

141 FERC ¶ 61,224
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.

Gulf South Pipeline Company, LP

Docket No. RP12-813-000

ORDER ACCEPTING TARIFF RECORDS SUBJECT TO CONDITIONS

(Issued December 20, 2012)

1. On June 20, 2012, Gulf South Pipeline Company, LP (Gulf South) filed tariff records¹ to revise its tariff provisions pertaining to reservation charge credits to be consistent with Commission policy. On July 31, 2012, the Commission accepted and suspended the tariff records, subject to refund and further Commission action, effective January 1, 2013, or some earlier date set forth in a subsequent order.² For the reasons discussed below, the Commission accepts the revised tariff records effective January 1, 2013, subject to conditions. Gulf South is directed to file revised tariff records or provide further information and, pursuant to section 5 of the Natural Gas Act (NGA), either to modify certain tariff provisions concerning reservation charge credits or show cause why it should not be required to do so, as discussed below.

I. Background

2. In *Natural Gas Supply Association, et al.*,³ the Commission encouraged interstate pipelines to review their tariffs to determine whether their individual tariff is in compliance with the Commission's policy concerning reservation charge credits, and, if not, make an appropriate filing to come into compliance. In general, the Commission requires all interstate pipelines to provide reservation charge credits to their firm shippers

¹ Gulf South Pipeline Company, LP, FERC NGA Gas Tariff, Tariffs; [Section 1, Table of Contents, 6.0.0](#); [Section 6.7, GT&C - Operating Conditions, 3.0.0](#); [Section 6.21.5, GT&C - Misc. Provisions - Force Majeure, 2.0.0](#); [Section 6.25, GT&C - Demand Charge Credits, 5.0.0](#); [Section 6.26, GT&C - List of Non-Conforming Service Agreements, 0.0.0](#).

² *Gulf South Pipeline Co.*, 140 FERC ¶ 61,081 (2012) (July 2012 Order).

³ *Natural Gas Supply Ass'n, et al.*, 135 FERC ¶ 61,055, at P 2 (2011) (NGSA).

during both *force majeure* and non-*force majeure* outages. The Commission requires pipelines to provide full reservation charge credits for outages of primary firm service caused by non-*force majeure* events. The Commission also requires the pipeline to provide partial reservation charge credits during *force majeure* outages, so as to share the risk of an event for which neither party is responsible. Partial credits may be provided pursuant to: (1) the No-Profit method under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1, or (2) the Safe Harbor method under which the pipeline provides full credits after a short grace period when no credit is due (i.e., 10 days or less).⁴

3. The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. The Commission has held that routine, scheduled maintenance is not a *force majeure* event, even on “pipelines with little excess capacity”⁵ where such maintenance may require interruptions of primary firm service. That is because, even if such outages are considered to be uncontrollable, they are expected. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed this policy in *North Baja Pipeline, LLC v. FERC*,⁶ stating:

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.

4. As the Commission requested in *NGSA*, Gulf South reviewed the reservation charge crediting provisions in its tariff. That tariff contains only limited provisions concerning reservation charge crediting. Section 6.7(9) of Gulf South’s General Terms and Conditions of Service (GT&C) provides that, if Gulf South is unable to transport gas “as a result of scheduled maintenance,” then Gulf South will provide reservation charge

⁴ See, e.g., *Tennessee Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *order on reh’g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*). The Commission has also stated that pipelines may use some other method which achieves equitable sharing in the same ball park as the first two methods.

⁵ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at 61,350 (2003).

⁶ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *affg*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh’g*, *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

credits “for the appropriate portion of the reservation charge for the period of the interruption.” Gulf South’s tariff does not provide for reservation charge credits in any other circumstance, including outages due to a *force majeure* situation. Gulf South, accordingly, determined that its tariff does not fully comply with Commission policy.

5. Accordingly, on June 20, 2012, Gulf South proposed to modify its tariff to bring both its *force majeure* and non-*force majeure* reservation charge crediting provisions into compliance with Commission policy. The filing included: (i) a proposed section 6.25⁷ dedicated to reservation charge credits;⁸ (ii) a proposed modification to the definition of *force majeure* concerning new pipeline safety and integrity management obligations; and (iii) minor conforming changes to the Table of Contents and the GT&C.

6. Gulf South proposed to provide reservation charge credits for *force majeure* events utilizing the Safe Harbor Method. Following the ten-day grace period during which no credits are provided, Gulf South would provide reservation charge credits for the “Force Majeure Average Usage Quantity” that Gulf South failed to deliver to the customer’s primary delivery point(s) due to the *force majeure* event provided that the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf South would determine the Force Majeure Average Usage Quantity based upon nominations over the seven gas days prior to the first gas day of the *force majeure* event.

7. Gulf South also proposed to provide full reservation charge credits for non-*force majeure* events, including maintenance events not included in the revised definition of *force majeure* described below. Gulf South would provide reservation charge credits for any “Maintenance Average Usage Quantity” that it failed to deliver during a non-*force majeure* event provided the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf South would determine the Maintenance Average Usage Quantity based upon nominations over the seven gas days prior to the first gas day of the maintenance and non-*force majeure* event.

8. Gulf South also proposed to change its definition of *force majeure* in section 6.21.5(2) to address new pipeline safety and integrity management obligations resulting from the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act). Specifically, Gulf South proposed to include in the definition of *force majeure* “any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled

⁷ This section was formerly dedicated to the “List of Non-Conforming Agreements” which has been relocated to section 6.26 of the Tariff.

⁸ Gulf South employs the term “demand charge credits” for reservation charge credits.

maintenance, to comply with the [2011 Act] requirements issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) [of the United States Department of Transportation (DOT)] pursuant to the 2011 Act, [and] requirements resulting from PHMSA's ongoing gas pipeline rulemaking proceedings." Gulf South contended that these initiatives are expected to result in an increase in operations and maintenance costs and greater pressure on pipelines to perform upgrades and replacements. Gulf South further contended that, while the exact nature of any additional pipeline safety requirements is undetermined, disruptions in service and pipeline infrastructure modernization costs are likely to be substantial.

9. Gulf South stated that the Commission's current *force majeure* policy on reservation charge crediting stems from the D.C. Circuit's order in *North Baja* affirming the Commission's holding that scheduled maintenance is not a *force majeure* event. However, Gulf South contended that recent pipeline incidents, new legislation, and ongoing rulemakings have resulted in increased scrutiny of pipeline operations, and this scrutiny is evident in several DOT and PHMSA initiatives and actions by the Executive Branch.⁹ Gulf South argued that any resulting outages are not the routine scheduled maintenance considered in *North Baja*. Gulf South asserted that such service disruptions are due to broad government-initiated actions that are not reasonably in control of pipelines and which represent a sea change for the natural gas industry. Gulf South contended that, in *North Baja*, the court's rationale for upholding the Commission's general exclusion of routine maintenance and testing outages from the definition of *force majeure* was that a pipeline's rates "incorporate [the] costs associated with a pipeline operating its system so that it meet its contractual obligations."¹⁰ Gulf South argues that this rationale does not apply to these outages as pipelines' existing rates do not and cannot incorporate the costs associated with complying with the new requirements.

10. Protests were filed by Atmos Energy Corporation (Atmos); Trans Louisiana Gas Pipeline, Inc. and Atmos Energy Marketing, LLC; Devon Gas Services, L.P. (Devon); Indicated Shippers;¹¹ Southern Company Services, Inc., as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company; and United Municipal Distributors Group

⁹ Transmittal Letter at 7-8.

¹⁰ (Citing *North Baja*, 483 F.3d 819, 823).

¹¹ For the purposes of this proceeding, the Indicated Shippers are Apache Corporation; BP America Production Company and BP Energy Company; Chevron Natural Gas, a division of Chevron U.S.A. Inc.; ConocoPhillips Company; and Shell Energy North America (US), L.P.

(UMDG).¹² The protests generally argued that Gulf South's proposal conflicted with the Commission's policy and precedents regarding reservation charge crediting policy.

11. On July 10, 2012, Gulf South filed an answer to the protests (Answer) and proposed several alternatives to its original proposal which are discussed below.

