139 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kern River Gas Transmission Company | Docket Nos. RP10-1410-001
RP10-1410-002
RP10-1410-003

ORDER ON COMPLIANCE FILING AND REQUEST FOR REHEARING

(Issued April 19, 2012)

1. On April 21, 2011, the Commission issued an order[1] rejecting Kern River Gas Transmission Company's (Kern River) September 30, 2010 filing to comply with the Commission's August 2010 order [2] concerning the Commission's reservation charge crediting policy. On May 11, 2011, Kern River filed revised tariff records to be effective December 1, 2010 to comply with the April 2011 Order.[3] On May 19, 2011, Kern River filed revised tariff records[4] to reflect draft language that Kern River inadvertently failed

[1] *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050 (2011) (April 2011 Order).

[2] *Kern River Gas Transmission Co.*, 132 FERC ¶ 61,111 (2010) (August 2010 Order).

[3] Kern River Gas Transmission Company, FERC NGA Gas Tariff, Gas Tariff, Sheet No. 26, Rate Schedule KRF-1, KR Firm Transportation Service, 2.0.0; Sheet No. 27, Rate Schedule KRF-1, KR Firm Transportation Service, 1.0.0; Sheet No. 28, Rate Schedule KRF-1, KR Firm Transportation Service, 0.0.0; Sheet No. 138, GT&C Force Majeure, 2.0.0; Sheet No. 301, Firm Transportation Service Agreement KRF-1, 2.0.0.

[4] Kern River Gas Transmission Company, FERC NGA Gas Tariff, Gas Tariff, Sheet No. 29, Rate Schedule KRF-1, KR Firm Transportation Service, 0.1.0; Sheet No. 29A, Rate Schedule KRF-1, KR Firm Transportation Service, 0.1.0.

to update before submitting its May 11, 2011 filing pertaining to reservation charge credits and segmentation. For the reasons set forth below, the Commission accepts the tariff records in the May 11, 2011 compliance filing, as modified by tariff records in the May 19, 2011 filing, to be effective December 1, 2010, subject to the revisions required by this order. The Commission denies the request for rehearing of the April 2011 Order by BP Energy Company (BP).

I. Background

2. In this proceeding, the Commission has sought to bring Kern River's tariff into compliance with the Commission's reservation charge crediting policy. The Commission has discussed and reaffirmed its reservation charge crediting policy in several recent orders.[5] That policy differentiates between the credits a pipeline is required to give firm shippers depending upon whether the outage is caused by a *force-majeure*[6] event or a non-*force majeure* event. With respect to non-*force majeure* outages, where the curtailment occurred due to circumstances within a pipeline's control, including planned or 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.[7] Commission policy also requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event in order to share the risk of an event not in the control of the pipeline. In that event, the Commission allows two different methods for the credit, either full reservation credits after a short grace period (i.e., ten days or less) (Safe Harbor Method) or partial crediting starting on the first day of a *force majeure* event (No Profit Method).[8] In *North Baja Pipeline, LLC v. FERC*,[9] the Court of

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[5] *See, e.g.*, *Natural Gas Supply Ass'n*, 135 FERC ¶ 61,055 (2011) (*NGSA*); *S. Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *N. Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 (2011); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*).

[6] *Force majeure* events are "unexpected and uncontrollable events." *Tenn. Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,088 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997).

[7] *See, e.g.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,086, *as clarified by*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006).

[8] *NGSA*, 135 FERC ¶ 61,055 at P 17; *Midwestern*, 137 FERC ¶ 61,257 at PP 19-20.

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

(continued…)

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.

3. In August 2010, the Commission issued an order[10] on a filing by Kern River to comply with an earlier order[11] directing Kern River either to modify its tariff to provide reservation charge credits consistent with Commission policy or explain why it should not be required to do so. The August 2010 Order agreed with Kern River's explanation that it should not be required to modify the existing reservation charge crediting provisions in Rate Schedules CH-1, UP-1, MO-1 and SH-1, because those rate schedules reflect the terms of individually negotiated contracts. However, the August 2010 Order found that Kern River had not disputed that its generally applicable firm transportation 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.[12] Accordingly, the Commission required Kern River to modify Rate Schedule KRF-1 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."[13] The Commission also noted that it "has approved two different methods for providing a partial reservation charge credit, the Safe Harbor Method and the No-Profit Method, and the Commission will not direct which partial credit method Kern River should choose."[14]

4. Kern River did not seek rehearing of the August 2010 Order's requirement that it modify Rate Schedule KRF-1 consistent with the policy set forth in that order. In its September 30, 2010 filing to comply with that order, Kern River proposed to add a new section 9 titled "Reservation Charge Adjustments" to its existing firm transportation Rate Schedule KRF-1. Proposed section 9 did not distinguish between *force majeure* and non-*force majeure* events. Instead, Kern River proposed that, in the event of any type of

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aff'g, North Baja Pipeline, LLC, 109 FERC ¶ 61,159 (2004), *order on reh'g, North Baja Pipeline, LLC,* 111 FERC ¶ 61,101 (2005).

[10] August 2010 Order, 132 FERC ¶ 61,111.

[11] *Kern River Transmission Co.*, 129 FERC ¶ 61,262 (2009).

[12] August 2010 Order, 132 FERC ¶ 61,111 at P 17.

[13] *Id*.

[14] *Id*.

outage, it would not provide shippers any reservation charge credit for the first 30 days of the outage, and then for days 31 and thereafter, only a partial reservation charge credit equal to the pipeline's return on equity and associated income taxes. Kern River requested that its compliance filing be made effective December 1, 2010.

5. The April 2011 Order rejected Kern River's compliance filing, finding that it failed to comply with the Commission's policy concerning reservation charge credits in both *force majeure* and non-*force majeure* situations. The Commission found that, as applied to *force majeure* situations, Kern River's proposal was a hybrid of the Safe Harbor Method and the No-Profit Method for sharing the risk of *force majeure* outages, and complied with neither. The Commission stated that Kern River's proposal was similar to the one the Commission had rejected in *North Baja Pipeline, LLC*.[15] In that case, the pipeline proposed that shippers would receive no refund for the first ten days of a *force majeure* interruption, and thereafter a percentage refund. The D.C. Circuit affirmed the Commission's holding that the pipeline's proposal improperly combined the pipeline-favorable aspects of the Safe Harbor and No Profit Methods.[16] Therefore, the Commission directed:

> 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.[17]

6. The April 2011 Order also held that Kern River's proposed section 9, as applied to non-*force majeure* outages, was inconsistent with Commission policy requiring pipelines to provide full reservation charge credits for all scheduled gas not delivered due to a non-*force majeure* event, including outages during scheduled maintenance. The Order directed Kern River to provide full reservation charge credits for all scheduled gas not delivered to shippers due to a non-*force majeure* event.

