intent in Transwestern's restructuring proceeding to "clearly mandate that the pipeline must enter into a firm contract with the replacement shipper" and "that the replacement shipper will receive

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[17] TECO Companies Initial Brief at 3.

[18] 18 C.F.R. § 284.8 (2018). Transwestern provides a chart comparing its tariff provisions against the regulatory requirements. Transwestern Initial Brief, Attachment A (discussing compliance of GT&C Sections 30 through 30.9 (Capacity Release) with 18 CFR 248.8(a) through (h)).

[19] Transwestern Initial Brief at 5 (citing *Transwestern Pipeline Co.*, 61 FERC ¶ 61,332, at 62,231 (1992) (requiring Transwestern to modify certain aspects of GT&C Section 30), *compliance and reh'g order*, 62 FERC ¶ 61,090, at 61,659 (accepting Transwestern's revised GT&C Section 30 subject to Transwestern filing to modify provisions related to the withdrawal of bids), *partial reh'g order*, 63 FERC ¶ 61,138 (1993) (*Transwestern Restructuring*)).

[20] *Pipeline Service Obligations Revisions to Regulations Governing Self-Implementing Transportation; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939 (cross-referenced at 59 FERC ¶ 61,030; *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (cross-referenced at 60 FERC ¶ 61,102; *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992).

service under [the applicable] rate schedule."[21] Transwestern states that Section 30 properly reflects the release of firm capacity only – not the assignment of the releasing shipper's contract or the rights thereunder. According to Transwestern, GT&C Section 30.5(E)(2) states that service to the replacement shipper "shall commence once capacity has been awarded and a Service Agreement has been executed by both parties."[22] In addition, Transwestern states that GT&C Section 30.8(M) states that service provided to the replacement shipper shall be in accordance with the terms and conditions of the applicable rate schedules of its tariff and the replacement shipper's service agreement.[23]

21. Transwestern points out that the *pro forma* capacity release service agreement in its tariff designates primary receipt and delivery points for the release of firm capacity. Transwestern asserts that the replacement shipper has the same right to use secondary receipt and delivery points and change primary points as any other shipper.[24] Transwestern identifies the price setting process under the tariff and argues that a releasing shipper cannot bind the pipeline through the competitive bidding process to any particular usage charge for the replacement shipper.[25]

22. Transwestern asserts that Commission precedent supports its position that contract rights in the original contract do not automatically flow through to the replacement shipper. Transwestern notes that in *Northwest Pipeline LLC*, the Commission approved tariff records limiting the ability of a releasing shipper with a grandfathered unilateral termination right to include that right in a permanent release of its capacity.[26] Similarly,

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[21] *See Transwestern Restructuring*, 61 FERC ¶ 61,332 at 62,231; 62 FERC ¶ 61,090 at 61,659.

[22] Transwestern Initial Brief at 10 (citing GT&C Section 30.5(E)(2)).

[23] *Id.* (citing GT&C Section 30.8(M): "Service for the Replacement Shipper under Transporter's capacity release program shall be in accordance with the terms and conditions of the applicable Rate Schedules of Transporter's Tariff and Replacement Shipper's Service Agreement").

[24] *Id.*

[25] *Id.* at 10-11 (citing *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at 62,293 (1992) (*El Paso*); *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396, at P 20 (2008); *Natural Gas Pipeline Co. of America LLC*, 126 FERC ¶ 61,156, at P 12 (2009); *Tres Palacios Gas Storage LLC*, 126 FERC ¶ 61,167, at P 12 (2009)).

[26] *Northwest Pipeline LLC*, 147 FERC ¶ 61,019 (2014) (*Northwest*).

according to Transwestern, in *Tennessee Gas Pipeline Co.*, the Commission held that a releasing shipper's grandfathered primary delivery point rights do not transfer to the replacement shipper.[27]

23. Transwestern asserts that its tariff makes clear that a shipper using secondary receipt or delivery points outside the shipper's primary path will pay an additional charge.[28] According to Transwestern, this incremental charge is appropriately treated as a usage charge, because it is assessed only on the days on which such secondary receipt and delivery points are actually used in any given month, as opposed to the regular reservation charge that is billed monthly and is not based on usage. Citing *Texas Eastern Transmission*, *LP*, Transwestern asserts that the Commission has emphasized that "[u]nlike the process for determining a replacement shipper's reservation rate, the replacement shipper's usage charge is a matter solely between the replacement shipper and the pipeline."[29]

24. Transwestern also asserts that its capacity release policies are consistent with the Commission's directives concerning capacity release in Order No. 712.[30] Transwestern states that shippers have argued that pipelines should be required, in Order No. 712 compliance proceedings, to provide a releasing shipper's discounted or negotiated usage and fuel rates to a releasing shipper's asset manager. Transwestern notes that the Commission declined on the principle that the pipeline "generally should not be required to give the replacement shipper the same discount of the usage charge as it gave the releasing shipper."[31]

25. Instead, according to Transwestern, the Commission determined that pipelines should apply the Commission's selective discounting policy on a case-by-case basis to

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[27] *Tennessee Gas Pipeline Co., L.L.C.*, 143 FERC ¶ 61,128 (2013) (*Tennessee*).