12. The July 2012 Order allowed the protestors an opportunity to respond to Gulf South's Answer before a final disposition of the filing by the Commission. Responses to Gulf South's Answer were filed by Indicated Shippers, Atmos, Devon, and UMDG (Responses). The Responses generally argue that Gulf South's proposal conflicts with the Commission's policy and precedents regarding reservation charge crediting policy. Gulf South filed an answer to the responses (Answer to Responses).¹³ The Responses and Answer to Responses are discussed below.

II. Discussion

13. The Commission accepts the revised tariff records listed in footnote n.1 of this order to become effective January 1, 2013, subject to conditions. As discussed below, the Commission requires Gulf South to file revised tariff records or provide further information and, pursuant to NGA section 5, directs Gulf South to make certain changes in the reservation charge crediting provisions in its tariff or explain why it should not be directed to do so.

A. Outages to Comply with the 2011 Act and PHMSA Rulemakings as Force Majeure Events

1. Gulf South's Proposal

14. Gulf South proposes to change its definition of *force majeure* in section 6.21.5(2) to include outages necessary to comply with the 2011 Act and PHMSA's ongoing gas

¹² UMDG consists of the following municipal-distributor customers of Gulf South: Utilities Board of the City of Atmore, Alabama; City of Brewton, Alabama; Town of Century, Florida; Utilities Board of the Town of Citronelle, Alabama; City of Fairhope, Alabama; Utilities Board of the City of Foley, Alabama; North Baldwin Utilities, Alabama; Okaloosa Gas District, Florida; City of Pascagoula, Mississippi; City of Pensacola, Florida; and South Alabama Gas District, Alabama.

¹³ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)(2) (2012)) prohibits answers to protests or answers unless otherwise ordered by the decisional authority. In this case, the Commission will accept Gulf South's Answer to Responses because it may assist the Commission in its decision-making process.

pipeline rulemakings. Specifically, Gulf South proposes to include in the definition of *force majeure* “any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, to comply with the [2011 Act] requirements issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) [of the United States Department of Transportation (DOT)] pursuant to the 2011 Act, [and] requirements resulting from PHMSA’s ongoing gas pipeline rulemaking proceedings.”

2. Positions of the Parties

15. In its transmittal letter and its Answer, Gulf South argued that its proposal to amend its definition of *force majeure* to include service interruptions associated with compliance with the 2011 Act is just and reasonable.¹⁴ Gulf South asserted that it is appropriate for it and its shippers to share the risk of such service interruptions pursuant to the well-established Safe Harbor Method applicable to other *force majeure* outages. Gulf South argued that the 2011 Act and PHMSA’s ongoing rulemaking proceedings will result in significant, new safety requirements, increasing the risk of service disruptions which cannot be considered “routine” and over which the pipeline will have little control.

16. Gulf South stated that in August 2011 PHMSA issued an Advance Notice of Proposed Rulemaking (ANOPR),¹⁵ requesting comment on various potential changes in PHMSA’s gas pipeline safety regulations. Gulf South stated that PHMSA requested comment on strengthening of PHMSA’s existing integrity management (IM) regulations, expanding the application of those regulations beyond High Consequence Areas (HCAs),¹⁶ strengthening criteria for pipeline assessment tools, modifying repair criteria, and revising data collection requirements. PHMSA also requested comment on adding new requirements concerning corrosion control, weld seams, Maximum Allowable Operating Pressure (MAOP), and the use and location of certain mainline valves. Gulf South stated that PHMSA is expected to issue multiple proposed rules on the issues

¹⁴ Gulf South contends that the Commission must accept Gulf South’s proposal, if the Commission determines that it is just and reasonable, regardless of whether other tariff or rate mechanisms are also just and reasonable or it has approved different provisions for other pipelines (*citing Columbia Gas Transmission Corp.*, 124 FERC ¶ 61,122, at P 26 (2008) (*citing Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993); and *Consolidated Edison Co. v. FERC*, 165 F.3d 992 (D.C. Cir. 1999) (*Consolidated Edison*)), *reh’g denied*, 133 FERC ¶ 61,217 (2010)).

¹⁵ (*Citing* 76 FR 53086 (August 25, 2011)).

¹⁶ An HCA is a location which is defined in the pipeline safety regulations as an area where pipeline releases would have greater consequences to the health, safety, or environment.

covered by the ANOPR and these will likely require additional facility testing and upgrades which will disrupt service.

17. Gulf South also stated that the 2011 Act, which the President signed into law on January 3, 2012, will likely lead to significant service disruptions. Specifically, Gulf South asserted that the provisions of section 23(a) of the 2011 Act, adding section 60139, Maximum Allowable Operating Pressure to Chapter 601 of Title 49 of the United States Code, will likely cause PHMSA to take actions that will disrupt pipeline service. Gulf South stated that new section 60139(a) requires pipelines to verify the records of pipeline segments in Class 1 and Class 2 HCAs and Class 3 and Class 4 locations¹⁷ to confirm their established MAOP. New section 60139(b) requires pipelines to report by July 3, 2012 those pipeline segments for which MAOP cannot be confirmed with records. Gulf South pointed out that new section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline to reconfirm a MAOP. Gulf South asserted that reconfirmation could require in-line inspection, or other alternative tests of Gulf South's pipeline which could result in disruptions to pipeline service. Gulf South also pointed out that new section 60139(c)(2) authorizes PHMSA to take interim measures until MAOP can be reconfirmed and such actions could involve pressure cuts reducing the pipeline's capacity.

18. Gulf South stated that section 23 of the 2011 Act also requires PHMSA to issue regulations to require strength testing of previously-untested gas pipelines in HCAs operating at a pressure of greater than 30 percent of specified minimum yield strength. Gulf South stated that such testing could include pressure testing, in-line inspections, and other alternative testing methods and could result in additional disruptions in pipeline service.

19. In addition to the 2011 Act's requirements concerning MAOP, Gulf South maintained that PHMSA is required by the 2011 Act to conduct studies to help determine whether to expand the scope of integrity management requirements or to require the use of automatic or remote-controlled shut off valves. Gulf South stated that PHMSA's existing integrity management program covers only about seven percent of all gas transmission pipelines, but portions of the 2011 Act have the potential to apply to all gas transmission pipelines. Gulf South also maintained that, if PHMSA determines that such changes are appropriate, PHMSA has the discretion to initiate a rulemaking to implement them.

20. Gulf South asserted that the risk of outages under the new pipeline safety requirements is sufficiently detailed to provide certainty as to the range of impacts and is not speculative. Gulf South further contended that any such outages should be considered outside the control of the pipeline and thus qualify as *force majeure* events for

¹⁷ Basically, these are areas with greater population density.

which cost sharing is appropriate, contending that the costs of such outages are not currently included in their rates. Gulf South further asserted that its proposed risk sharing mechanism will not provide an incentive to prolong outages because it will have an incentive to keep outages to the shortest possible duration to reduce the amount of reservation charge credits after the 10-day safe harbor grace period.

21. Gulf South contended that the service disruptions anticipated to result from the 2011 Act and pending PHMSA rulemakings were not contemplated prior to the 2011 Act and are not accounted for in Gulf South's existing rates or the Commission's existing *force majeure* policy. Gulf South argued that any rate changes through a general section 4 rate case or adjustment of billing determinants and return on equity would only take place on a prospective basis. Gulf South maintained that until it has operated under any increased regulatory requirements for a transitional period, including those costs in its rates would be difficult because the outages would not be reflected in test period data. Gulf South asserted that the exact level of service interruptions resulting from the new requirements is unknown, and a proposal to include their costs in its rates could potentially be rejected on the ground that such interruptions are speculative and non-recurring events, i.e., such as interim pressure reductions. Gulf South asserts that resolution through a general section 4 rate case ignores the realities of the current natural gas market, and it likely would be unable to recover any increased rate because of competitive circumstances.

22. In the alternative, Gulf South offered, to limit its equitable sharing proposals to a transitional period outside its *force majeure* provisions. Gulf South proposes a transitional period when the costs of outages caused by increased regulatory requirements are not reflected in its rates. Gulf South contended that treating outages due to the 2011 Act as *force majeure* events for at least a transitional period is necessary to address their cost recovery concerns.

23. In their Responses, the respondents generally argue that the proposal to modify the definition of *force majeure* conflicts with Commission and judicial precedents, including *North Baja*, that classify outages for scheduled maintenance as non-*force majeure* events. They also point out that PHMSA has not yet determined what requirements will be necessary for pipelines to comply with the 2011 Act and that the Act does not require PHMSA to issue any regulations until July 3, 2013. Therefore, the respondents contend that Gulf South has not presented any evidence that it will be unable to provide primary firm service as a result of the possibility of future regulations which have not yet been enacted.

