140 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP Docket Nos. RP12-318-002
RP12-318-001

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued September 20, 2012)

1. On January 20, 2012, Texas Eastern Transmission, LP (Texas Eastern) filed a revised tariff record[1] to revise the *pro forma* service agreement for Texas Eastern's Rate Schedule FTS-5 to provide additional flexibility (January 2012 Filing).[2] On February 16, 2012, the Commission accepted the revised tariff record to be effective February 19, 2012, subject to the condition that, pursuant to section 5 of the Natural Gas Act (NGA), Texas Eastern either file revisions to its tariff concerning reservation charge credits to conform to current Commission policy or explain why it should not be required to do so.[3] Texas Eastern filed a request for rehearing (Request for Rehearing) and a response to the February 2012 Order (Response). As discussed below, the Commission grants, in part, and denies, in part, the request for rehearing and directs Texas Eastern to file revised tariff records.

[1] 20., FTS-5 Service Agreement, 2.1.0 to Texas Eastern Database 1, FERC NGA Gas Tariff.

[2] The revised tariff record corrected a typographical error in Texas Eastern's January 19, 2012 Filing in Docket No. RP12-318-000.

[3] *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126 (2012) (February 2012 Order).

I. **Background**

2. In the February 2012 Order, the Commission accepted Texas Eastern's proposed tariff record to revise the *pro forma* service agreement for Texas Eastern's Rate Schedule FTS-5. The February 2012 Order also addressed a protest concerning Texas Eastern's reservation charge crediting provisions, which Texas Eastern had not proposed to change. in its January 2012 Filing.

3. Texas Eastern's existing Rate Schedules for firm transportation, CDS, FT-1, FTS, FTS-2, FTS-4, FTS-5, FTS-7, FTS-8, SCT, LLFT, VKFT, and MLS-1, and firm storage, FSS-1, SS, and SS-1 contain reservation charge crediting provisions. Sections 3.3, 3.4, or 3.5 of each firm rate schedule provides that Texas Eastern will provide reservation charge credits if it delivers less than 95 percent of the firm shipper's nominated volumes at its primary delivery points (95 Percent Requirement). Paragraph (B) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold a reservation charge credit if the failure to deliver "is the result of Pipeline having operational flow orders [OFO] in effect on such Day" (the OFO Exemption). Paragraph (C) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold the reservation charge credit if the outage is due to "routine operational maintenance and repair" during the period from May 1 through November 1 of any year (the Routine Maintenance Exemption). Paragraph (D) provides that Texas Eastern need not provide credits if the failure to deliver is the result of Texas Eastern "performing at any time repair and maintenance of its facilities to comply with regulatory requirements" (the Regulatory Requirements Exemption). Finally, paragraph (E) provides that Texas Eastern need not provide credits during the first ten days of a *force majeure* event.

4. Section 17, Force Majeure, of Texas Eastern's General Terms and Conditions (GT& C) enumerates various *force majeure* events in section 17.1, including "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means." In addition, section 17.1 provides that force majeure events include any other outage "not within the control of" the pipeline and which the pipeline could not have prevented "by the exercise of due diligence." Finally, section 17.3, Scheduling of Routine Maintenance, provides:

> Pipeline shall have the right to curtail, interrupt, or discontinue service in whole or in part on all or a portion of its system from time to time to perform *routine repair and maintenance* on Pipeline's system as necessary to maintain the operational capability of Pipeline's system or to comply with applicable regulatory requirements. Pipeline shall exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and shall provide reasonable notice of the same to Customers [emphasis added].

5. Indicated Shippers,[4] in its protest to the January 2012 Filing, stated that, in *Natural Gas Supply Ass'n*, *et al.*,[5] the Commission encouraged shippers who believe a pipeline's tariff is not in compliance with the Commission's reservation charge crediting policy to file a complaint under section 5 or raise the issue in any section 4 filing made by that pipeline.[6] Indicated Shippers argued that Texas Eastern's existing tariff did not comply with that policy and that the unjustified crediting exemptions should be removed. On February 9, 2012, Texas Eastern filed an answer to the protest (Answer).

6. In the February 2012 Order, the Commission determined that several of Texas Eastern's reservation charge crediting provisions were in conflict with Commission policy. The Commission explained that Commission policy requires a full reservation charge credit for non-*force majeure* outages and a partial credit for *force majeure* outages when the pipeline fails to deliver the entire amount nominated by that shipper, not any lesser amount.

7. First, the Commission found that the 95 Percent Requirement is contrary to the requirement to provide full reservation charge credits for non-*force majeure* outages. The 95 Percent Requirement permits Texas Eastern not to provide credits, so long as it delivers at least 95 percent of nominated volumes during a non-*force majeure* outage. The Commission cited *Southern Natural Gas Co.*,[7] in which the Commission held that a similar 98 percent threshold for providing reservation charge credits was unjust and unreasonable.

8. Second, the Commission also found that the Routine Maintenance Exemption conflicts with the Commission's longstanding policy concerning outages caused by routine maintenance or repairs. The Commission stated that it had held that such routine repair and maintenance is not an emergency situation or unexpected.[8] Therefore, the Commission stated, it has held that scheduled maintenance is a non-*force majeure* event

[4] Indicated Shippers consists of BP America Production Company, BP Energy Company, Hess Corporation, and SWEPI LP.

[5] 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA*).

[6] *Citing NGSA*, 135 FERC ¶ 61,055 at P 13.

[7] 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050, at P 33 (2011) (*Southern*).

[8] *Citing Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123, at 61,663 (1996) (*Portland*).

within the pipeline's control, and the pipeline must provide full reservation charge credits for the nominated amounts not delivered during these non-*force majeure* outages.[9] The Commission also pointed out that, in *North Baja v. FERC*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld that policy.[10]

9. Further, the Commission found that Commission policy does not permit an exemption from providing reservation charge credits for interruptions due to repair and maintenance to comply with applicable regulatory requirements or OFOs. The Commission explained that it has recognized that the actions of an administrative or regulatory agency may support declaration of a *force majeure* event for which only partial reservation charge credits are required.[11] However, the Commission stated that it has held that "testing and maintenance are a part of the service provider's duties under a certificate of public convenience and necessity that are not appropriately considered a *force majeure* event,"[12] and, therefore, the Commission has required pipelines to provide full reservation charge credits for outages due to maintenance including where the maintenance is necessary to comply with regulatory requirements.[13] Therefore, the Commission concluded that there is no basis for Texas Eastern to exempt from the crediting requirement outages during which any repair or maintenance was performed to comply with applicable regulatory requirements. Similarly, the cause of OFO curtailments is only relevant to the amount of the required credit.

10. Finally, the Commission found that Texas Eastern should revise section 17 of its GT&C, entitled Force Majeure. Specifically, the Commission stated that section 17.3 included references to routine repair and maintenance. The Commission stated that those references should be removed from section 17.3, because such routine repair and maintenance is not a *force majeure* event.

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[9] *Citing Southern*, 135 FERC ¶ 61,056 at PP 24-27.

[10] *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 822-23 (D.C. Cir. 2007) (*North Baja v. FERC*), *aff'g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

[11] *Citing Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, *order on reh'g*, 107 FERC ¶ 61,074, at P 32 (2004) (*Florida Gas*); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*).

[12] *Quoting Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009) (*Orbit*).

[13] *Citing Florida Gas*, 107 FERC ¶ 61,074 at PP 28-29.

11. The Commission also rejected Texas Eastern's contention in its Answer that there is not a sufficient showing to support initiating an investigation under section 5 of the NGA. The Commission concluded that at least a *prima facie* showing had been made that Texas Eastern's existing tariff was inconsistent on its face with the Commission's current reservation charge crediting policy, as established in previously litigated adjudications. Therefore, pursuant to NGA section 5, the Commission directed Texas Eastern either to file revised tariff records to conform to the Commission's reservation charge crediting policy or explain why it should not be required to do so.

12. On March 19, 2012, Texas Eastern filed a Request for Rehearing of the February 2012 Order. On the same date, Texas Eastern filed a Response to the requirements of the February 2012 Order, contending that its existing reservation charge crediting provisions are just and reasonable and should not be modified under NGA section 5.

13. The issues raised by Texas Eastern's Request for Rehearing and Response are discussed below.

II. Rehearing of the February 2012 Order

14. For the reasons discussed below, the Commission generally denies rehearing of the February 2012 Order. We find that the February 2012 Order properly initiated an investigation under NGA section 5 as to whether Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable and must be modified. However, the Commission grants rehearing of the February 2012 Order's requirements concerning GT&C section 17.3.

A. Rehearing Request

15. On rehearing, Texas Eastern contends that the February 2012 Order requiring it to show cause why its reservation charge crediting tariff provisions should not be changed is contrary to NGA section 5 and the *NGSA* decision. Texas Eastern asserts that the Commission has the burden of proof in this section 5 proceeding and therefore has the initial burden of producing evidence that Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable. However, Texas Eastern asserts, the February 2012 Order initiated this section 5 proceeding based solely on a general comparison of Texas Eastern's reservation charge crediting provisions to the Commission's reservation charge crediting policy set forth in *NGSA*. Texas Eastern points out that, in *NGSA*, the Commission denied the petition of various trade associations to initiate an immediate industry-wide NGA section 5 proceeding requiring all pipelines to comply with the Commission. Moreover, Texas Eastern contends, the Commission recognized that its order in *NGSA* was nothing more than a statement of

policy.[14] Texas Eastern concludes that comparing its tariff to the policy set forth in *NGSA* does not constitute evidence and cannot constitute the *prima facie* case required before the burden of going forward with evidence can be shifted to the pipeline in a section 5 proceeding.

16. Texas Eastern also argues that the Commission previously found Texas Eastern's reservation charge crediting provisions to be just and reasonable when Texas Eastern restructured its services in order to comply with Order No. 636.[15] Texas Eastern asserts that no evidence has been presented in this proceeding to show any changed circumstances or other reason why those provisions are no longer just and reasonable.

17. Finally, Texas Eastern contends that the Commission erred in finding that section 17.3 of its GT&C defines routine repair and maintenance as a *force majeure* event. Texas Eastern asserts that it is section 17.1, not section 17.3, that defines *force majeure*, and section 17.1 does not include routine repair or maintenance in the list of events that would constitute *force majeure*. Texas Eastern contends that section 17.3 only sets forth due diligence and prior notice safeguards for routine repair and maintenance similar to safeguards for *force majeure*.

B. <u>Commission Determination</u>

18. The Commission finds that the February 2012 Order properly required Texas Eastern either to file revised tariff records to conform the provisions of its firm rate schedules to the Commission's reservation charge crediting policy or explain why it should not be required to do so. However, the Commission grants rehearing with respect to its requirements concerning section 17.3 of Texas Eastern's GT&C.

19. The February 2012 Order initiated an investigation under NGA section 5 as to whether Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable and must be modified. In order to modify Texas Eastern's reservation charge crediting provisions under NGA section 5, the Commission has the burden of persuasion to demonstrate both that Texas Eastern's existing tariff provisions are unjust and unreasonable and that any replacement tariff provisions we impose are just and

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[14] Request for Rehearing at 9 (citing the *NGSA*, *order on reh'g*, 137 FERC ¶ 61,051, at P 26).