[28] *See* Transwestern Initial Brief at 15 (citing Rate Schedule FTS-1, Section 3.1(b)).

[29] *Id.* at 11 (citing *Texas Eastern Transmission*, *LP*, 129 FERC ¶ 61,025, at P 14 (2009), *order on reh'g,* 130 FERC ¶ 61,189 (2010) (*Texas Eastern II*)).

[30] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 123 FERC ¶ 61,286 (2008).

[31] Transwestern Initial Brief at 11-12 (citing *Texas Eastern Flow-Through Order*, 129 FERC ¶ 61,031 at P 24; *El Paso*, 61 FERC ¶ 61,333 at 62,309).

discounted or negotiated usage-related or fuel charges.[32] Transwestern asserts that it performed the required similarly-situated analysis and quotes the Commission's statements in the *Texas Eastern Flow-Through Order* indicating that an asset manager is not similarly situated to the releasing shipper if the manager could make greater use of secondary points than the releasing shipper, use points other than those for which the discount was anticipated, or aggregate released capacity to expand the rights originally provided to the releasing shipper.[33]

C. Shippers' Reply Briefs

26. Indicated Shippers assert that Transwestern misinterprets precedent on the flow-through of a replacement shipper's contract rights to its replacement shipper. Indicated Shippers cite *Phillips v. ANR* as stating that, if the releasing shipper, "whether paying a discounted rate or not, has the right to transfer to a secondary point without making additional payment to [the pipeline], then the replacement shipper has the same right, unless prohibited in the release agreement."[34] Indicated Shippers object to Transwestern's focus on capacity release as a transfer of capacity rather than a transfer of contract rights. While Indicated Shippers acknowledge that the Commission upheld a contract requirement in *Tenaska Marketing Ventures v. Northern Border Pipeline Co.*,[35] they note the Commission's statement that "the pipeline does not establish the price or the terms and conditions of the release."[36] Indicated Shippers criticize Transwestern for ignoring releasing shippers' right to designate reservation charges and release terms.

27. Indicated Shippers contest Transwestern's reliance on other cases, noting that *Northwest Pipeline* addressed permanent capacity releases, while Indicated Shippers'

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[32] *Id.* at 12.

[33] *Id.* at 12-13 (citing *Texas Eastern Flow-Through Order*, 129 FERC ¶ 61,031 at PP 3, 4; *El Paso*, 61 FERC ¶ 61,333 at 62,309).

[34] *Phillips v. ANR*, 65 FERC ¶ 61,162 at 61,804.

[35] *Tenaska Marketing Ventures v. Northern Border Pipeline Co*., 99 FERC ¶ 61,182, at 61,708 (2002) (*Tenaska*).

[36] Indicated Shippers Reply Brief at 10 (citing *Tenaska*, 99 FERC ¶ 61,182 at 61,708).

objections relate to temporary releases. Indicated Shippers state that *Tennessee* considered grandfathered rights, which are not at issue here.[37]

28. Indicated Shippers take issue with Transwestern's characterization of the additional fees for use of secondary points outside the primary path as "usage charges." According to Indicated Shippers, Transwestern's attempt to re-define the type of charge does not change the reservation charge in the original contract into a usage charge. Indicated Shippers contend that the Commission's rate design principles are clear regarding the design of reservation charges as separate and apart from usage charges.[38]

29. Indicated Shippers question Transwestern's claim to examine each capacity release on a case-by-case basis using a similarly situated analysis for a discount outside of the primary path.[39] Indicated Shippers claim this suggestion is misleading and contradicted by Transwestern's February 2013 Notice.[40]

30. Southwest Gas downplays Transwestern's reliance on the tariff procedures as only corroborating the mechanical procedures that apply to capacity releases, which, it says, are largely undisputed. Southwest Gas argues that the Commission should apply its precedent, including *Phillips v. ANR*, affording a replacement shipper the same rights as the releasing shipper to reservation charge discounts.[41]

31. Southwest Gas distinguishes *Tennessee* as addressing a very specific issue and unique facts and failing to establish whether replacement shippers receive the same

[37] *Id*. at 6.

[38] *Id.* at 8.