24. The respondents argue that Commission policy requires that *force majeure* events must be both uncontrollable and unexpected. They contend that outages for compliance with the 2011 Act are not unexpected, as evidenced by Gulf South's instant request. The respondents also assert that the details of how Gulf South manages compliance with any

new requirements resulting from the 2011 Act, including when and where outages occur is likely to be in the control of the pipeline. The respondents further assert that testing and maintenance required by government regulation are part of a pipeline's duties under a certificate of service and are not appropriately considered a *force majeure* event. Some respondents argue that *North Baja* only stated that a pipeline's rates should incorporate the costs associated with meeting its contractual obligations but did not require including such costs as a requirement for crediting. The respondents also argue that, if Gulf South's rates are insufficient to recover those costs it may file pursuant to section 4 for a rate increase.

25. The respondents also contend that, if Gulf South is unable to verify its records and confirm the MAOP of certain pipeline segments, as required by section 23(a) of the 2011 Act, that could be the result of its own negligence in failing, for example, to keep proper records or conduct appropriate tests in the past. The respondents assert that, in such circumstances, any outages required to reconfirm MAOP could not qualify as no-fault, *force majeure* events for which only partial credits are required.

26. In its Answer to Responses, Gulf South argues that its new obligations are not speculative since PHMSA is actively developing regulations to implement the 2011 Act. Gulf South asserts that a significant expansion of PMSHA regulation is reasonably foreseeable and could result in service interruptions. Gulf South further asserts that, in any case, shippers will not be harmed if there are no disruptions. Gulf South argues that interruptions are not, and could not have been, included in its rates and, therefore, its proposal is not inconsistent with the outages considered in *North Baja* since these outages are not provided for in its existing rates.

27. Gulf South also states that it could be required to reconfirm MAOP on certain portions of its system despite having followed all applicable regulatory requirements, and thus outages required for such reconfirmation would not be attributable to any negligence on its part. It points out that neither the pipeline safety laws nor PHMSA regulations required Gulf South to retain record of the original design, installation, construction, initial inspection and initial testing specifications of pipeline facilities built before August 19, 1970.¹⁸ Gulf South also states that it has set the MAOP of some of its pre-1970 pipeline at historical high operating pressures, as permitted by PHMSA regulations.¹⁹

3. Commission Determination

28. The Commission finds that Gulf South's proposal to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity

¹⁸ (Citing 49 U.S.C. § 60104(b)).

¹⁹ (Citing 49 C.F.R. § 192.619(c) (2012)).

required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings is overbroad. With one exception, the nature and timing of any new safety requirements PHMSA may adopt pursuant to the 2011 Act or ongoing PHMSA rulemakings is too speculative at this time to justify modifying Commission policy to treat any outages resulting from such new requirements as *force majeure* events at this time. However, for the reasons discussed below, we will allow partial reservation charge crediting for a transitional two-year period for outages due to orders PHMSA may issue pursuant to section 60139(c) of Chapter 601 of Title 49, as added by section 23 of the 2011 Act. This determination is without prejudice to Gulf South filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.

Safety Requirements Other Than Those Related to MAOP

29. Aside from the 2011 Act's provisions concerning MAOP, Gulf South focuses primarily on potential new regulations concerning integrity management programs and remote or automatic shut-off valves in order to support its proposal to revise its definition of *force majeure*. However, as discussed below, it is unclear at the present time what changes, if any, PHMSA may make with respect to its existing regulations concerning integrity management and shut-off valves. Nor do any such changes appear likely to take effect before 2014, at the earliest. In these circumstances, Gulf South cannot show that its proposal to provide only partial reservation charges for outages that may result from whatever regulations PHMSA may adopt on these subjects is just and reasonable.

30. PHMSA adopted its first integrity management regulations pursuant to the Pipeline Safety Improvement Act of 2002 (2002 Act), which provided for PHMSA to issue regulations requiring pipelines to implement integrity management programs for pipeline segments in HCAs. Those regulations took effect on January 14, 2004,²⁰ and specify how pipeline operators must identify, prioritize, assess, evaluate, repair, and validate the integrity of gas transmission pipelines in HCAs as part of their routine, periodic maintenance activities. Shortly after those regulations took effect, the Commission rejected a pipeline's proposal to treat outages resulting from PHMSA's integrity management regulations as *force majeure* events.²¹ The Commission held that an outage due to periodic maintenance required by government regulations for the safe operation of the pipeline "is a necessary non-*force majeure* event within the control of the

²⁰ See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 FR 69778 (December 15, 2003).

²¹ See *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at PP 19 and 28-29 (2004) (*Florida Gas*).

pipeline.”²² In subsequent orders, the Commission has explained that testing and maintenance required by government regulation are a part of the service provider’s duties under a certificate of public convenience and necessity and thus are not appropriately considered a *force majeure* event or otherwise exempted from the requirement for full reservation charge crediting.²³

31. In the ANOPR, PHMSA sought comments on whether the existing integrity management regulations should be strengthened. For example, PHMSA requested comment on whether the definition of a HCA should be modified to include more miles of pipeline; whether some integrity management requirements should be imposed on pipelines outside of HCAs; whether repair criteria for both HCA and non-HCA areas should be strengthened; whether in-line inspection methods, including pigging, should be required whenever possible; revising the requirements for collecting, validating, and integrating pipeline data; requiring the use of automatic and remote controlled shut off valves; and valve spacing. However, PHMSA did not propose any specific changes in its integrity management regulations in the ANOPR. Before making any changes to its integrity management regulations in response to the comments received in response to the ANOPR, PHMSA must issue a notice of proposed regulations (NOPR), proposing specific changes to those regulations and requesting comment. PHMSA must then analyze those comments and issue a final rule adopting revised regulations. Thus, at the present time, there is no certainty as to whether and how PHMSA may modify its integrity management regulations in the rulemaking proceeding initiated by the ANOPR. Moreover, because PHMSA has not yet issued a NOPR on this subject, it will likely be at least a year before any final rule can be issued in that proceeding.

32. In addition to the integrity management issues raised by the ANOPR, sections 5(a) and (b) of the 2011 Act require PHMSA to evaluate, by July 3, 2013, whether some or all of its integrity management requirements should be expanded beyond HCAs, taking into account various factors including “the need to perform integrity management assessments and repairs in a manner that is achievable and sustainable, and that does not disrupt pipeline service,” and “the options for phasing in the extension of integrity management requirements beyond [HCAs], including the most effective and efficient options for decreasing risks to an increasing number of people living or working in proximity to

²² *Id.*, P 29.

²³ *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009); *see also Natural Gas Pipeline Co. of America*, 106 FERC ¶ 61,310, at P 15 (2004) (*Natural*); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*); *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011), *order on reh’g*, 139 FERC ¶ 61,050, at PP 80-82 (2012) (*Tennessee*); *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126, at P 82, *order on reh’g*, 140 FERC ¶ 61,216, at P 88 (*Texas Eastern*); and *Rockies Express Pipeline Co.*, 139 FERC ¶ 61,275, at P 19 (2012) (*Rockies Express*).

pipeline facilities.” Section 5(c) of the Act requires PHMSA to submit a report to Congress by January 3, 2014 on the results of its evaluation of expanding integrity management requirements. In order to give Congress time to review the report, section 5(f) of the Act prohibits PHMSA from issuing any final rule expanding IM requirements beyond HCAs until the earlier of one year after completion of the report to Congress or January 3, 2015, unless PHMSA determines such a regulation is necessary to address a risk to public safety, property, or the environment or an imminent hazard exists.

33. Thus, the 2011 Act does not require PHMSA to take any specific actions with respect to its integrity management regulations, apart from evaluating the need for expanding the existing requirements in its regulations and submitting a report to Congress by January 3, 2014. Moreover, the 2011 Act requires PHMSA to wait until the earlier of one year after submitting the report or January 3, 2015, to issue any final rule expanding integrity management requirements beyond HCAs, unless such a regulation is necessary to address a risk to public safety, property, or the environment. It thus appears unlikely that any such final rule could take effect before 2015.