[15] *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005), *aff'd*, *North Baja*, 483 F.3d 819.

[16] *North Baja*, 483 F.3d at 822.

[17] April 2011 Order, 135 FERC ¶ 61,050 at P18.

7. The April 2011 Order also required Kern River to revise its proposal to clarify when a shipper whose nomination has been cut during the Timely Nomination Cycle must renominate in subsequent nomination cycles.[18] The Commission stated that in *Wyoming Interstate Company, Ltd*.,[19] it had held 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. The shipper 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, the Commission required Kern River to clarify its proposed reservation charge crediting provisions consistent with *WIC*.

8. Finally, the April 2011 Order held that Kern River's proposal to limit reservation charge credits to transactions using primary points was consistent with Commission policy, and Kern River need not provide credits for curtailed volumes at secondary points.

9. Accordingly, the Commission rejected Kern River's September 30, 2010 compliance fling and directed Kern River to file revised tariff records consistent with the findings of the April 2011 Order. The Commission also directed that the revised tariff records be effective on December 1, 2010, the effective date Kern River had proposed for its September 30, 2010 compliance filing.

II. Rehearing Request

10. BP requested rehearing of the April 2011 Order's holdings on several issues. No other party sought rehearing of the April 2011 Order.

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[18] 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).

[19] *Wyo. Interstate Co., Ltd.*, 130 FERC ¶ 61,091, at P 17 (2010) (*WIC*).

A. **Service at Secondary Points**

11. BP contends that the April 2011 Order erred in holding that Kern River need not provide reservation charge credits when service is curtailed at a secondary receipt point. This, BP asserts, is inconsistent with the Commission's prior determinations in this proceeding. BP argues that the August 2010 Order required Kern River to provide reservation charge credits for "all scheduled gas not delivered," without distinguishing between primary and secondary receipt points. BP contends that therefore under the plain language of the August 2010 Order, Kern River is to provide reservation charge credits for all gas that is scheduled but not delivered, regardless of whether the gas is scheduled at a primary or secondary receipt point.

12. The Commission denies rehearing on this issue. Our August 2010 Order did not address the issue of whether Kern River must provide credits with respect to secondary firm service, since no party expressly raised that issue in the pleadings addressed by that order. However, protests to Kern River's filing to comply with the August 2010 Order did raise the issue. In response, the April 2011 Order stated the Commission's longstanding policy that reservation credits are only provided for primary firm service, not secondary service, citing our 1995 order in *Tennessee Gas Pipeline Co*.[20] As the April 2011 Order explained:

> 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 provide for reservation charge credits for curtailed volumes at secondary points is acceptable.[21]

13. The Commission denies BP's request that we modify our policy so as to require full reservation charge credits for a pipeline's failure to provide firm service at secondary points. The Commission requires pipelines to provide full reservation charge credits during non-*force majeure* outages on the ground that a pipeline should be responsible for operating its system so that it can meet its contractual obligations, regardless of any operational need to restrict service on some parts of its system to carry out required

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[20] 73 FERC ¶ 61,083, at 61,206 (1995).

[21] April 2011 Order, 135 FERC ¶ 61,050 at P 29.

maintenance.[22] The policy also contemplates that pipelines may incorporate the costs of operating their systems in their rates.[23] In short, the crediting requirement places the pipeline at risk for any failure to meet its contractual obligations to firm customers during non-*force majeure* outages, while permitting the costs of meeting those obligations to be included in rates.

14. The Commission finds it just and reasonable to limit such a blanket at-risk requirement to the pipeline's failure to provide primary firm service. A firm shipper has a guaranteed firm contractual right to service only at its primary points, not secondary points. As the Commission stated in *Tennessee Gas Pipeline Co.*, 73 FERC ¶ 61,083, at 61,206 (1995):

> 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 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. [Emphasis added].[24]

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[22] Opinion No. 406, 76 FERC ¶ 61,022 at 61,086.

[23] *North Baja*, 483 F.3d at 823 ("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 [emphasis added].").

[24] *See also Tenn. Gas Pipeline Co.*, 94 FERC ¶ 61,097, at 61,402 (2001) ("When firm shippers contract with Tennessee for firm transportation service, their contracts specify the receipt and delivery points to which the shipper will have primary rights. The shipper then has a guaranteed firm right to use those designated primary receipt and delivery points."); and *Regulation of Short-Term Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 48 (2002).

15. Pipelines design their systems in order to have the capacity to satisfy their primary firm obligations, and the Commission has never required pipelines to maintain sufficient capacity to give firm shippers a guaranteed right to service at secondary points. The Commission is also concerned that expanding the requirement of full reservation charge credits to failure to provide secondary firm service could increase the pipeline's costs of operating its system and ultimately lead to higher rates for shippers. Therefore, the Commission continues to find that relief from a shipper's contractual obligation to pay the agreed-upon reservation charge for the capacity reserved for its use should be limited to situations where the pipeline has failed to meet its contractual obligation to provide primary firm service on that capacity.[25]

16. BP has not advanced any reason that the Commission should change its policy as to reservation charge credit at secondary points.

B. Other Issues

17. The August 2010 Order directed Kern River to provide reservation charge credits for *force majeure* outages in accordance with Commission policy by adopting either the Safe Harbor or No-Profit Method. BP contends that the April 2011 Order inappropriately modified these directives by stating, for the first time, that Kern River could propose a different reservation charge crediting method providing for similar equitable sharing of the cost of *force majeure* outages as the two methods set forth in the August 2010 Order. BP asserts that the April 2011 Order should not have given Kern River the option to use another method, because of the delay by Kern River in complying with the August 2010 Order.

18. The Commission, as well as the court in *North Baja*, have consistently indicated that in the *force majeure* situation a pipeline could adopt a method other than the Safe Harbor method or No-Profit method, provided that method results in an equitable sharing of the risk. Thus, the statement in the April 2011 Order here merely followed that precedent. However, as discussed below, Kern River's filing to comply with the April 2011 Order has again combined the pipeline-favorable aspects of the Safe Harbor and No Profit Methods. Therefore, in light of Kern River's continued failure to comply with our directives concerning *force majeure* outages, in this order we are directing Kern River to adopt either the Safe Harbor Method or the No Profit Method.

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[25] *Southern*, 137 FERC ¶ 61,050 at PP 11-17.