[39] *Id.* (referencing Transwestern's discussion of the selective discounting policy and representation that it determines on a case-by-case basis whether a replacement shipper is similarly situated to the releasing shipper in order to be eligible for a discount for secondary points outside the primary path; Initial Brief at 12-13, 16).

[40] The February 2013 Notice informed customers that replacement shippers may not use secondary points at the bid reservation charge. Indicated Shippers state that this was the first such notification that they know of since 1993. Indicated Shippers state that Transwestern had never previously informed them that it was engaging in such an analysis for specific secondary market transactions.

[41] Southwest Gas Reply Brief at 10-11 (citing *Phillips v. ANR*, 65 FERC ¶ 61,162 at 61,804).

discounted or negotiated reservation charges as the releasing shipper.[42] Southwest Gas states that *Northwest* involved a grandfathered evergreen provision and stands for the proposition that permanent capacity release is not required where the pipeline would be economically adversely affected by the permanent release.[43]

32. Southwest Gas disputes Transwestern's contention that the charge for use of secondary receipt and delivery points is a "usage-related charge," citing the tariff's description of the charge as an "Additional Reservation Charge."[44] Southwest Gas states that Transwestern also fails to address situations where the releasing shipper seeks to release capacity with a right to change primary delivery points at the contract rate.

33. Salt River asserts that Transwestern is attempting to improperly broaden the narrow "usage and fuel" exception provided for in Order No. 636.[45] Southwest Gas claims that *Texas Eastern Flow-Through Order* does not cover reservation charges. Salt River criticizes the "overly restrictive conditions with regard to the rights of replacement shippers" in a capacity release transaction and joins with Indicated Shippers, claiming that *Phillips v. ANR* runs counter to Transwestern's position that it may deny certain reservation charge discounts to replacement shippers.[46]

D. Transwestern's Reply Brief

34. Transwestern contests Indicated Shippers' claim that all contract rights of the releasing shipper flow to the replacement shipper under section 284.8(f) of the Commission's regulations, which provides that, unless otherwise agreed by the pipeline, the contract of the shipper releasing capacity will remain in full force and

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[42] *Id*. at 7 (citing *Tennessee Gas Pipeline Co.*, 104 FERC ¶ 61,063, at P 125 (2003) (*Tennessee II*)).

[43] *Id.* at 8 (citing *Northwest*, 147 FERC ¶ 61,019 at P 10).

[44] *Id*. at 6 (citing Rate Schedule FTS-1, Section 3.1(b), providing for an additional reservation charge "not to exceed the maximum applicable tariff rate" for secondary receipt or delivery points). No party alleges that Transwestern's practice to calculate daily charges for secondary receipt/delivery points results in a charge that exceeds the referenced tariff reservation charge.

[45] Salt River Reply Brief at 2 (citing Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,418-19).

[46] *Id.* at 1-2 (citing *Phillips v. ANR*, 65 FERC ¶ 61,162 at 61,804).

effect, with the net proceeds from any resale to a replacement shipper credited to the releasing shipper's reservation charge.[47]

35. Transwestern asserts that section 284 is silent on whether contract rights flow to the replacement customer. Instead, according to Transwestern, section 284.8(f) embodies a pipeline's right to decide whether the releasing shipper's contract is terminated or in effect. Transwestern states that if the contract remains in effect, the net reservation charge proceeds from the replacement shipper are credited to the releasing shipper's reservation charge. Otherwise, Transwestern states, the pipeline will agree to terminate the releasing shipper's contract and no crediting occurs.[48]

36. Transwestern contests Southwest Gas' reliance on *Phillips v. ANR* for the proposition that the replacement shipper effectively stands in the shoes of the releasing shipper.[49] Transwestern notes that, in that order, the pipeline sought and received clarification from the Commission that the pipeline need not credit the releasing shipper the added revenue that the pipeline receives as a result of the replacement shipper's moving to a secondary point.[50] According to Transwestern, the Commission confirmed that the pipeline "need not worry that a shipper, by releasing to a marketing affiliate, would be able to carry a discount to a secondary point and circumvent any right of [the pipeline] to charge a higher rate for a new service."[51] Transwestern states that the *ANR I* holding is distinguishable and does not support the Commission's making any change to what Transwestern states is the Commission's policy that discounts at outside-the-path secondary points do not automatically flow through to the replacement shipper;[52] Transwestern further argues that to allow such flow-through of discounts would circumvent operation of its tariff and the Commission's selective discounting policy.[53]

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[47] 18 C.F.R. § 284.8(f).

[48] Transwestern Reply Brief at 6.

[49] *See* Southwest Gas Initial Brief at 2 (citing *Phillips v. ANR*, 65 FERC ¶ 61,162 at 61,804).

[50] Transwestern Reply Brief at 19.

[51] *Id.* (citing *Phillips v. ANR*, 65 FERC at 61,804).

