

143 FERC ¶ 61,041  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Panhandle Eastern Pipe Line Company, LP

Docket Nos. RP12-455-001  
RP12-455-000

ORDER ON REHEARING AND COMPLIANCE

(Issued April 18, 2013)

1. On March 1, 2012, Panhandle Eastern Pipe Line Company, LP (Panhandle) filed tariff sheets<sup>1</sup> reflecting its revised fuel reimbursement adjustment percentages pursuant to section 24 of its General Terms and Conditions (GT&C) in Panhandle's FERC Gas Tariff (March 2012 Filing). On March 30, 2012, the Commission accepted Panhandle's fuel reimbursement adjustment to be effective April 1, 2012, and directed Panhandle, pursuant to section 5 of the Natural Gas Act (NGA), to file tariff language providing reservation charge credits when firm service is curtailed, consistent with Commission policy, and also to revise its tariff's definition of *force majeure*, or show cause why it should not be required to do so.<sup>2</sup> Panhandle filed concurrently on April 30, 2012, both a request for rehearing and a response to the March 2012 Order explaining why it believed it should not be required to comply. As discussed below, the Commission denies the request for rehearing and directs Panhandle to file revised tariff records.

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<sup>1</sup> See Appendix A of Panhandle's March 1, 2012 Fuel Reimbursement Adjustment Filing.

<sup>2</sup> *Panhandle Eastern Pipe Line Co., LP*, 138 FERC ¶ 61,245 (2012) (March 2012 Order).

## I. Background

2. In *Natural Gas Supply Association, et al.*,<sup>3</sup> 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. The Commission also stated that if any shipper on a particular pipeline believes that the pipeline's tariff does not comply with Commission policy and the pipeline is not taking appropriate action to bring its tariff into compliance, it can file a complaint alleging non-compliance and seek section 5 relief, or raise the issue in any section 4 filing by the pipeline, including where the issue was not directly related to the pipeline's tariff proposal.<sup>4</sup> Finally, the Commission directed the Division of Audits in the Office of Enforcement that its future audits of interstate pipelines should include whether the tariffs comply with the Commission's reservation charge crediting policy.

3. In general, the Commission requires all interstate pipelines to provide reservation charge credits to their firm shippers 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).<sup>5</sup>

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<sup>3</sup> 135 FERC ¶ 61,055, at P 2 (2011) (NGSA).

<sup>4</sup> The Commission cited *Kern River Transmission Co.*, 129 FERC ¶ 61,262, at P 22 (2009), as an example of a limited section 4 filing where the Commission had permitted this issue to be raised, despite the fact the issue was not directly related to the pipeline's tariff proposal.

<sup>5</sup> See, e.g., *Tennessee Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, order on reh'g, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), as clarified by, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*). The Commission has also stated that pipelines may use some other method that achieves equitable sharing reasonably equivalent to the two specified methods.

4. 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”<sup>6</sup> 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*,<sup>7</sup> 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.

5. On March 1, 2012, Panhandle made a limited section 4 filing to revise its fuel reimbursement percentages. As permitted by NGSA and Commission policy, ProLiance Energy, LLC (ProLiance) filed a protest, concerning the absence of a reservation charge credit provision in Panhandle’s tariff, which Panhandle had not proposed to change in its March 2012 filing.<sup>8</sup>

6. Panhandle’s existing tariff does not contain any provision requiring it to provide reservation charge credits to firm shippers, if it fails to provide service nominated by the shipper. Moreover, section 20 of Panhandle’s GT&C concerning *force majeure* provides that the firm shippers’ obligation to pay reservation charges when due is not suspended, in whole or in part, during *force majeure* outages. Section 20 also defines *force majeure* to include “the necessity for making repairs or alterations to wells, machinery, or lines of pipe.”

7. ProLiance, in its protest, requested that the Commission require Panhandle to add reservation charge crediting provisions to its tariff in compliance with the Commission’s reservation charge crediting policy. ProLiance also requested that the Commission

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<sup>6</sup> *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at 61,350 (2003) (*El Paso*).

