

135 FERC ¶ 61,050  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Kern River Gas Transmission Company

Docket No. RP10-1410-000

ORDER ON COMPLIANCE FILING

(Issued April 21, 2011)

1. On September 30, 2010, Kern River Gas Transmission Company (Kern River) filed revised tariff records<sup>1</sup> to comply with the Commission's August 6, 2010 order<sup>2</sup> in Docket No. RP10-160-000, *et al.* pertaining to reservation charge credits. Kern River proposes to include a new section 9 under its firm transportation Rate Schedule KRF-1, to be effective December 1, 2010, to provide for reservation charge credits for shippers receiving service in the event of a non-delivery by Kern River within a firm shipper's entitlement. For the reasons set forth below, the Commission rejects the proposed tariff records listed in footnote No. 1, and directs Kern River to file tariff records as directed below, to be effective December 1, 2010.

**Background**

2. On December 18, 2009, the Commission issued an order<sup>3</sup> in Docket No. RP10-160-000 in response to Kern River's November 19, 2009 filing finding that Kern River's tariff did not contain a consistent method for crediting the reservation charge, and that firm Rate Schedule KRF-1 did not contain any such provision. The order concluded,

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<sup>1</sup> Sheet No. 26, Rate Schedule KRF-1, KR Firm Transportation Services, 1.0.0; Sheet Nos. 27-29, , 0.0.0; Sheet No. 138, GT&C Force Majeure, 1.0.0; Sheet No. 301, Firm Transportation Service Agreement KRF-1, 1.0.0; to Gas Tariff, FERC NGA Gas Tariff.

<sup>2</sup> *Kern River Gas Transmission Co.*, 132 FERC ¶ 61,111 (2010) (August 6 Order).

<sup>3</sup> *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,262 (2009) (December 18 Order).

“Commission policy requires that pipelines provide full reservation charge credits for all scheduled gas not delivered due to a non-*force majeure* event and partial reservation charge credits during *force majeure* events.”<sup>4</sup> Accordingly, the Commission required Kern River to file revisions to its tariff to provide such credits in conformance to Commission policy, or explain why it should be exempted from this requirement.<sup>5</sup>

3. On January 19, 2010, Kern River filed a request for rehearing of the December 18 Order, arguing that the Commission should not have taken any action on the reservation charge credit issue since it was not part of Kern River’s November 19, 2009 filing. Kern River also submitted a response, explaining why it should not have to make the ordered change. Kern River argued that it should not be required to file uniform tariff revisions providing for crediting firm service reservation charges during periods of curtailment for a number of reasons including that: (1) Kern River entered into 17 firm Transportation Service Agreements (TSA) with prospective shippers and many of these contracts which contain individually negotiated provisions regarding reservation charge credits have been brought forward to the existing tariff in specified Rate Schedules, and these TSAs are provided as collateral to its lenders because Kern River is a project-financed pipeline; (2) the Commission already approved language in Rate Schedule in KRF-1 allowing Kern River and its shippers to negotiate reservation charge credits; (3) any changes to reservation charge credits should be handled in a general rate case proceeding filed pursuant to section 4 of the Natural Gas Act (NGA); and (4) reservation charge credits during non-*force majeure* events may unduly advantage Kern River’s shippers since the pipeline may have kept them whole if they were able to schedule at alternate points.

4. The August 6 Order denied Kern River’s request that the Commission not address the reservation charge credit issue in this proceeding for the same reason set forth in the December 18 Order. The Commission permitted Kern River to continue to include varying provisions related to reservation charge credits in Rate Schedules CH-1, UP-1, MO-1 and SH-1 to Kern River’s tariff, since these rate schedules reflect the result of individually negotiated contracts. However, the Commission also found that Kern River’s response did not dispute that Kern River’s firm Rate Schedule KRF-1 does not contain any provision for granting shippers reservation charge credits during periods of curtailment. Thus, the Commission acted under NGA section 5 to require that Kern River revise Rate Schedule KRF-1 to include such a provision consistent with Commission policy.<sup>6</sup> Accordingly, the Commission required Kern River to modify

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<sup>4</sup> *Id.* P 22.

