137 FERC ¶ 61,202
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company — Docket Nos. RP11-2061-001 and RP11-2061-000

ORDER ON REHEARING

(Issued December 15, 2011)

1. On June 16, 2011, the Commission issued an order[1] addressing Northern Natural Gas Company's (Northern) April 29, 2011 tariff filing. Indicated Shippers had filed comments requesting the Commission require Northern to revise its tariff to be consistent with the Commission's policy on reservation charge crediting. The June 16 Order directed Northern to revise its tariff "so that it is consistent with Commission policy with respect to non-*force majeure* situations, unless it can show why it should not be required to do so."[2] However, the June 16 Order did not require Northern to revise its tariff to provide reservation charge credits during *force-majeure* events, as Indicated Shippers had requested. On July 18, 2011, Northern filed its response, contending it should not be required to make the revision, and Indicated Shippers filed a request for rehearing on the *force-majeure* ruling. The Commission grants Indicated Shipper's request for rehearing, and requires Northern to implement reservation charge crediting provisions consistent with Commission policy as to both *force majeure* and non-*force majeure* events, as discussed below.

Background

2. On April 19, 2011, Northern filed to revise its new Market Area Winter fuel percentages to be effective November 1, 2011. On May 11, 2011, Indicated Shippers filed comments, requesting that the Commission require Northern to comply with the

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[1] *Northern Natural Gas Co.*, 135 FERC ¶ 61,250 (2011) (June 16 Order).

[2] *Id.* P 18.

Commission's findings in *NGSA*[3] relating to the Commission's policy on reservation charge crediting. The June 16 Order accepted Northern's proposed Market Area Winter fuel percentages. However, the Commission rejected Northern's contention that the reservation charge crediting issue should not be addressed in this limited section 4 proceeding in which Northern did not propose any tariff changes related to reservation charge credits. The Commission found, pursuant to NGA section 5, that certain of Northern's existing tariff provisions concerning reservation charge crediting were inconsistent with the Commission's policy concerning reservation charge credits.

3. In general, Commission policy requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event[4] in order to share the risk of an event for which neither party is responsible. With respect to non-*force majeure* outages, where the curtailment occurred due to circumstances within a pipeline's control, including scheduled maintenance, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.[5] In *North Baja Pipeline, LLC v. FERC*,[6] the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

4. Section 7 of Northern's General Terms and Conditions (GT&C) tariff requires Northern to provide reservation charge credits only when "the failure to deliver or receive gas is caused by negligence on the part of Northern . . . ." The June 16 Order determined that section 7 was not consistent with Commission policy requiring full reservation charge credits in non-*force majeure* situations. The order directed Northern to modify its tariff consistent with Commission policy unless Northern can show why it should not be required to do so. However, the order determined that when there is a *force majeure*

[3] *Natural Gas Supply Ass'n, et al.*, 135 FERC ¶ 61,055 (2011) (*NGSA*).

[4] *Force majeure* events are "events that are not only uncontrollable, but also unexpected." *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,088 (1996).

[5] *See, e.g.*, Opinion No. 406, 76 FERC ¶ 61,022, *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*).

[6] *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007) (*North Baja*), *affg, North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005).

situation Northern is not required to modify section 7 to grant partial reservation charge credits. The Commission found that in that situation because Northern allocates some fixed costs to its usage charge, it already shares the risk of *force majeure* outages by not collecting the fixed costs included in the usage charge.

5. On July 18, 2011, Indicated Shippers filed a request for rehearing to require Northern to grant partial reservation charge crediting during *force majeure* events, and Northern filed an explanation why Commission policy with respect to non-*force majeure* situations should not be applied to Northern in this proceeding.