[15] *Citing Texas Eastern Transmission Corp*., 62 FERC ¶ 61,015, *order on reh'g*, 63 FERC ¶ 61,100, *order on reh'g*, 64 FERC ¶ 61,305 (1993) (*Restructuring Orders*).

reasonable.[16] The February 2012 Order did not make any final merits decision on either of those issues. Rather, the February 2012 Order established procedures in order to develop a record upon which the Commission can decide those issues. Texas Eastern contends that those procedures violate NGA section 5 by placing upon it the initial burden to produce evidence that its reservation charge crediting provisions remain just and reasonable. The Commission disagrees.

20. In response to a protest by Indicated Shippers, the Commission reviewed Texas Eastern's reservation charge crediting provisions and found that the 95 Percent Requirement, Routine Maintenance Exemption, Regulatory Requirements Exemption, and OFO Exemption in its firm rate schedules and section 17.3 of its GT&C[17] are all inconsistent on their face with the Commission's policy concerning reservation charge credits for non-*force majeure* outages. The Commission accordingly concluded that at least a *prima facie* showing had been made that Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable. On that basis, the Commission required Texas Eastern either to modify its reservation charge crediting provisions or explain why its tariff should not be modified consistent with Commission policy.

21. In contending that the February 2012 Order improperly shifted the burden of producing evidence to it, Texas Eastern asserts that the February 2012 Order "initiated this Section 5 proceeding solely on a comparison of Texas Eastern's reservation charge crediting provisions to the Commission's recent statement of policy"[18] in the *NGSA* order. Texas Eastern argues that a comparison of its tariff to a statement of policy does not constitute evidence and cannot constitute the *prima facie* case required before the burden of production can be shifted to the pipeline in a section 5 proceeding. Texas Eastern points out that, in *Pacific Gas & Electric Co. v. FPC*,[19] the D.C. Circuit held that, when an agency applies a policy announced in a policy statement in a particular case, the agency must be prepared to support the policy just as if the policy statement had never been issued.

[16] *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (*Western Resources*).

[17] Below, we grant rehearing with respect to the February 2012 Order's holding that section 17.3 improperly treats routine maintenance as a *force majeure* event.

[18] Request for Rehearing at 5.

[19] 506 F.2d 33, 38 (D.C. Cir. 1974) (*PG&E v. FPC*).

22. Texas Eastern's contention is fatally flawed by the fact that it has mischaracterized the February 2012 Order as simply comparing its tariff to the *NGSA* policy statement. That is not true. The February 2012 Order found that:

> Texas Eastern's tariff provisions are inconsistent on their face with the Commission's policy concerning reservation charge credits for non-*force majeure* outages, *as established in previously litigated adjudications* [emphasis added].[20]

In analyzing the consistency of the relevant provisions of Texas Eastern's tariff with Commission policy, the Commission did not rely on, or cite, the *NGSA* policy statement.[21] To the contrary, the Commission found that each of those tariff provisions conflicted with binding precedents established in adjudications concerning the reservation charge crediting provisions of individual pipelines. For example, the Commission relied on precedent from an adjudication in *Southern*,[22] to find that the 95 Percent Requirement violated the Commission's policy that pipelines must provide a full reservation charge credit with respect to any amount the pipeline fails to deliver as a result of a non-*force majeure* event.[23] The Commission relied on *Portland*,[24] and *Southern*,[25] in finding that the Routine Maintenance Exemption conflicts with the Commission's longstanding policy that scheduled maintenance is a non-*force majeure* event within the pipeline's control, and therefore the pipeline must provide full reservation charge credits for the nominated amounts not delivered during these non-*force majeure* outages.[26] The Commission also pointed out that in *North Baja v. FERC*, the D.C. Circuit affirmed orders applying that policy in another adjudication.[27] Similarly,

[20] February 2012 Order, 138 FERC ¶ 61,126 at P 14.

[21] *See Id*. PP 10-13.

[22] 137 FERC ¶ 61,050 at P 33.

[23] February 2012 Order, 138 FERC ¶ 61,126 at P 10.

[24] 76 FERC at 61,663.

[25] 135 FERC ¶ 61,056 at PP 24-27.

[26] February 2012 Order, 138 FERC ¶ 61,126 at P 11.

[27] *North Baja v. FERC*, 483 F.3d 819, 822-23.

the Commission relied on binding precedent in individual adjudications in *Orbit*,[28] and *Florida Gas*,[29] in finding that the Regulatory Requirements Exemption violated the requirement that pipelines provide full reservation charge credits for outages due to maintenance necessary to comply with regulatory requirements.[30]

23. In addition, while not mentioned in the February 2012 Order, in a 2004 adjudication in *Natural Gas Pipeline Company of America*,[31] the Commission found that reservation charge crediting provisions almost identical to Texas Eastern's provisions were contrary to Commission policy. In that case, the pipeline requested approval of its proposal on the ground it was virtually identical to the approved Texas Eastern tariff language. The Commission rejected Natural Gas Pipeline Company of America's (Natural) proposal, holding that the *Restructuring Orders* no longer reflected Commission policy and Natural's proposal was therefore not just and reasonable.

24. The policies established in *Natural* and the adjudications relied on by the February 2012 Order have the force of law. While the court held in *PG&E v. FPC*[32] that policy statements do not establish a "binding norm," the court also stated that, in contrast to a policy statement:

> An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedent.

The Commission has formulated its reservation charge crediting policy through a series of adjudications concerning the reservation charge crediting tariff provisions of particular pipelines. The D.C. Circuit affirmed the major elements of that policy in *North Baja*.

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[28] 126 FERC ¶ 61,095, at P 68 (2009).

[29] 107 FERC ¶ 61,074 at PP 28-29.

[30] February 2012 Order, 138 FERC ¶ 61,126 at P 12.

[31] *Natural Gas Pipeline Co. of America*, 102 FERC ¶ 61,326 (2003), *order on reh'g*, 106 FERC ¶ 61,310 at PP 13-15, *order on reh'g*, 108 FERC ¶ 61,170 (2004) (*Natural*).

[32] 506 F.2d 33, 38 (footnote and citations omitted). *See also, e.g., Consolidated Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency may "change the established law and apply newly created rules . . . in the course of an adjudication").

Therefore, consistent with *PG&E v. FPC*, the Commission's orders in those adjudications constitute "binding precedents" which establish "binding policy" that has "the force of law." Similarly, in *Michigan Wis. Pipe Line Co*., 520 F.2d 84, 89 (D.C. Cir. 1975), the court stated:

> There is no question that the Commission may attach precedential, even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a stare decisis manner.[33]

25. The Commission recognizes that, in the October 2011 Order on rehearing of our April 2011 *NGSA* Order, we stated that the summary of our reservation charge crediting policy included in the April 2011 Order was a policy statement, which was not finally determinative of any issue concerning the justness and reasonableness of any pipeline's reservation charge crediting provisions.[34] As such, the *NGSA* policy statement does not constitute binding precedent, unlike our orders in the individual adjudications discussed above. However, the Commission also stated in the October 2011 *NGSA* rehearing order:

> While [the April 2012 *NGSA* order] is itself a policy statement, the Commission may in future cases treat its decisions in the adjudications described in [*NGSA*] as binding precedent. In *PG&E v. FPC*, 506 F.2d at 38, the court recognized that an "agency may establish binding policy. . . through adjudications which constitute binding precedents." The Commission precedents described in the April 21 Order were established in adjudications concerning the justness and reasonableness of the reservation charge crediting tariff provisions of specific pipelines.[35]

Therefore, our reliance in the February 2012 Order in this case on binding precedents established in individual adjudications to establish a *prima facie* case that Texas Eastern's reservation charge crediting provisions are unjust and unreasonable is entirely consistent with our statements in the October 2011 *NGSA* rehearing order.

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[33] *See Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 61 (D. C. Cir. 1999), holding that to the extent "arguments reflect efforts to skirt or modify, rather than comply" with current Commission policy, the Commission may reject them.

[34] October 2011 *NGSA* rehearing order, 137 FERC ¶ 61,051 at P 26.

[35] *Id*. n.20.

26. Having found that Texas Eastern's reservation charge crediting provisions conflict with binding Commission precedents having the force of law, the Commission reasonably required Texas Eastern either to file revised tariff records to conform to the Commission's reservation charge crediting policy or explain why it should not be required to do so. In *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), the court addressed a similar issue concerning the Commission's ability to require a pipeline to provide information in a section 5 proceeding investigating compliance with Commission policies having the force of law. *INGAA* involved a Commission regulation, adopted in Order No. 637, requiring pipelines to permit shippers to segment their capacity to the extent operationally feasible.[36] Order No. 637 directed each pipeline to file *pro forma* tariff sheets showing how it intended to comply with that regulation or to explain why its system's configuration justified curtailing segmentation rights. The pipelines contended that the Commission had shifted to them the burden of proof that segmentation was infeasible on their systems, thus evading its duty to carry the burden of supporting a change implemented under NGA section 5. The court rejected this argument, finding that the Commission had stated that it "will indeed shoulder the burden under § 5 of the NGA." *INGAA*, 285 F.3d 18, 38. As pertinent here, the court expressly stated that:

> As to the Commission's determination to extract information from pipelines relevant to the practical issues, we see no violation of the NGA. The Commission has authority under § 5 to order hearings to determine whether a given pipeline is in compliance with FERC's rules, 15 U.S.C. § 717d(a), and under § 10 and § 14 to require pipelines to submit needed information for making its § 5 decisions, 15 U.S.C. §§ 717i & 717m(c). *Id*. (emphasis added).

27. In this case, the Commission is also investigating whether a pipeline is in compliance with a binding policy having the force of law, although here the policy has been established through adjudications constituting binding precedent, rather than through rulemaking procedures. The February 2012 Order required Texas Eastern to make precisely the same type of filing concerning its reservation charge crediting provisions as Order No. 637 required pipelines to make concerning segmentation: either revise its tariff consistent with Commission policy or explain why it should not be required to do so. Accordingly, the Commission was well within its authority under NGA section 5 "to order hearings to determine whether a given pipeline is in compliance

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[36] 18 C.F.R. § 284.7(d) (2011). *Regulation of Short-term Natural Gas Transportation Services*, FERC Stats. and Regs. ¶ 31,091 (Order No. 637), *order on reh'g*, FERC Stats. and Regs. ¶ 31,099 (2000) (Order No. 637-A).

with FERC's rules and under [NGA section] 10 and [section] 14 to require pipelines to submit needed information for making its" section 5 decisions.[37]

28. Moreover, as the Commission noted in the February 2012 Order, in *East Tennessee Natural Gas Co. v. FERC*,[38] the court held that the Commission may, consistent with its burden of persuasion under section 5, impose on a pipeline the burden of producing evidence justifying a tariff provision, once a *prima facie* showing is made that the provision is unjust and unreasonable. Texas Eastern attempts to distinguish *East Tennessee* on the basis that in that case there was record evidence, including an evidentiary hearing and testimony, supporting the *prima facie* showing that the pipeline's minimum bill was anticompetitive and thus unlawful. Texas Eastern argues that in this case there is no record evidence that the existing provisions of its firm rate schedules are unjust or unreasonable or that the previous Commission findings that these exact provisions are just and reasonable are no longer correct.[39]

29. However, the nature and type of evidence necessary to make a *prima facie* case that a tariff provision is unjust and unreasonable depends upon the tariff provision at issue and the extent to which there may be material issues of fact relevant to the establishment of a *prima facie* case. The provisions of Texas Eastern's firm rate schedules concerning reservation charge crediting are inconsistent on their face with the Commission's binding policy concerning credits during non-*force majeure* outages, as established in previously litigated adjudications. In addition, as we pointed out in the February 2012 Order, our policy requiring full reservation charge credits during outages for routine maintenance "is not dependent upon specific operating conditions on the pipeline."[40] In these circumstances, a showing that a pipeline's reservation charge crediting provisions are not consistent with the Commission's reservation charge crediting policies is sufficient to establish a *prima facie* case that the provisions are unjust

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[37] *INGAA*, 285 F.3d 18, 38.