19. Finally, the April 2011 Order stated that Commission policy requires that pipelines provide full reservation charge credits "for all *scheduled* gas not delivered"[26] due to a non-*force majeure* event and partial reservation charge credits during *force majeure* events. BP requests the Commission clarify that the term "scheduled," as used in the April 2011 Order, should be understood to include "nominations," since the pipeline would not schedule gas when there is no capacity available because of an outage.[27]

20. The Commission grants the requested clarification. As pointed out in *Tennessee Gas Pipeline Co.* (*Tennessee*),[28] a shipper's scheduling nominations are often referred to as amounts the shipper "scheduled," despite the fact that only the pipeline "schedules" service. As we explained in the April 2011 Order,[29] the amount of reservation charge credits a pipeline must give in the non-*force majeure* situation is measured by the amount of service which the shipper nominated to be scheduled by the pipeline but the pipeline was unable to schedule or deliver.

III. Kern River's May 2011 Compliance Filings

21. Kern River filed to comply with the April 2011 Order on May 11, 2011, and filed corrections to its compliance filing on May 19, 2011. In the May 2011 compliance filings, Kern River makes an entirely new reservation charge crediting proposal, including a number of new elements not included in the September 2010 compliance filing rejected by the April 2011 Order. Kern River proposes to add a new section 9 titled "Reservation Charge Adjustments" to its existing firm transportation Rate Schedule KRF-1 and to make certain conforming changes to sections 7 of its General Terms and Conditions concerning *force majeure* and its *pro forma* service agreement for Rate Schedule KRF-1. For the reasons discussed below, the Commission accepts the tariff records in Kern River's May 2011 compliance filings effective December 1, 2010, and the Commission requires Kern River to modify those tariff sheets consistent with the directives below.

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[26] April 2011 Order, 135 FERC ¶ 61,050 at PP 13 and 19 (emphasis added).

[27] On June 3, 2011, Kern River filed an answer to BP's request for rehearing. As provided in 18 C.F.R. § 385.713(d), the Commission does not permit answers to requests for rehearing. Therefore, Kern River's answer to BP's rehearing request is rejected.

[28] 135 FERC ¶ 61,208, at P 74 (2011).

[29] April 2011 Order, 135 FERC ¶ 61,056 at P 32.

A. **Details of Compliance Filing**

22. In order to comply with the April 2011 Order's requirements concerning crediting in *force majeure* situations, Kern River again proposes not to use either the Safe Harbor or No Profit Methods for providing partial credits. Instead, it proposes a variation on its original proposal of no reservation charge credits for the first 30 days of the outage, and thereafter, a partial reservation charge credit equal to the pipeline's return on equity and associated income taxes. Under the revised proposal, Kern River would still provide no credits during the first 15 days. However, during the next 15-day period, Kern River would provide credits for "Required Market Deliveries" which Kern River failed to deliver because of the *force majeure* event. Kern River proposes in section 9.3(j) to define "Required Market Deliveries" as "the minimum quantities actually required by Shipper to serve or otherwise meet its firm market at Primary Delivery Points."[30] The credits would equal the lesser of (1) the reservation rate otherwise payable by the shipper or (2) "the added out-of-pocket cost per Dth actually incurred by Shipper for the purpose of meeting Required Market Deliveries through alternate means," referred to as the shipper's "Incremental Cost." After the first 30 days of the *force majeure* outage, Kern River proposes to provide a partial credit for undelivered "Required Market Deliveries" equal to the lesser of (1) the pipeline's return on equity and associated income taxes or (2) the shipper's Incremental Cost.

23. For non-*force majeure* events, including scheduled and unscheduled maintenance, Kern River proposes to provide reservation charge credits in the same manner as during the second 15 days of a *force majeure* outage. Thus, credits would only be given for "Required Market Deliveries" which Kern River failed to deliver, and the credit would be equal to the lesser of (1) the reservation rate otherwise payable by the shipper or (2) the shipper's incremental cost of meeting Required Market Deliveries through alternate means.

24. Kern River also proposes, for the first time, to establish procedures a shipper must follow in order to obtain a credit. Pursuant to section 9.4, a shipper must file a claim within 10 days of the end of the event and support the claim through the use of an affidavit. Section 9.4(a) provides that the shipper "bears the burden of demonstrating that the claim is Bona Fide and mitigated." Section 9.4(b) requires that the shipper include a

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[30] It appears that, pursuant to section 9.3(k)(1), on the first day of a *force majeure* outage, Kern River would treat the undelivered volume which was nominated and scheduled for the shipper before the event as the "Required Market Delivery" eligible for a credit. Thereafter, the credits would be based on the minimum quantities actually required by the shipper to serve its firm market at primary delivery points.

detailed schedule of Required Market Deliveries and the undelivered quantities for each day of the outage, an affirmation that the shipper had purchased or was prepared to purchase gas supplies at the shipper's primary receipt points, verifiable support of the shipper's incremental cost for meeting its Required Market Deliveries, and detail regarding all actions to mitigate the size of the claim. Kern River adds that it "reserves the right to request, as a condition of issuing the reservation charge credit, that the shipper provide additional information if necessary to validate the claim and the mitigation that was undertaken."[31]

25. Kern River also proposes in section 9.6 that reservation credits applicable to a replacement shipper under a capacity release would be based on the lesser of the releasing or replacement shipper's reservation charge and that there would be no credit if the replacement shipper is paying a volumetric rate. Kern River proposes in section 9.7 that, when a shipper has segmented its capacity, its reservation charge credits will be limited to the original contract demand in the service agreement, for which the shipper is paying a reservation charge.

26. Kern River also proposes in section 9.8 that, if a shipper takes deliveries during any hour in excess of 1/24 of its daily scheduled quantity during an outage, the shipper's credits will be reduced by the quantity taken in excess of its hourly rights. In addition, Kern River proposes in section 9.9 that if a shipper takes deliveries in excess of its hourly rights after notification of the outage, the shipper will be subject to a penalty equal to the greater of $25 per Dth, the market price reported in Platt's Gas Daily for Kern River, or the market price reported in Platt's Gas Daily for SoCalGas.

B. <u>Protests and Comments</u>

27. BP Energy Company (BP) protested Kern River's filing. The Rolled-In Customer Group (RCG)[32] filed a protest and request for rejection of Kern River's filing. Nevada Power Company d/b/a NV Energy (Nevada Power) filed comments and a request for a technical conference on Kern River's filing.[33] Kern River filed an answer to the protests.

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[31] Kern River, May 11, 2011 Filing at 6-7.

[32] RCG consists of 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), L.P., and Williams Gas Marketing Inc.