34. Until there is some certainty as to what new integrity management requirements PHMSA may adopt for pipelines and when they will take effect, it is premature for the Commission to consider modifying its well established current policy that pipelines must provide full reservation charge credits for outages of primary firm service due to scheduled maintenance and repairs performed as part of an integrity management program. Because of the uncertainty as to what integrity management requirements may be adopted, it is uncertain how any such new requirements will affect pipelines’ ability to minimize outages due to their integrity management activities. For example, it is unclear whether, even if PHMSA adopts strengthened integrity management regulations, those regulations will significantly exceed the integrity management activities pipelines are already voluntarily conducting and would conduct in any case. The Interstate Natural Gas Association of America (INGAA) has reported to PHMSA that, while only about 4.5 percent of all member pipeline miles are included in HCAs, interstate pipelines have assessed and mitigated 53 percent of their pipeline miles pursuant to IM programs.²⁴

35. Also, section 5 of the 2011 Act requires PHMSA to take into account “the need to perform integrity management assessments and repairs in a manner that . . . does not disrupt pipeline service” and to consider options for phased implementation of any new requirements. When PHMSA adopted the first integrity management regulations pursuant to the 2002 Act, it gave pipelines no later than one year after enactment to develop written integrity management plans and gave pipeline operators no later than five years after enactment to assess 50 percent of their covered pipelines and another five

²⁴ See INGAA submission responding to *The State of the National Pipeline Infrastructure – A Preliminary Report*, June 22, 2011, Docket No. PHMSA-2011-0127.

years to assess the remainder. There could be a similar phased implementation of any new requirements, which would give pipelines considerable control over when any necessary outages on particular pipeline segments occur. In light of the uncertainty concerning the nature and timing of any new integrity management requirements, the Commission lacks the information necessary to evaluate whether it would be just and reasonable to grant any relief from the present requirement that pipelines provide full reservation charge credits for any outages of primary firm service due to integrity management activities required to comply with PHMSA regulations.

36. With regard to Gulf South's concern about shut-off valves, section 4 of the 2011 Act requires PHMSA, "if appropriate," to issue regulations not later than January 3, 2014, requiring automatic shut-off valves on pipelines constructed or entirely replaced after adoption of the regulation where economically, technically and operationally feasible. PHMSA has not yet issued any Notice of Proposed Rulemaking pursuant to section 4 of the Act. Therefore, PHMSA has not yet provided even a preliminary statement of its views concerning the appropriateness of requiring such shut-off valves. Moreover, even if PHMSA does determine such regulations are appropriate, any regulations it adopts would only apply to new construction occurring after adoption of the regulations and would not appear to be directly related to existing pipeline facilities. Accordingly, as with integrity management, it is premature to consider whether to permit partial reservation charge crediting for outages of primary firm service related to the installation of shut-off valves.

37. The 2011 Act contains numerous other provisions requiring studies of various kinds, apart from the MAOP provisions discussed in the next section. For example, section 7 of the Act requires PHMSA by December 31, 2012, and every two years thereafter, to conduct surveys to measure progress in plans for safe management and replacement of cast iron (CI) pipelines. PHMSA must also submit a report to Congress not later than December 31, 2013, identifying all CI pipelines and evaluating the pipeline's safety programs. However, Gulf South does not expressly rely on these other provisions to support their partial crediting proposal.

MAOP Requirements

38. We now turn to the new requirements concerning MAOP established by section 23 of the 2011 Act. As described above, section 23(a) of the 2011 Act added section 60139, Maximum Allowable Operating Pressure, to Chapter 601 of Title 49 of the United States Code. Section 60139(a) required each owner and operator of a pipeline to conduct a verification of its records of relating to pipelines in class 3 and class 4 locations and class 1 and class 2 HCAs by July 3, 2012. The purpose of the verification is to ensure that the records accurately reflect the physical and operational characteristics of the subject pipelines and to confirm their established MAOP. Section 60139(b) requires each owner or operator of a pipeline facility to identify and submit to PHMSA documentation

relating to each pipeline segment for which its records are insufficient to confirm the established MAOP of the segment by July 3, 2013. Section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline owner or operator of a pipeline facility identified pursuant to section 60139(b) to reconfirm a MAOP “as expeditiously as economically feasible,” and PHMSA must determine what interim actions “are appropriate for the pipeline owner or operator to take to maintain safety until a [MAOP] is confirmed.” Section 60139(c)(2) requires that, in determining the interim actions for each pipeline owner or operator to take, PHMSA must take into account “potential consequences to the public safety and the environment, potential impacts on pipeline system reliability and deliverability, and other factors, as appropriate.”

39. Section 60139(d)(1) also requires PHMSA to issue regulations by July 3, 2013, to require testing to confirm the material strength of previously-untested gas pipelines located in HCAs which are operating at a pressure greater than thirty percent of specified minimum yield strength (SMYS). This requirement includes both grandfathered pre-1970 pipelines and post-1970 pipelines. Section 60139(d)(2) requires PHMSA to consider safety testing methodologies, including at a minimum pressure testing and other alternative methods, including in-line inspections, determined by DOT to be of equal or greater effectiveness. Section 60139(d)(3) requires PHMSA, in consultation with the Chairman of FERC and State regulators, to establish time frames for completion of the testing which “take into account potential consequences to public safety and the environment and that minimize costs and service disruptions.”

40. For the reasons discussed below, we find it is just and reasonable for Gulf South to provide partial reservation charge credits consistent with the Safe Harbor Method for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) for a transitional two-year period starting on January 1, 2013. However, it is premature to consider any similar partial reservation crediting provision for outages that may be caused by any strength testing regulation PHMSA may adopt pursuant to section 60139(d).

41. Section 60139(c) provides that, if a pipeline is unable to confirm MAOP for a pipeline segment by July 3, 2013, PHMSA must require the pipeline to reconfirm the MAOP of the segment as expeditiously as economically feasible, and PHMSA may require the pipeline to take interim actions to maintain safety until MAOP can be confirmed. Unlike the other sections of the 2011 Act discussed above, all of which require PHMSA to conduct rulemaking proceedings before modifying current requirements, section 60139(c) does not require PHMSA to conduct any rulemaking proceeding before it orders particular pipelines to reconfirm MAOP and take interim actions to maintain safety until MAOP is confirmed. Rather, PHMSA may simply issue an order to a particular pipeline tailored to address the specific circumstances of its system. Therefore, unlike the non-MAOP provisions of the 2011 Act discussed in the preceding section, PHMSA actions pursuant to section 60139(c) of the Act are relatively

imminent, and could take effect at any time without advance notice of the type that would ordinarily be provided in a rulemaking proceeding.

42. In addition, the Commission finds several other important factors which distinguish any outages resulting from actions PHMSA takes pursuant to section 60139(c) from the routine, periodic maintenance which the Commission has held are within the control of the pipeline and therefore must be treated as non-*force majeure* events for which full reservation charge credit must be given. First, whatever actions PHMSA takes pursuant to section 60139(c) of the 2011 Act would be one-time non-recurring events. Section 60139(c) does not create an ongoing requirement to reconfirm MAOP on a periodic basis comparable to ordinary integrity management programs. Section 60139 simply authorizes PHMSA to require a one-time reconfirmation of MAOP for the subject pipeline segments, pursuant to in-line inspection, hydrostatic testing, or other alternative tests.²⁵ Also, any interim safety measures, such as a requirement for the pipeline to operate at reduced pressure, would only be in effect until MAOP is reconfirmed. Moreover, the pipeline could have less discretion concerning the timing of testing to reconfirm MAOP or any interim measures to maintain safety until MAOP can be reconfirmed, than it has concerning the timing and location of routine scheduled maintenance.

43. Second, costs of outages for such one-time testing or reduced operating pressure would generally not be recurring costs eligible for inclusion in a pipeline's rates in a general section 4 rate case.²⁶ By contrast, as the court in *North Baja* emphasized in affirming our policy concerning full reservation charge credits for scheduled maintenance, that policy is premised on the ability of the pipeline to include the expected costs that would be incurred under that policy in its rates.²⁷

44. The Commission also finds that a blanket authorization of partial crediting for outages required to reconfirm MAOP pursuant to section 60139(c) for a transitional period is consistent with Congress's determination that MAOP should be confirmed "as expeditiously as economically feasible." The Commission recognizes that there could be circumstances in which a pipeline's inability to verify its records concerning the MAOP of a particular pipeline segment could arguably be attributable at least in part to the

²⁵ In this regard, PHMSA orders requiring a one-time reconfirmation of MAOP and interim safety measures may be considered comparable to the one-time requirement that a pipeline be relocated for highway construction, which the Commission held could be treated as a *force majeure* event in *Florida Gas*, 107 FERC ¶ 61,074 at P 32. See also *Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 6.