[52] *Id.* (citing ANR I, FERC 61,140).

[53] *Id.*

37. Transwestern defends its actions in limiting the terms and conditions of releases as fully complying with the Commission's capacity release and selective discounting policies. Transwestern states that if it determines that the replacement shipper is similarly situated to the releasing shipper, then, consistent with Commission policies, it provides the replacement shipper the same rate for service to outside-the-primary path secondary points that it provided to the releasing shipper. Transwestern states that it makes the determination of whether a shipper is similarly situated to another shipper, consistent with the Commission's selective discounting policy.[54] In support of this approach, Transwestern relies on the Commission's statement in Order No. 636 that a replacement shipper entering into a new service agreement "becomes a shipper like any other shipper and is subject to the pipeline's operational provisions as stated in its tariff."[55]

38. Transwestern claims that, because its additional reservation charge is based on usage, it is a matter between the replacement shipper and the pipeline.[56] Transwestern states that the Commission approved an additional charge for secondary points outside a shipper's path in its restructuring proceeding.[57] Transwestern states that the shipper has no capacity guarantee outside its contract path and therefore cannot transfer the right to a discounted or negotiated reservation charge for use of secondary points located outside its contract path if the pipeline is able to accommodate an out-of-path movement.[58]

39. Transwestern argues that the Commission has recognized that a replacement shipper should not be permitted to use the releasing shipper's contract rights in an

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[54] *Id.* at 18-19 (citing *Williston Basin Interstate Pipeline Co.*, 85 FERC ¶ 61,247, at 62,028-30 (1998) (*Williston I*)).

[55] Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,419-20.

[56] Transwestern Reply Brief at 13 (citing *El Paso*, 61 FERC ¶ 61,333 at 62,309-10).

[57] *Id*. at 15 (citing *Transwestern Restructuring*, 62 FERC ¶ 61,090 at 61,555; *Panhandle Eastern Pipe Line Co.*, 78 FERC ¶ 61,202, at 61,870 n.7 (1997) ("A point outside of the primary path will only be available upon payment of an incremental rate")).

[58] Transwestern Reply Brief at 16 (citing Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 at 30,559).

expanded way that would negatively impact the pipeline.[59] Transwestern states that the Commission requires that pipelines perform the case-by-case, similarly situated determination, not the releasing shipper, due to the possibility of a negative impact on the pipeline that could result from providing the same rights that were negotiated with the releasing shipper to a replacement shipper that is not similarly situated.[60] For example, Transwestern notes that the Commission allows a pipeline to refuse to allow a capacity release if it has reasonable basis to conclude that it will not be financially indifferent to the release of the capacity.[61]

40. Transwestern cites the Commission's discussion in the *Texas Eastern Flow-Through Order* of a number of factual situations in which, even in the context of an asset manager agreement, the releasing shipper and the asset manager (i.e., the replacement shipper) would not be similarly situated.[62] The Commission held that there may be "circumstances in which the pipeline could conclude that the asset manager will use the capacity in a different manner than the releasing shipper used the capacity or in a different manner than the pipeline anticipated the releasing shipper would use the capacity."[63]

41. Transwestern concludes that if the replacement shipper cannot qualify on its own as similarly situated to the releasing shipper, it has no right to a discounted or negotiated rate provided to the releasing shipper by the pipeline based on a different set of circumstances. Transwestern states that a replacement shipper should not be

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[59] *Id.* at 9 (citing *Texas Eastern Flow-Through Order*, 129 FERC ¶ 61,031 at P 24).

[60] *Id*. at 19 (citing *Williston I*, 85 FERC ¶ 61,247 at 62,028-30).

[61] *Id*. at 9 (citing *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 123 (2008): "the Commission permits a pipeline to refuse to allow a permanent release of capacity if it has a reasonable basis to conclude that it will not be financially indifferent to the release").

[62] 129 FERC ¶ 61,031 at P 24.

[63] *Id.*

able to do something indirectly through the capacity release mechanism that it could not do directly.[64]

42. Transwestern asserts that the policies advocated by Indicated Shippers and Southwest Gas are not only contrary to Commission policy, but also would have far-reaching problematic consequences if implemented. Transwestern reasons that, following the shippers' logic, a replacement shipper could acquire the releasing shipper's discounted or negotiated rate at outside-the-path secondary points, or right to change to primary points outside the primary path at a discounted or negotiated rate, with no involvement of the pipeline and without consideration whether the shipper is similarly situated to the releasing shipper. Transwestern states that such a situation would place the releasing shipper in the position of negotiating rates for service on the pipeline without restriction.[65]

43. Transwestern characterizes Indicated Shippers' comparison of GT&C Section 30 to capacity release provisions in other tariffs, including that of Transwestern's affiliate, Panhandle Eastern Pipe Line Company, as vague and unsupported.[66] Transwestern characterizes such comparisons as irrelevant to the issue agreed to in the Settlement, which is limited to Transwestern's tariff.