<sup>5</sup> The order also addressed other parts of Kern River’s filing, but these matters are not relevant to the instant proceeding.

<sup>6</sup> August 6 Order, 132 FERC ¶ 61,111 at P 17.

Rate Schedule KRF-1 consistent with Commission policy that requires pipelines to provide full reservation charge credits for all scheduled gas not delivered due to a non-*force majeure* event and partial reservation charge credits during *force majeure* events. The Commission also noted that it has approved two different methods for providing a partial reservation charge credit. The first method is the Safe Harbor Method where shippers are entitled to a full credit of applicable reservation charges incurred after the curtailment has been in effect for a specified time period, i.e., 10 days or less. The second is the No-Profit Method where starting on day one of the curtailment, shippers receive a partial reservation charge credit (i.e. the shippers are credited an amount equal to the portions of the reservation charge that reflect the pipeline's return on equity and associated income taxes). The Commission stated that it would not direct which partial credit method Kern River should choose.

5. Kern River did not seek rehearing of the August 6 Order's requirement that it modify Rate Schedule KRF-1 consistent with the policy set forth in that order.

### **Instant Filing**

6. Kern River proposes to add a new section 9 titled "Reservation Charge Adjustments" to its existing firm transportation Rate Schedule KRF-1. Kern River explains that the new section is similar to the reservation charge credit provisions negotiated with customers and accepted by the Commission as part of many of Kern River's firm transportation agreements. Kern River states<sup>7</sup> that nine contracts for service under Rate Schedule KRF-1 include individually negotiated reservation charge credit provisions which differ from the Commission's reservation charge crediting policy and that the Commission has accepted those contracts.

7. As noted above, Commission policy requires different crediting for *force majeure* outages and non-*force majeure* outages, and permits a choice of how to credit in the *force majeure* event. Kern River's proposal does not distinguish between the two situations. Kern River states that new section 9 in Rate Schedule KRF-1 provides for a Safe Harbor for the first 30 consecutive days of non-delivery and then adopts the No-Profit Method by a reduction in, or credit to reservation charges beginning on day 31 of any event that causes an inability to deliver the shipper's confirmed and scheduled firm quantity. The proposed reservation charge credit the shipper will receive will be equal to the portion of the reservation rate associated with Kern River's average return on equity and associated federal and state income taxes. Kern River states that this will still allow it to recover in the reservation charge principal and interest on Kern River's project-financed debt. Kern River states that the reservation charge credit will apply to scheduled quantities that Kern River is unable to deliver, up to a shipper's Total

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<sup>7</sup> Kern River Letter of Transmittal at p. 2, n. 3.

Maximum Daily Quantity (TMDQ). The shipper's credit shall continue until Kern River is again able to deliver the shipper's scheduled quantity. Kern River states that the reservation charge credit will not apply to: (1) quantities in excess of shipper's TMDQ; (2) nominations using alternate receipt and/or delivery points; (3) nominations not submitted by shipper and confirmed by upstream and downstream parties in accordance with the North American Energy Standards Board (NAESB) timelines; or (4) a shipper that has an individually negotiated reservation charge credit provision in its TSA. Finally, Kern River proposes to make reference to its reservation charge credit in its *force majeure* tariff provisions and in its *pro forma* service agreement applicable to Rate Schedule KRF-1.