²⁶ See 18 C.F.R. § 154.303(a)(4) (2012).

²⁷ *North Baja*, 483 F.3d 819, 823.

pipeline's failure to maintain adequate records, at least for pipeline segments constructed after 1970. However, the Commission finds that, on balance, it is preferable to permit pipelines to include in their tariffs a bright-line rule that the pipeline will provide partial reservation credits for all outages resulting from PHMSA orders issued pursuant section 60139(c). Such a bright-line rule should minimize the need for burdensome case-by-case consideration of whether a pipeline's mismanagement may have contributed to its inability to verify the records for a particular pipeline segment. This will expedite the resolution of what credits are due the shippers. Also, the requirement that the pipeline provide partial credits regardless of fault will ensure that pipelines share the risk of all outages of primary firm service resulting from compliance with PHMSA orders pursuant to section 60139(c).

45. The Commission will limit any authorization for partial crediting for outages resulting from section 60139(c) to a transitional period of two years. This two-year transitional period is consistent with the fact that actions by PHMSA pursuant to section 60139(c) are only temporary in nature to reconfirm MAOP and require interim safety measures until MAOP is reconfirmed. After MAOP is reconfirmed, there should no longer be a need for such a special partial crediting provision. At the end of the transitional period, the Commission will reexamine whether there is any need to extend this tariff provision. Accordingly, Gulf South may include in its tariff a provision permitting partial reservation charge crediting, for a transitional period of two years commencing on January 1, 2013, for outages resulting from orders issued by PHMSA pursuant to section 60139(c) of the 2011 Act. That tariff provision should include a requirement that, when Gulf South provides notice of an outage required to comply with an order issued by PHMSA pursuant to section 60139(c), that notice identify the specific PHMSA order with which it is complying.

46. This allowance of partial crediting is limited solely to outages resulting from section 60139(c). Unlike section 60139(c), section 60139(d) requires PHMSA to issue regulations by July 3, 2013, before requiring strength testing of previously-untested gas pipelines located in HCAs and operating at a pressure greater than thirty percent of specified minimum yield strength. Section 60139(d) also requires PHMSA, in consultation with the Chairman of FERC and State regulators, to establish time frames for completion of the testing which minimize outages. Therefore, it is possible that the pipelines will be permitted a longer period of time to conduct this testing, than any testing required to reconfirm MAOP or interim safety measures adopted under section 60139(c) of the 2011 Act discussed above. That would give the pipelines a greater ability to control outages due to the strength testing required by section 60139(d), than they are likely to have in complying with requirements issued under section 60139(c). Accordingly, the Commission finds that consistent with the discussion above, it is appropriate to await developments in the rulemaking proceeding required by section 60139(d) before permitting any special tariff provision with respect to outages resulting from strength testing under section 60139(d).

47. In summary, the Commission finds that Gulf South has not shown that its proposal to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings is just and reasonable. However, the Commission will permit Gulf South to file revised tariff records which require the partial reservation charge credits for outages due to PHMSA orders pursuant to section 60139(c) of the 2011 Act for a transitional period of two years. We emphasize that our holdings in this order are without prejudice to Gulf South filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable. The Commission is aware of the possible impact of the 2011 Act and PHMSA rulemakings and will closely monitor the implementation of the new requirements. The Commission is tracking the impacts of the 2011 Act and understands the importance of these issues and will consider the need for further action as the impact of PHMSA's implementation process moves forward.²⁸

B. Calculation of Reservation Charge Credits During non-Force Majeure Outages

1. Gulf South's Proposal

48. Proposed section 6.25(2)(a) provides that Gulf South will provide reservation charge credits "for any Maintenance Average Usage Quantity that Gulf South failed to deliver to the primary delivery point(s), provided such quantity was not utilized on a non-primary basis." As proposed in Gulf South's June 20, 2012 filing, section 6.25(2)(b) provides that the Maintenance Average Usage Quantity shall be:

(i) the Customer's average nominated quantity of Primary Firm Service requiring nominations and (ii) Customer's average actual flows at primary delivery locations where nominations are not required. Such average shall be determined based upon the seven (7) Gas Days prior to the first Gas Day of the maintenance event; provided, however, during the first Gas Day of the Maintenance Event, the Customer's "Maintenance Average Usage Quantity" *shall be the quantity of Primary Firm Service scheduled or, if greater, the quantity of Primary Firm Service that would have been scheduled but for the Maintenance Event if:*

²⁸ See *CenterPoint Energy-Mississippi River Transmission, LLC*, 140 FERC ¶ 61,253, at P 65 (2012), where the Commission expressed similar concerns in denying a proposal to track costs related to the requirements of the 2011 Act.

- (i) Gulf South did not post notice of the Maintenance Event before 7:00 a.m. CCT the Gas Day preceding the Maintenance Event; and
- (ii) the Customer did not change its nomination under its firm service agreement after Gulf South posted notice of the Maintenance Event [emphasis added].

49. In its Answer, Gulf South offered to clarify this proposed language in response to Indicated Shippers' contention that the seven day average should only be used to determine credits for subsequent days of a multi-day outage when Gulf South gave advance notice that the outage would continue on that particular day before the Timely Nomination Cycle for that gas day. Specifically, Gulf South proposed to add the following language to section 6.25(2)(b):

The previous seven (7) days' average daily quantity usage will only be used in the determination of the Maintenance Average Usage Quantity when Gulf South has posted notice prior to the Timely Cycle nomination deadline that the capacity will be unavailable for the day in question.

Gulf South also proposed to amend section 6.25(2)(b)(ii), to change the 7:00 a.m. CCT deadline to conform to the deadline established above, which is tied to the Timely Cycle nomination deadline. Gulf South asserted that such deadline for the posting notice is appropriate because it better synchronizes with the actual nominations process.

2. Positions of the Parties

50. In its initial protest to Gulf South's filing, Indicated Shippers contended that the italicized language improperly limits the calculation of credits for the first day of the outage to the amount that is scheduled or would have been scheduled but omits the requirements that reservation charge credits be based upon the amount nominated that the pipeline was unable to schedule or deliver. Indicated Shippers argued that the Commission in *Tennessee* "required pipelines to provide shippers a full reservation charge credit for the amount of primary firm service they nominated to be scheduled but the pipeline was unable to schedule or deliver."²⁹ Indicated Shippers request that the Commission require Gulf South to modify the italicized language so that the credits are based upon the amount of primary firm service nominated, as opposed the amount which was scheduled or would have been scheduled but for the outage.

51. In its answer, Gulf South contends that the proposed language reasonably takes into consideration the circumstances both when notice is and is not provided prior to the

²⁹ (Citing *Tennessee*, 135 FERC ¶ 61,208 at P 74).

Maintenance Event. Gulf South also states that the Commission approved language similar to that objected to by Indicated Shippers in *Midwestern Gas Transmission Co.*³⁰

52. Indicated Shippers responds that Gulf South's proposed language not only does not properly differentiate between the amount nominated and the amount Gulf South scheduled and was unable to deliver but also does not describe how Gulf South would know what volumes "would have been scheduled but for the Maintenance Event."

3. Commission Determination

53. As Indicated Shippers states, when there is no advance notice of an outage, the amount of reservation charge credits a pipeline must give in the non-*force majeure* situation is measured by the amount of service which the shipper nominated to be scheduled by the pipeline but the pipeline was unable to schedule or deliver.³¹ We believe that Gulf South's proposal to provide credits for "the quantity of Primary Firm Service that would have been scheduled but for the Maintenance Event" may be read as consistent with that policy, because the quantity that would have been scheduled but for the maintenance event would appear to be the amount the shipper nominated to be scheduled. However, in order to avoid any ambiguity, the Commission directs Gulf South to revise proposed section 6.25(2)(b)(i) to expressly provide that, when there is no advance notice of an outage, Gulf South will provide credits based on the amount of primary firm service which the shipper nominated for scheduling, but the pipeline was unable to schedule or deliver because of a non-*force majeure* event.