A. Indicated Shippers' Request for Rehearing

1. The Rehearing Request

6. Indicated Shipper's argue that by not requiring Northern to modify its tariff in *force-majeure* situations the Commission failed to follow its reservation charge crediting policy, which requires an equitable apportionment of the risk of curtailment during *force majeure* situations.[7]

7. Indicated Shippers state that Commission policy during *force majeure* situations requires pipelines to provide partial reservation charge credits for curtailed services, using either the "No-Profit" method, or the "Safe Harbor"[8] method, or "any other method provided it results in the same type of risk-sharing as the two approved methods do."[9] Indicated Shippers state that in *NGSA* the Commission recognized that where the pipeline's usage charge contains fixed costs the pipeline is not required to grant partial reservation charge credits in the *force majeure* event because the pipeline was already bearing an equitable portion of the risk associated with curtailed services.[10] Indicated Shippers argue that this is not the case here because there is no evidence that Northern's usage rates contain any fixed costs, under the express terms of the RP03-398/RP04-155

[7] *See NGSA*, 135 FERC ¶ 61,055 at P 16-18.

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

[9] *NGSA*, 135 FERC ¶ 61,055 at P 16.

[10] *Id.* at n.16 (citing, Opinion No. 406-A, 80 FERC at 61,200).

settlement Northern relied upon.[11] Indicated Shippers assert that that settlement was a black box settlement which did not specify which costs were included in the usage rates.

8. Indicated Shippers further argue that, even if the Commission did accept Northern's position that some fixed costs were included in its currently effective usage rates, the Commission should still require Northern to implement partial reservation charge crediting for curtailments during *force majeure* situations. Indicated Shippers assert that the $16 million allegedly allocated to the usage charge represents only three percent of the approximately $178 million cost of service set forth in the settlement that Northern refers to. This amount of costs included in the usage rates does not equitably apportion the risk of curtailments during a *force majeure* situation. Indicated Shippers state that the June 16 Order relied on Opinion No. 406-A[12] for its ruling that partial credits need not be given in the *force-majeure* event when a pipeline uses a non-SFV rate design. Indicated Shippers argue that Opinion No. 406-A was based upon the fact that the pipeline's usage/commodity rates contained $79 million of transmission fixed costs, which were approximately 12 percent of its transmission cost of service.[13] Indicated Shippers assert that here, where only three percent of the fixed costs are included in the usage rates, the ruling in Opinion No. 406-A should not apply. Indicated Shippers contend that the approximately three percent of fixed costs that Northern stated was included in its usage rates does not equitably apportion the risk of curtailments during a *force majeure* situation in a manner similar to the risk assumed by the pipeline in Opinion No. 406-A.

9. Indicated Shippers further contend that since Northern's return on equity and associated taxes are approximately $190,000,000 annually, the $16 million costs in the usage rates, represent approximately 8.4 percent of that amount.[14] Indicated Shippers argue that if Northern were required to implement the "No-Profit" method, where the reservation charge credits would be the return on equity and income taxes portion of the rates, the amount of risk Northern would assume would be substantially greater than the $16 million that Northern argued was included in its usage charges. Accordingly, the Commission should grant rehearing, and require Northern to grant reservation charge credits for *force majeure* outages.

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[11] *Northern Natural Gas Co*., 111 FERC ¶ 61,444 (2005).

[12] Opinion No. 406-A, 80 FERC at 61,200.

[13] *Id*.

[14] Rehearing Request at n.16.

2. Northern's Answer

10. On August 2, 2011, Northern filed an answer to the request for rehearing filed by the Indicated Shippers. Rule 713 (d) (1) of the Commission's regulations 18 C.F.R. § 385.713(d)(1) (2011) does not permit answers to requests for rehearing. However, the Commission will accept the answer in this case, since Northern's answer clarifies the record, and therefore its acceptance will expedite our resolution of the issues in this section 5 proceeding, where any action we take must be prospective only.

11. Northern states that it has been utilizing a non-SFV rate design methodology since its rate case settlement in Docket No. RP98-203-000, in which $16 million of fixed costs were included in the usage rates.[15] Northern further argues that this rate design has been continued in each of Northern's subsequent rate cases, including Northern's most recent proceeding in Docket No. RP04-155-000.

12. Northern further disputes Indicated Shippers' contention that Northern is not sharing the risk of recovering fixed costs during the instances of *force majeure*. Northern states that if volumes do not flow during a *force majeure* event, then Northern does not recover the fixed costs included in the usage rates.

3. Commission Determination

13. We find that Northern's rate design does allocate $16 million of fixed costs to the usage rate. However, Northern does not dispute that this represents only three percent of the cost of service under the settlement it refers to. We agree with Indicated Shippers that in these circumstances Northern's tariff does not equitably apportion the risk of curtailments during a *force majeure* situation, and will grant rehearing.