[33] On August 25, 2011, Nevada Power filed to supplement its comments by incorporating in its comments the protests of BP and RCG. The Commission finds this pleading not necessary to preserve Nevada Power's ability to protect its interests and

(continued…)

The Commission will accept the answer to the protests since it presents a more complete record.[34]

28. RCG asserts that Kern River's filing failed to comply with the Commission's directive in the April 2011 Order in all respects, and the Commission should reject the filing. RCG contends that contrary to the April 2011 Order Kern River filed a hybrid of the Safe Harbor and the No-Profit Methods in *force majeure* situations, choosing the most pipeline-favorable aspects of each method. RCG argues that not only does Kern River's proposal not meet the requirement of these methods, but Kern River has included a new way of crediting the shippers, namely the incremental cost to serve any undelivered quantity, whichever results in the lowest total credit. RCG asserts this proposal violates the Commission's requirement that reservation charge credits be based upon a shipper's reservation rate, not on some other amount. RCG continues that in addition, Kern River included tariff changes that go beyond the April 2011 Order dictates, such as section 9.4 requiring shippers to file a claim within 10 days including an affidavit justifying the claimed credit, as well as new hourly limitation provisions in proposed sections 9.8 and 9.9.

29. BP's protest echoes RCG's protest. BP stresses that Kern River admits in its filing that its proposal is "a blending of the Commission's no-profit and safe-harbor method,"[35] when the April 2011 Order specifically directed that Kern River's compliance should not propose "a hybrid of the most-favorable aspect of each method as it did in the [September

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those of its ratepayers.

[34] On July 12, 2011, Nevada Power filed an Order to Show Cause asking the Commission to require Kern River to submit certain documents relating to the reliability of Kern River's system. The requested information would consist of approximately 60 pages of prior sworn testimony and discovery that Kern River provided in 2008 to the Public Utilities Commission of Nevada (PUCN) in support of Nevada Power's 2009 Energy Supply Plan (the information). On July 18, 2011 Kern River filed an answer. Kern River states it has requested, and Nevada Power has refused, to provide any justification as to why the information it seeks to include from this state regulatory proceeding is relevant to the issues under consideration by the Commission in this docket. We deny Nevada Power's motion since it is based on a claim regarding the operational reliability of Kern River's system which is not relevant to the issues in this proceeding.

[35] *See* Kern River, May 11, 2011 Filing at 4.

10] filing." Moreover, Kern River has included a new provision in section 9.4 that the shippers' credit is subject to a duty to mitigate.

30. Nevada Power asserts that in the May 11, 2011 filing Kern River offers yet another hybrid approach which still does not strike an appropriate balance between pipeline and shipper interests. Further, Nevada Power argues, in the filing Kern River claims a 15-day safe harbor provision is necessary because interruption of service may be an extended period due to the unique location of Kern River's facilities. These statements, Nevada Power claims, present a far more dire view of pipeline reliability than the representations that were made by Kern River in 2008, when Nevada Power was considering whether to invest in an expansion of the Kern River system or in an alternate supply source. Nevada Power contends that a technical conference will provide an opportunity for shippers to learn what, if anything has changed since 2008, and what mitigation may be required, by Kern River and/or its shippers, to adequately protect service reliability.

C. <u>Kern River's Answer</u>

31. With respect to the protests, Kern River argues that the Commission has permitted distinct proposals that while consistent with the basic tenets of the Commission's policy, were appropriate for that particular pipeline. Kern River argues that the proposal it made implements the Commission's policy in a comprehensive manner to show how the crediting would actually be applied. Kern River contends its reservation charge credit proposal for *force majeure* situations is based upon a rational blending of the Commission's crediting methods, resulting in an equitable sharing of costs while protecting against gaming.

32. Kern River argues that the two 15-day periods in its proposal result in an equitable balance of risk and therefore the proposal is fair to shippers. It contends that period is related to the unusual operating conditions on its system. It argues that the fact that it adopted a 15 day period, rather than 10 days mentioned in prior Commission orders, does not make it unreasonable.

33. Kern River contends that the new provisions included in the filing, such as the claims procedure, are consistent with the Commission's goal of economic efficiency in natural gas markets.

34. Finally, Kern River states that any delay in implementing reservation charge crediting due to its multiple compliance filings, will not prejudice its shippers, because the April 2011 Order directed that Kern River begin its crediting retroactively as of December 1, 2010 once a crediting mechanism is approved by the Commission.

D. Commission Determination

35. The Commission accepts Kern River's May 2011 compliance filings effective December 1, 2010, subject to the revisions discussed below. While the Commission is accepting the compliance filing, the Commission finds that a number of the tariff provisions included in that filing do not comply with the April 2011 Order. Therefore, the Commission directs Kern River to modify the tariff records included in the May 2011 filings, consistent with this order.

1. Credits During Force Majeure Outages

36. The April 2011 Order in clear terms directed Kern River to revise its tariff consistent with Commission policy. As to *force majeure* events the order directed that Kern River "must provide for partial reservation charge credits . . . based either on the Safe Harbor Method or the No-Profit Method, but not a hybrid of the most pipeline-favorable aspect of each method,"[36] as Kern River had proposed in its previous compliance filing, which the April 2011 Order rejected. The Commission also stated that Kern River could 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.

37. We find, as protestors urge, that Kern River has failed to follow Commission policy with respect to reservation charge credits during a *force majeure* outage. Kern River again proposes a hybrid of the Safe Harbor and No-Profit Methods, with an initial 15-day Safe Harbor period where the shipper receives no credit, then followed by a 15-day period when the shipper receives full credit, and after the 30th day, the shipper receives a partial reservation charge credit under the No-Profit Method until the curtailment ends. Kern River contends that this proposal is reasonable in light of the remote location of many of its facilities, including in the 9,000 foot Wasatch Mountain range. Kern River states that some of its facilities can only be reached by helicopter, and repair of a catastrophic compressor station outage could take up to 90 days.

38. Kern River's revised proposal again cherry picks the most pipeline favorable aspects of the Commission's two approved methods for providing credits during *force majeure* outages. While the Commission has found that both the Safe Harbor and the No Profit Methods achieve an equitable sharing of the risks of *force majeure* outages, they allocate the risks of short- and long-term outages in a different manner. The Safe Harbor Method allocates the entire risk of *force majeure* outages of 10 days or less to the firm shippers. The requirement to provide full credits after Day 10 then allocates to the pipeline a progressively greater share of the risk of a *force majeure* outage the longer the

[36] April 2011 Order, 135 FERC ¶ 61,050 at P 18.

outage lasts. For example, if the outage lasts 90 days, the Safe Harbor Method would require the pipeline to credit to its firm shippers about 88 percent of the total reservation charges that would otherwise be due during that period. By contrast, the No Profit Method allocates the same proportionate risk to the pipeline regardless of the length of the *force majeure* outage, because the pipeline must provide a credit equal to its return on equity and associated income taxes beginning on Day One. Thus, unlike the Safe Harbor Method, the No Profit Method requires the pipeline to bear some of the risk of short term *force majeure* outages. On the other hand, since a pipeline's return on equity and associated income taxes generally constitute somewhat less than 50 percent of its fixed costs, the No Profit Method allocates less of the risk of long-term *force majeure* outages to pipelines, than the Safe Harbor Method.