<sup>7</sup> 483 F.3d 819, 823 (D.C. Cir. 2007), *aff’g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh’g*, *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

<sup>8</sup> On March 21, 2012, ProLiance filed an errata to its initial March 14, 2012 protest.

require Panhandle to modify its tariff definition of *force majeure* so that it is clear that planned and scheduled maintenance is not included as a *force majeure* event.

8. On March 21, 2012, Panhandle filed an answer to the protest requesting that the Commission defer action on the protest until an ongoing audit of Panhandle was completed. The March 2012 Order rejected Panhandle's answer and specifically declined to delay remedial action on the ProLiance protest, as requested by Panhandle, noting that in *NGSA*, the Commission encouraged shippers to challenge a pipeline's non-compliance with the Commission's reservation charge crediting policy.

9. In the March 2012 Order, the Commission accepted Panhandle's revised fuel reimbursement percentages. However, the Commission determined that Panhandle's failure to provide reservation charge credits when firm service is curtailed is unjust and unreasonable and contrary to Commission policy. The Commission explained that pipelines are required to provide firm shippers with reservation charge credits when they are unable to provide primary firm service. The Commission further explained that its reservation charge crediting policy differentiates between the credits required in *force majeure* and non-*force majeure* outages. 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. Accordingly, the Commission directed Panhandle to file tariff language to provide reservation charge credits consistent with Commission policy when firm service is curtailed or show cause why it should not be required to do so.

10. The Commission also found section 20 of Panhandle's GT&C fails to make the distinction between *force majeure* and non-*force majeure* scheduled maintenance events. The Commission found Panhandle's tariff definition of *force majeure* was unjust and unreasonable and must be revised. Again, the Commission explained that Commission policy requires a full reservation charge credit for non-*force majeure* events such as scheduled maintenance, while a partial credit is permitted for *force majeure* outages. The Commission required Panhandle to modify its tariff definition of *force majeure* so that planned and scheduled maintenance is not included as a *force majeure* event. Accordingly, the Commission directed Panhandle to add the italicized language to Panhandle's *force majeure* definition: "or the necessity for making repairs or alterations to wells, machinery, or lines of pipe *but not including planned or scheduled maintenance.*" In sum, pursuant to NGA section 5, the Commission directed Panhandle either to file revised records to conform to the Commission's reservation charge crediting policy and to revise its tariff language related to the definition of *force majeure*, or explain why it should not be required to do so.

11. On April 30, 2012, Panhandle filed its request for rehearing of the March 2012 Order. On the same date, Panhandle filed its show cause response to the March 2012 Order. In both pleadings, Panhandle made essentially the same arguments, contending that: (1) the show cause directive on reservation charge crediting was a violation of section 5 of the NGA and improperly shifted the burden of supporting its existing tariff to Panhandle; (2) the Commission has previously found Panhandle's tariff on the issue of reservation charge credits, including the definition of *force majeure*, to be just and reasonable; (3) it is improper to require Panhandle to provide reservation charge credits based on the presumption that service outages necessary to perform Federally-mandated safety compliance work are caused by pipeline "mismanagement"; (4) the reservation charge directive was improper and unnecessarily duplicative of an ongoing Commission audit; (5) the Commission failed to acknowledge that the reservation charge crediting exists as just one consideration of Panhandle's Commission-approved settlement rates; and (6) it was improper for the Commission to accept ProLiance's late protest and not consider Panhandle's answer.

12. On May 25, 2012, Process Gas Consumers Group (PGC) filed for leave to intervene out-of-time and filed an answer to Panhandle's request for rehearing. On May 29, 2012, ProLiance filed an answer to Panhandle's response to the March 30, 2012 order's show cause directive, again requesting the Commission require Panhandle to file tariff sheets that comply with the Commission's reservation charge credit policy as soon as possible.

13. The issues raised by Panhandle's request for rehearing and response to the show cause directive of the March 30, 2012 order are discussed below.