14. As the Commission explained in *NGSA*,[16] f*orce majeure* outages are no-fault occurrences because they are unexpected and uncontrollable events. Since no blame can be ascribed to either party, the Commission's policy is that both the pipeline and its customer should share the risk equitably.[17] Before Order No. 636, and the Commission's requirement that pipelines use the straight fixed variable (SFV) rate design, the risk of a

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[15] *Northern Natural Gas Co.*, 87 FERC ¶ 61,321 (1999).

[16] *NGSA*, 135 FERC ¶ 61,055 at P 16.

[17] Opinion No. 406, 76 FERC at 61,088-9, *reh'g*, Opinion No. 406-A, 80 FERC ¶ at 61,199. *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 at P 14, *order on reh'g*, 111 FERC ¶ 61,101 at P 11, *aff'd, North Baja*, 483 F.3d at 822-23.

force majeure interruption was automatically shared between the pipeline and the shippers. A non-SFV rate design places some portion of the pipeline's fixed costs in the usage charge. For example, under the Modified Fixed Variable (MFV) generally being used before Order No. 636, the pipelines' return on equity and associated income taxes were recovered in the usage charge. Thus, in the event of an interruption in service due to *force majeure*, the pipeline would be at risk for the fixed costs included in the usage charge since there would be no volumes on which to assess the usage charge, but the shipper would continue to be responsible for the reservation charge during curtailment. However, under an SFV rate design, the pipeline does not share any risk when volume is curtailed because all of its fixed costs are included in the reservation charge, which the pipeline still receives, even when there is curtailment.

15. After Order No. 636, the Commission first addressed the issue of how to accomplish a sharing of the risk of *force majeure* service interruptions on pipelines with an SFV rate design in Opinion No. 406 involving *Tennessee Gas Pipeline Co.* (*Tennessee*).[18] At the time of Opinion No. 406, Tennessee had shifted to an SFV rate design as required by Order No. 636, yet its tariff still contained a provision excusing it from providing any reservation charge credits during a *force majeure* service interruption. Opinion No. 406 held that a continuation of that tariff provision would be unjust and unreasonable, because the SFV rate design required Tennessee's shippers to bear all of the risk of a *force majeure* service interruption, absent reservation charge credits. Accordingly, the Commission affirmed the Administrative Law Judge's decision requiring Tennessee to adopt what has become known as the No-Profit method of determining a partial reservation charge credit. Under that method, the pipeline provides partial refunds commencing on the first day of the interruption in service, covering the portion of the pipeline's reservation charge that represents the pipeline's return on equity and associated income taxes. Opinion No. 406 also pointed out that in other cases the Commission had approved a different method of providing partial reservation credits, the Safe Harbor method. Under that method, reservation charges must be credited in full to the shippers after a short grace period when the shipper receives no credit (*i.e.*, 10 days or less).[19]

16. On rehearing of Opinion No. 406, the Commission reaffirmed the policy adopted in that opinion. However, the Commission found that circumstances on the Tennessee

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[18] Opinion No. 406, 76 FERC ¶ 61,022 (1996), *opinion and order on reh'g*, Opinion No. 406, 80 FERC ¶ 61,070.

[19] *See, e.g.*, *Texas Eastern Transmission Co.*, 62 FERC ¶ 61,015 (1993). *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, at P 20-24, *order denying reh'g*, 108 FERC ¶ 61,170, at P 10-11 (2004).

system had changed since Opinion No. 406, because a settlement had modified Tennessee's rate design to include approximately 12 percent of its fixed costs in the usage charge so that Tennessee no longer utilized the SFV rate design. Opinion No. 406-A held that Tennessee's new non-SFV rate design accomplished the Commission's goal of ensuring that the risk of *force majeure* service interruptions be shared, because Tennessee would share the risk by not collecting the fixed costs in the usage charge, while the shippers would continue to pay the reservation charge.[20] Therefore, the Commission allowed Tennessee to retain its tariff provision excusing it from providing reservation charge credits during *force majeure* service interruptions.