39. Kern River's hybrid proposal would give it the pipeline-favorable aspects of both the Safe Harbor and No Profit Methods. As under the Safe Harbor Method, Kern River's proposal would place the entire risk of short-term *force majeure* outages of 10 days or less on its shippers.[37] Kern River's proposal would then continue to place the entire risk of the *force majeure* outage on the shipper for another five days, since Kern River does not propose to start giving full credits until Day 16 of the *force majeure* outage. Thus, Kern River's proposal would result in its bearing even less of the risk of short-term *force majeure* outages than under the Safe Harbor Method. At the same time, Kern River's proposal to provide full credits for the second 15 days of the outage and partial credits thereafter approximates the cost sharing for longer term outages under the No Profit Method. Except for outages of exactly 30 days, the credits provided by Kern River would always be less than 50 percent of the shippers' total reservation charges for the overall period of the outage. Thus, Kern River's proposal would not provide shippers significantly greater credits during long-term *force majeure* outages than under the No Profit Method. In short, Kern River continues to cherry pick the most pipeline-favorable aspects of each method by combining the no refund period for short-term outages with a percentage refund for longer-term outages. As the court held in *North Baja*, such a

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[37] In all cases where the Commission has approved a pipeline's use of the Safe Harbor Method, the no credit period has been limited to 10 days or less. *See, e.g., Midwestern*, 137 FERC ¶ 61,257 at P 20; *Tuscarora Gas Transmission Co.*, 123 FERC ¶ 61,109, at P 12 (2008); *Entrega Gas Pipeline LLC*, 114 FERC ¶ 61,326, at P 13 (2006); *Natural Gas Pipeline Co. of Am.*, 106 FERC ¶ 61,310, at P 24, *reh'g*, 108 FERC ¶ 61,170, at PP 8-11 (2004); *Tex. E. Transmission Co.*, 62 FERC ¶ 61,015, at 61,090 (1993). Kern River has not cited any case where the Commission approved a grace period of more than 10 days.

blending of the two risk sharing methods does not "achieve[ ] an equitable cost-sharing in the same ballpark as" the Safe-Harbor and No-Profit Methods.[38]

40. Kern River suggests its hybrid variation on the two approved methods for sharing the risk of a *force majeure* outage is justified, because a *force majeure* outage on its system could be relatively lengthy, given the difficulty of reaching the remote mountainous regions where some of its facilities are located, particularly in the winter. The Commission disagrees. By giving pipelines the choice of adopting either the Safe Harbor Method or the No Profit Method, the Commission gives each pipeline the flexibility to choose whichever method best addresses its operational situation, including the potential duration of *force majeure* outages on its system. Virtually all pipelines have chosen the Safe Harbor Method, apparently in the expectation that *force majeure* outages on their systems are likely to be relatively short-term. However, if Kern River is concerned that *force majeure* outages on its system may be lengthy, it can choose the No Profit Method. Under that method, no matter how long a *force majeure* outage on its system lasts, Kern River would only have to credit the portion of its reservation charges reflecting return on equity and associated income taxes. Thus, the No Profit Method provides an equitable method of sharing the risk of *force majeure* outages on Kern River's system, including any long-term outages.

41. The Commission has now twice ordered Kern River to file revised tariff records providing for partial reservation charge credits during *force majeure* outages consistent with Commission policy. Each time the Commission directed Kern River either to adopt the Safe Harbor or No Profit Methods or to propose an alternative approach that achieves an equitable cost sharing in the same ballpark as those two methods. Both times Kern River proposed an alternative approach that failed to provide for the required equitable cost sharing. Because we have now given Kern River two opportunities to develop an acceptable alternative method and Kern River has failed to comply on both occasions, we now order Kern River to revise the tariff records included in the May 2011 compliance filings in order to use either the Safe Harbor Method or the No Profit Method for reservation charge crediting during *force majeure* outages. We will not entertain any further effort by Kern River in this proceeding to use any cost-sharing arrangement other than one of those two approved methods, both of which the D.C. Circuit has held "incorporate a careful balancing of risk between shippers and pipelines."[39]

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[38] *North Baja*, 483 F.3d 819, 822.

[39] *Id*.

2. Volumes Eligible for Credits

42. The April 2011 Order directed Kern River to revise its tariff to provide full reservation charge credits during non-*force majeure* outages, including outages during scheduled maintenance, consistent with Commission policy.[40] The Commission requires pipelines to provide credits during non-*force majeure* outages equal to the amount of primary firm service which the shipper nominated for scheduling but the pipeline was unable to deliver.[41] These credits are intended to compensate the shipper for the primary firm service it would have received but for the curtailment.

43. In its compliance filing, Kern River proposes in section 9.5(b) to provide credits during the first day of a non-*force majeure* outage equal to the quantities the shipper nominated and Kern River scheduled for delivery at a primary delivery point, but Kern River failed to deliver. On subsequent days, Kern River proposes to provide credits equal to the shipper's "Required Market Deliveries." Kern River defines Required Market Deliveries in section 9.3(j) as "the minimum quantities actually required by Shipper to serve or otherwise meet its firm market at Primary Delivery Points."

44. Kern River also proposes to limit any partial or full credits given during *force majeure* outages to "Required Market Deliveries."

45. The Commission finds that Kern River's proposal concerning the measurement of reservation charge credits during non-*force majeure* and *force majeure* outages is contrary to Commission policy. The Commission has held that, when the pipeline gives notice of the outage at any time after the shipper's first opportunity to submit a scheduling nomination for the day in question, the credit should be based on the quantity the shipper nominated for scheduling but the pipeline was unable to deliver.[42] However, when the pipeline has provided advance notice of the outage before the shipper's first opportunity to submit scheduling nominations for the day (or days) of the outage,[43] it is reasonable for the pipeline to use an appropriate historical average of usage as a substitute for the use

[40] April 2011 Order, 135 FERC ¶ 61,050 at P 23.

[41] *Midwestern*, 137 FERC ¶ 61,257 at P 16.

[42] *Southern*, 135 FERC ¶ 61,056 at P 32.