III. Interventions

44. Article VI of the Settlement provides that parties not object to late interventions or briefs filed on the reserved issue, so long as intervenors accept the record and do not oppose the Settlement or delay the briefing schedule.

45. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2018), all timely filed motions to intervene and any 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, that are consistent with the terms of the Settlement, will not disrupt the proceeding, or place additional burdens on existing parties.

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[64] Transwestern Reply Brief at 18 (citing *Tennessee*, 143 FERC ¶ 61,128 at P 61: "it is an axiom of the law that one may not presume the right to do indirectly what one may not do directly").

[65] *Id.* at 20.

[66] *Id.* at 22.

IV. Commission Determination

46. Based on the representations in the pleadings, we find that Transwestern's current administration of its tariff in regard to the rates paid by replacement shippers for use of secondary points outside their primary path, but within the same rate zones as their primary path, is inconsistent with the Commission's regulations and capacity release policies. However, as explained below, we also disagree with the shippers' assertions that replacement shippers should be automatically entitled to the same discounts for use of outside-the-path secondary points as Transwestern provides the releasing shipper. Rather, the reservation charge component of the replacement shipper's rate for all service within the applicable rate zone, both within and outside the primary path, must be the capacity release rate determined through negotiations between the releasing and replacement shippers and any required bidding on the release. This is true, regardless of whether the reservation charge component of the release rate is billed on a volumetric basis or is a fixed reservation charge. However, if the replacement shipper seeks to use a secondary point outside the rate zone(s) included in the release, Transwestern may require it to pay an additional charge to be negotiated between Transwestern and the replacement shipper.

A. Consistency of Transwestern's February 2013 Notice with Commission Policy

47. In its February 2013 Notice, Transwestern announced that:

> Shippers that acquire capacity through capacity release . . . in a bid solicitation for available capacity, are not entitled to use alternate points outside the awarded path/rate area at the bid rate. . . . Consistent with Section 3.1(b) of Transwestern's firm transportation rate schedules, the acquiring Shipper and Transwestern must agree to the rate for usage of any alternate points located outside the Shipper's path.

48. This announcement was contrary to the Commission's longstanding capacity release policies. The Commission has held that a replacement shipper is entitled to use secondary points up to its contract demand anywhere in the zones for which it is paying, whether the secondary points are inside or outside its primary path.[67] Moreover, since

[67] *El Paso*, 61 FERC ¶ 61,333 at 62,286; *see also order on reh'g*, 62 FERC ¶ 61,311, at 62,991 (1993). *Transwestern Restructuring*, 61 FERC ¶ 61,332 at 62,231-32. Order No. 636 required each interstate pipeline to submit a compliance filing to restructure its services. The compliance filings of El Paso and Transwestern were the first Order No. 636 compliance filings the Commission acted on in December 1992. Accordingly, it was in the orders on those filings, cited above, that the Commission

the Commission adopted the capacity release program in Order No. 636, the Commission has consistently held that the reservation charge component of the rate is determined solely by the releasing shipper and the replacement shipper. Section 284.8 of the Commission's regulations requires that the reservation charge component of the replacement shipper's rate be determined either through a bidding process initiated by the releasing shipper or by negotiation between the releasing shipper and the replacement shipper if the release is exempt from bidding. For this reason, when the Commission first addressed in El Paso's Order No. 636 restructuring proceeding the issue of the rate to be paid by a replacement shipper when it uses secondary points within its rate zone, the Commission held that the replacement shipper is entitled to pay the reservation charge agreed upon with the releasing shipper, "regardless of whether it uses the releasing shipper's primary points or some other points and regardless of any discount agreement between the pipeline and releasing shipper."[68] Thus, as the Commission stated in *Texas Eastern Transmission*, *LP*, "[t]he pipeline plays no role in determining the reservation rate paid by the replacement shipper."[69]

49. Transwestern's February 2013 Notice is inconsistent with this policy. The February 2013 Notice would require the replacement shipper to agree with Transwestern as to the rate for service to secondary points within the zone for which it was paying but outside its primary path. That is contrary to the Commission's holding that the pipeline plays no role in determining the reservation charge paid by the replacement shipper. The February 2013 Notice also provides that the rate agreed to between the releasing and replacement shippers cannot apply to service at secondary points. This restriction is contrary to the Commission's policy that the reservation charge component of that rate must apply to all service provided to the replacement shipper within its rate zone.