8. Kern River states that the proposed reservation charge credit provision takes into consideration Kern River's need to protect its lenders from default in payment of Kern River's project financing. Kern River explains that this provision reflects the operation of Kern River's long-haul pipeline that operates at a high load factor with no access to storage, and few receipts from other interstate and intrastate pipelines that could assist with maintaining service during potential outages. Kern River states that its proposed reservation charge credit provision ensures that Kern River will have a reasonable amount of time to perform maintenance activities without being placed in a position of potentially not recovering its cost-of-service. Kern River concludes that while its reservation charge credit provision to Rate Schedule KRF-1 differs in substantial part from the Commission's general policy for reservation charge credits, the Commission should approve its proposal since: (1) Kern River has a record for outstanding reliability; (2) Kern River has regularly expanded its interstate pipeline system (with accompanying outages) without complaint; (3) the Commission has previously approved Kern River's provisions that differ from the Commission's standard policy; and (4) Kern River has demonstrated its ability to perform maintenance with little or no interruption to service.

### **Notice , Protests and Answer**

9. Public notice of the filing was issued on October 4, 2010. Interventions and protests were due on or before October 12, 2010. Rolled-In Customer Group (RCG),<sup>8</sup>

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<sup>8</sup> Rolled-In Customer Group includes Aera Energy LLC, Anadarko E&P Company LP and Anadarko Petroleum Corporation, Chevron USA Inc. (on its own behalf and on behalf of Nevada Cogeneration Associates #1 and #2), Occidental Energy Marketing Inc., Shell Energy North America (US) LP, and Williams Gas Marketing Inc.

BP Energy Company (BP), and Nevada Power Company (NVE) filed timely protests.<sup>9</sup> Pursuant to Rule 214, 18 C.F.R. § 385.214 (2010), 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 will not disrupt this proceeding or place additional burdens on existing parties. Kern River requested waiver of the Commission's regulations to permit it to file an answer to the protests, which the Commission will grant and accept the answer since it clarifies the issues in this proceeding.

10. RCG and BP state that Kern River's proposed reservation charge credit provision violates Commission precedent on reservation charge crediting, including the Commission's December 18 Order and August 6 Order requiring Kern River to comply with Commission policy. RCG and BP explain that the Commission's policy on reservation charge credits requires pipelines to provide full reservation charge credits during curtailments of firm service for non-*force majeure* events and partial reservation charge credits determined by either the Safe Harbor Method or the No-Profit Method during *force majeure* events, and contend that Kern River's proposal violates both aspects of the Commission's policy. RCG asserts that for non-*force majeure* events, Kern River's proposal does not provide any credit for the first 30 days and then only provides partial reservation charge credits equal to the return on equity and associated income taxes portion of its recourse rate. RCG requests that the Commission require Kern River to implement full reservation charge crediting for all flow days affected by non-*force majeure* events.

11. RCG states that the only new arguments Kern River raised in the instant filing is that the proposal: (1) provides Kern River with a reasonable amount of time to perform maintenance activities without being placed in a position of potentially not recovering its cost-of-service; and (2) ensures that maintenance occurs as needed to maintain system integrity with minimal or no service disruption. RCG contends that these arguments do not support waiver of the Commission's policy on reservation charge credits. RCG cites to *El Paso Natural Gas Company* where the Commission held that the imposition of reservation charge credits for curtailments of firm service during non-*force majeure* events (e.g. scheduled maintenance) is entirely consistent with the Commission's goal of establishing reliable service.<sup>10</sup>

12. Kern River responds that the Commission should adopt its reservation charge credit proposal based on the particular circumstances of Kern River's system. Kern River

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<sup>9</sup>RCG and NVE each adopt the protest of the other in addition to filing their own protest.

<sup>10</sup> *El Paso Natural Gas Company*, 105 FERC ¶ 61,262, at P 15 (2003) (*El Paso*).

states that its proposed provision provides the best balance of the needs of its customers, its obligations to its lenders, and specific system operational needs. Kern River contends that it has justified a variation from the Commission's general policy. Kern River also agrees to submit new language to address the concern by RCG that section 9.3 may render section 9 meaningless. Kern River's responses to certain other issues are addressed below.