17. Indicated Shippers' request for rehearing in this case raises the issue of whether inclusion of any amount of fixed costs in a pipeline's usage charge, no matter how small, is sufficient to satisfy the Commission's policy of requiring pipelines and shippers to share the risk of *force majeure* outages. The Commission finds that Northern's inclusion of only about three percent of its fixed costs in its usage charge is too small an amount to accomplish an equitable sharing of the risks of *force majeure* outages. Northern's current tariff requires its shippers to bear 97 percent of the risk of a *force majeure* curtailment, while the pipeline bears only 3 percent of the risk. This is virtually indistinguishable from the situation on a pipeline with SFV rates, where the Commission has found it unjust and unreasonable for shippers to bear 100 percent of the risk of a *force majeure* outage, and accordingly requires such pipelines to provide partial reservation charge credits.

18. Therefore, the Commission finds Northern's existing tariff provision exempting it from providing any reservation charge credits during *force majeure* outages to be unjust and unreasonable, and the Commission holds that Northern must revise its tariff to provide some level of partial reservation charge credits during *force majeure* outages. These holdings are consistent with the Commission's reservation charge crediting policy in *force-majeure* events as explained in the *North Baja* proceeding, which the D.C. Circuit affirmed in all respects, *supra* n.6.

19. In *North Baja* the pipeline proposed a partial crediting formula that combined elements of the No Profit and Safe Harbor methods described above, with no credits being provided during the first ten days of a *force majeure* outage, with only partial credits provided thereafter. The Commission rejected the proposed formula as inconsistent with Commission policy, since it was a cherry-picking of the two approved methods that combined the pipeline-favorable aspect of the two methods. The Commission explained that the "proposal allows [the pipeline] to retain charges equating to *both* the profit component and the fixed cost component of its reservation charge

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[20] Opinion No. 406-A, 80 FERC ¶ 61,070, at 61,200.

through the first ten days following a *force majeure* event. Since a *force majeure* event is a no-fault occurrence, we do not approve of [the]… proposal, which overall places more risk on the shipper."[21] The Commission added that under the proposal "the shipper bears the full risk for the first ten days, and therefore, the risk is not balanced equitably."[22] The Commission also clarified that the No Profit and Safe Harbor methods were not the only two permissible partial credit approaches, stating that it "is open to alternative approaches if fully justified and supported."[23]

20. On appeal, the D.C. Circuit affirmed all the Commission's rulings. The court stated that "with respect to the cost-sharing formula, FERC reasonably rejected North Baja's proposal as inconsistent with agency policy."[24] The court explained that the two methods the Commission has approved for the *force majeure* cost sharing "incorporate a careful balancing of risk between shippers and pipelines. The problem here is that [the pipeline] effectively cherry-picked the most pipeline favorable aspects of each formula…."[25] The court agreed with the Commission, that the proposed "hybrid of the two policies altered the responsibility for *force majeure* events in favor of the pipeline and against the shippers."[26] The court concluded that "The Commission has simply instructed North Baja to choose the *Texas Eastern* or *Tennessee* formulas*, or* to propose a formula that achieves an equitable cost-sharing <u>in the same ballpark</u>" as the two approved methods (Emphasis added).[27] The court similarly found that the Commission "made clear that it remained open to alternative mechanisms." However, to be acceptable, such alternatives must "achieve a similar sharing of risk as the two previously approved policies."[28]

21. As the Commission held in Opinion No. 406-A, a non-SFV rate design may achieve an equitable sharing of the costs of a *force majeure* outage in the same ballpark

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[21] *North Baja Pipeline, LLC*, 111 FERC at 61,491.

[22] *Id.* at 61,492

[23] *Id.* at 61,493.

[24] 483 F.3d at 821.

[25] *Id.* at 822.

[26] *Id.* at 822.

[27] *Ibid*.