[38] 863 F.2d 932, 938 (D.C. Cir. 1988) (*East Tennessee*), finding that the Commission may, consistent with it burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill, once a *prima facie* showing is made that the minimum bill is anticompetitive and therefore *prima facie* unlawful.

[39] The applicability of the Commission's previous determinations in the Texas Eastern's Order No. 636 restructuring orders is addressed below.

[40] *North Baja v. FERC*, 483 F.3d at 823 (*quoting El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at P 15 (2003) (*El Paso*)).

and unreasonable. That showing has clearly been made in this case with respect to the provisions of Texas Eastern's firm rate schedules, and justifies imposing on the pipeline the burden to produce evidence showing that its provisions are just and reasonable.

30. However, the Commission recognizes that, despite the fact the February 2012 Order reasonably imposed a burden of producing evidence on Texas Eastern, the Commission continues to have the burden of persuasion under NGA section 5 to demonstrate both that (1) the existing reservation charge crediting provisions in Texas Eastern's firm rate schedules are unjust and unreasonable and (2) any replacement tariff provisions we impose are just and reasonable.[41] As stated earlier, the February 2012 Order only established procedures for developing a record to enable the Commission to determine whether its burden of persuasion can be satisfied. Later in this order, we find that the record does justify a finding that the reservation charge crediting provisions in Texas Eastern's firm rate schedules are unjust and unreasonable, and we require Texas Eastern to make a compliance filing proposing just and reasonable replacement tariff provisions. We will not determine just and reasonable replacement tariff provisions until we act on the compliance filing required by this order.

31. While we deny rehearing with respect to the reservation charge crediting provisions of Texas Eastern's firm rate schedules, we grant rehearing with respect to section 17.3 of Texas Eastern's GT&C. That section provides that Texas Eastern may curtail, interrupt, or discontinue service to perform routine repair and maintenance to maintain the operational capability of its system or to comply with applicable regulatory requirements. Section 17.3 also requires Texas Eastern to exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and shall provide reasonable notice of the same to its shippers. Section 17 of Texas Eastern's GT&C is entitled "Force Majeure." The February 2012 Order interpreted GT&C section 17.3 as treating routine repair and maintenance as a *force majeure* event. The order stated that, under Commission policy, such repair and maintenance is not a *force majeure* event and therefore required Texas Eastern to revise its tariff to remove references to routine repair and maintenance as a *force majeure* event.

32. On rehearing, Texas Eastern asserts that neither GT&C section 17.3 nor any other provision of its tariff defines routine repair and maintenance as a *force majeure* event. Texas Eastern asserts that section 17.1 of its GT&C, not section 17.3, provides the actual definition of *force majeure* and contains a laundry list of events that would constitute *force majeure,* and routine repair and maintenance is not among the events listed. Texas

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[41] *East Tennessee*, 863 F.2d 932, 938 ("FERC nonetheless retained the ultimate burden of persuasion."). *Western Resources*, 9 F.3d 1568, 1578.

Eastern contends that section 17.3 only sets forth due diligence and prior notice safeguards for routine repair and maintenance similar to safeguards for *force majeure*.

33. Upon reconsideration, the Commission grants rehearing and eliminates the requirement that Texas Eastern further support or remove section references to routine maintenance in section 17.3. As explained by Texas Eastern, its *force majeure* definition is in section 17.1. Section 17.3 contains no provision treating routine repair and maintenance as a *force majeure* event for which only partial reservation charge credits would be required or otherwise addressing the issue of reservation charge credits. Rather, section 17.3 is limited to (1) authorizing Texas Eastern to interrupt or curtail service in order to perform routine repairs and maintenance "as necessary to maintain the operational capability of Pipeline's system or to comply with applicable regulatory requirements," and (2) requiring Texas Eastern to exercise due diligence to schedule such repair and maintenance so as to minimize disruptions of service and provide reasonable notice to shippers. Because section 17.3 contains no provision concerning the issue of when Texas Eastern must provide reservation charge credits for a failure to schedule primary firm service, there is nothing in that section contrary to Commission policy concerning reservation charge credits. However, as discussed in the next part of this order, the Commission will require Texas Eastern to clarify that section 17.3 does not authorize Texas Eastern to curtail service after it has been scheduled.

III. <u>Texas Eastern's Response to the February 2012 Order</u>

34. For the reasons discussed below, the Commission finds, pursuant to NGA section 5, that Texas Eastern's Routine Maintenance Exemption, Regulatory Requirement Exemption, 95 Percent Requirement, and OFO Exemption are unjust and unreasonable and, accordingly, must be eliminated. The Commission believes that revision of Texas Eastern's reservation charge credit tariff provisions to conform to current Commission policy will (1) provide an important additional financial incentive for Texas Eastern to minimize interruptions of primary firm service and (2) provide rate relief to firm shippers if an interruption does prevent them from using the primary firm service for which they are paying reservation charges. Therefore, the Commission requires Texas Eastern to file revised tariff language consistent with the discussion below.

A. <u>Pleadings</u>

35. In its Response to the February 2012 Order, Texas Eastern asserts that the Commission has already found these tariff provisions to be just and reasonable in its Order No. 636 restructuring proceeding, and no party presented any evidence to support a contrary result. Texas Eastern further asserts that, if the Commission decides to require tariff revisions notwithstanding the lack of supporting record evidence, it will be contrary to and undermine the safety and reliability goals of the Commission and the Pipeline and

the Department of Transportation's Hazardous Materials Safety Administration (PHMSA).

36. Public notice of Texas Eastern's Response was issued on April 10, 2012, allowing parties to file comments on or before April 18, 2012. Comments and untimely motions to intervene[42] were filed by the Municipal Defense Group (MDG)[43] and ConocoPhillips Company (ConocoPhillips).[44] On May 3, 2012, Texas Eastern filed an answer to the comments (Answer to Comments). On May 18, 2012, Indicated Shippers filed an answer to Texas Eastern's Answer to Comments (Answer to Texas Eastern). On June 1, 2012, Texas Eastern filed an answer to Indicated Shippers' Answer to Texas Eastern (Answer to Indicated Shippers).[45] The East Tennessee Group (ETG) made a filing on June 8, 2012

[42] Peoples Natural Gas Company LLC and Peoples TWP LLC (collectively Peoples) also filed untimely motions to intervene. Although ConocoPhillips, MDG, and Peoples filed unopposed motions to intervene which were out of time, no delay will be caused by granting the motions. Therefore, these motions to intervene are granted.

[43] MDG consists of Borough of Chambersburg, Pennsylvania; Batesville, Indiana; Cairo Public Utility Company, an Illinois not-for-profit corporation; Gloster, Mississippi; Harrisburg, Arkansas; Horton Highway Utility District, Tennessee; Lawrenceburg, Tennessee; Loretto, Tennessee; Middleborough, Massachusetts, Municipal Gas and Electric Department; Norwich, Connecticut, Department of Public Utilities; Smyrna, Tennessee; and Utica, Mississippi.

[44] On March 29, 2012, The Interstate Natural Gas Association of America (INGAA) filed a letter in this proceeding requesting reconsideration of the February 2012 Order. The Natural Gas Supply Association, the American Forest & Paper Association, Inc., the American Public Gas Association, the Independent Petroleum Association of America, and the Process Gas Consumers Group) (collectively, the Associations) filed an answer to INGAA's letter. Texas Eastern filed an answer responding to the Associations' answer. INGAA and the Associations have not filed motions to intervene in this proceeding and are not parties. Therefore, INGAA's letter and the Associations' answer to it will not be considered in this order and, accordingly, there is no need to consider Texas Eastern's response to the Associations' answer.

[45] The Commission's Rules of Practice and Procedure do not permit answers to protests or answers unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2) (2012). However, to the extent Texas Eastern's Answer to Comments, Indicated Shippers' Answer to Texas Eastern, and Texas Eastern's Answer to Indicated Shippers are such answers, the Commission finds good cause to accept them since it will

(continued…)

(June 2012 Filing), to inform the Commission of the potential precedential effect of this proceeding on Texas Eastern's sister pipeline, East Tennessee Natural Gas, LLC (East Tennessee). The comments and the answers to those comments are discussed below.

B. The Routine Maintenance Exemption

37. Paragraph (C) of sections 3.4, 3.5, or 3.6 of Texas Eastern's firm rate schedules provides that Texas Eastern can withhold the reservation charge credit if its failure to deliver is due to "routine operational maintenance and repair" during the period from May 1 through November 1 of any year.

1. Positions of the Parties

38. Texas Eastern asserts that its Routine Maintenance Exemption is just and reasonable and should not be modified. Texas Eastern states that the Commission approved this tariff provision in its Order No. 636 restructuring proceeding,[46] finding the provision consistent with then current policy goals. Texas Eastern states that the Routine Maintenance Exemption is narrowly crafted to apply only to outages due to routine maintenance and repair during the traditional off-peak service months on its system. This has provided it an incentive to schedule maintenance during the off-peak period when outages will be least disruptive. Texas Eastern also states that its historical practice of scheduling maintenance in off-peak periods has provided shippers certainty regarding the timing of necessary maintenance, and no shipper has complained about the operation of this tariff provision. Texas Eastern states there is no evidence of changed circumstances on Texas Eastern's system that would upset the balance and incentives achieved by the provisions approved in its restructuring proceeding. Texas Eastern argues that the February 2012 Order fails to explain why twenty years of operating under these provisions without any shipper complaint does not provide ample proof that the Commission was correct in the *Restructuring Orders*.[47]

39. Texas Eastern also asserts that rigid application to Texas Eastern of the Commission's generic policy would undermine the pro-shipper reliability protections built into Texas Eastern's tariff, requiring early notice and targeted scheduling of maintenance activities and would contravene the safety objectives of the Commission and

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not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record.

[46] *See* the *Restructuring Orders,* 64 FERC ¶ 61,305 (1993).