54. The Commission also finds that Gulf South's proposal in its Answer to revise section 6.25(2)(b) to clarify that the seven days average will only be used when Gulf South has posted notice before the Timely Cycle Nomination deadline that the capacity will be unavailable is reasonable and consistent with Commission policy. Therefore, Gulf South is directed to file revised tariff records to revise section 6.25(2)(b) consistent with that alternative proposal.

C. NNS Shippers' Long-Term Outages

1. Gulf South's Proposal

55. In its June 20, 2012 proposal, Gulf South proposed, in section 6.25(1) concerning *force majeure* outages, to calculate reservation charge credits for all firm services based

³⁰ (Citing 137 FERC ¶ 61,257, at PP 15 and 18 (2011) (*Midwestern*)).

³¹ See, e.g., *Tennessee*, 135 FERC ¶ 61,208 at P 74. See also *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, at P 32, *order on reh'g*, 137 FERC ¶ 61,050 (2011).

on (1) the shipper's average nominated quantity during the seven days immediately before the *force majeure* outage for services requiring nominations and (2) the shipper's actual flow quantity during the preceding seven days for services not requiring nominations. Gulf South proposed, in section 6.25(2) concerning non-*force majeure* outages, to calculate reservation charge credits in a similar manner (except where it had not given advance notice of the outage before the timely nomination opportunity).

56. In its protest to the June 20, 2012 filing, UMDG argued that the seven-day period immediately before an outage fails to accurately reflect a No Notice (NNS) shipper's loss of firm service during long-term outages. UMDG stated that, while Gulf South's proposal is a reasonable approach for short-term outages, it fails to anticipate prolonged outages. UMDG asserted that NNS Rate Schedule shippers have varying seasonal contact quantities and their usage is seasonal and typically weather driven, i.e., lower in the summer and higher in the winter with corresponding average usage. Therefore, UMDG argued that Gulf South should include an alternative calculation of Average Usage Quantities for outages lasting more than 28 days based on the level of service experienced in a comparable period in the prior year, presuming that the historical period was not subject to an outage.

57. In its Answer, Gulf South acknowledged that a seven-day historical period may not be sufficient for NNS service during a long-term outage. Gulf South asserted that, unlike its annual services, NNS service provides customers with a Maximum Daily Quantity (MDQ) that changes seasonally, i.e., during the Summer Season, Winter Season, and two Shoulder Months.³² Gulf South further asserted that when an outage extends into a new season, it may be appropriate to calculate the Average Usage Quantity based upon the average usage of that season from previous years. Gulf South contended that because usage of NNS service is highly weather dependent, an average of several past seasons will appropriately normalize any atypical usage data caused by unusual weather events, such as an extremely warm or cold winter. Gulf South stated that it would be willing to modify its tariff to take into consideration the seasonal nature of NNS service. Gulf South accordingly proposed to add a subsection (iii) for *force majeure* events to proposed section 6.25(1)(b) that would provide:

(iii) For NNS Customers only, if the FM Event extends into another season, upon the first day of such season and throughout such season, Customer's average nominated quantity for Primary Firm Services requiring nominations and Customer's average actual flow quantity for Primary Firm Service where nominations are not required will both be determined based

³² Gulf South states that, for the purposes of this provision, it intends extensions into "another season" to include extensions into a Shoulder Month.

upon the applicable average nominated quantities in the respective seasons during the previous three calendar years.

Gulf South also offered to make similar changes to proposed section 6.25(2), which addresses credits for non-*force majeure* events.

58. Gulf South contended that, while it is economically incentivized to eliminate such interruptions as soon as possible; where a long-term interruption occurs, its modified proposal appropriately acknowledges the seasonality of NNS service and establishes a calculation that reasonably accounts for the impact of weather conditions on NNS usage.

2. Positions of the Parties

59. UMDG argues that there are two problems with Gulf South's modified proposal. UMDG asserts that (1) the credits for long-term outages under Rate Schedule NNS will be based on "average nominated quantities" and (2) the seven Gas Days prior to the outage may be unrepresentative long before the season changes. UMDG contends that it is inappropriate to use nominated quantities when NNS shippers do not need to nominate delivery quantities and, therefore, the credits would be based on an artificially low calculation of Average Usage Quantity. UMDG further contends that, in contrast, for all other outages, Gulf South specifies that average nominated quantities will be used to calculate the Average Usage Quantities for services requiring nominations, and average actual flow quantities will be used for services where nominations are not required to ensure that a shipper is adequately compensated for the reserved firm services that do not require nominations. UMDG asserts that, as with all other outages for firm services that do not need to be nominated, long-term outages under Rate Schedule NNS should be based on average actual flow quantities.

60. UMDG further argues that the proposed seasonal averages are too broad to accurately measure the Average Usage Quantity during NNS outages. UMDG asserts that Gulf South's modified proposal only recognizes that an outage is long-term if it continues into another season. However, UMDG asserts that a long-term outage may not last into another pipeline season, and the previous seven-day average may still be unrepresentative. UMDG asserts that NNS service is highly weather dependent and, therefore, i.e., usage for one week at the beginning of five-month winter season may not adequately represent usage in later weeks at the height of winter. UMDG argues that, another trigger, such as a predetermined number of days, should be added as an alternative basis for determining when an NNS outage should be considered long term, i.e., 28 days.

61. Finally, UMDG contends that, instead of using the average nominated quantities over the entire new season when tabulating a shipper's Average Usage Quantity, using a shorter, more tailored past period would likely be more accurate. UMDG further contends that the number of days in the alternative trigger could form the basis for a more

tailored time period, i.e., if the outage extends into another season or lasts more than 28 days, Gulf South could base the Average Usage Quantity on average actual flow quantities from prior 28-day periods (or a multi-year average of usage over the same periods).

3. Commission Determination

62. The Commission finds that Gulf South's revised proposal for addressing long-term outages reasonably addresses the concern that the seven-day average usage immediately before the outage may become unrepresentative of the service a NNS shipper would have used during a long-term outage. However, the Commission requires Gulf South either to provide a further explanation of under what circumstances it is appropriate to use nominated quantities to determine reservation charge credits for No Notice service or revise its proposal so as always to base such credits on actual deliveries, as requested by UMDG.

63. Under the NGA, the Commission must accept a just and reasonable tariff proposal by a pipeline, regardless of whether other tariff provisions would also be just and reasonable.³³ The Commission recognizes that an NNS shipper's need to transport gas may change over time, with the result that a shipper's usage during the seven days immediately before an outage may not be representative of the service the shipper would have used during the latter part of a long-term outage.³⁴ Gulf South proposes to address this problem by proposing that, when an outage extends into a new "season," it will determine an NNS shipper's credits based on its average usage during the same "season" of the preceding three years. For this purpose, it proposes to use the same seasons as are used in its NNS rate schedule for purposes of the seasonal changes to the MDQs of its NNS shippers. These are a November through March winter season, an April shoulder season, a May through September summer season, and an October shoulder season.

64. UMDG is concerned that its usage during an early week in the five-month winter season may not be representative of its usage later in that season. However, Gulf South's NNS rate schedule assumes that the major changes in NNS shippers' need to use NNS service occur when the seasons set forth in the NNS rate schedule change, since those are the seasons when the NNS shippers' MDQs are adjusted up or down. Therefore, the Commission finds that Gulf South's proposal to tie changes in the calculation of NNS shippers' reservation charge credits to those same seasons is reasonable. While Gulf South's proposal may produce only a rough estimate of the service a NNS shipper would have used during the outage, there is no perfect method of estimating that usage.³⁵ Any

³³ *Consolidated Edison*, 165 F.3d 992, 998, 1002-1004.

³⁴ *See Kern River Gas Transmission Co.*, 139 FERC ¶ 61,044, at P 49 (2012).

³⁵ *See Midwestern*, 137 FERC ¶ 61,257 at P 22.

inaccuracies in the estimate produced by Gulf South's proposed methodology should even out over time, because that methodology could as easily overestimate, as underestimate, a shipper's need for NNS service during the outage. Regardless of such inaccuracies, the credits calculated pursuant to Gulf South's proposal should accomplish the basic purpose of the Commission reservation charge crediting policy: provide Gulf South an incentive to minimize any outage of primary firm service and provide the shipper reasonable compensation for any inability to use the primary firm service.