### **Discussion**

13. In the December 18 Order, the Commission required Kern River to either modify its tariff consistent with Commission policy on reservation charge credits or explain why it should be exempted from that policy. In the August 6 Order, the Commission accepted Kern River's explanation that it should not be required to modify its rate schedules reflecting individually certificated contracts. However, the Commission rejected its explanation with respect to Rate Schedule KRF-1, and the Commission accordingly ordered Kern River, pursuant to NGA section 5, "to modify Rate Schedule KRF-1 consistent with Commission policy that requires that pipelines provide full reservation charge credits for all scheduled gas not delivered to a non-*force majeure* event and partial reservation charge credits during force majeure events."<sup>11</sup> Kern River did not seek rehearing of the Commission's section 5 action in the August 6 Order. Therefore, the only issue before us now is whether Kern River has complied with the requirements of the August 6 Order. As discussed below, the Commission finds that Kern River has not complied with the August 6 Order.

#### **A. Force Majeure Outages**

14. As the Commission stated in the August 6 Order the Commission requires pipelines to provide partial reservation charge credits during *force majeure* events.<sup>12</sup> The order referred to the two different Commission-approved methods for providing a partial reservation charge credit in the *force majeure* situation, the Safe Harbor Method and the No-Profit Method, described *supra* P 4, and stated that the Commission would not direct which partial credit method Kern River should choose.

15. RCG and BP state that for *force majeure* events, Kern River's proposal is a hybrid of the two methods, consisting of a 30-day Safe Harbor period where no credit is due, and then a partial no-profit credit. They argue that the 30-day period exceeds the 10-day time

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<sup>11</sup> August 6 Order, 132 FERC ¶ 61,111 at P 17.

<sup>12</sup> *Id.*

period the Commission has approved in other proceedings.<sup>13</sup> Moreover, Commission policy provides that the partial credit under the No-Profit Method applies to the entire period of curtailment, and there is no Safe Harbor period. RCG and BP contend that Kern River has cherry picked the more favorable aspects of the Safe Harbor and No-Profit Methods. RCG states that the Commission in its August 6 Order required Kern River to choose either the Safe Harbor Method or the No-Profit Method, but not a hybrid version that places all of the risk of curtailment on Kern River's shippers.<sup>14</sup> RCG requests that the Commission require Kern River to implement the No-Profit Method for partial reservation charge credits for curtailments due to *force majeure* events.

16. Protestors are correct that Kern River's proposed Rate Schedule KRF-1, section 9 is contrary to the Commission's reservation charge crediting policy concerning *force majeure* events, and thus Kern River's proposal does not comply with the Commission's directive in the August 6 Order that Kern River modify Rate Schedule KRF-1 consistent with Commission policy. Kern River proposes in section 9 of Rate Schedule KRF-1 that for events including but not limited to *force majeure* outages, there will be no reservation charge credit for days 1 through 30, and then for days 31 and thereafter, only a partial reservation charge credit equal to the return on equity and income taxes portion of its recourse rate. Kern River's proposal is a hybrid of the Safe Harbor Method and the No-Profit Method, complies with neither, and clearly is not consistent with Commission policy that requires an appropriate partial credit for *force majeure* outages.

17. Kern River's proposal is similar to the one the Commission rejected in *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005). There the pipeline proposed that shippers would receive no refund for the first ten days of a *force majeure* interruption, and after that ten days period, the shippers would receive a percentage refund for each additional day the pipeline was out of service. The Commission rejected the proposed formula as inconsistent with Commission policy since it combined the pipeline-favorable aspects of the two methods. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's policy that the risks of any *force majeure*-induced service disruptions should be "equitably" shared by the pipeline and its shippers.<sup>15</sup> The court held that both sharing methods approved by the Commission "incorporate a careful balancing of risk between shippers and pipelines," and therefore the Commission reasonably required the pipeline to choose one of those methods or

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<sup>13</sup> RCG cites to *Tuscarora Gas Transmission Co.*, 123 FERC ¶ 61,109, at P 11 (2008).