## **II. Overview of Holdings in this Order**

14. For the reasons discussed below, the Commission denies rehearing of the March 2012 Order and finds that the absence of any reservation charge crediting provision in Panhandle's tariff is unjust and unreasonable. We find that the order properly initiated an investigation under NGA section 5 as to whether Panhandle's omission of reservation charge crediting provisions and Panhandle's tariff definition of *force majeure* were unjust and unreasonable and must be modified. We also clarify that the March 2012 Order only initiated a section 5 investigation and did not make any final merits holding that Panhandle's current tariff is unjust and unreasonable.

15. We next proceed to address the issue of whether Panhandle's tariff is unjust and unreasonable, addressing each of Panhandle's contentions. We first find that the provision in GT&C section 20 providing that firm shippers must continue to pay their full reservation charges during *force majeure* outages is contrary to the Commission's policy that the risk of *force majeure* outages should be shared by both the pipeline and its firm shippers. Therefore, Panhandle must revise its tariff to provide for a sharing of the risk of

force majeure outages consistent with Commission policy. Second, we find that Panhandle's failure to provide for full reservation charge credits for non-*force majeure* outages of primary firm service is unjust and unreasonable and Panhandle must revise its tariff to provide such credits. Finally, we find that the definition of *force majeure* in GT&C section 20 is unjust and unreasonable, because it defines all repairs and alterations to wells, machinery, or lines of pipe in the definition, including routine and scheduled maintenance.

16. In this order, we do not fix just and reasonable replacement tariff provisions providing for reservation charge credits pursuant to NGA section 5. Because Commission policy allows pipelines various options for providing such credits, the Commission requires Panhandle to file revised tariff language proposing how it desires to implement reservation charge credits consistent with Commission policy. Consistent with NGA section 5, the Commission will establish a prospective effective date for the tariff changes required by this order when the Commission acts on Panhandle's compliance filing.

17. In the discussion below, the Commission addresses the Request for Rehearing and the Response concurrently, because Panhandle's contentions in the two pleadings are essentially the same.

### **III. Authority to Initiate NGA Section 5 Investigation**

18. Panhandle contends on rehearing that the March 2012 Order is contrary to NGA section 5 and the *NGSA* decision. Panhandle asserts that the Commission has the burden of proof in a section 5 proceeding and therefore has the initial burden of showing that Panhandle's Commission-approved tariff is unjust and unreasonable. Panhandle asserts that the Commission "did not identify any evidence" and instead based its commencement of a NGA section 5 investigation on "undocumented and unsupported [curtailment] claims, made without affidavits or studies to support the assertions."<sup>9</sup>

19. Panhandle contends the Commission has improperly shifted its NGA section 5 burden to Panhandle.<sup>10</sup> Panhandle argues the Commission is forcing Panhandle to file testimony in order to defend itself.<sup>11</sup> Panhandle asserts that the Commission relied solely on ProLiance's statement of Commission policy on reservation charge crediting set out in the *NGSA* orders and the fact that Panhandle's tariff does not provide for reservation

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<sup>9</sup> Panhandle's Request for Rehearing at PP 11,13.

<sup>10</sup> Panhandle's Request for Rehearing at PP 18, 24, 27.

<sup>11</sup> Panhandle's Request for Rehearing at P 27.

charge credits.<sup>12</sup> Panhandle states that the Commission recognized that its order in *NGSA* was merely a policy statement which does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed.<sup>13</sup> Panhandle further notes that in *NGSA*, the Commission declined to initiate an industry-wide section 5 investigation requiring all pipelines to comply with the Commission's stated reservation charge crediting policy statement.<sup>14</sup> Panhandle contends the *NGSA* orders are not evidence and a Commission policy is not a rule.<sup>15</sup> Panhandle states it is improper for the Commission merely to restate its generic non-binding policy in an attempt to carry its NGA section 5 burden, without adequate supporting evidence.<sup>16</sup>

20. Panhandle further argues it contravenes constitutional due process and is fundamentally unfair to require Panhandle to provide evidence to rebut claims not supported by record evidence.<sup>17</sup> Other than assertions by ProLiance and the Commission's affirmance of its current reservation charge crediting policy, Panhandle states there is no substantial record evidence that its existing tariff provisions are no longer just and reasonable.