[47] Response at 3.

the PHMSA of the U.S. Department of Transportation. Texas Eastern argues that the basic premise of the Commission's precedent requiring reservation charge credits for non-*force majeure* service outages, including scheduled maintenance, is that requiring credits for such outages will create incentives for the pipeline to minimize service outages. Texas Eastern asserts that there already is an adequate incentive in section 17.3 of its GT&C which states that the pipeline should "exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and [to] provide reasonable notice of the same to Customers." Texas Eastern further asserts that this tariff language and its notices of planned maintenance activities mean that shippers have an opportunity to work with Texas Eastern to minimize impacts on their service and provides shippers an opportunity to schedule maintenance on their facilities at the same time as Texas Eastern's scheduled maintenance. Texas Eastern further argues that its existing tariff provisions are superior to current Commission policy which penalizes compliance and fails to provide the necessary pro-shipper incentives.[48]

40. Texas Eastern asserts that service interruptions due to necessary maintenance do not constitute a failure of due diligence.[49] Texas Eastern asserts that the Commission's statement in the February 2012 Order that "routine repair and maintenance is not an emergency situation or unexpected loss of capacity and should be planned through scheduling and not interrupt firm service"[50] is inapplicable to its system. Texas Eastern states that it has an obligation, as an open-access transporter, to make its entire certificate design capacity available to be subscribed for on a firm basis and, at the same time, to maintain its system in a safe and reliable manner and comply with applicable safety requirements. Texas Eastern asserts that the Commission's orders certificating the construction of its system did not authorize a design capacity that would allow Texas Eastern to be able to provide firm service up to its design capacity every day of the year and, at the same time, schedule maintenance in a manner that would ensure that there never would be an interruption of service. Texas Eastern further asserts that, to be able to prevent any interruption of firm service, it would have to build inefficient and redundant facilities, which would be cost prohibitive.

41. Texas Eastern argues that the Commission's reservation charge crediting policy is based on the incorrect assumptions in Opinion No. 406 that the pipeline can manage its system to prevent scheduled maintenance outages and therefore any such outages are the

[48] Response at 8-10.

[49] Response at 13-15.

[50] *Citing* February 2012 Order, 138 FERC ¶ 61,126 at P 11.

result of "mismanagement" by a pipeline. Texas Eastern cites the Commission's statement in Opinion No. 406 that:

> … 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 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 [emphasis added] .[51]

42. Texas Eastern argues that scheduled maintenance is outside the pipeline's control, because pipelines are required as prudent operators to meet safety requirements to perform maintenance. Texas Eastern states that scheduled maintenance on its system is the direct result of its efforts to enhance the reliability of its services by implementing its integrity management program and to comply with other safety initiatives, including PHMSA regulations. Texas Eastern asserts that the Commission has not made a finding of mismanagement in this case and is unaware of such finding in any other proceeding. Texas Eastern also asserts that unlike the circumstances in *North Baja*, it provides full reservation charge credits for peak periods. Texas Eastern concludes that scheduled maintenance is the hallmark of good management, and the Commission found in the *Restructuring Orders* that maintenance outages on Texas Eastern's system do not constitute failure of due diligence. Texas Eastern argues that the Commission's reliance on *North Baja* to support its policy related to scheduled maintenance is misplaced.

43. ConocoPhillips and MDG argue that Texas Eastern should be required to eliminate its Routine Maintenance Exemption. ConocoPhillips and MDG further argue that Texas Eastern mistakenly relies on the *Restructuring Orders*. Conoco Phillips asserts that the scheduling of maintenance is clearly within the pipeline's control. Indicated Shippers argues that the pipeline's duty to perform maintenance does not support an exemption from the Commission current reservation charge crediting policy.

44. MDG argues that the policy is not so much a penalty for mismanagement as it is fairness for the shipper, and, if a pipeline's behavior has been exemplary, it should not

[51] *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022, at 61,086 (1996) (Opinion No. 406), *order on reh'g*, 80 FERC 61,070 (1997) (Opinion No. 406-A).

fear these modest tariff changes. Indicated Shippers argues that the reservation charge crediting requirement does not require a specific finding of fault by the pipeline. Indicated Shippers also argues that the tariff requirements to minimize outages do not support an exemption from the Commission's reservation charge crediting policy.

2. Commission Determination

45. The Routine Maintenance Exemption exempts Texas Eastern from providing any reservation charge credits to firm shippers for outages required to perform "routine operational maintenance and repair" during the May 1 through November 1 off-peak period. That exemption is contrary to the Commission's policy, requiring the pipeline to provide firm shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver because of a non-*force majeure* outage.[52] The Commission has consistently treated outages due to routine or planned maintenance as non-*force majeure* events, even where the pipeline has little or no excess capacity and thus some scheduled maintenance outages could be uncontrollable.[53]

46. Texas Eastern contends that the Commission's policy concerning routine maintenance is incorrect and, in any event, does not justify a finding that its Routine Maintenance Exemption is unjust and unreasonable. Below, the Commission first summarizes the basis for the Commission's policy requiring full reservation charge credits for routine maintenance and then addresses each of Texas Eastern's contentions as to why the policy should be modified or not applied to it.

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[52] Planned, scheduled, and routine maintenance, repair, and testing concerning events within the pipeline's control, *i.e.*, pipeline operations, are anticipated and, therefore, are non-*force majeure* events. Obviously, routine maintenance, repair, and testing should be both planned and scheduled. Unscheduled maintenance generally results from an operational problem and is therefore a no-fault, *force majeure* event. *El Paso*, 105 FERC ¶ 61,262 at 62,351. *Natural*, 108 FERC ¶ 61,170 at P 7 (maintenance is not always within the control of the pipeline). *See also Florida Gas*, 107 FERC ¶ 61,074 at P 27.

[53] *North Baja*, 111 FERC ¶ 61,101.

<u>Basis for Commission Policy</u>

47. The Commission's policy requiring full reservation charge credits for non-*force majeure* outages rests on the principle that a pipeline should be responsible for operating its system so that it can meet its contractual obligations to provide primary firm service, regardless of any operational need to restrict service on some parts of its system to carry out routine maintenance.[54] The Commission established this policy in the mid-1990s, shortly after completing the processing of pipeline filings to restructure their systems in compliance with Order No. 636. In June 1995, the Commission rejected a proposal by Tennessee Gas Pipeline Co. under which it, like Texas Eastern, would not provide reservation charge credits for scheduled maintenance conducted during the off-peak period from May 1 through November 1. The Commission reasoned that "pipelines should be able to provide the service that they have contracted to perform," absent a *force majeure* event.[55] In that proceeding, the Commission also recognized pipelines' contracts with firm shippers only require them to provide guaranteed firm service at the shipper's primary points.[56] Accordingly, the Commission limited the pipeline's obligation to provide reservation charge credits to situations where it failed to satisfy its contractual obligation to provide nominated primary firm service.

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

[55] *Tennessee Gas Pipeline Co*., 71 FERC ¶ 61,399 at 62,580, *reh'g denied*, 73 FERC ¶ 61,083 (1995) (*Tennnessee*).

[56] *Tennessee*, 73 FERC ¶ 61,083 at 61,206 ("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.") *See also Tennessee Gas Pipeline Co.*, 94 FERC ¶ 61,097, at 61,402 (2001), *aff'd*, *Process Gas Consumers Group v. FERC*, 292 F.2d 831 (D.C. Cir. 2002) ("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."). *See also Regulation of Short-Term Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 48 (2002).

48. A year later, the Commission reaffirmed its policy of requiring full reservation charge credits for routine maintenance in a subsequent Tennessee rate proceeding, explaining in Opinion No. 406:[57]

> 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 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.

49. Since Opinion No. 406, the Commission has consistently treated outages due to scheduled or routine maintenance as non-*force majeure* events for which the pipeline must give full reservation charge credits.[58] In several of those cases, the pipelines contended that the reasoning in Opinion No. 406 was inapplicable to the facts of their systems. Those pipelines argued that, contrary to Opinion No. 406's assumption that planned maintenance is within the pipeline's control and may be managed so as to avoid interruptions of service, such maintenance is a non-discretionary activity required for the safe operation of the pipeline and inevitably requires service outages on pipelines with little or no excess capacity.[59]

50. For, example, in *El Paso*, the pipeline contended that it operates at a very high annual load factor in certain parts of its system and therefore it has little flexibility to schedule maintenance required for the safe operation of its pipeline in a manner that

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[57] 76 FERC ¶ 61,022 at 61,086.

[58] *Alliance Pipeline*, *L.P.*, 84 FERC ¶ 61,239, at 62,214 (1998) (*Alliance*); *El Paso*, 105 FERC ¶ 61,262 at PP 14-15; *Florida Gas*, 105 FERC ¶ 61,171 at P 34, *order on reh'g*, 107 FERC ¶ 61,074 at PP 27-33; *Natural*, 102 FERC ¶ 61,326 at PP 18-19, *order on reh'g*, 106 FERC ¶ 61,310 at PP 13-15; *North Baja*, 109 FERC ¶ 61,159 at P 12, *order on reh'g*, 111 FERC ¶ 61,101 at PP 15-19. *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express I*). *Southern*, 135 FERC ¶ 61,056 at PP 24-27. *Northern Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202, at PP 30-32 (2011) (*Northern*).

[59] *See North Baja*, 111 FERC ¶ 61,101.

would limit service interruptions. The Commission responded by recognizing that maintenance is an important and necessary function. However, the Commission emphasized that "the pipeline should have an incentive to perform maintenance with minimal service disruptions," and full reservation charge credits provide that incentive.[60] The Commission also stated that its policy on this issue is not dependent upon the specific operating conditions on the pipeline.[61] In *Florida Gas*, the pipeline asserted that planned maintenance is a non-discretionary activity necessary to comply with regulatory requirements, and, because it operates at a high annual load factor, it cannot guarantee that there will be no service interruptions as a result of such planned maintenance. The Commission nevertheless required the pipeline to treat scheduled maintenance as a non-*force majeure* event, again finding that "full reservation charge crediting is an incentive to perform maintenance with minimal service disruption."[62]

51. Finally, in *North Baja*, the pipeline similarly contended that, on its system, outages for planned maintenance are unavoidable and should not be treated as non-*force majeure* events requiring full credits. As summarized by the Commission, North Baja Pipeline, LLC (North Baja) argued that "the foundation of the Commission's policy regarding reservation charge credits has always been control – when the pipeline is not at fault for the interruption and has not mismanaged its pipeline, the Commission has required only partial credits."[63] However, North Baja contended that some planned repair and maintenance, such as periodic "pigging," create unavoidable service interruptions through no fault of the pipeline. The Commission nevertheless required North Baja to provide full reservation charge credits for outages due to planned maintenance, explaining,

> Furthermore, we do not agree with North Baja that "planned" maintenance is "uncontrollable". While we agree that certain planned maintenance, such as "pigging," may be necessary and unavoidable to preserve the safety and integrity of the pipeline facilities, we do not agree that the pipeline has no "control" over how and when it performs such maintenance. . . . These are activities over which North Baja exercises a degree of control, unlike acts of God in typical *force majeure* situations. Accordingly, this control warrants that the pipeline provide full credits to shippers for all such

[60] *El Paso*, 105 FERC ¶ 61,262 at P 14.

[61] *Id*. P 15.

[62] *Florida Gas*, 107 FERC ¶ 61,074 at P 29.

[63] *North Baja*, 111 FERC ¶ 61,101 at P 15.