<sup>14</sup> RCG cites to the August 6 Order, 132 FERC ¶ 61,111 at P 17.

<sup>15</sup> *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007) (*North Baja*).

propose another “formula that achieves an equitable cost-sharing in the same ballpark” as the two approved methods.<sup>16</sup> The court upheld the Commission, stating “[t]here is nothing unreasonable about the Commission comparing North Baja’s proposal to previously-approved policies to determine if the proposal equitably shares the risk between North Baja and its shippers.”<sup>17</sup> Moreover, the court pointed out that the Commission had stated that it “remains open to other approaches that achieve a similar sharing of the risk as the two previously approved policies.”<sup>18</sup>

18. Kern River concedes that its proposed section 9 of Rate Schedule KRF-1 pertaining to reservation charge credits differs in substantial part from the Commission’s general policy for reservation charge credits.<sup>19</sup> Kern River explains that section 9 is modeled on the reservation charge credit provisions previously negotiated with customers and accepted by the Commission as part of many of Kern River’s firm transportation agreements. While as discussed below the Commission permits individual shippers to negotiate reservation charge crediting provisions in their particular service agreements which vary from Commission policy and the pipeline’s generally applicable tariff, such individually negotiated agreements do not justify Kern River’s failure to modify its generally applicable Rate Schedule KRF-1 consistent with Commission policy, as required by the August 6 Order. Kern River must provide for partial reservation charge credits during *force majeure* events based either on the Safe Harbor Method or the No-Profit Method, but not a hybrid of the most pipeline-favorable aspects of each method, as it did in the compliance filing. Kern River may also propose a different approach than either of these methods, so long as it “achieves an equitable cost sharing in the same ballpark as” these methods.<sup>20</sup>

#### **B. Non-Force Majeure Outages**

19. As the Commission stated in the August 6 Order, Commission policy requires pipelines to provide full reservation charge credits for all scheduled gas not delivered due to a non-*force majeure* event. However, in its compliance filing, Kern River proposes to provide the same partial credits during non-*force majeure* outages, as it proposes to provide during *force majeure* periods. Thus, Kern River’s proposal provides for a 30-day

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<sup>16</sup>*Id.* at 822.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> September 30, 2010 Filing at p. 4.

<sup>20</sup> *North Baja*, 483 F.3d at 822.

Safe Harbor period where no credits would be due the shipper, and thereafter it would provide partial credits. In support of that position, Kern River states that its proposal “provides Kern River with a reasonable amount of time to perform maintenance activities without placing it in a position of potentially not recovering its prudently-incurred cost of service.”<sup>21</sup> Kern River argues that while the Commission has required reservation charge credits for outages due to scheduled maintenance, its situation is different. Kern River asserts that RCG’s reliance on *El Paso*, *supra* P 10, is misplaced. There, it asserts, the Commission denied El Paso’s proposal for less than full reservation charge credits for planned maintenance as an incentive for El Paso to provide reliable firm service. Kern River contends that its situation is distinguishable from the Commission’s holding in *El Paso* because Kern River has always provided reliable firm service and, unlike El Paso, does not set aside capacity for system management.

20. The Commission finds no merit in Kern River’s contention. Commission policy is clear and consistent that scheduled maintenance is not a *force majeure* event and full reservation credits are due the shipper during all non-*force majeure* outages, including periods of scheduled maintenance. The full credit applies “even to pipelines with little or no excess capacity.”<sup>22</sup>

21. The Commission explained its position in Opinion No. 406,<sup>23</sup> stating:

[b]ecause a pipeline is responsible for operating its system so that it can meet its contractual obligations, if the pipeline must curtail firm service due to an event within its control, or management, the Commission finds it inequitable for the pipeline’s customers to bear the risk associated with such mismanagement.