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

of actual nominated amounts to determine the level of the shipper's reservation charge credits. This approach minimizes the potential for gaming, where shippers would submit scheduling nominations for high amounts knowing that the scheduling nomination will be rejected, while ensuring that shippers who do not nominate will receive credits based on their recent usage of the system.[44]

46. Kern River's proposal to limit reservation charge credits after the first day of a non-*force majeure* outage and the fifteenth day of a *force majeure outage* to "Required Market Deliveries" is contrary to the above policy. By defining that term to mean the quantities required by the shipper to "meet *its firm market* at Primary Delivery Points,"[45] Kern River would limit the credits to quantities which the shipper has a firm contractual obligation to supply to its downstream customers. However, the shipper's contractual arrangements with its downstream customers are not relevant to determining the reservation charge credits intended to compensate the shipper for Kern River's failure to satisfy its firm contractual obligation to the shipper. A shipper may use its primary firm transportation capacity on Kern River for a variety of purposes, including to take advantage of short-term interruptible business opportunities. For example, a local distribution company may contract with Kern River for sufficient primary firm capacity to serve the peak needs of its retail customers, but also use its capacity to serve interruptible downstream markets during other periods. Therefore, absent either a non-*force majeure* or a *force majeure* outage, the shipper might have used its capacity to serve interruptible as well as firm downstream markets. Accordingly, Kern River's proposal to limit reservation charge credits to the shipper's "Required Market Deliveries" would fail to accomplish the goal of compensating the shipper for the primary firm service Kern River would have provided, but for the outage.

47. Kern River suggests that it proposed to limit reservation charge credits to "Required Market Deliveries" to prevent gaming by shippers after Kern River has announced that an outage will occur. The Commission recognizes that when the pipeline gives advance notice of an outage, a shipper could nominate volumes it never intended to move. Therefore, in that situation, the Commission has permitted pipelines to use "an appropriate historical average of usage" as a substitute for actual shipper nominations in order to minimize the potential for gaming.[46] A shipper's historical average usage over a

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[44] *Southern*, 135 FERC ¶ 61,056 at P 33, *order on reh'g*, 137 FERC ¶ 61,050 at P 22-21.

[45] Proposed section 9.3(j) (emphasis added).

[46] *Southern*, 135 FERC ¶ 61,056 at P 33.

representative period would include the shipper's usage both to serve its firm downstream market and any interruptible downstream market. Thus, the historical usage approach avoids the flaw in Kern River's proposal of only taking into account the level of a shipper's firm downstream market.

48. Also, a shipper's historical usage of the pipeline is an objective fact easily determined by both the pipeline and the shipper and thus unlikely to engender factual disputes. By contrast, there could be many disputes concerning the level of a shipper's "firm market" at its delivery point. For example, a local distribution company is generally required to serve the full requirements of its retail customers. What those full requirements were during the period of the outage could be a matter of considerable dispute. A similar problem would arise with shippers who use the gas delivered to them in their own operations, such as an electric generator.

49. In its orders in other cases where the gaming issue has arisen, the Commission has approved pipeline proposals to base reservation charge credits on each shipper's average usage during the seven days immediately before the outage.[47] However, the Commission recognizes that a shipper's need to transport gas may change over time, with the result that usage during the period immediately before an outage may become less representative of the service a shipper would have nominated during the outage the longer the outage lasts. Therefore, we do not intend in this order to foreclose pipelines from proposing other objective methods of estimating the service shippers would have nominated, particularly during longer term outages. For example, it may be possible to base the credits on a shipper's usage of its primary firm service during a comparable period of the prior calendar year or years. In this order, we hold only that Kern River's proposal to limit reservation charge credits to "Required Market Deliveries" is unjust and unreasonable, because that method (1) fails to take into account the level of a shipper's non-firm downstream market, and (2) is not based upon easily ascertainable objective facts about which there is unlikely to be any dispute.

50. Therefore, Kern River must modify the tariff records in its May 2011 compliance filings in order to remove all provisions related to its proposal to limit reservation charge credits to "Required Market Deliveries." Kern River must revise its tariff to provide that, when it gives notice of a service interruption at any time after the shipper's first opportunity to schedule service for the day in question,[48] the reservation charge credit

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[47] *See, e.g., Midwestern*, 137 FERC ¶ 61,257 at P 22.

[48] The North American Energy Standards Board (NAESB) standards currently provide shippers four nomination opportunities: the Timely Nomination Cycle (11:30 a.m. Central Clock Time (CCT) the day prior to gas flow); the Evening

(continued…)

will be based on the volume the shipper nominated for scheduling but the pipeline was unable to deliver because of the service interruption. Consistent with the discussion above, Kern River may propose to use an appropriate historical average of usage as a substitute for use of actual scheduled amounts to determine the level of the shipper's reservation charge credits in circumstances where the pipeline has given advance notice of the unavailability of service prior to shippers' scheduling nominations.[49]

3. Incremental Cost Limit on Credits

51. Kern River proposes that the full reservation charge credits it provides during non-*force majeure* outages and during Days 15 through 30 of *force majeure* outages equal the lesser of (1) the reservation rate otherwise payable by the shipper or (2) the shipper's incremental cost of serving the undelivered volumes through alternate means.[50] Kern River also proposes an incremental cost limit on any partial credit it provides in connection with a *force majeure* outage.

52. The Commission finds that Kern River's proposal to limit reservation charge credits to the shipper's incremental cost of obtaining alternative service is contrary to Commission policy and unjust and unreasonable. As discussed above, the Commission has limited the obligation to provide reservation charge credits to situations where the pipeline has failed to meet its contractual obligation to provide a shipper the primary firm service for which the shipper has contracted. In non-*force majeure* situations, the Commission has found that it is unjust and unreasonable for the pipeline to require the shipper to make any payment for primary firm service that the shipper has nominated pursuant to its contract but the pipeline cannot provide. The fact that the shipper may obtain alternative service on another pipeline at a lower rate than the rate in the shipper's contract with Kern River does not alter the fact that Kern River failed to provide the primary firm service for which the shipper was paying a reservation charge. It remains unjust and unreasonable for Kern River to retain any portion of the shipper's payment for service Kern River did not provide.

53. In addition, even if we were to permit the shipper's incremental cost of obtaining alternative service to be taken into account, Kern River has failed to show why the credits

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Nomination Cycle (6 p.m. CCT the day before gas flow); Intra-Day Cycle 1 (10 a.m. CCT the day of gas flow); and Intra-Day Cycle 2 (5 p.m. CCT the day of gas flow).

[49] *See Southern*, 135 FERC ¶ 61,056 at PP 32-34, and *Midwestern*, 137 FERC ¶ 61,257 at PP 16-22.