> scheduled gas not delivered. Furthermore, since such maintenance is planned, the pipeline should have provided for such maintenance interruptions in its rates. . . . [A]lthough control is an important principle, it is not the Commission's only consideration in such circumstances. The Commission also has an important goal of providing the pipeline, the entity in the best position to cure the non-*force majeure* interruption, in this case planned maintenance, with an incentive to resolve the interruption as quickly as possible.[64]

52. Thus, the Commission recognized that some primary firm service interruptions for planned or routine maintenance may be unavoidable. Nevertheless, in order to provide pipelines an incentive to minimize any such interruptions, the Commission requires pipelines to provide full reservation charge credits for any failure to meet its contractual obligations to firm customers during such outages, while permitting pipelines to include the cost of planned maintenance interruptions in their rates.

53. The D.C. Circuit affirmed the Commission's *North Baja* orders, rejecting North Baja's contention that Opinion No. 406 emphasized "control" and therefore that opinion is inapplicable to a pipeline where outages for planned maintenance are uncontrollable because it operates at full capacity. The court held,

> In Opinion [No.] 406, however, the Commission defined force majeure events as events that are not only uncontrollable, but also unexpected. As the Commission wrote, "neither Tennessee, not its shippers are at fault for force majeure interruptions, because these are unexpected and uncontrollable events." 76 FERC ¶ 61,022 at 61,088. Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipelines' rates should incorporate the 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. The Commission here reasonably determined that North Baja's circumstances did not exempt it from the Commission's longstanding policy regarding scheduled maintenance.[65]

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[64] *Id*. PP 18-19.

[65] *North Baja v. FERC*, 483 F.3d 819, 823.

54. Consistent with *North Baja*, we find that Texas Eastern's Routine Maintenance Exemption is contrary to longstanding Commission policy regarding routine or planned maintenance and thus is unjust and unreasonable. It fails to provide Texas Eastern a sufficient financial incentive to perform routine maintenance with the minimum possible disruptions to primary firm service, and thus meet its contractual obligations to provide primary firm service to the maximum extent possible. Below, we address Texas Eastern's contentions as to why the policy affirmed by the D.C. Circuit in *North Baja v. FERC* is wrong or should not be applied to it.

<u>Whether Full Credits Are or Should Be Limited to Cases of Mismanagement</u>?

55. First, Texas Eastern emphasizes Opinion No. 406's statements that scheduled maintenance is within the pipeline's "control" and, therefore, any resulting outage was caused by "mismanagement."[66] Texas Eastern asserts that these statements demonstrate that the premise of the Commission's requirement of full reservation charge credits for routine maintenance outages is that a pipeline can manage its system in order to avoid outages for routine or scheduled maintenance. Texas Eastern asserts that this premise is wrong. It states that pipelines are required, both as prudent operators and by regulatory requirements, to perform maintenance, and, therefore, the performance of such maintenance is outside the pipeline's control. Texas Eastern also asserts that the Commission's open access regulations require pipelines to make their entire certificated design capacity available to be subscribed on a firm basis, making it impossible for pipelines to reserve some capacity for use to provide service when subscribed capacity is out of service for maintenance. Finally, Texas Eastern states that, regardless of whether maintenance outages on other systems may have been caused by mismanagement, there is no evidence in the instant record that Texas Eastern ever mismanaged its scheduling of routine maintenance or failed to exercise due diligence to minimize outages. Accordingly, Texas Eastern asserts that the premise of Opinion No. 406's requirement of full credits is inapplicable to its system.

56. Contrary to Texas Eastern's contentions, in cases after Opinion No. 406, the Commission expressly extended the policy set forth in that case to situations where some interruptions of primary firm service may be unavoidable and thus not constitute mismanagement. As described above, *El Paso, Florida Gas*, and *North Baja* all made essentially the same arguments as Texas Eastern concerning their inability to avoid service interruptions routine maintenance in opposing the requirement that they provide full credits for routine maintenance outages. The Commission recognized in those

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

proceedings that scheduled maintenance is "an important and necessary function,"[67] and "that certain planned maintenance, such as 'pigging,' may be necessary and unavoidable to preserve the safety and integrity of the pipeline facilities."[68] The Commission also did not disagree with the assertion that pipelines operating at a high load factor might have to interrupt primary firm service on occasion to perform maintenance.

57. Nevertheless, the Commission required those pipelines to provide full reservation charge credits for any interruptions of primary firm service to perform routine maintenance. The Commission explained in *North Baja*, while "control is an important principle, it is not the Commission's only consideration." [69] The Commission's reservation charge crediting policy also has the important goal of providing pipelines an incentive to minimize any interruptions to their shippers' primary firm service which may be necessary to perform planned maintenance. Firm shippers pay reservation charges for a guaranteed firm right to ship gas, throughout the year, up to their mainline contract demand using the primary receipt and delivery points in their contracts.[70] Therefore, they should be able to rely on the availability of that service whenever they request it to the maximum extent possible, consistent with safe operation of the pipeline. While some service disruptions may be unavoidable, the pipeline still exercises a "degree of control" over when it performs such maintenance, thus enabling it to minimize any necessary disruptions in response to the incentives created by the Commission's reservation charge crediting policy. When the pipeline is unable to satisfy its contractual obligation to provide the primary firm service for which the shippers pay reservation charges, it is reasonable to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided.

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[67] *El Paso*, 105 FERC ¶ 61,262 at P 14.

[68] *North Baja*, 111 FERC ¶ 61,101 at P 18.

[69] *Id*. P 19.

[70] *Tennessee Gas Pipeline Co.*, 94 FERC ¶ 61,097, at 61,402 (2001), *aff'd*, *Process Gas Consumers Group v. FERC*, 292 F.2d 831 (D.C. Cir. 2002) ("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."). *See also Regulation of Short-Term Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 48 (2002).

58. In affirming the Commission's *North Baja* orders, the court recognized that the Commission's policy extended to scheduled maintenance interruptions that are not controllable, stating:

> Although some scheduled maintenance interruptions may be uncontrollable, they are certainly not unexpected.[71]

The court then concluded that "[t]here 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." [72] The Commission sees no reason to modify the policy concerning reservation charge credits for routine maintenance, affirmed by the court. The Commission continues to find that the policy reasonably (1) provides pipelines a financial incentive to manage maintenance of their systems so as to minimize primary service interruptions as much as possible; (2) provides shippers relief from paying reservation charges for primary firm service not provided; and (3) allows pipelines to include in their cost of service prudently incurred costs associated with routine and regulatory maintenance necessary for a pipeline's safe and proper functioning.

59. Because the policy of requiring full reservation charge credits for routine maintenance outages is applicable regardless of whether such outages are avoidable or attributable to "mismanagement," there is no need in this proceeding to show that Texas Eastern could manage routine maintenance on its system so as to avoid any primary firm service outages or to show that any failure to avoid such outages in the past or the future would constitute mismanagement.

Cost Impact of Policy; Extent of Obligation to Provide Service

60. Second, Texas Eastern asserts that requiring it to operate its system so as meet its primary firm contractual obligations at all times would require it to build inefficient and redundant facilities for use solely during maintenance outages. Texas Eastern asserts that the cost of such facilities would be so prohibitive that no one would agree to pay for service on the pipeline. However, the Commission's reservation charge crediting policy does not require pipelines to build redundant facilities so as to be physically capable of providing primary firm service at all times. As already discussed, the Commission recognizes that pipelines may have to interrupt primary firm service on occasion to

[71] *North Baja v. FERC*, 483 F.3d 819, 823.

[72] *Id*. (emphasis added).

perform scheduled or routine maintenance, particularly fully subscribed pipelines operating at a high load factor, such as the pipelines at issue in *El Paso*, *Florida Gas*, and *North Baja*. However, the Commission expects pipelines to make every possible effort to perform routine maintenance in a manner that allows them to satisfy their contractual obligations to provide primary firm service at a reasonable cost to shippers.

61. Pipelines can employ various methods of continuing to meet their primary firm service obligations during maintenance outages without constructing cost-prohibitive redundant facilities. Unlike the pipelines at issue in *El Paso*, *Florida Gas*, and *North Baja*, a pipeline such as Texas Eastern, whose firm shippers do not use their full contract demand every day throughout the year, should have the flexibility to plan most or all routine maintenance for periods when its firm shippers are not using their service. For example, in its answer to ConocoPhillips' pleading, Texas Eastern states that it scheduled maintenance near ConocoPhillips' delivery period for a period when ConocoPhillips rarely nominates service.

62. In addition, pipelines may have various back-up methods of providing primary firm service during outages that are not unreasonably costly. For example, in *Northern*, the pipeline stated that it routinely employs various 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.[73] In addition, in *Alliance*,[74] the Commission authorized that pipeline to construct a back-up compressor in order to continue providing service when a regular compressor is out of service for maintenance.

63. It is for each pipeline to make a prudent determination as to the most cost-effective method for it to minimize interruptions of primary firm service as much as possible. If the costs of continuing service during a particular maintenance outage are sufficiently high to outweigh the benefits to the affected shippers of continued service, then the pipeline may choose to interrupt service and give the shippers the required reservation charge credits. As the Commission stated in *North Baja*, the pipeline may recover the prudently incurred costs of planned maintenance interruptions in its rates.[75] Thus, consistent with the reservation charge crediting policy approved in *North Baja*, a pipeline could include in its cost of service a reasonable projection of its recurring cost of

[73] 137 FERC ¶ 61,202 at P 35.

[74] 84 FERC ¶ 61,239 at 62,214.

[75] *North Baja*, 111 FERC ¶ 61,101 at P 18.

providing reservation charge credits,[76] including reservation charge credits caused by new regulatory requirements, or its cost of pursuing other strategies to minimize service interruptions.

Do Full Credits During Peak Periods Provide Sufficient Protection?

64. Third, Texas Eastern seeks to distinguish *North Baja*, on the ground that, in *North Baja*, the pipeline sought to treat outages for scheduled maintenance as *force majeure* events for which only partial credits would be provided, regardless of whether the outage occurred during a peak or off-peak period. Texas Eastern asserts that the court's decision was limited to affirming the Commission's refusal to allow a pipeline to classify routine maintenance as *force majeure*. Texas Eastern argues that, in contrast with *North Baja*, it has not sought to classify outages for routine maintenance as *force majeure* events for which only partial credits would be given, and it in fact provides full reservation charge credits for scheduled maintenance outages during peak periods. Texas Eastern further asserts that this distinction also applies to the other Commission orders cited in the February 2012 Order,[77] because these decisions all addressed situations in which the pipeline was defining *force majeure* to include scheduled maintenance.

65. Texas Eastern's attempt to distinguish *North Baja v. FERC* fails. As the court summarized the Commission's policy in *North Baja v. FERC*, we require full reservation charge credits for all outages due to scheduled and routine maintenance, and do not permit the use of "a cost-sharing" mechanism [78] in connection with such non-*force majeure* outages. Texas Eastern, like the pipeline in *North Baja v. FERC,* uses a cost-sharing mechanism for scheduled maintenance outages, albeit a different such mechanism. While North Baja required its shippers to share the cost of maintenance service interruptions throughout the year by providing only partial credits in both off-peak and peak periods, Texas Eastern requires firm shippers to bear the full cost of scheduled maintenance outages during off-peak periods while providing full credits in peak periods. Moreover, in both *Tennessee*[79] and *Natural,*[80] we rejected cost sharing mechanisms for scheduled maintenance outages identical to Texas Eastern's cost-sharing

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[76] *Northern*, 137 FERC ¶ 61,202 at P 36.