[28] *Ibid.*

as the No Profit and Safe Harbor methods. However, in finding that Tennessee's non-SFV rate design provided for sufficient cost sharing without credits, Opinion No. 406-A relied on the fact that the pipeline would recover 12 percent of its cost-of-service through the usage rate.[29]

22. In the present case, where Northern allocates only three percent of its fixed costs in the usage rate, Northern's non-SFV rate design hardly exposes Northern to the same type of risks that the pipeline in Opinion No. 406-A was exposed to. To not require Northern to grant partial credits in the event of a *force majeure* outage would not be consistent with our policy of requiring the pipeline to share in the risk associated with a *force majeure* outage, as set forth in both Opinion No. 406-A and *North Baja*. Accordingly, we will require Northern to revise its tariff to grant partial reservation charge credits for *force majeure* events. However, Northern may modify the usual provisions of the Safe Harbor or No-Profit methods to reflect that a certain portion of the fixed costs are included in the usage charge.[30]

23. We recognize that the *NGSA* order stated that since "A Non-SFV rate design places some portion of the pipeline's fixed costs in the usage charge" that pipeline need not grant partial reservation charge credits. We certainly did not intend for this to apply when only a minimal amount of fixed costs is recovered in the usage charge. In this case we conclude that three percent is not an amount that is in the same ballpark as the sharing in the approved methods, and does not satisfy the rationale in Opinion No. 406-A. Accordingly, we grant rehearing and will require Northern to grant reservation charge credits in *force majeure* events, as explained above.

B. Reservation Charge Credits During Non-*Force Majeure* Situations

24. Section 7 of Northern's GT&C requires Northern to provide reservation charge credits only when its negligence causes its failure to deliver or receive gas. The June 16 Order determined that this provision was not consistent with Commission policy requiring full reservation charge credits in non-*force majeure* situations. The order directed Northern to modify its tariff consistent with Commission policy unless Northern can show why it should not be required to do so.

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[29] Opinion No. 406-A, 80 FERC at 61,200.

[30] The modification might be an increase in the number of days at the outset of the Safe Harbor method when no credit is due or adjust the amount of credit under the No-Profit method. The Commission is not approving any modification at this time, and will consider the modification when Northern makes its compliance filing.

1. **Northern's Response**

25. On June 18, 2011, Northern filed its response to the Commission's June 16 Order. Northern states that a change to its agreed upon reservation charge crediting provision should be made only after evaluation of a full and complete record in a section 4 rate case proceeding. Northern states that the crediting of reservation charges creates risk for a pipeline's revenues and is a rate matter that should be addressed in a general rate proceeding.[31] Northern further argues that the treatment of one rate matter in isolation and separate and apart from all other elements relating to Northern's rates is unjustified and inherently arbitrary and capricious. Northern argues that such an approach violates the Commission's policy to avoid "piecemeal" ratemaking.[32]

26. Northern further states that its existing reservation charge crediting provision was negotiated by Northern and its shippers in Northern's Global Settlement in Docket No. RS92-8, *et al.*, and accepted by the Commission on July 16, 1993.[33] Northern asserts this provision should be changed only in a general section 4 rate proceeding where all aspects of Northern's rates and terms and conditions of service can be reviewed. Northern further argues that its customers had the opportunity to modify Northern's existing tariff language in a number of section 4 and section 5 proceedings after the 1993 settlement, but failed to do so.

27. Northern contends that the Commission's statement in *NGSA* that it would honor previously-approved agreements between the pipeline and its shippers regarding reservation charge crediting is directly on point here. Northern reiterates that its customers were fully aware of the Commission's policy regarding reservation charge credits, and yet repeatedly agreed to the current provision contained in Northern's tariff. Northern argues that changing this one provision outside the context of a review of interrelated rates and terms and conditions of service in a section 4 rate case proceeding would be arbitrary and capricious.

28. Northern states that it routinely employs various methods to ensure continued service during maintenance to ensure continuous service to its customers. It asserts that

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[31] Northern cites to *Golden Triangle Storage, Inc.*, 134 FERC ¶ 61,036, at P 8 (2011); *Texas Eastern Transmission Corp.*, 63 FERC ¶ 61,100, at 61,434 (1993), *affirming*, 62 FERC ¶ 61,015, at 61,090 (1993).

[32] *See Trunkline Gas Co.*, 94 FERC ¶ 61,381, at 62,422 (2001); *CNG Transmission Corp.*, 63 FERC ¶ 61,330, at 63,192 (1993).