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first established its policies concerning the details of how the capacity release program was to be implemented. Those orders are thus the lead orders on the Commission's capacity release policies. *See also Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, at 31,592-93 (2000) (cross-referenced at 92 FERC ¶ 61,015.

[68] *El Paso*, 62 FERC ¶ 61,311 at 62,991.

[69] *Texas Eastern II*, 129 FERC ¶ 61,025 at P 12.

50. Transwestern seeks to justify its February 2013 Notice by citing the Commission's policy that the determination of the replacement shipper's usage charge is a matter between the pipeline and the replacement shipper.[70] Transwestern claims that the rate to be paid by a replacement shipper for use of secondary points outside its primary path must be treated as a usage charge, because that rate is paid only on days that the replacement shipper uses secondary points outside its primary path and thus is effectively a volumetric rate. Accordingly, Transwestern argues that its requirement that replacement shippers negotiate the rate for service to secondary points outside their primary path is consistent with Commission policy.

51. We reject this contention. Transwestern assumes that the Commission's statement that a replacement shipper's usage charge must be agreed upon between the pipeline and the replacement shipper refers to any rate that the replacement shipper pays on a volumetric basis. That is not true. A pipeline's firm recourse rates applicable to capacity releases are two-part rates, including a reservation charge and a usage charge. If the pipeline uses a straight-fixed variable (SFV) rate design, as Transwestern does, the reservation charge recovers its fixed costs, and the usage charge recovers only variable costs. When the Commission stated that a replacement shipper's usage charge must be agreed upon between the pipeline and the replacement shipper, it was referring only to the usage charge component of the pipeline's two-part firm rates, not the reservation charge component.[71]

52. Although the releasing shipper's reservation charge is a fixed monthly payment, the reservation charge component of the replacement shipper's rate may be a volumetric rate. In Order No. 636-B, the Commission held that a releasing shipper may request volumetric bids for the reservation charge component of the replacement shipper's rate, finding that permitting the replacement shipper to pay a volumetric rate would enable capacity release to compete better with the pipeline's interruptible transportation service.[72] As the Commission explained in *El Paso*, when the replacement shipper agrees to pay a volumetric reservation charge, "it would pay, in effect, a two-part volumetric

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[70] *Transwestern Restructuring*, 61 FERC ¶ 61,332 at 62,233-34, 62,239; *El Paso*, 61 FERC ¶ 61,333 at 62,293 and 62,309-10; *Texas Eastern II*, 129 FERC ¶ 61,025 at P 14.

[71] *See Texas Eastern Flow-Through Order*, 129 FERC ¶ 61,031 at P 6 (stating that the issue whether the pipeline must offer an asset manager replacement shipper the same usage charge discount as its releasing shipper would not arise on a pipeline with SFV rates, because a usage charge with only variable costs is not discountable).

[72] Order No. 636-B, 61 FERC ¶ 61,272 at 61,997. *Transwestern Restructuring*, 61 FERC ¶ 61,332 at 62,239; *El Paso*, 61 FERC ¶ 61,333 at 62,293.

rate: first, it would pay a volumetric rate relating to the reservation charge *which would be determined through the bidding process*; second it would pay whatever usage charge it agreed to pay" the pipeline.[73] Thus, the Commission has held that, even when the reservation charge component of a replacement shipper's rate is paid on a volumetric basis, that rate is to be determined solely between the releasing shipper and the replacement shipper.

53. For these reasons, we conclude that Transwestern cannot require replacement shippers to negotiate a separate reservation charge to apply whenever the replacement shipper uses a secondary point outside its primary path but within the rate zone for which it is paying. Rather, Transwestern must charge the replacement shipper the reservation charge agreed to between the releasing shipper and the replacement shipper through the capacity release bidding process or otherwise for any service within the rate zones for which the replacement shipper is paying, without regard to whether the replacement shipper is using a secondary point within its primary path or outside that path.

B. Shippers' Contention that Replacement Shippers are Entitled to Same Rate at Secondary Points as Releasing Shipper

54. For similar reasons, we reject shippers' contention that, when a replacement shipper uses a secondary point, it is automatically entitled to pay the same discounted rate as the releasing shipper pays for service at that point. In *El Paso*, the Commission established its policy concerning the treatment of a releasing shipper's discounts in the context of a capacity release.[74] The Commission first explained that a pipeline's discounts to releasing shippers are a matter of contract between the pipeline and the releasing shipper. The Commission stated that, consistent with this policy, pipelines may offer discounts to releasing shippers that are limited to service at particular receipt and delivery points or to service along a particular path, while not providing discounts to the same shipper for service at other points.[75] The Commission explained that market conditions may be different at different points, justifying the pipeline in providing discounts at some points but not others. Alternatively, the pipeline can provide a firm shipper a discount that applies at all points within the rate zone or zones for which a reservation charge is paid.