[77] *Citing* the February 2012 Order at P 12, which cited *Orbit*,126 FERC ¶ 61,095; *Tarpon Whitetail*, 125 FERC ¶ 61,050; *Florida Gas,* 107 FERC ¶ 61,074.

[78] *North Baja v. FERC,* 483 F.3d 819, 822.

[79] 71 FERC ¶ 61,083 at 62,580.

[80] 106 FERC ¶ 61,310 at PP 13-15.

mechanism, finding that an exemption from providing credits for such outages during the May 1 through November 1 off-peak period was contrary to our policy that routine maintenance is a non-*force majeure* event.

66. Texas Eastern's cost-sharing mechanism is unjust and unreasonable for the same reasons as all the other cost-sharing mechanisms for routine maintenance outages we have rejected in previous orders. It fails to provide Texas Eastern a sufficient financial incentive to perform routine maintenance with the minimum possible disruptions to primary firm service, and thus meet its contractual obligations to provide primary firm service to the maximum extent possible. Shippers pay reservation charges to reserve primary firm capacity for both peak and off-peak periods, and they should receive full credits whenever routine maintenance prevents them from obtaining the service they have paid for. While Texas Eastern's tariff gives it a financial incentive to avoid scheduled maintenance during the peak period, the total exemption from providing credits during the off-peak period allows it to perform maintenance at any time during the off-peak period without any financial penalty for disruptions of primary firm service.

Effect of Policy on Other Customer Protections

67. Fourth, Texas Eastern asserts that rigid application of the Commission's generic policy to its system would undermine the pro-shipper reliability protections built into its tariff, requiring early notice and targeted scheduling of maintenance activities and would contravene the safety objectives of the Commission and PHMSA. Texas Eastern asserts that there already is an adequate incentive for it to minimize maintenance outages in section 17.3 of its GT&C which states that the pipeline should "exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and [to] provide reasonable notice of the same to Customers." Texas Eastern further asserts that this tariff language and its notices of planned maintenance activities[81] enable Texas Eastern to work with its shippers to minimize impacts on their service.

[81] Texas Eastern, in its Answer to Comments, responds to ConocoPhillips' assertions that ConocoPhillips received a non-critical notice of planned maintenance outages near a delivery point used by ConocoPhillips, and therefore it will pay approximately three million dollars for firm service which it cannot use during May 2012. Texas Eastern argues that its website postings illustrate how its existing provisions promote the Commission's goals of minimizing outages during scheduled maintenance and providing early advance notice of outages. Texas Eastern asserts that, while significant quantities of gas were scheduled at the delivery point referenced by ConocoPhillips during the winter, almost no deliveries were scheduled at that point in April 2012. Texas Eastern states that it expects similar low system demand for flow at

(continued…)

68. The Commission disagrees with Texas Eastern's assertion that requiring it to comply with Commission policy would compromise or eliminate the existing protections for shippers in its tariff. While we are requiring Texas Eastern to eliminate its Routine Maintenance Exemption, we are not requiring Texas Eastern to remove section 17.3 of its GT&C. The requirements in that section for Texas Eastern to minimize, and give reasonable notice of, service interruptions due to routine repair and maintenance are just and reasonable and will remain in effect. As the Commission recently held in *TransColorado Gas Transmission Co., LLC*,[82] advance notice of outages due to routine maintenance, including details as to the timing of the outage and specific facilities affected, provides important benefits to shippers and the market. Such information gives shippers and others time to plan for each outage and make alternative arrangements to obtain needed gas supplies during the period of the outage.

69. Requiring Texas Eastern to provide full reservation charge credits for all disruptions of primary firm service caused by routine maintenance should not affect either its ability or incentive to continue providing detailed advance notice of such outages and working with shippers to minimize disruptions of primary firm service. In *TransColorado*,[83] we recognized that a pipeline could reasonably be concerned that shippers might use the information in a detailed advance notice of maintenance of the type Texas Eastern issues[84] to maximize their credits, if the credits are calculated based

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that delivery point in May 2012, and its diligent maintenance planning accomplishes the Commission's goals. Texas Eastern further asserts that these postings also provide significant advance notice, an average of three months and, in some cases, up to eleven months, and additional helpful information, including details as to the locations on the system that may be affected by the maintenance and how various categories of shippers are expected to be affected.

[82] 139 FERC ¶ 61,229, at P 36 (2012) (*TransColorado*).

[83] *Id*. PP 34-41.

[84] Section 20.1(c) of TransColorado's tariff provides that:

> TransColorado shall post a Monthly Maintenance Schedule on its Interactive Website each month prior to bid-week for the subsequent month that contains a list of scheduled maintenance activities TransColorado anticipates conducting in the subsequent month which are likely to result in curtailment or outages on the pipeline. Such Monthly Maintenance Schedule posting shall include the facilities anticipated to be impacted by the project, an estimate of the date each project will be conducted, and the

(continued…)

on the shippers' service nominations after the notice is given. In order to avoid any disincentive for the pipeline to provide the most accurate possible advance notices of maintenance outages, the Commission accepted the pipeline's proposal to calculate the credits based on the level of primary firm service the shippers used during the seven days immediately before notice of the maintenance outage is given. Texas Eastern may, as part of its compliance filing in this proceeding, propose a comparable method of determining reservation charge credits in situations where it provides advance notice of a routine maintenance outage.[85] Thus, removal of the Routine Maintenance Exemption should not prevent Texas Eastern from continuing to give shippers detailed advance notice of maintenance outages in the same manner it states it gave ConocoPhillips notice of the May 2012 maintenance outage on facilities near its delivery point.

70. Far from undermining the pro-shipper reliability protections reflected in section 17.3 of Texas Eastern's GT&C, requiring Texas Eastern to provide full reservation charge credits for scheduled maintenance outages of primary firm service will provide an important additional financial incentive for it to minimize such service disruptions, consistent with longstanding Commission policy consistently applied to other pipelines. Commission policy is thus consistent with, complementary to, and will operate in conjunction with other incentives to provide an increased financial incentive to achieve governmental goals and requirements by minimizing all outages and completing regulatory requirements in an expeditious manner. While we understand that Texas Eastern is or will be facing increased regulatory requirements, those requirements do not eliminate the responsibility of operating the system to minimize interruptions of reserved firm service. Specifically, the Commission is tracking the impacts of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011. While the Pipeline and Hazardous

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name and amount of estimated curtailment for each segment anticipated to be impacted by the project.

[85] The historical period to be used to calculate the credits should be reasonably representative of the usage shippers would have made of the facilities during the period of the outage. The Commission found the seven-day historical period proposed in TransColorado to be reasonably representative, because that period would generally occur in the month immediately preceding the outage. Texas Eastern may propose other reasonably representative historical periods in order to accomplish the objective of minimizing gaming. For example, it may be reasonable to base the credits on a shipper's usage of its primary firm service during a comparable period of a prior calendar year or years. *See*, *e.g.*, *Kern River Gas Transmission Co.*, 139 FERC ¶ 61,044, at P 49 (2012).

Materials Safety Administration is in the early stages of implementing the statute,[86] the Commission remains committed to supporting efforts to ensure pipeline safety including maintenance. The decision here does not in any way diminish the Commission's support for routine maintenance and safety of the system. If additional outages become necessary, it will be all the more important that pipelines take care to minimize their adverse effect on shippers' contractual rights to primary firm service to the maximum extent possible. Accordingly, the required revision of Texas Eastern's current crediting requirements does not, as Texas Eastern asserts,[87] eliminate the existing incentives, to work with shippers and minimize service interruptions. The result is, in fact, a necessary additional incentive to minimize outages while meeting the governmental requirements and goals.

71. In any case, regardless of the existing incentives to minimize outages, the Commission has found it unjust and unreasonable to require shippers to pay reservation charges for primary firm service, when routine maintenance prevents them from obtaining the service they have paid for. Texas Eastern must provide the primary firm services it has a contractual obligation to provide or credit the shipper for the service which is not provided. Accordingly, Texas Eastern's assertions that Commission policy impermissibly contravenes governmental goals and requirements are rejected.

Prior Approval of Provision and Lack of Complaints

72. Finally, Texas Eastern seeks to avoid compliance with Commission policy requiring full reservation charge credits for non-*force majeure* outages based on the fact the Commission approved its existing Routine Maintenance Exemption in the 1993 *Restructuring Orders*. Texas Eastern also asserts that in the nearly two decades that exemption has been in effect, there have been no shipper complaints or assertions of lack of due diligence by Texas Eastern to minimize service disruptions until this limited section 4 proceeding. Texas Eastern argues that, unless changed circumstances are shown, the findings in the *Restructuring Orders* compel continued acceptance of its existing reservation charge credit provisions.

73. While the *Restructuring Orders* approved the Routine Maintenance Exemption, those orders predate the Commission's current reservation charge crediting policy. As described above, in June 1995, the Commission issued an order in *Tennessee*,[88] requiring

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[86] *See* Advanced Notice of Proposed Rulemaking in *Pipeline Safety: Safety of Gas Transmission Pipelines*, 76 Fed. Reg. 53,086 (Aug. 25, 2011).

[87] Response at 5.

[88] *Tennessee*, 71 FERC ¶ 61,399 at 62,580.

full reservation charge credits for routine maintenance outages and rejecting a proposal for an off-peak exemption from crediting identical to that approved in Texas Eastern's *Restructuring Orders*. The Commission has consistently required full reservation charge credits for non-*force majeure* outages, including for routine maintenance, ever since.

74. In 2004, Natural proposed reservation charge crediting provisions modeled on the Texas Eastern provisions approved in the *Restructuring Orders*. Natural requested approval of its proposal on the ground it was virtually identical to the approved Texas Eastern tariff language.[89] The Commission rejected Natural's proposal, finding that the *Restructuring Orders* no longer reflected Commission policy.[90] The Commission stated that:

> While the Commission accepted Texas Eastern's reservation charge credit provisions in Texas Eastern's Order No. 636 restructuring proceedings, subsequent to that proceeding the Commission clarified its policy on reservation charge credits in Opinion No. 406. In Opinion No. 406 the Commission expressly required pipelines to grant full reservation charge credits in non-*force majeure* situations. The Commission stated "the Commission will continue to require Tennessee to provide full reservation charge credit for those interruptions within its control.…" Thus, while in Opinion No. 406 the Commission stated that Texas Eastern's method of sharing the

[89] Section 5.2(c)(2) of Natural's GT&C stated:

> Natural shall not be obligated to adjust the Reservation Charge under any contract pursuant to Section 5.2(c)(1) when Natural's failure to deliver on any Day at least 95% of the Firm Daily Volume: (i) is the result of the conduct of Shipper or the downstream operator of the facilities at the Delivery Point; (ii) is the result of Natural having operational flow orders in effect on such Day; (iii) is the result, during the period from April 1 through November 1 of any year, of Natural performing routine operational maintenance and repair prudently and with due diligence; (iv) is the result of Natural at any time performing prudently and with due diligence testing and repair and maintenance of its facilities to comply with applicable regulatory requirements; or, (v) occurs either (a) within ten (10) Days following a *force majeure* event as contemplated by Section 27 of the General Terms and Conditions, or (b) prior to the date Natural has or should have, in the exercise of due diligence, overcome the *force majeure* event, whichever occurs first.