[33] *Northern Natural Gas Co.*, 64 FERC ¶ 61,073 (1993).

providing credits in non-*force majeure* outages may actually provide less value to customers than the other measures Northern now currently provides to its customers to ensure continued service in the event of non-*force majeure* outages.[34]

2. Indicated Shippers' Answer

29. On August 2, 2011, the Indicated Shippers filed an answer to Northern's response. Indicated Shippers argue that the Commission should reject Northern's response because it consists of basically the same arguments which the Commission rejected in the June 16 Order. Indicated Shippers state that the only new argument presented by Northern is that reservation charge crediting might deter Northern from its efforts to maintain service during non-*force majeure* events. Indicated Shippers assert that this argument is without merit. The specific purpose of reservation charge crediting is to "provide an incentive for the pipeline to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system."[35] Thus, requiring that credits be given for curtailed volumes is an incentive that curtailment not occur.

3. Commission Determination

30. The Commission reaffirms its finding that Northern's reservation charge crediting provision in non-*force majeure* events is not consistent with Commission policy and must be changed. As set forth above, *supra* P 3, for non-*force majeure* outages, where the curtailment occurred due to circumstances within a pipeline's control, including scheduled maintenance, the pipeline must provide shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.[36] The Commission's rationale was set forth in Opinion No. 406, where it stated:

> Because 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

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[34] Rehearing Request at 5.

[35] *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,073, at 61,086 (1993).

[36] *See, e.g.*, Opinion No. 406, 76 FERC ¶ 61,022, *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070, *as clarified by, Rockies Express*, 116 FERC ¶ 61,272 at P 63. In *Rockies Express,* the Commission clarified that credits are due for the undelivered amount whenever the pipeline fails to deliver 100 percent of the scheduled deliveries.

> management, the Commission finds it inequitable for the pipeline's customers to bear the risk associated with such mismanagement. Thus, the Commission generally requires a pipeline to provide reservation charge credits to compensate its customers for the interruption in service. The reservation charge credits also provide an incentive for the pipeline to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system. [37]

31. The Commission has consistently followed this policy in subsequent cases, [38] including in *North Baja*, affirmed by the D.C. Circuit. The court, in upholding the Commission's ruling that scheduled maintenance is not a *force majeure* event, stated: "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."[39]

32. Northern's provision that it will grant reservation charge credits only when it is negligent is clearly contrary to the Commission's policy of requiring full credits in all circumstances where a pipeline fails to make primary firm deliveries because of a non-*force majeure* event. Northern does not contest that its tariff is inconsistent with Commission policy as set forth in Opinion No. 406 and subsequent cases. However, it asserts that any change in that tariff provision must be in a general NGA section 4 rate case. Northern argues that reservation charge crediting creates a risk for a pipeline's revenues and thus is a rate matter that should only be addressed in a general rate proceeding, where all aspects of Northern's rates and terms and conditions of service can be reviewed. The Commission rejects this contention.

33. Permitting the reservation charge crediting issue to be addressed in a limited section 4 filing outside the context of a general section 4 rate case has been the Commission's policy for a substantial period of time.[40] Good reason exists why the

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[37] *Tennessee Gas Pipeline Co.*, 76 FERC at 61,086.

[38] *See, e.g., Alliance Pipeline L.P.*, 84 FERC ¶ 61,239 (1995); *Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, at P 34 (2003); *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262 (2003); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006); *Petal Gas Storage*, L.L.C., 126 FERC ¶ 61,199, at P 25 (2009).

[39] 483 F.3d at 823.

[40] *Natural Gas Pipeline Co. of America*, 102 FERC ¶ 61,326, at P 19 (2003);

(continued…)

Commission has adopted this policy. If the Commission had to await for a pipeline to file a general section 4 rate case before that pipeline's compliance with the Commission's clear policy concerning reservation charge crediting could be addressed, compliance with that policy would be significantly delayed. Pipelines whose rates are currently fully recovering their cost-of-service have no incentive to file a section 4 rate case, and Order No. 636's elimination of the periodic rate refiling requirement has resulted in many pipelines not filing new section 4 rate cases for a decade or more.[41]