[50] Proposed sections 9.5(a) and (b).

should be limited to the *lesser* of that incremental cost and the reservation charge otherwise payable. If it is reasonable to limit a shipper's credit to the incremental cost of alternative service when that cost is less than the reservation charge, it would appear equally reasonable to require Kern River to compensate the shipper when Kern River's failure to provide primary firm service causes the shipper to incur costs to obtain alternative service in excess of the reservation charge. Moreover, considering the shipper's incremental cost of obtaining alternative service would inevitably lead to disputes about the level of those costs and what costs should be considered. For example, issues could arise as to the reasonableness of including (1) any additional gas costs if the shipper was required to purchase gas supplies from a different supplier, or (2) the cost of the time spent by the shippers' employees in making alternative transportation arrangements. Basing the level of reservation charge credit solely on the amount of the reservation charge credit owing for the primary firm service not provided avoids such disputes and makes the determination of the reservation charge credits a relatively simple matter unlikely to engender difficult and time-consuming disputes among the parties.

54. For similar reasons, the Commission finds that it would be unreasonable to consider the shipper's incremental cost of obtaining alternative service during *force majeure* outages. The Commission has held that the cost of such outages must be shared pursuant to the Safe Harbor or No Profit Methods or another method providing similar cost sharing. If the shipper's incremental cost of obtaining alternative service were to be treated as a relevant factor in determining an equitable sharing of the cost of a *force majeure* outage, then there would appear to be no reason to limit consideration of that factor to situations where the incremental cost is less than the shipper's reservation charge, as Kern River has proposed. Moreover, as explained above, consideration of the shipper's incremental cost of obtaining alternative service would engender disputes concerning the level of those costs and what costs should be considered. The Commission concludes that Kern River's incremental cost proposal is not just and reasonable.

55. Therefore, Kern River must remove from proposed section 9 of its GT&C all provisions related to its proposed incremental cost limit on reservation charge credits.

4. Procedures for Obtaining Credits

56. In its compliance filing, Kern River proposes, for the first time, to require a shipper to file a claim for a reservation charge credit within 10 days of the end of the service outage and support the claim through the use of an affidavit. Kern River proposes to require the shipper to include, among other things, a detailed schedule of its Required Market Deliveries and the undelivered quantities for each day of the outage, an affirmation that the shipper had purchased or was prepared to purchase gas supplies at the shipper's primary receipt points, verifiable support of the shipper's incremental cost for

meeting its Required Market Deliveries, and detail regarding all actions to mitigate the size of the claim.

57. The Commission rejects Kern River's proposed claims procedure, as unnecessary in light of our rulings in the two previous sections. The primary purpose of the claims procedure is to require shippers to provide evidence of (1) their Required Market Deliveries defined as "the minimum quantities actually required by Shipper to serve or otherwise meet its firm market at Primary Delivery Points" and (2) their incremental cost of satisfying their Required Market Deliveries. However, above we have rejected Kern River's proposal to consider either a shipper's Required Market Deliveries or its incremental cost of satisfying those requirements in calculating the reservation charge credits to be provided the shipper. Therefore, there is no need for Kern River to require shippers to provide that information.

58. As required by this order, the reservation charge credits to be provided by Kern River will be based on either (1) the amount of primary firm service nominated for scheduling by the shipper which could have been provided but for the *force majeure* or non-*force majeure* outage, or (2) a reasonable measure of historic usage as discussed above. This information should already be in the hands of Kern River without the need for any special claims process. In fact, Kern River did not include such a claims procedure in its filing to comply with the August 2010 Order, nor do other pipelines have such a claims procedure for reservation charge credits. Accordingly, Kern River must remove from its proposed GT&C section 9 all provisions related to its proposed claims procedure.

5. WIC

59. The April 2011 Order, at P 26, required Kern River to clarify when a shipper whose nomination has been cut during the Timely Nomination Cycle must renominate in subsequent nomination cycles, consistent with the policy set forth in *WIC*.[51] In that case, the Commission held that, in the limited case where a shipper whose nominated amount is curtailed by the pipeline in the Timely Nomination Cycle 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

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[51] 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).

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 in order to receive reservation charge credits. The shipper need not resubmit its nominations in subsequent nomination cycles.

60. Kern River's May 2011 filing, fails to implement reservation charge crediting procedures consistent with *WIC* as directed by the Commission. Therefore, Kern River must revise proposed GT&C section 9 to include such procedures.

6. Capacity Release

61. In section 9.6, Capacity Release, Kern River proposes tariff language concerning the determination of reservation charge credits during periods when a shipper has released its capacity to a replacement shipper. Specifically, Kern River proposes in that situation, the reservation charge credit applicable to the replacement shipper will be the lower reservation rate of the releasing and replacement shipper. Kern River also proposes that if the replacement shipper is paying a volumetric rate, it will provide no reservation charge credit. The Commission finds this proposal is reasonable, subject to the conditions discussed below.

62. First, we address the situation where the replacement shipper is paying a reservation charge which is lower than the releasing shipper's rate. In that circumstance, it is reasonable for the reservation charge credit applicable to the replacement shipper to be based on that shipper's reservation charge, so long as the pipeline continues to reduce the releasing shipper's rate by the amount of the replacement shipper's reservation charge. Because the replacement shipper is not paying the higher reservation charge applicable to the releasing shipper, there is no reason for the pipeline to provide the replacement shipper a credit in excess of the replacement shipper's reservation charge. Kern River's compliance filing does not expressly address how it intends the reservation charge credit given to the replacement shipper to affect Kern River's obligation under the Commission's capacity release regulations to credit the replacement shipper's reservation charge payments to the releasing shipper's reservation charge.[52] We find that the pipeline should continue to credit the replacement shipper's reservation charge to the releasing shipper, without regard to the credits given to the replacement shipper for the outage. Otherwise, the releasing shipper would be required, in effect, to subsidize the reservation charge credits the Commission requires the pipeline to give to the replacement shipper for the pipeline's failure to provide that shipper its contracted-for service. At the same time, there is no reason to require Kern River to provide the

[52] 18 C.F.R. § 284.8(f) (2011).

releasing shipper any greater credits against its reservation charge than the releasing shipper would have received absent the outage.

63. We now turn to the situation where the replacement shipper is paying a reservation charge which is higher than the releasing shipper's reservation charge. In this situation, Kern River proposes to limit the reservation charge credit applicable to the replacement shipper to the reservation charge paid by the releasing shipper. We find that this proposal is generally reasonable, subject to the conditions discussed below. As described above, the Commission's capacity release regulations require the pipeline to credit the entire reservation charge paid by the replacement shipper to the releasing shipper. Thus, the releasing shipper is entitled to any profit from releasing its capacity at a rate higher than it is paying the pipeline. Kern River's proposal to limit the credit to the replacement shipper to the releasing shipper's rate has the effect of requiring the replacement shipper to continue to fund the releasing shipper's profit on its release. The replacement shipper would continue to pay the pipeline the amount by which its reservation charge exceeds the releasing shipper's reservation charge. Consistent with the discussion in the preceding paragraph, the pipeline would then credit to the releasing shipper both the amount of the releasing shipper's reservation charge and the amount the replacement shipper continues to pay the pipeline. This would put the releasing shipper in the same position as if the outage had not occurred, and thus treats the releasing shipper in a reasonable manner. The replacement shipper would not be credited the entire amount of its reservation charge. However, the Commission finds this is reasonable, because the pipeline had no control over the release rate agreed to between the releasing shipper and the replacement shipper and never had any right to retain the excess amount paid by the replacement shipper.