[90] *Natural*, 106 FERC ¶ 61,310 at PP 13-15.

> risk in the *force majeure* situation was an acceptable method, this did not constitute approval of how Texas Eastern granted reservation charge credits in the non-*force majeure* situation.[91]

The Commission also specifically found that the exemption from crediting for routine maintenance performed in the May1 through November 1 off-peak period was inconsistent with *El Paso*.[92]

75. In addition, the Commission has required pipelines to modify their tariffs to comply with the Commission's reservation charge crediting policies without regard to whether the pipelines have a past history of service disruptions for routine maintenance or complaints about such disruptions.[93] The objective of such credits is to give pipelines a financial incentive to minimize maintenance outages and avoid requiring shippers to pay a reservation charge for primary firm service that is not provided. A pipeline's failure to provide for such credits in its tariff is unjust and unreasonable, regardless of whether shippers have protested the lack of such a tariff provision in the past. In any event, in this proceeding, parties have correctly contended that Texas Eastern's existing Routine Maintenance Exemption is contrary to Commission policy and, therefore, unjust and unreasonable, and they have accordingly requested that Texas Eastern's tariff be modified under NGA section 5.[94]

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[91] *Id*. P 14 (citations omitted).

[92] *Citing El Paso*, 105 FERC ¶ 61,262.

[93] *See North Baja*, 111 FERC ¶ 61,101 at P 17. *See also Florida Gas*, 107 FERC ¶ 61,074 at P 22.

[94] *See* the comments on the Response filed by MDG and ConocoPhillips and Indicated Shippers' answer to Texas Eastern's Answer to Comments. On June 1, 2012, Texas Eastern filed an answer to Indicated Shippers' Answer to Texas Eastern. In addition, The East Tennessee Group (ETG) made a filing to inform the Commission of the potential precedential effect of this proceeding on Texas Eastern's sister pipeline, East Tennessee Natural Gas, LLC (East Tennessee). ETG asserts that comparable language in East Tennessee's tariff has resulted in recent outages that cut off or completely restricted their primary firm deliveries. As the Commission noted in *NGSA*, if shippers believe a pipeline's tariff is not in compliance with the Commission's reservation charge credit policy they may file a complaint under section 5 or raise that issue in any section 4 filing made by that pipeline. *NGSA*, 135 FERC ¶ 61,055 at P 13.

76. It is thus clear that, in seeking to retain its existing Routine Maintenance Exemption, Texas Eastern is requesting that we depart from current policy in order to allow it to retain a tariff provision which is clearly unjust and unreasonable under our established reservation charge crediting policies.[95] However, as the courts have held many times, the Commission may not depart from established policies without providing an explanation of the reasons for doing so.[96] For the reasons discussed above, Texas Eastern has not persuaded us to modify our existing policy requiring full reservation charge credits for routine maintenance outages of primary firm service, which the D.C. Circuit affirmed in *North Baja v. FERC.*[97] Nor has Texas Eastern provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the policy we have applied consistently to other pipelines.

77. Therefore, the Routine Maintenance Exemption violates Commission policy, and Texas Eastern is directed, pursuant to section 5 of the NGA, to eliminate that provision.

C. The Regulatory Requirement Exemption

78. Paragraph (D) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern need not provide reservation charge credits if its failure to deliver is the result of Texas Eastern "performing at any time repair and maintenance of its facilities to comply with regulatory requirements."

1. Positions of the Parties

79. In its Response to the February 2012 Order, Texas Eastern generally contends that it should be allowed to retain both the Routine Maintenance Exemption and the Regulatory Requirement Exemption, without making separate contentions with respect to

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[95] Texas Eastern asserts that it tariff provisions are in the range of acceptable just and reasonable provisions since the Commission has previously found them to be just and reasonable, citing, *e.g.*, *PG&E Gas Transmission, Northwest Corp. v. FERC*, 315 F.3d 383, 386 (D.C. Cir. 2003). However, the Commission, pursuant to section 5, finds in this order that these provisions conflict with current Commission policy and are not just and reasonable.

[96] *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001).

[97] *North Baja v. FERC*, 483 F.3d 819.

each exemption.[98] Therefore, we do not summarize or discuss in this section of the order Texas Eastern's contentions which have already been addressed in the preceding section.

80. Texas Eastern asserts that the Regulatory Requirement Exemption, as accepted in the *Restructuring Orders*, is narrowly crafted to apply only to maintenance and repair to comply with regulatory requirements. Texas Eastern contends that removal of the Regulatory Requirement Exemption would be inconsistent with, and penalize Texas Eastern for, compliance with current and future safety regulations. Texas Eastern explains that its repair and maintenance activities are often mandated by Federal and state law. For example, Texas Eastern states that it schedules some maintenance activities in order to comply with the safety regulations adopted by the PHMSA of the U.S. Department of Transportation. Moreover, it states that the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 requires PHMSA to implement more stringent safety requirements, including the already directed demonstration of testing records and other testing obligations for safety improvements that will require outages. Texas Eastern states that it does not control what maintenance activities are required to comply with safety, integrity management planning, and environmental regulations or the timing of such activities, and, therefore, such maintenance is neither controllable nor avoidable.

81. ConocoPhillips and MDG argue that Texas Eastern should be required to eliminate its Regulatory Requirements Exemption. Indicated Shippers argues that that the pipelines' duty to perform maintenance does not support an exemption from the Commission current reservation charge credit policy.

2. Commission Determination

82. The Commission finds that Texas Eastern's existing Regulatory Requirements Exemption is unjust and unreasonable. That provision exempts Texas Eastern from providing any reservation charge credits for any repair or maintenance attributable to "regulatory requirements." Unlike the Routine Maintenance Exemption, the Regulatory Requirements Exemption applies to service interruptions which occur at any time of the year. Texas Eastern's Regulatory Requirements Exemption thus imposes on its shippers the entire risk of any service interruption to comply with regulatory requirements. Such a

[98] Texas Eastern, in its Response at n.3, states that, in that pleading, it uses the term "Maintenance Exemption" to refer to both the Routine Maintenance Exemption and the Regulatory Requirement Exemption. Texas Eastern also states that, unless specifically stated otherwise, any reference in its Response to "maintenance" refers to both routine maintenance and maintenance to comply with regulatory requirements.

total exemption from reservation charge crediting is contrary to longstanding Commission policy concerning reservation charge crediting.

83. Commission policy requires pipelines to provide firm shippers with either full or partial reservation charge credits when they are unable to provide primary firm service.[99] When the interruption is the result of a *force majeure* event, *i.e*., an event that is "not only uncontrollable, but also unexpected,"[100] the pipeline must provide partial reservation charge credits. When the interruption is the result of a non-*force majeure* event, the pipeline must provide shippers a full reservation charge credit.[101] Therefore, the Commission requires pipelines to provide some level of reservation charge credits whenever the pipeline is unable to schedule reserved primary firm service.

84. The Commission has applied this general reservation charge crediting policy to all interruptions of primary firm service, including those attributable to government actions.[102] Thus, whether a pipeline must provide full or partial credits for an interruption of service caused by a government action turns on whether the particular government action is considered a *force majeure* or non-*force majeure* event. For example, the Commission has held that outages due to scheduled or routine maintenance necessary to comply with regulatory requirements are not *force majeure* events, and thus the pipeline must provide full reservation charge credits for any such outages.[103] The Commission explained that government required "testing and maintenance are a part of

[99] *See*, *e.g.*, *Southern*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050; *Northern*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202; *Midwestern Gas Transmission Co*., 137 FERC ¶ 61,257 (2011).

[100] *North Baja v. FERC*, 483 F.3d 819, 823, approving the Commission's policy of defining *force majeure* events as events that not only uncontrollable but also unexpected. *See also* Opinion No. 406, 76 FERC ¶ 61,022 at 61,088.

[101] *See, e.g.*, Opinion No. 406, and Opinion No. 406-A, *as clarified by Rockies Express I*, 116 FERC ¶ 61,272 at P 63.

[102] *Tennessee Gas Pipeline Co*., 139 FERC ¶ 61,050, at PP 80-82 (2012). *Rockies Express Pipeline Co*., 139 FERC ¶ 61,275, at P 19 (2012) (*Rockies Express II*).

[103] *Natural*, 106 FERC ¶ 61,310, at P 15; *Florida Gas*, 107 FERC ¶ 61,074 at PP 28-29; *Tennessee Gas Pipeline Co*., 139 FERC ¶ 61,150 at P 81. *See* also *El Paso*, 105 FERC ¶ 61,262 at PP 6 and 11, holding that scheduled maintenance is within the control of the pipeline despite the El Paso Natural Gas Company's contention that such maintenance may be required by government agencies.

the service provider's duties under a certificate of public convenience and necessity that are not appropriately considered a *force majeure* event."[104] The Commission recognizes that compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform to ensure the safe operation of its system may require interruptions of service. However, as the Commission held in *North Baja*,[105] the pipeline has some degree of control over when it conducts these activities on particular facilities, and in any event the need to conduct such regular, periodic activities cannot be considered "unexpected."

85. However, the Commission has also recognized that, in some circumstances, an outage required to comply with governmental requirements may be treated as resulting from a *force majeure* event for which partial reservation charge credits are required.[106] As the Commission stated in *Florida Gas*:

> An appropriately designed *force majeure* provision should complement the pipeline's regulatory obligations. In this regard, the Commission recognizes that there may be circumstances in which it would be appropriate for FGT to declare a *force majeure*, as provided in Section 8(c), due to the actions of an administrative or regulatory agency, provided such circumstances otherwise fit its definition of *force majeure*. [107]

86. Such outages may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and are unexpected. For example, the Commission held, in *Florida Gas*, that a government order requiring a pipeline to be relocated for highway construction, circumstances not related to the pipeline's operations or in its control, could be treated as a *force majeure* event.[108]

[104] *Orbit*, 126 FERC ¶ 61,095 at P 68; *See also Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 5.

[105] 111 FERC ¶ 61,101 at P 18.

[106] *See Florida Gas*, 107 FERC ¶ 61,074 at P 32. *Tarpon Whitetail,* 125 FERC ¶ 61,050 at P 5.

[107] *Florida Gas,* 107 FERC ¶ 61,074 at P 32; *See also Tarpon Whitetail,* 125 FERC ¶ 61,050 at P 6.

[108] *See Florida Gas*, 107 FERC ¶ 61,074 at P 32.

87. Texas Eastern's Regulatory Requirements Exemption is clearly contrary to the above policy, because it exempts Texas Eastern totally from providing any reservation charge credits when it performs "repair and maintenance of its facilities to comply with regulatory requirements." Thus, Texas Eastern would not provide full credits in a non-*force majeure* situation or partial credits in a *force majeure* situation. While the *Restructuring Orders* accepted Texas Eastern's Regulatory Requirements Exemption, in 2004 the Commission rejected Natural's proposal to adopt the same exemption.[109] The Commission held that such a total exemption from reservation credits for maintenance to comply with regulatory requirements was no longer permitted by Commission policy. Therefore, pursuant to NGA section 5 the Commission requires Texas Eastern to remove its Regulatory Requirements Exemption.