34. In addition, compliance with Commission policy on reservation charge crediting need not have any significant effect on a pipeline's costs and revenues. Pipelines design their systems to be able to provide the primary firm service they have contracted to provide their firm shippers at all times. As the court in *North Baja* explained, in affirming the Commission's ruling that scheduled maintenance is not a *force-majeure* event "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.'"[42] In recognition of this principle, the Commission has imposed the reservation charge crediting requirement when a pipeline fails to provide nominated service only at a firm shipper's primary points due to a non-*force majeure* event. Thus the Commission has rejected requests to extend the crediting requirement to failure to provide nominated service at a firm shipper's secondary points, thereby limiting the pipeline's cost of compliance with the reservation charge crediting policy.[43]

Tuscarora Pipeline Co., 120 FERC ¶ 61,022, at P 12 (2007); *Wyoming Interstate Pipeline*, 129 FERC ¶ 61,022, at P 11 (2009).

[41] Northern cites the Commission's orders in the Order No. 636 restructuring proceeding of Texas Eastern Transmission Co, as holding that, since reservation charge crediting is a rate matter, it should be addressed only in a general rate proceeding (*Transwestern Pipeline Co.*, 62 FERC, at 61,090, *reh'g*, 63 FERC, at 61,434 (1993)). However, those orders were issued shortly after Order No. 636, before the Commission had any experience with how Order No. 636's elimination of the three-year rate refiling requirement would affect the frequency with which pipelines file general section 4 rate cases. Moreover, those orders were issued prior to the Commission's exposition of its post-Order No. 636 reservation charge crediting policy in Opinion No. 406.

[42] 483. F.3d at 823.

[43] *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050, P 11-17 (2011) (*Southern*).

35. In this case, Northern states that it prides itself on the continued reliability of its system and plans maintenance at times that are the least disruptive to its customers. Northern states that it routinely employs methods to ensure continued service during maintenance such as investments in line looping, temporary line bypasses, temporary regulation, stopple fittings, natural gas bottle trucks or liquefied natural gas tankers.[44] In fact, Northern claims that it "now routinely employs [measures] to ensure continued service in the event of non-*force majeure* outages,"[45] This suggests that Northern is currently operating its system so as to meet its contractual obligations to provide primary firm service at all times. It would thus appear that requiring it to modify its tariff consistent with Commission policy concerning reservation charge credits during non *force majeure* outages should not have a significant effect on its costs and revenues since there should only be a limited number of such curtailments in light of Northern's claimed procedures.

36. The Commission recognizes, however, that it has held that a pipeline may incorporate in its rates the costs associated with operating its system so that it can meet its contractual obligations. Therefore, if a pipeline thinks that Commission action under NGA section 5 requiring it to revise its tariff to be consistent with Commission policy would result in its rates being too low to recover its overall cost of service, it could file to show why it believes that would be the consequence of that action.[46] To enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the pipeline would have to provide evidence of the number of non-*force majeure* outages it experienced during a past representative period, and the dollar amount of the additional credits it would have had to give. In addition, the pipeline would have to provide the Commission with the information necessary to determine whether the pipeline's existing rates are insufficient to recover any additional costs resulting from compliance. For example, the pipeline could file a full cost and revenue study consistent with what we have required in recent section 5 investigations of the justness and reasonableness of a pipeline's overall rates.[47] Alternatively, the pipeline

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[44] Northern's July 18, 2011 Response at 5.

[45] Response at 6.

[46] *See ANR Pipeline Co. v. FERC*, 863 F.2d 959, 962-964 (D.C. Cir. 1988).

[47] *See Ozark Gas Transmission, LLC*, 133 FERC ¶ 61,150 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 (2011) (*Ozark*); *Kinder Morgan Interstate Gas Transmission LLC*, 133 FERC ¶ 61,157 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*); *Natural Gas Pipeline Co. of America LLC*, 129 FERC ¶ 61,158 (2009), *reh'g denied*, 130 FERC ¶ 61,133 (2010) (*Natural Gas*); *Northern Natural Gas*

(continued…)

could also file a general section 4 rate case to increase its rates to recover the increased costs from compliance with that policy.