21. PGC argues Panhandle's Request for Rehearing is an impermissible collateral attack on the Commission's *NGSA* orders in Docket No. RP11-1538-000, a proceeding in which Panhandle participated. PGC asserts the issues raised by Panhandle in its Request for Rehearing were adequately addressed and disposed of in Docket No. RP11-1538-000 and should not be revisited again here.

### **Commission Determination**

22. The Commission finds the March 2012 Order properly required Panhandle either to file revised tariff records to provide reservation charge credits consistent with Commission policy when firm service is interrupted and also revise its tariff's definition of *force majeure*, or show cause why it should not be required to do so.

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<sup>12</sup> Panhandle's Request for Rehearing at PP 14, 17.

<sup>13</sup> Panhandle's Request for Rehearing at P 16 (citing *NGSA*, 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051, at P 25 (2011) (*NGSA Rehearing Order*)).

<sup>14</sup> Panhandle's Request for Rehearing at P 16.

<sup>15</sup> Panhandle's Request for Rehearing at P 15.

<sup>16</sup> Panhandle's Request for Rehearing at P 15.

<sup>17</sup> Panhandle's Request for Rehearing at PP 24-28.

23. The March 2012 Order initiated an investigation under NGA section 5 to determine whether Panhandle's omission of reservation charge crediting provisions and Panhandle's tariff definition of *force majeure* were unjust and unreasonable and must be modified. In order to modify Panhandle's existing reservation charge crediting provisions and tariff definition of *force majeure* under NGA section 5, the Commission has the burden of persuasion to demonstrate both that Panhandle's existing tariff provisions are unjust and unreasonable and that any required replacement tariff provisions are just and reasonable.<sup>18</sup> By giving Panhandle the option either to revise its tariff or explain why it should not be required to do so, the March 2012 Order did not make any final merits decision under NGA section 5 on either of those issues. Rather, the March 2012 Order began a proceeding to decide those issues.

24. Panhandle contends that the Commission improperly based its commencement of an NGA section 5 investigation on unsupported curtailment claims, and could not initiate the section 5 process without affidavits or studies to support the assertions.<sup>19</sup> The Commission disagrees.

25. In response to a protest by ProLiance, the Commission reviewed Panhandle's tariff, specifically, and confirmed the absence of a reservation charge credit provision in Panhandle's tariff. Inasmuch as the absence of a reservation charge credit provision is inconsistent on its face with the Commission's policy concerning reservation charge crediting, the Commission reasonably exercised its discretion to initiate a section 5 investigation into whether Panhandle's tariff should be revised to provide reservation charge credits. Similarly, in reviewing Panhandle's tariff's definition of *force majeure*, the Commission confirmed that Panhandle's tariff failed to make the critical distinction between *force majeure* and non-*force majeure* scheduled maintenance events. This too is inconsistent on its face with the Commission's reservation charge crediting policy.<sup>20</sup> Accordingly, the Commission concluded that at least a *prima facie* showing had been made that Panhandle's tariff, with its absence of reservation charge crediting and its tariff definition of *force majeure* was unjust and unreasonable. It is on this basis that the Commission directed Panhandle to file tariff language providing reservation charge credits when firm service is curtailed, consistent with Commission policy, and also to

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<sup>18</sup> *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (*Western Resources*).

<sup>19</sup> Panhandle's Request for Rehearing at PP 11, 13.