88. In addition, section 17.1 of Texas Eastern's GT&C includes as a *force majeure* event "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means." To the extent that this provision is intended to treat all service interruptions for testing, repair and maintenance in compliance with government orders as *force majeure* events, this provision is contrary to Commission policy. As discussed above, the Commission has held that outages for routine maintenance to comply with government orders and regulations do not constitute *force majeure* events. In *Tennessee*, the Commission required the pipeline to clarify identical tariff language to ensure that routine testing and maintenance required to comply with governmental action are not treated as f*orce majeu*re events.[110] Accordingly, the Commission also requires Texas Eastern to modify section 17.1 of its GT&C to exclude outages resulting from regulatory requirements which are within the pipeline's control or expected. However, consistent with the discussion above, Texas Eastern may propose to include in the definition of *force majeure* outages to comply with government requirements which are both outside the pipeline's control and unexpected.

D. The OFO Exemption

89. Paragraph (B) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold a reservation charge credit if the failure to deliver "is the result of Pipeline having operational flow orders [OFO] in effect on such Day."

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[109] *Natural*, 106 FERC ¶ 61,310 at P 15.

[110] *Tennessee Gas Pipeline Co*., 139 FERC ¶ 61,150 at P 82. *See also Rockies Express II*, 139 FERC ¶ 61,275 at P 19.

1. **Positions of the Parties**

90. Texas Eastern asserts that the OFO Exemption was fully litigated and approved in the *Restructuring Orders* and is narrowly tailored to apply for outages due to OFOs currently in effect.[111] Texas Eastern further asserts that the OFO provisions in its existing tariff provide similar narrow circumstances in which an OFO can be issued,[112] and these provisions continue to provide the same support for the Commission's previous findings. Texas Eastern contends that there is no record evidence to suggest changed circumstances.

2. **Commission Determination**

91. Commission policy requires pipelines to provide some level of reservation charge credits whenever the pipeline is unable to schedule primary firm service. Therefore, the issuance of an OFO cannot justify a complete exemption from reservation charge crediting. The only issue is whether the issuance of the OFO is the result of a *force majeure* situation outside the pipeline's control, in which case only partial credits are required. Therefore, the cause of OFO interruptions is only relevant to the amount of the required credit and there is no basis for an exemption from the Commission's current reservation charge crediting policy for OFO outages. As the Commission found in *Natural*,[113] such exemptions from providing credits whenever there is an OFO must be eliminated to reflect current Commission policy. Accordingly, pursuant to NGA section 5, Texas Eastern must revise its tariff records to eliminate the OFO Exemption from its obligation to provide reservation credits, consistent with current Commission policy.

E. **The 95 Percent Requirement**

92. Sections 3.3, 3.4, or 3.5 of each firm rate schedule allow Texas Eastern a 5 percent tolerance before it must provide reservation charge credits. Thus, Texas Eastern is required to provide reservation charge crediting only if it delivers less than 95 percent of the shipper's nominated volumes.

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[111] *Citing Restructuring Orders*, 62 FERC ¶ 61,015; *order on reh'g*, 63 FERC ¶ 61,100; *order on reh'g*, 64 FERC ¶ 61,305.

[112] *Citing* section 4.3 of its GT&C.

[113] *Natural*, 106 FERC ¶ 61,310 at PP 13, 15.

1. Positions of the Parties

93. Texas Eastern argues that the 95 Percent Requirement which requires it to deliver at least 95 percent of the quantities requested each day to avoid a reservation charge credit was fully litigated and addressed in the *Restructuring Orders* must be retained because there is no evidence to suggest changed circumstances. Texas Eastern asserts that, in the *Restructuring Orders,* the Commission rejected arguments that reservation charge credits must be provided for a failure to deliver 100 percent of nominated volumes and found that the 95 Percent Requirement was appropriate due to unique factors on its system.[114]

2. Commission Determination

94. The Commission finds that the 95 Percent Requirement is contrary to Commission policy and thus unjust and unreasonable. While the *Restructuring Orders* approved the 95 Percent Requirement, those orders predated the Commission's current reservation charge crediting policy. The Commission established its current policy in a 2006 order in *Rockies Express I,* where the Commission rejected a provision similar to that at issue here. The Commission explained:

> The Commission's policy regarding reservation charge adjustments is that where scheduled gas is not delivered due to a non-*force majeure* or planned maintenance event, there must be a full reservation charge adjustment as to the undelivered amount. This is because the failure was due to the pipeline's conduct and was within its control. We agree with BP that Rockies Express' proposal not to provide reservation charge credits when it schedules at least 98 percent of a shipper's nominations in non-*force majeure* situations does not adequately comply with Commission policy. We acknowledge that we accepted a similar proposal in *Tennessee* [Opinion No. 406], but in that case the Commission did not specially address the merits of that provision. Upon consideration here, we find that Rockies Express' proposal is unjust and unreasonable because it requires its customers to bear the risk associated with interruption of service within the pipeline's control.[115]

[114] *Citing Restructuring Orders,* 63 FERC ¶ 61,100 at 61,433.

[115] *Rockies Express I,* 116 FERC ¶ 61,272 at P 63.

95. In subsequent cases, the Commission has consistently followed the holding in *Rockies Express*.[116] For example, in recent orders in both *Southern*[117] and *Tennessee Gas Pipeline Co.*,[118] the Commission acted under NGA section 5 to require those pipelines to remove their similar tariff provisions exempting them from providing credits where they delivered at least 98 percent of nominated amounts, despite the fact the Commission had previously approved those provisions. Therefore, pursuant to NGA section 5, the Commission finds that Texas Eastern's 95 Percent Requirement reservation charge credits is unjust and unreasonable and must be removed from its tariff. Texas Eastern is directed to revise its tariff to require full reservation charge credits when it does not provide 100 percent of nominated reserved firm service.

F. Section 17.3 Curtailment Provision

96. Section 17.3 currently contains a provision regarding Texas Eastern's curtailment of service which does not comply with Commission policy. Section 17.3 provides, in part that Texas Eastern has the "right to curtail, interrupt, or discontinue service in whole or in part on all or a portion of its system from time to time to perform routine repair and maintenance." The Commission finds that the reference to "curtailment" in this provision is unjust and unreasonable. The Commission has found that pipelines may only "curtail" service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled.[119] Because routine repair or maintenance is not an emergency situation or an unexpected loss of capacity, the pipeline should take outages required for routine repair and maintenance into account when it is scheduling service, rather than curtailing service after it is scheduled. If an interruption of service is required for routine repair or maintenance, then the pipeline should not confirm shipper nominations to schedule service that it will not be able to provide for the period of the outage. For that reason, the Commission has held that pipelines should plan routine repair and maintenance through the scheduling process and should not curtail confirmed

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[116] *See, e.g., Petal Gas Storage, L.L.C.*, 126 FERC ¶ 61,199, at PP 25-26 (2009); *Orbit*, 126 FERC ¶ 61,095 at P 69; *SG Resources Mississippi, L.L.C.*, 122 FERC ¶ 61,180, at P 6 (2008).

[117] 135 FERC ¶ 61,056 at P 20-21, *reh'g denied*, 137 FERC ¶ 61,050 at PP 30-33.

[118] 135 FERC ¶ 61,208 at PP 64-66.

[119] *See, e.g., Portland*, 76 FERC ¶ 61,123 at 61,663; *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at P 68 (2011).

scheduling nominations in order to perform routine repair and maintenance.[120] Therefore, Texas Eastern is directed to modify section 17.3 to remove the authorization to "curtail" service to perform routine repair and maintenance.

G. <u>Effective Date of Section 5 Action</u>

97. Finally, ConocoPhillips requests that any tariff modifications pursuant to NGA section 5 be retroactive to March 19, 2012, thirty days after the February 2012 Order. ConocoPhillips argues that the Commission, in the February 2012 Order, already rejected Texas Eastern's contentions as to why its tariff provisions concerning reservation charge credits should not be modified under section 5.

98. The Commission rejects this request. When the Commission acts under NGA section 5 to revise a pipeline's tariff, the Commission's action must be prospective only. NGA section 5(a) provides that once the Commission has found a tariff provision to be unjust and unreasonable, the Commission "shall determine the just and reasonable" tariff provision "to be thereafter observed and in force and shall fix the same by order." In this order, the Commission holds that Texas Eastern's existing reservation charge credits are unjust and unreasonable and requires Texas Eastern to file revised reservation charge crediting provisions consistent with the discussion above. Texas Eastern has some degree of discretion as to how it will revise its tariff in compliance with this order. For example, it has various options as to how credits should be calculated when it gives advance notice of routine maintenance.[121] Accordingly, we cannot "fix" the just and reasonable reservation charge crediting provisions "to be thereafter observed" until we issue an order accepting Texas Eastern's Filing to comply with this order. In these circumstances, we cannot make our section 5 action in this case effective until the date of issuance of the order accepting Texas Eastern's compliance filing.[122]

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[120] *Id*.

[121] *See* P 69, *supra*.

[122] *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985). *Williston Basin Interstate Pipeline Co.*, 59 FERC ¶ 61,202, at 61,716-717 (1992), *order on remand*, 68 FERC ¶ 61,357, *reh'g denied*, 69 FERC ¶ 61,360, at 62,362-363 and n.16 (1994). *Kern River Gas Transmission Co.*, 133 FERC ¶ 61,162, at PP 20-22 (2010) (Opinion No. 486-D).

Conclusion

99. Pursuant to NGA section 5, Texas Eastern is directed to file revised tariff records, within 30 days of the date of this order, to eliminate: (1) the 95 percent threshold and provide reservation charge credits when it does not provide 100 percent of nominated reserved firm service consistent with Commission policy; (2) the Routine Maintenance Exemption; (3) the Regulatory Requirements Exemption; and (4) the OFO Exemption. Further, based on Texas Eastern's explanation, the Commission grants rehearing, in part, with respect to the requirement that Texas Eastern revise section 17.3 of its GT&C. However, as discussed above, Texas Eastern is required to clarify section 17.1 to be consistent with the Commission policy concerning what constitutes a *force majeure* event and section 17.3 to be consistent with Commission curtailment policy. Texas Eastern's other requests for rehearing of the February 2012 Order are denied, consistent with the discussion above.

The Commission orders:

(A) Texas Eastern's request for rehearing in this proceeding is granted, in part and denied, in part, as discussed in the body of this order.

(B) Texas Eastern is directed, within 30 days of the date of this order, pursuant to NGA section 5, to file revised tariff records to eliminate from its tariff: (1) the 95 percent Requirement and require reservation charge credits when it does not provide 100 percent of nominated reserved firm service consistent with Commission policy; (2) the Routine Maintenance Exemption; (3) the Regulatory Requirements Exemption; and (4) the OFO Exemption, consistent with the discussion in this order. Texas Eastern must also revise sections 17.1 and 17.3 of its GT&C consistent with the discussion in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.