65. While the Commission accepts Gulf South's proposed method for accounting for seasonal changes in shippers' need for NNS service, Gulf South has not yet justified its proposal concerning the use of "nominated quantities" to calculate the NNS shippers' credits. Gulf South proposes in sections 6.25(1) and (2) to calculate credits for all firm shippers based on "average nominated quantities" for "services requiring nominations" and based on "actual flow quantities" for services "where nominations are not required." Gulf South's proposed revised tariff language concerning credits to NNS shippers includes similar language. It is not clear how Gulf South would apply its proposed distinction between "services requiring nominations" and services "where nominations are not required" in the context of No Notice Service.

66. Section 2(b) of Gulf South's No Notice Rate Schedule provides that "nominations are required at the primary or supplemental receipt points but are not required for storage injections or for transportation to the primary No Notice delivery points up to the Seasonal Daily Contract Demand." That section also provides that a NNS "Customer shall nominate and deliver sufficient quantities of gas into Gulf South's system to meet the Customer's actual demand and to fill the storage space contracted for under this Rate Schedule during the Injection Period." As a general matter, an NNS shipper's actual need for, and use of, its NNS service would appear to be best represented by actual deliveries to that shipper at its primary delivery point. As UMDG points out, NNS shippers are not required to nominate transportation service to those delivery points. Therefore, arguably on days during the past period used to calculate reservation charge credits when there was a variation between an NNS shipper's nominations at receipt points and actual deliveries to that shipper at its primary delivery point, it would be reasonable to use the actual deliveries to calculate the average quantities on which reservation charge credits are based, rather than the nominated quantities. On the other hand, Gulf South has not described the circumstances in which it believes use of an NNS shipper's nominated quantities would be appropriate. Before deciding this issue, the Commission requires Gulf South to provide a detailed explanation of the circumstances under which it would use an NNS shipper's nominated quantities to determine reservation charge credits and when it would use actual deliveries.

67. In addition, the Commission requests that Gulf South explain the extent to which it provides any firm services other than NNS service which do not require nominations. If there are no other services, the references to services "where nominations are not

required” should be clarified to refer only to NNS service. If there are other such services, Gulf South should provide a similar explanation to that required above with respect to NNS service as to when it will use nominated deliveries and when it will use actual deliveries to calculate reservation charge credits.

D. Secondary Points

1. Gulf South’s Proposal

68. Proposed section 6.25(5)(a) states that Gulf South will reduce the amount of reservation charge credits owed by “the quantity of gas delivered by Gulf South to non-primary delivery points during the FM [*force majeure*] or the Maintenance Event.”

2. Positions of the Parties

69. Indicated Shippers argues that the proposed tariff language conflicts with Gulf South’s intent to reduce credit amounts by non-primary deliveries used by the shipper because the proposed language does not require action on the shipper’s part to effectuate a delivery by Gulf South. Indicated Shippers asserts that, as a result, the proposed language could permit Gulf South to act on its own accord to deliver gas to non-primary delivery points and thereby reduce a shipper’s reservation charge credits accordingly. Therefore, it requests that the Commission direct Gulf South to revise its tariff to expressly require that Gulf South may only reduce reservation charge credits based on deliveries to secondary points when the shipper nominates such deliveries to the secondary point. Gulf South answers that its proposed section 6.25(5)(a) must be read in the context of its entire tariff. Gulf South states that, under its tariff, it must receive and deliver gas based on nominations submitted by customers pursuant to their service agreements. Therefore, it cannot deliver gas to a shipper’s secondary points on its own accord for the purpose of reducing a shipper’s reservation charge credits.

3. Commission Determination

70. The Commission agrees with Gulf South that Indicated Shippers’ requested change in section 6.25(5)(a) is unnecessary. As Gulf South states, its tariff does not give it discretion to make deliveries to secondary points when such deliveries are not nominated, and therefore, Gulf South could not engage in the gaming about which Indicated Shippers is concerned without violating its tariff.

E. Submission of Nominations

1. Positions of the Parties

71. Indicated Shippers argues that the Commission should require Gulf South to revise its proposal to be consistent with the Commission policy set forth in *Wyoming Interstate*

*Company, Ltd.*³⁶ Indicated Shippers asserts that, consistent with *WIC*, a shipper should not be required to submit a primary firm nomination in the Timely and Evening cycles to be eligible for reservation charge credits if the shipper has moved its now curtailed amounts to another pipeline.

72. Gulf South asserts that it has not proposed a requirement to re-submit nominations. Gulf South asserts re-submission is not an issue where a historical seven-day average is used and the nominations have already occurred. Gulf South further asserts that the proposal obviously does not require re-submission of a nomination for credits during the first day of a curtailment when credits are based upon that day's nominations.

73. Indicated Shippers requests that, as in *Rockies Express*,³⁷ Gulf South's tariff be interpreted to require that a shipper only need nominate in the Timely and Evening nomination cycles to receive reservation charge credits, unless the shipper nominates a curtailed quantity on an alternate pipeline. Indicated Shippers contends that, to the extent that Gulf South interprets its tariff otherwise, the Commission should require Gulf South to file tariff sheets in compliance with *WIC*.

2. Commission Determination

74. While the Commission found in *WIC* that it is unreasonable to require a shipper that has been curtailed by *WIC* and then moved its supply to another pipeline to renominate in the Evening Cycle in order to claim a reservation charge credit, that decision was in response to *WIC*'s proposal to require a shipper to resubmit a nomination in the Evening Cycle in order to receive the credit even if the shipper moved to an alternate pipeline. In contrast, Gulf South states that, if a shipper does not receive nominated firm service, it will be entitled to a credit without having to resubmit a nomination in a later nomination cycle. Therefore, Indicated Shippers' request that the Commission direct Gulf South to implement tariff language that provides a shipper only need to nominate in the Timely and Evening nomination cycles to receive reservation credits is denied, as unnecessary.³⁸

³⁶ *Wyoming Interstate Company, Ltd.*, 130 FERC ¶ 61,091, at P 17 (2010) (*WIC*).

³⁷ (Citing *Rockies Express*, 139 FERC ¶ 61,275 at P 6).

³⁸ *Tennessee*, 139 FERC ¶ 61,050 at PP 103-104.

F. Outages Due to Acts of Shippers or Third Parties

1. Gulf South's Proposal

75. Proposed section 6.25(4) provides that a customer's "Average Usage Quantity shall be reduced to the extent any curtailments are the result of Customer's negligence or intentional wrongful acts. Customer shall not be entitled to [reservation] charge credits as a result of loss of any of the following: (a) gas supply, (b) markets, or (c) transportation upstream or downstream of Gulf South's system."

76. Protestors argued that proposed section 6.25(4) conflicts with the Commission's policy which holds that a pipeline is exempted from providing reservation charge credits only where the outage is solely due to an upstream or downstream disruption or the conduct of a third party, including shippers, and not controlled by the pipeline.

77. In its Answer, Gulf South contended that its proposed section 6.25(4) is consistent with Commission policy. However, Gulf South stated that it is willing to modify the second sentence of its section 6.25(4) with the following emphasized language:

Unless Gulf South has declared a force majeure, maintenance, or non-force majeure event, Customer shall not be entitled to demand charge credits as a result of loss of any of the following: (a) gas supply, (b) markets, or (c) transportation upstream or downstream of Gulf South's system.

78. Gulf South asserts that this clarification makes it clear that Gulf South will not be exempt from providing credits if it cannot provide service due to an interruption on its facilities. Gulf South contends that its proposed revision is more appropriate than limiting the exemption to circumstances solely due to others' operating conditions or the conduct not controlled by the pipeline since use of the term "solely" could be interpreted to require reservation charge credits when not appropriate. Gulf South gave the following example of a situation where it asserted that reservation credits would be inappropriate, even though a party might contend that the inability to make deliveries was not due solely to another pipeline. In this example, Gulf South has historically delivered gas into Pipeline X at a certain pressure. Pipeline X declares a *force majeure* but claims that the reason it cannot accept Gulf South's gas is due to pressures provided by Gulf South. However, Gulf South stands ready and able to delivery gas at historical pressures. Gulf South asserts that in such a situation it should not be obligated to provide reservation charge credits because the cause of the interruptions is outside of Gulf South's control.