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[73] *El Paso*, 61 FERC ¶ 61,333 at 62,293 (emphasis supplied).

[74] *El Paso*, 62 FERC ¶ 61,311 at 62,990-91.

[75] *Id*. at 62,991.

55. However, in *El Paso*, the Commission pointed out that, in the context of capacity release, the replacement shipper's reservation charge is determined through the bidding or other procedures set forth in the pipeline's tariff consistent with the capacity release regulations in section 284.8 of the Commission's regulations.[76] Therefore, the Commission concluded, the replacement shipper must pay that rate, regardless of what secondary points it uses and "*regardless of any discount agreement between the pipeline and releasing shipper*."[77] Thus, the Commission has clearly held that the replacement shipper is not entitled to pay the same discounted rate as the pipeline has provided to the releasing shipper. Rather, the replacement shipper must pay the rate provided for in its release agreement with the releasing shipper.

56. In *El Paso*, the Commission also explained that, although the replacement shipper pays its release rate for the use of any point, its actions may affect the rate paid by the *releasing shipper*. The Commission pointed out that the releasing shipper must pay the pipeline any amount by which its reservation charge exceeds the reservation charge component of the replacement shipper's rate. Therefore, if the pipeline "has contracted to give the releasing shipper a discount only at its primary points and the replacement shipper uses other points, [the pipeline] would be free to collect from the releasing shipper any difference between the rate paid by the replacement shipper and the maximum reservation charge."[78] The Commission explained that the pipeline "cannot be bound by its discount agreement with the releasing shipper, since that agreement applies only to service at the releasing shipper's primary points."[79]

57. The Commission stated that the releasing shipper is free to protect itself by establishing conditions in the notice of release concerning the replacement shipper's use of points other than the releasing shipper's primary points. For example, the releasing shipper could require that the replacement shipper compensate it for any additional charges that it incurs to the pipeline as a result of the use of points other than the releasing shipper's primary point.[80] Alternatively, the releasing shipper could place a

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[76] *Id*. at 62,990-91.

[77] *Id.* at 62,991 (emphasis supplied).

[78] *Id*.

[79] *Id*.

[80] *Id*.

condition on the release preventing the replacement shipper from using points where the releasing shipper does not have a discount.[81]

58. Subsequently, in Order No. 637, the Commission stated that the discount policy adopted in *El Paso* should be re-examined in the individual pipeline proceedings to comply with Order No. 637. The Commission explained in Order No. 637-B that it was concerned that requiring a releasing shipper with a discounted rate to pay the maximum rate in order to effectuate a release transaction could interfere with the competition created by capacity release.[82] In some Order No. 637 compliance proceedings, the Commission limited the pipeline's ability to require releasing shippers with discounted rates at their primary points to pay the maximum rate if the replacement shipper used a different point.[83] However, the United States Court of Appeals for the District of Columbia Circuit remanded one of those cases to the Commission.[84] The court stated that the Commission had not adequately addressed the concern that limiting the ability of pipelines to restrict discounts to particular points could discourage pipelines from offering selective discounts to maximize the use of their systems. On remand, the Commission provided an opportunity for the industry to comment on this issue. Based on the comments, the Commission reaffirmed its *El Paso* policy in *Williston II*.[85] Accordingly, the *El Paso* policy, that the replacement shipper must pay its release rate for use of any points within its rate zones regardless of any discounts provided the releasing shipper, remains in effect.

59. The shippers rely on a 1993 order in the Order No. 636 restructuring proceeding of ANR Pipeline Company to support their contention that a replacement shipper inherits the releasing shipper's right to discounted rates at secondary points when the replacement shipper succeeds to the rights and obligations in the original contract. In that order, the Commission stated, "we clarify that the replacement shipper, if it changes to secondary points, is responsible for any additional payments to ANR that the releasing shipper would have paid if it had made the same change. On the other hand, if the releasing

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[81] *Williston Basin Interstate Pipeline Co*., 110 FERC ¶ 61,210 at P 5, *reh'g denied*, 112 FERC ¶ 61,038 (2005) (*Williston II*).

[82] *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637-B, 92 FERC ¶ 61,062 at 61,167-68 (2000).

[83] *See, e.g., Colorado Interstate Gas Co.*, 95 FERC ¶ 61,321 (2001).

[84] *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d 45 (D.C. Cir. 2004).