<sup>20</sup> March 2012 Order, 138 FERC ¶ 61,245 at PP 8-9.

revise its tariff's definition of *force majeure*, or show cause why it should not be required to do so.<sup>21</sup>

26. In contending the March 2012 Order improperly shifted the burden of producing evidence to it, Panhandle asserts that the March 2012 Order relied solely on the *NGSA* policy statement.<sup>22</sup> Panhandle contends the *NGSA* orders are not evidence and a Commission policy statement is not a rule, and as such, it is improper for the Commission merely to restate its generic non-binding policy in an attempt to carry its *NGA* section 5 burden, which required substantial supporting evidence.<sup>23</sup> Panhandle essentially argues that a comparison of its tariff for conformance with the Commission's announced policy does not constitute evidence and cannot satisfy the Commission's section 5 burden. Panhandle points out that, in *Pacific Gas & Electric Co. v. FPC*,<sup>24</sup> 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.<sup>25</sup>

27. Panhandle has mischaracterized the March 2012 Order as simply comparing its tariff to the *NGSA* policy statement. To the contrary, the March 2012 Order found that the absence of any reservation charge crediting provisions in Panhandle's tariff and its tariff definition of *force majeure* conflicted with binding precedents established in adjudications concerning the reservation charge crediting provisions of individual pipelines. Specifically, the Commission relied on precedent from adjudications in *Southern*, *Northern Natural*, and *Midwestern* for the proposition that pipelines are required to provide firm shippers with reservation charge credits when they are unable to provide primary firm service.<sup>26</sup> The Commission stated that the reservation charge

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<sup>21</sup> See *East Tennessee*, 863 F.2d 932, 938 (D.C. Cir. 1988) (finding that the Commission may, consistent with its 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).

<sup>22</sup> Panhandle's Request for Rehearing at PP 14, 17.

<sup>23</sup> Panhandle's Request for Rehearing at P 15.

<sup>24</sup> 506 F.2d 33, 38 (D.C. Cir. 1974) (*PG&E v. FPC*).

<sup>25</sup> Panhandle's Request for Rehearing at P 15.

<sup>26</sup> March 2012 Order, 138 FERC ¶ 61,245 at P 8, n.5 (citing *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *Northern Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202

(continued...)

crediting policy differentiates between the credits required in *force-majeure* and non-*force majeure* curtailments. Relying on Opinion No. 406, the Commission stated that, in non-*force majeure* outages, where the interruption occurred due to circumstances within the pipeline's control, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.<sup>27</sup> The Commission further explained that Commission policy also requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event in order to share the risk of an event not in the control of the pipeline, citing both *Ingleside* and Opinion No. 406.<sup>28</sup> The Commission also stated in Opinion No. 406 that *force majeure* events are "unexpected and uncontrollable events."<sup>29</sup> The Commission relied on *Midwestern* in stating that it allows two different methods for determining partial credits for *force majeure* events, either full reservation credits after a short grace period (i.e., ten days) or partial crediting starting on the first day of a *force majeure* event.<sup>30</sup>

28. Similarly, the Commission relied on Opinion No. 406,<sup>31</sup> in determining that Panhandle's failure to make the critical distinction between *force majeure* and non-*force majeure* scheduled maintenance events is inconsistent with the Commission's reservation charge crediting policy. Opinion No. 406 stands for the proposition that where a curtailment occurred due to circumstances within a pipeline's control (i.e., a non-*force majeure* event), *including planned or scheduled maintenance*, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.<sup>32</sup> The

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(2011) (*Northern Natural*); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*)).

<sup>27</sup> Opinion No. 406, 76 FERC ¶ 61,022, *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070, *as clarified by*, *Rockies Express*, 116 FERC ¶ 61,272 at P 63.

<sup>28</sup> See *Ingleside Energy Center, LLC*, 112 FERC ¶ 61,101, at P 58 (2005); and Opinion No. 406, 76 FERC at 61,086-89.

<sup>29</sup> Opinion No. 406, 76 FERC at 61,088.

<sup>30</sup> *Midwestern*, 137 FERC ¶ 61,257 at PP 19-20.

<sup>31</sup> March 2012 Order, 138 FERC ¶ 61,245 at P 8.

<sup>32</sup> March 2012 Order, 138 FERC ¶ 61,245 at P 8 (emphasis added).