2. Positions of the Parties

79. Indicated Shippers asserts that there is no basis for Gulf South's proposed exemption, because Gulf South's proposal relates to the inability to deliver gas at the pipeline interconnect due to deviations in pressure from historical averages. Indicated Shippers further asserts that the pressure at an interconnection is solely an issue between the interconnecting parties and there are contractual remedies. UMDG objects that Gulf South's alternative language specifies that it must actually declare that there is an outage on its system and allows Gulf South to avoid paying reservation charge credits by failing to declare or delaying a *force majeure*, and instead blaming a concurrent outage on a third-party system. UMDG argues that the Commission should require Gulf South to replace "Gulf South has declared" with "there is," a more objective standard, or, in the alternative, instead insert the term "solely."

80. UMDG also argues that Gulf South's proposal in the first sentence of section 6.25(4) to reduce a customer's Average Usage Quantity "to the extent any curtailments are the result of Customer's negligence or intentional wrongful acts" conflicts with Commission policy. UMDG argues that this proposed use of a crediting reduction due to the shipper's comparative negligence is inappropriate for *force majeure* events because such events by definition are uncontrollable, unexpected, and out of the control of either party.

81. Gulf South contends that this provision was not drafted to apply specifically to *force majeure* events and, rather, is a general provision that applies to "any" curtailment. Gulf South further contends that it is appropriate that reservation charge credits be reduced to the extent curtailments were caused by a customer's negligent or intentional wrongful acts, i.e., if a customer negligently damages Gulf South's pipe.

3. Commission Determination

82. We find that Gulf South's proposed crediting exemption must be revised to be consistent with Commission policy. Commission policy is to require the pipeline to provide reservation charge credits for outages where the failure to deliver is due to events within the pipeline's control. On the other hand, when a pipeline cannot deliver the service because of events not within the pipeline's control, i.e., due to the conduct of the shipper or the operator of upstream or downstream facilities, the pipeline should not be required to grant credits.³⁹ Therefore, Gulf South's proposed exemption must be limited

³⁹ See, e.g., *Natural*, 106 FERC ¶ 61,310 at P 15, n.10; *Tennessee*, 139 FERC ¶ 61,050 at PP 100-101; *TransColorado Gas Transmission Company, LLC*, 139 FERC ¶ 61,229, at P 50 (2012) (*TransColorado*).

to include only those circumstances where its failure to provide service is due to events or conduct of others outside of its control which result in an outage of reserved firm service.

83. In addition, when *force majeure* events occur on both Gulf South's facilities and the facilities of others, Gulf South could not have provided service in any case. Therefore, as the Commission found in *Paiute Pipeline Co.* in a *force majeure* event when both the pipeline's and the facilities of others are affected, then the traditional *force majeure* rule applies and the pipeline is required to provide partial credits.⁴⁰ Therefore, Gulf South's tariff also must expressly provide that it is exempted from issuing reservation charge credits only when Gulf South's failure to schedule or deliver gas is solely due to conduct of others not controllable by Gulf South.⁴¹ With regard to UMDG's concern regarding comparative negligence, we agree with Gulf South that reservation charge credits may be reduced to the extent any outages were caused by a customer's negligent or intentional wrongful acts, under an appropriately revised exception as discussed above.

84. Gulf South's alternative also does not conform to the Commission policy discussed above. The additional language requiring a declaration of an outage by the pipeline must be eliminated to make clear that it is the pipeline's failure to deliver the nominated firm service, not declarations by the pipeline related to the outage, that requires it to provide reservation charge credits. Therefore, the Commission directs Gulf South instead to limit the scope of the proposed section 6.25(4) exemption to make clear that Gulf South is exempted from issuing reservation charge credits only when Gulf South's failure to deliver gas was due solely to the conduct of others or events not controllable by Gulf South, i.e., operating conditions on upstream or downstream facilities or a shipper's inability to obtain gas supplies or find a purchaser to take delivery of the supplies.

G. Segmented Capacity, Capacity Release, and Partial Assignment

1. Positions of the Parties

85. Indicated Shippers argues that sections 6.25(1)(c) and 6.25(5)(d) both define the reservation charge credits owed for segmented capacity, capacity release, or partial assignment. Indicated Shippers contends that section 6.25(1)(c) should be eliminated as redundant to section 6.25(5)(d).

⁴⁰ *Paiute Pipeline Co.*, 139 FERC ¶ 61,089, at PP 30-32 (2012). See also *Rockies Express*, 139 FERC ¶ 61,275 at P 12; *TransColorado*, 139 FERC ¶ 61,229 at PP 51-52.

⁴¹ *Rockies Express*, 139 FERC ¶ 61,275 at P 12; *TransColorado*, 139 FERC ¶ 61,229 at P 52.

86. Gulf South agrees to delete both proposed section 6.25(1)(c) and section 6.25(2)(c) because they are redundant.

2. Commission Determination

87. We will accept Gulf South's agreement to remove proposed sections 6.25.1(c) and 6.25.2(c). Therefore, we direct South to file revised tariff records removing proposed sections 6.25.1(c) and 6.25.2(c), as proposed in its Answer.

H. Existing Curtailment Provision

88. The currently effective section 9 of Gulf South's GT&C contains a provision regarding curtailment of service which does not comply with Commission policy. Section 9 provides, in part, that Gulf South's service "may be interrupted or curtailed due to scheduled routine maintenance." The Commission finds, pursuant to NGA section 5, that the reference to "curtailment" in this provision is unjust and unreasonable. The Commission has found that pipeline service may be "curtailed" 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.⁴² 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 scheduling nominations in order to perform routine repair and maintenance.⁴³ Therefore, pursuant to section 5 of the NGA, Gulf South is directed to modify section 9 of its GT&C to remove the authorization to curtail service to perform routine repair and maintenance or explain why it should not be required to do so.

I. Force Majeure Definition

1. Gulf South's Proposal

89. Gulf South's existing GT&C section 6.21.5(2) includes "the necessity for testing or making repairs or alterations to machinery or lines of pipe" as an instance of *force*

⁴² See, e.g., *Texas Eastern*, 140 FERC ¶ 61,216 at P 96; *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123, at 61,663 (1996); *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at P 68 (2011).

⁴³ *Id.*

majeure. Gulf South proposes to remove from that language the phrase “testing or for making repairs or,” so that the provision would read “the necessity for alterations to machinery or lines of pipe.”

2. Positions of the Parties

90. UMDG argues that Gulf South’s existing definition of *force majeure* described above violates Commission policy which limits *force majeure* to uncontrollable and unanticipated events and specifically excludes scheduled maintenance. UMDG contends that, accordingly, Gulf South’s currently effective definition of *force majeure* is unjust and unreasonable.

91. Gulf South answers that its proposal to remove the phrase “testing or for making repairs or” from the language UMDG objects to makes clear that only non-routine maintenance and testing and not scheduled maintenance is included in the definition of *force majeure*. Gulf South asserts that this provision applies only to outages necessary to comply with the previously unanticipated large-scale changes in PHMSA’s pipeline safety regulations which are anything but routine and outside of the control of the pipeline.

3. Commission Determination

92. As discussed above, the Commission has held that outages for routine or scheduled maintenance do not constitute *force majeure* events which are both outside the pipeline’s control and unexpected. In any case, contrary to Gulf South’s assertions, this provision is not limited to outages to comply with PHMSA regulations.⁴⁴ Routine and scheduled maintenance may include alterations to machinery or lines of pipe. Therefore, both the existing language which Gulf South does not propose to remove, which defines all service interruptions for alteration of certain pipeline facilities as *force majeure* events, is overbroad and thus contrary to Commission policy. Accordingly, pursuant to section 5 of the NGA, Gulf South is directed to file revised tariff records to eliminating this provision from its definition of *force majeure* or explain why it should not be required to do so.

The Commission orders:

(A) The tariff records listed in footnote no. 1 of this order are accepted to become effective January 1, 2013, subject to conditions, as discussed in this order.

⁴⁴ Any such provision would of course be subject to the Commission’s determination of the related issues in this order.

(B) Within thirty (30) days of the date of this order, Gulf South is directed to file revised tariff records, to be effective January 1, 2013, modifying the tariff changes it filed pursuant to NGA section 4, or provide further information concerning those proposals, consistent with the discussion in the body of this order,.

(C) Within thirty (30) days of the date of this order, Gulf South is directed, consistent with the discussion in the body of this order, pursuant to NGA section 5, either to modify certain existing provisions in its tariff or explain why it should not be required to do so.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.