22. In *North Baja*, the pipeline appealed the Commission’s rejection of its argument that since it operated at full capacity, like Kern River argues here, scheduled maintenance should be considered a *force majeure* event. The court upheld the Commission’s long-standing policy that *force majeure* events are “events that are not only uncontrollable, but also unexpected.”<sup>24</sup> The court held that, while some scheduled maintenance interruptions may be “uncontrollable” on a system operating at full capacity, they are not

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<sup>21</sup> *Id.* p. 3.

<sup>22</sup> *El Paso*, 105 FERC at 62,350.

<sup>23</sup> *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,086 (1996), *reh’g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997).

<sup>24</sup> *North Baja*, 483 F.3d at 823.

“unexpected.” The court concluded that “there is nothing unreasonable about FERC’s policy that pipelines’ rates should incorporate costs associated with a pipeline ‘operating its system so that it can meet its contractual obligations,’ and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service.”<sup>25</sup>

23. Therefore, the Commission finds that consistent with its August 6 Order and Commission precedent,<sup>26</sup> Kern River must provide full reservation charge credits for all scheduled gas not delivered to shippers due to a non-*force majeure* event, including outages during scheduled maintenance.<sup>27</sup>

### C. Nominations

24. BP requests guidance from the Commission in the situation where a shipper whose nomination has been cut during the Timely Nomination Cycle and the shipper has then nominated service on an alternate pipeline.<sup>28</sup> BP urges that the shipper should not be required to re-submit a nomination in the remaining nomination cycles in order to receive a reservation charge credit. BP states that this clarification has been granted with regard to other pipeline systems.

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<sup>25</sup> *Id.*

<sup>26</sup> See also *Tuscarora Gas Transmission Co.*, 123 FERC ¶ 61,109, at P 10 (2008), and *Central Kentucky Transmission Co.*, 114 FERC ¶ 61,170, at P 31 (2006).

<sup>27</sup> In a contemporaneous order, the Commission finds that, when a pipeline has given advance notice of an outage or scheduled maintenance before shippers have submitted scheduling nominations for the day (or days) of the outage, it may calculate the reservation charge credits based on an appropriate historical average of usage during an immediately preceding period as a substitute for use of actual scheduled amounts. *Southern Natural Gas Company*, Docket No. RP11-60-001. However, when a pipeline has not given such advance notice of an outage, the reservation charge credit must be based on the scheduled amount not delivered. In its compliance filing, Kern River may propose to determine reservation charge credits during non-*force majeure* periods consistent with this policy.

<sup>28</sup> The 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 1 (10 a.m. CCT the day of gas flow); and Intra-Day 2 (5 p.m. CCT the day of gas flow).

25. Kern River states that the Commission should reject BP's request to require Kern River to provide reservation charge credits to a shipper whose volume was cut after the Timely Nomination Cycle, even though the shipper had not submitted a nomination in the remaining cycles. Kern River states that when it is able to cure any delivery issue within the gas day, there is no reason for any credit. Kern River states that in the August 6 Order the Commission required Kern River to provide credits only in situations where the scheduled gas had not been delivered. Thus, where Kern River could have delivered the gas later in the gas day, no credit should be due under the Commission ruling. Kern River contends that the provision requested by BP would allow the shipper to game the system and would cause factual disputes that would be difficult to resolve.

26. The Commission's policy on this issue is, as BP contends, set forth in *Wyoming Interstate Company, Ltd.*<sup>29</sup> There, the Commission stated that, in the limited case where a shipper whose nominated amount is curtailed by the pipeline in the Timely Nomination Cycle (Cycle 1) nominates on another pipeline, it need not re-submit its nomination in the Evening cycle to receive the reservation charge credit. However, if a shipper does not nominate on another pipeline after it is curtailed in the Timely Cycle, the pipeline may, as a means of preventing gaming, require the shipper to re-submit its nomination through the Evening Nomination Cycle (Cycle 2) in order to receive reservation charge credits. It need not resubmit its nominations through the Intra-Day Cycles (Cycles 3 and 4). If the shipper subsequently uses more capacity on the pipeline in the Intra-Day Cycles (Cycles 3 and 4), its credits may be appropriately reduced. Therefore, with regard to this issue, the Commission finds that Kern River must provide for reservation charge credits consistent with *WIC*.