Commission also pointed out that in *North Baja*, the D.C. Circuit affirmed orders applying these policies in another adjudication.<sup>33</sup>

29. The adjudications relied on by the March 2012 Order have the force of law. While the court held in *PG&E v. FPC*<sup>34</sup> 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 the precedential parameters for applying its reservation charge crediting policy. These have the effect of a rule of law, having been established in numerous prior 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*. 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.<sup>35</sup>

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<sup>33</sup> *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 at 822-23 (D.C. Cir. 2007) (*North Baja*), *affg*, *North Baja Pipeline*, 109 FERC ¶ 61,159, *order on reh'g*, 111 FERC ¶ 61,101.

<sup>34</sup> 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”).

<sup>35</sup> *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.

30. The Commission recognizes that in the *NGSA Rehearing Order*, we stated that the reservation charge crediting policy included in the April 2011 *NGSA 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.<sup>36</sup> As such, the *NGSA* policy statement does not itself have the force of law, unlike the precedents established in the series of orders in the individual adjudications discussed above. However, the Commission also stated in the October 2011 *NGSA* rehearing order:

While [the April 2011 *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.

Therefore, our reliance in the March 2012 Order in this case on binding precedents established in prior individual adjudications on similar issues to establish a *prima facie* case that Panhandle's definition is unjust and unreasonable is consistent with our statements in the October 31, 2011 *NGSA Rehearing Order*.

31. Having determined that Panhandle's absence of reservation charge crediting provisions and tariff definition of *force majeure* conflict with binding Commission precedents having the force of law, the Commission reasonably required Panhandle 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.<sup>37</sup> 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

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<sup>36</sup> See *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26.

<sup>37</sup> 18 C.F.R. § 284.7(d) (2011). *Regulation of Short-term Natural Gas Transportation Services*, Order No. 637, FERC Stats. and Regs. ¶ 31,091, *order on reh'g*, Order No. 637-A, FERC Stats. and Regs. ¶ 31,099 (2000).

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, which was the Commission's burden 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).

32. 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 rules for implementing that policy have been established through adjudications constituting binding precedent, rather than through a rulemaking. The March 2012 Order required Panhandle to make precisely the same type of filing concerning its reservation charge crediting provisions and *force majeure* definition 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 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.<sup>38</sup>

33. Panhandle further argues that in this case there is no record evidence that its existing tariff provisions are unjust and unreasonable and that this contravenes its constitutional due process rights and is fundamentally unfair. Panhandle's assertions are misdirected. As described above, the Commission concluded that at least a *prima facie* showing had been made that Panhandle's absence of reservation charge crediting and its tariff's definition of *force majeure* were unjust and unreasonable. In *East Tennessee Natural Gas Co. v. FERC*,<sup>39</sup> the court held that the Commission may, consistent with its

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<sup>38</sup> *INGAA*, 285 F.3d 18, 38. See also *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at P 27 (2012) (*Texas Eastern*).

<sup>39</sup> 863 F.2d 932, 938 (D.C. Cir. 1988) (*East Tennessee*), finding that the Commission may, consistent with its burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill, once a *prima facie* (continued...)

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. As stated in *Texas Eastern*, 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.<sup>40</sup> As also described above, the absence of a reservation charge credit provision and Panhandle's *force majeure* tariff definition were inconsistent on their face with the Commission's precedent previously established in litigated adjudications. Moreover, Commission policy requiring full reservation charge credits during outages for routine maintenance "is not dependent upon specific operating conditions on the pipeline."<sup>41</sup>

34. 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 and unreasonable. This *prima facie* showing is in and of itself evidence. The showing that Panhandle's absence of reservation charge crediting and its tariff definition of *force majeure* are not consistent with the Commission's longstanding reservation charge crediting policies was clearly made in this case,<sup>42</sup> and justified initiating a section 5

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showing is made that the minimum bill is anticompetitive and therefore *prima facie* unlawful.