37. Northern again asserts that its existing reservation charge crediting provision originated in its Global Settlement approved in 1993,[48] and that Northern and its customers have settled its four subsequent section 4 rate cases without modifying that reservation charge crediting provision. Northern points out that, in *NGSA*, we stated, "Where the pipeline and its shippers have entered into currently effective agreements that include provisions that differ from the Commission's reserve charge crediting policy, and which the Commission has accepted, those agreements need not be changed."[49] Northern argues that its reservation charge crediting provision is part of a currently effective settlement and therefore should not be changed. However, as the Commission stated in the June 16 order, Northern's last section 4 rate settlement, approved in 2005, had a rate moratorium which terminated on November 1, 2007.[50] Northern has not cited any provision of either the 2005 settlement or any earlier settlement which prohibits a shipper from seeking a change in Northern's reservation charge crediting provisions pursuant to NGA section 5 at this time, four years after expiration of the rate moratorium. This case is thus similar to *Southern Natural Gas Co.*,[51] where the Commission rejected a similar contention that a prior rate case settlement justified continuation of the pipeline's existing reservation charge crediting provision.

38. Northern's argument, that requiring it to grant reservation charge credits during curtailment periods would deter Northern from its current efforts to maintain service clearly is difficult to fathom. Requiring Northern to grant such credits is an incentive to

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Co., 129 FERC ¶ 61,159 (2009), *reh'g denied*, 130 FERC ¶ 61,134 (2010) (*Northern Natural*); *Great Lakes Gas Transmission Limited Partnership*, 129 FERC ¶ 61,160 (2009), *reh'g denied*, 130 FERC ¶ 61,132 (2010) (*Great Lakes*). As the Commission explained in the *Natural* rehearing order, "[s]ections 10(a) and 14(a) of the NGA authorize the Commission to require [the pipeline] to submit the information required by the [order instituting investigation] in order to carry out its responsibility under NGA section 5 to ensure that the pipeline's rates are just and reasonable." *See, Natural Gas,* 130 FERC ¶ 61,133 at P 16.

[48] *Northern Natural Gas Co.*, 64 FERC ¶ 61,073 (1993).

[49] *NGSA*, 135 FERC ¶ 61,055 at n.12.

[50] *Northern Natural Gas Co.*, 111 FERC ¶ 61,444 (2009).

[51] 135 FERC ¶ 61,056 at, P 15 (2011).

it that such outages do not occur. Further, to the extent Northern claims that it "now routinely employs [measures] to ensure continued service in the event of non-*force majeure* outages,"[52] then the consequences of imposing the crediting requirement in non *force majeure* events should not be significant.

39. Finally, Northern's reliance on *Golden Triangle Storage, Inc.*,[53] is misplaced. In that case, the Commission originally required the pipeline to provide reservation charge credits where it curtails service in non-*force majeure* events. The pipeline sought rehearing, arguing that it had market-based authority and the reservation charge crediting was a rate issue since it was a matter of negotiation between it and its customers. It contended that certain customers may place no value on receiving reservation charge credits in non-*force majeure* situations and may wish to negotiate a lower rate for service that does not incorporate such credits. The Commission agreed and granted rehearing since the reservation charge crediting policy applied to pipelines with cost-based rates, while pipelines with market-based rate authority can negotiate alternate forms of rate relief. Northern has cost-based rates, and therefore the *Triangle* precedent concerning pipelines with market-based rates is inapplicable to Northern.

40. Northern's GT&C section 7 provides for full credits in non-*force majeure* situations only when curtailment is due to Northern's negligence. Commission policy requires pipelines to credit shippers for undelivered gas beyond the limited situation described in Northern's tariff. As such, we find that section 7 of Northern's GT&C does not meet the criteria for reservation credits established by Commission precedent, and is therefore unjust and unreasonable. In similar circumstances, the Commission has required other pipelines to revise their tariffs consistent with Commission policy.[54] Accordingly, we require Northern to revise section 7 of its GT&C to be consistent with the Commission's policy concerning reservation charge credits during non-*force majeure* outages, as set forth in *NGSA.*

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[52] Response at 6.

[53] 134 FERC ¶ 61,036 (2011).

[54] *See e.g., Tuscarora Pipeline Co.*, 120 FERC ¶ 61,022, where the pipeline's tariff similarly provided for reservation charge credits only in the event of the pipeline's negligence.

<u>The Commission orders:</u>

(A) The request for rehearing of the Indicated Shipper's is granted, as discussed in the body of this order.

(B) Northern is required to file tariff revisions within 30 days of the issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.