#### **D. Alternate Receipt and Delivery Points**

27. NVE and RCG protest Kern River's proposal in section 9.2(b) of Rate Schedule KRF-1 to deny reservation charge credits to nominations using alternate receipt and/or delivery points. NVE contends that this restriction would deny credits to firm customers even though their nominations using non-primary points were confirmed (scheduled) by Kern River. NVE states that this restriction is contrary to Commission policy that reservation charge credits shall be provided when the pipeline fails to deliver any nominated and confirmed (scheduled) volumes under certain circumstances. NVE states that this Commission policy was reflected in the Commission's August 6 Order in which Kern River was required to modify Rate Schedule KRF-1 to provide reservation charge credits for all scheduled gas not delivered.<sup>30</sup>

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<sup>29</sup> *Wyoming Interstate Company, Ltd.*, 130 FERC ¶ 61,091, at P 17 (2010) (*WIC*).

<sup>30</sup> NVE cites to the August 6 Order, 132 FERC ¶ 61,111 at P 17.

28. Kern River asserts there is no merit to NVE's request that Kern River must provide reservation charge credits when gas scheduled at alternate receipt and delivery points is not delivered. Kern River states that cases cited by NVE do not support its claim and Commission policy provides that there is no credit for curtailment at the secondary point. Kern River states that the tariff provisions subsequently approved by the Commission in *Rockies Express* do not support NVE's claims. Kern River refers to Rockies Express Pipeline's tariff which states "the applicable reservation charges shall be eliminated for the quantity of gas nominated but not scheduled for delivery by Transporter at primary delivery points within the shipper's firm daily quantity under the contract; provided, however, that these charges shall not be eliminated to the extent shipper uses secondary point service."<sup>31</sup> Kern River argues that NVE's position is not logical in that Kern River is contractually obligated to receive and deliver firm quantities within the shipper's maximum daily quantity at the shipper's primary firm delivery points, not at any secondary point.

29. Commission policy concerning reservation credits are related to primary firm service, not secondary service or the scheduling priority of such service.<sup>32</sup> The Commission's reservation charge crediting policy requirement is directed to the pipeline's responsibility to meet its contractual obligation to the shipper, and the firm shipper is guaranteed a firm right to delivery only at its primary points. Therefore, with regard to this issue, the Commission finds that Kern River's proposal that it need not

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<sup>31</sup> Kern River cites to Sheet No. 139 of Rockies Express Pipeline's tariff.

<sup>32</sup> See *Tennessee Gas Pipeline Co.*, 73 FERC ¶ 61,083, at 61,206 (1995), where that Commission stated that:

A shipper pays reservation charges based on primary points not on secondary points. The secondary rights to delivery points are based on Commission regulations and are by definition inferior to primary point [footnote omitted] rights. The reservation charge a customer pays is based on its contract with the pipeline for receipt and delivery of gas at particular primary points, and corresponding reservation charge credits should ordinarily be given when the pipeline fails to provide service to those particular points. The contract does not guarantee the same level of security if other points are used; rather the Commission's regulations require [a pipeline] to provide service to those other points if it can. If a customer wants to be able to receive reservation charge credits for service at a particular point, then that customer should reserve that point as a primary point.

provide for reservation charge credits for curtailed volumes at secondary points is acceptable.