[85] 110 FERC ¶ 61,210 at PP 22-24, *reh'g denied*, 112 FERC ¶ 61,038.

shipper, whether paying a discounted rate or not, has the right to transfer to a secondary point without making additional payment to ANR, then the replacement shipper has the same right, unless prohibited in the release agreement."[86]

60. We find that the shippers' reliance on this language is unavailing. To the extent this language may be interpreted as providing a replacement shipper a right to use secondary points at a rate other than that agreed to in its release agreement, that language was incorrect. As the Commission reaffirmed in *Williston II*, the policy set forth in *El Paso* governs the rates to be paid by both the replacement shipper and the releasing shipper when the replacement shipper uses a secondary point. As discussed above, *El Paso* requires the replacement shipper to pay the rate set forth in the release agreement when it uses a secondary point, regardless of any discount agreement between the releasing shipper and the pipeline. Indeed, a year after the 1993 Phillips v. *ANR* order relied on by the shippers, the Commission issued an order in an NGA section 4 rate case filed by ANR, stating: "[C]onsistent with our ruling in *El Paso Natural Gas Co*., the replacement shipper's reservation charge for the use of alternative points within the same zone is established through its bid, unless the releasing shipper provides otherwise in its notice of release."[87]

61. Accordingly, the Commission rejects the shippers' contention that a replacement shipper is entitled to the same discounted rate at a secondary point as Transwestern has provided to the releasing shipper at that point. Rather, the replacement shipper must pay the rate established in its capacity release agreement with the releasing shipper and is subject to any conditions that the releasing shipper may have included in that agreement, as described above.

C. Remedy

62. Based on the discussion above, the Commission finds that Transwestern's practice, as reflected in the February 2013 Notice, of requiring replacement shippers to negotiate with Transwestern the rates to be paid for use of secondary points outside their primary path but within their rate zone, is contrary to Commission policy and thus unjust and unreasonable. Transwestern must permit replacement shippers to use any secondary point in their rate zones while continuing to pay the reservation charge agreed to between the releasing shipper and the replacement shipper through bidding or otherwise. As described above, if the replacement shipper uses a point at which the releasing shipper does not have a discount, Transwestern may require the releasing shipper to pay any amount by which the maximum reservation charge exceeds the replacement shipper's

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[86] *Phillips v. ANR*, 65 FERC ¶ 61,162 at 61,804.

[87] *ANR Pipeline Co.*, 66 FERC ¶ 61,335, at 62,107-08 (1994) (citing *El Paso.,* 62 FERC ¶ 61,311).

reservation charge. The releasing shipper may protect itself by including a condition in the release that the replacement shipper may not use secondary points at which the releasing shipper does not have a discount or must compensate the releasing shipper for any additional charges that it incurs.

63. The Commission also finds, pursuant to NGA section 5, that Section 3.1(b) of Transwestern's firm rate schedules is unjust and unreasonable to the extent that section requires replacement shippers to negotiate with Transwestern the reservation charge to be paid by them for using secondary points outside their primary paths but within their rate zones. Therefore, the Commission requires Transwestern to modify Section 3.1(b) of each of its firm rate schedules to clarify that the requirements of that section concerning the rates to be paid for use of secondary points outside a shipper's primary path do not apply to replacement shippers, if the secondary points are within the rate zones for which the replacement shipper is paying.[88] Transwestern is directed to submit its compliance filing implementing these changes, within 30 days of the date of this order.

64. Finally, we note that the Commission has previously addressed the application of Section 3.1(b) of Transwestern's firm rate schedules to its primary shippers, including releasing shippers. As previously described, when Transwestern proposed to include this section in Rate Schedule LFT, a concern was raised as to whether the section was consistent with the Commission's policy that firm shippers may use all points in the rate zones for which they are paying. The Commission found that the provision is consistent with Commission policy so long as it is applied, consistent with Transwestern's answer: "to permit Transwestern to discount a shipper's primary path transportation, but collect an additional, negotiable charge if the shipper elects alternate points outside the path, as long as the total charge is not more than the maximum applicable rate."[89] The Commission permits pipelines to offer discounts to their primary shippers that are limited to service along a particular path, while not providing discounts to the same shipper for service at other points. Section 3.1(b) of Transwestern's firm rate schedules provides firm shippers notice that it limits the discounts in a service agreement to service along their primary path and that the rates for service at other points must be separately negotiated when that service is used. This approach to discounting firm service is permissible, so long as it is limited to Transwestern's primary shippers and not extended to replacement shippers. However, we remind Transwestern that it must permit a primary shipper to use points outside its primary path but within its rate zones, if the shipper is willing to pay the maximum rate and capacity is available.

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[88] Transwestern may require a replacement shipper to pay an additional charge for use of secondary points outside the rate zones for which it is paying.

[89] *Transwestern I*, 88 FERC ¶ 61,206 at 61,703.

The Commission orders:

(A) The reserved question proffered under the parties' settlement is resolved as discussed in the body of this order.

(B) Transwestern is directed to submit a compliance filing to revise its tariff as directed above, within 30 days of the date of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.