64. Finally, the Commission finds reasonable Kern River's proposal to provide no reservation charge credits when the replacement shipper pays a volumetric rate. Because the replacement shipper's rate is volumetric it will not make any payments to the pipeline during an outage, since it receives no service. Moreover, the releasing shipper, having released its capacity at a volumetric rate, takes the risk that it will receive no credits if the replacement shipper does not take any service. Therefore, in this situation, there is no need for Kern River to provide any credits to the releasing shipper.

65. Therefore, the Commission accepts proposed GT&C section 9.6, subject to Kern River clarifying that the credits it provides to releasing shippers will be unaffected by any reservation charge credits it provides to the replacement shipper during either a *force majeure* or non-*force majeure* outage.[53]

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[53] The Commission also finds that proposed section 9.7 concerning segmented

(continued…)

7. **Hourly Flow Provision**

66. In section 9.8, Kern River proposes that, to the extent specified in the notification of a *force majeure* or non-*force majeure* outage, it may limit hourly deliveries during an outage to 1/24 of the shipper's scheduled quantities. If a shipper exceeded 1/24 of the scheduled amount in any hourly period, it would forfeit reservation charge credits by the amount of the excess hourly deliveries. Kern River also proposes that it may waive the forfeiture of credits if no operational impairment results from the excess hourly deliveries.

67. In addition, in section 9.9 Kern River proposes a new "Excess Hourly Flow Penalty," pursuant to which a shipper who, following Kern River's notification of a *force majeure* or non-*force majeure* event, "takes deliveries at a delivery point in excess of 1/24 of the daily scheduled quantity shall be subject to a penalty . . . ." The proposed penalty would be equal to "the greater of (1) $25 per Dth; (2) the market price reported in Platt's Gas Daily for Kern River, delivered; or (3) the market price reported in Platt's Gas Daily for SoCal Gas." Kern River proposes to use the penalty revenues first to meet the claims of shippers for credit of a *force majeure* or non-*force majeure* event, and any excess revenues would then be credited to all Rate Schedule KRF-1 shippers not incurring penalties. Kern River also proposes that it may waive the penalty if shippers' excess hourly takes do not cause operational problems.

68. Kern River argues these provisions are necessary to "discourage bad behavior that may threaten the operational integrity of a pipeline" when a shipper exceeds the quantities it is able to flow on a daily or hourly basis.[54]

69. The Commission rejects Kern River's proposed uniform hourly flow requirements and excess hourly flow penalties as beyond the scope of compliance with the April 2011 Order. Section 154.203(b)[55] of our regulations provides that "filings made to comply with Commission orders must include only those changes required to comply with the order . . . A compliance filing that includes other changes or that does not comply with the applicable order in every respect may be rejected." As the Commission held in *El Paso Natural Gas Co.*,

> A compliance filing may not include new proposed tariff provisions

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transportation agreements is reasonable.

[54] Kern River, May 11, 2011 Filing at 9.

[55] 18 C.F.R. § 154.203(b) (2011).

> not addressed in the Commission order, and the Commission will reject a compliance filing that goes beyond the scope of the directives in the Commission order.[56]

70. Nothing in the April 2011 Order required Kern River to implement hourly flow limitations, or hourly flow penalties. Kern River did not propose any comparable tariff provisions in the compliance filing rejected by the April 2011 Order. Therefore, the April 2011 Order addressed no issue concerning hourly flow limitations or penalties in the April 2011 Order. The April 2011 Order required only that Kern River modify its tariff to provide partial reservation charge credits during *force majeure* outages and full reservation charge credits during non-*force majeure* outages and clarify when shippers need to resubmit a scheduling nomination in the evening nomination cycle in order to receive credits. Kern River contends that its proposed hourly flow limitations and penalties are necessary to address operational problems during *force majeure* and non-*force majeure* outages. However, the issue of operational problems that may occur during such outages is separate from the rate issue of providing reservation charge credits to shippers who are unable to obtain primary firm service during such outages. Thus, Kern River's inclusion of the penalties in the May 2011 filings goes beyond the scope of the directives in the April 2011 Order.

71. Moreover, Kern River's proposal to use the revenues from the proposed excess hourly flow penalty to pay for reservation charge credits is contrary to the requirement in section 284.12(b)(2)(v) of the regulations[57] that pipelines "may not retain net penalty revenues, but must credit them to shippers." Kern River's proposal, which would allow Kern River to use penalty revenues to pay for reservation charge credits, amounts to Kern River using penalty revenues for its own benefit, rather than crediting them to its shippers. The Commission's reservation charge crediting policy makes clear that reservation charge credits are owed when a pipeline fails to operate its system so that it can fulfill its contractual obligations. By using penalty revenues to pay reservation charge credits, Kern River's proposal would allow Kern River to shift these costs to its shippers.

72. Section 10.9 of Kern River's tariff provides it with the authority to take corrective action when the operation or integrity of the system is threatened. If Kern River believes it needs additional flexibility when its operation is threatened it should make the necessary section 4 filing. However, use of the instant section 5 proceeding involving the

[56] *El Paso Natural Gas Co.*, 115 FERC ¶ 61,356, at P 13 (2006).

[57] 18 C.F.R. § 284.12(b)(2)(v) (2011).

Commission's reservation charge crediting policy, to include such provisions is clearly not appropriate. Thus, we reject sections 9.8 and 9.9 because they do not comply with the April 2011 Order, and are contrary to Commission policy in any event.

8. Conclusion

73. The Commission accepts the tariff records listed in footnotes 3 and 4 of this order, subject to Kern River revising those tariff records consistent with the discussion above. Kern River must submit the revised tariff records required by this order on or before 30 days from the date of this order. As directed by the April 2011 Order, the tariff records accepted by this order are effective December 1, 2010.

The Commission orders:

(A) The tariff records listed in footnotes 3 and 4 of this order are accepted effective December 1, 2010. Kern River is directed to file revised tariff records in compliance with the directives in this order within thirty (30) days of the date of this order. The revised tariff records will be effective December 1, 2010.

(B) BP's request for rehearing is denied.

(C) Nevada Power's request for a technical conference is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.