**E. Individually Negotiated Firm Rate Agreements Under Rate Schedule KRF-1**

30. RCG objects to Kern River's proposed tariff language permitting it to negotiate with individual Rate Schedule KRF-1 shippers to include in their service agreements reservation charge crediting provisions different from the generally applicable provision being added to Rate Schedule KRF-1. The proposed tariff language would be included in both Rate Schedule KRF-1 and Article 7.2 of the General Terms and Conditions (GT&C) of Kern River's tariff. RCG asserts that while the Commission accepted Kern River's explanation for maintaining the individually negotiated reservation charge crediting language for Rate Schedules CH-1, UP-1, MO-1, and SH-1, the Commission expressly rejected Kern River's explanation for maintaining individually negotiated reservation charge crediting language for Rate Schedule KRF-1 contracts.<sup>33</sup> RCG requests that the Commission require Kern River to remove references to individually negotiated reservation charge crediting language under Rate Schedule KRF-1. Finally, RCG takes issue with the language proposed by Kern River in section 9.3 of Rate Schedule KRF-1. The proposed language states that nothing in this section shall relieve Transporter or shipper from its obligations due and owing before the onset of the inability to make deliveries. RCG requests that the Commission require Kern River to clarify that this provision is not meant to render the remainder of section 9 meaningless.

31. Kern River states that there is no basis for the protesting parties' attempts to abrogate the contracts at issue. Kern River states that the Commission should not force Kern River to make the new crediting provisions applicable to Rate Schedule KRF-1 contracts that already contain an individually negotiated crediting provision particularly since the Commission has approved those contracts. Kern River asserts that the Commission did not make a finding in the August 6 Order that Rate Schedule KRF-1 contracts that contain individually negotiated reservation charge credit provisions that may differ from Commission policy must be changed. Kern River states that many of the intervenors and protesting parties in this proceeding have either "self-contained" contracts or "vintage" contracts that include a reservation charge credit provision that the Commission has accepted dating back to Kern River's optional certificate proceeding. Kern River's table on page 6 of its answer lists the vintage contracts under which BP, NVE and other shippers take service under Rate Schedule KRF-1, and the section of the contracts that address the individually negotiated reservation and demand charge credit provisions.

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<sup>33</sup> RCG cites the August 6 Order, 132 FERC ¶ 61,111 at P 17.

32. In the August 6 Order, the Commission found that Kern River can continue to include varying provisions related to reservation charge credits in Rate Schedules CH-1, UP-1, MO-1, and SH-1 to Kern River's tariff, since these rate schedules reflect the result of individually negotiated contracts. Similarly, Kern River has shown that it has individually negotiated rate contracts under Rate Schedule KRF-1, which include reservation charge credit provisions that may differ from Commission policy. Kern River has provided a table in its answer that lists the name of the shipper, some of whom are protesters here, the contract number, and section of the contract that includes the negotiated reservation and demand charge provision.

33. These contracts had their origin when Kern River commenced operation in 1990, and included provisions for Monthly Reservation Charge Adjustments. In 2009, Kern River submitted to the Commission the active amendments to these contracts to ensure compliance with the Commission's order in *Southern Star*, 125 FERC ¶ 61,082 (2008). The Commission accepted the filing by order issued April 30, 2009 in Docket No. RP09-503-000. Kern River's proposal in section 9.2(d) is that the reservation charge credit will not apply to "a shipper that has individually-negotiated reservation charge adjustment provisions in its Transportation Service Agreement." Since the Commission has accepted these contracts, the Commission will not require any change to them. However, any new contracts under Rate Schedule KRF-1 must follow the Commission's reservation charge crediting policy, unless Kern River and the shipper agree to a provision that deviates from Rate Schedule KRF-1 as revised in this proceeding and Kern River files the service agreement containing the material deviation for Commission approval.

The Commission orders:

(A) Kern River's tariff records listed in footnote No. 1 are rejected.

(B) Kern River is required to file revised tariff records within 20 days of the issuance of this order that comply with the Commission's August 6 Order and this order as discussed herein.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.