<sup>40</sup> *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

<sup>41</sup> *North Baja v. FERC*, 483 F.3d at 823 (quoting *El Paso*, 105 FERC ¶ 61,262, at P 15). See also *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

<sup>42</sup> The fact Panhandle's tariff is directly contrary to the Commission's longstanding policies concerning reservation charge credits distinguishes this case from *Fuel Retention Practices of Natural Gas Companies*, FERC Stats. & Regs. ¶ 35,560 (2008); *Fuel Retention Practices of Natural Gas Companies*, FERC Stats. & Regs. ¶ 35,556 (2007). As Panhandle points out, in that proceeding, the Commission held that commenters asking the Commission to require all pipelines to recover fuel costs solely through a tracker and true-up mechanism had failed to provide a basis for the Commission to take section 5 action to implement their proposal. The Commission stated that the commenters had provided no independent policy justification for such action, other than the alleged difficulties of remedying cost overrecoveries through complaints against individual pipelines under NGA section 5. *Fuel Retention Practices of Natural Gas Companies*, 125 FERC ¶ 61,213 at P 9. Our action here is based on the independent policy justification that Panhandle's current tariff is contrary to longstanding

(continued...)

investigation to determine whether to require Panhandle to revise its tariff to be consistent with Commission policy and precedent.

#### **IV. Panhandle's Existing Tariff Provisions Concerning Reservation Charge Credits are Unjust and Unreasonable**

35. The Commission recognizes that, even though the March 2012 Order reasonably initiated a section 5 investigation of Panhandle's tariff and imposed a burden of producing evidence on Panhandle, the Commission continues to have the burden of persuasion under NGA section 5 to demonstrate both that: (1) the lack of reservation charge crediting provisions in Panhandle's tariff and Panhandle's tariff definition of *force majeure* are unjust and unreasonable; and (2) any replacement tariff provisions the Commission imposes are just and reasonable.<sup>43</sup> As stated earlier, the March 2012 Order only established procedures for developing a record to enable the Commission to determine whether its burden of persuasion can be satisfied. For the reasons discussed below, we now find that the record does justify a finding that the lack of reservation charge crediting provisions in Panhandle's tariff and Panhandle's tariff definition of *force majeure* are unjust and unreasonable. The Commission therefore will require Panhandle to make a compliance filing proposing just and reasonable replacement tariff provisions, and will determine just and reasonable replacement tariff provisions when addressing the compliance filing required by this order.

##### **A. Failure to Provide Any Credits During Force Majeure Outages**

36. Section 20 of Panhandle's GT&C expressly provides that its firm shippers must continue to pay reservation charges, when due, during *force majeure* outages. Thus, contrary to the Commission's policy that pipelines and their shippers should share the risk of *force majeure* outages, Panhandle's existing tariff places the entire risk of *force majeure* outages on its shippers.

37. Panhandle recognizes that section 20 of its GT&C fails to provide for any sharing of the risk of *force majeure* outages. However, it argues that the Commission specifically found section 20 of its GT&C to be just and reasonable in its Order No. 636 restructuring

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Commission policy concerning reservation charge credits, and we are, in fact, following the procedures required by section 5.

<sup>43</sup> *East Tennessee*, 863 F.2d 932, 938 (“FERC nonetheless retained the ultimate burden of persuasion.”); *Western Resources*, 9 F.3d 1568, 1578.

proceeding, and upheld that ruling on rehearing.<sup>44</sup> Panhandle asserts that, in seeking a change in that tariff language in this proceeding, ProLiance is improperly making an untimely request for rehearing of the orders approving its Order No. 636 compliance filing. Panhandle states the Commission has not provided any evidence to demonstrate why GT&C section 20 is no longer just and reasonable.<sup>45</sup> Panhandle asserts that no evidence has been presented to show how circumstances may have changed on the system from a legal, operational, market or other basis, since the Commission found these same tariff provisions just and reasonable.<sup>46</sup> Thus, according to Panhandle, without any evidence in the record specific to Panhandle, there is no evidentiary basis for modifying its tariff to require it to provide partial reservation charges during *force majeure* outages.

38. ProLiance argues that Panhandle mistakenly relies on the *Restructuring Orders* which pre-date the Commission's current reservation charge credit policy. ProLiance argues Panhandle's tariff violates the Commission's reservation charge credit policy on its face because it lacks reservation charge crediting language altogether. ProLiance argues that it would be unjust and unreasonable to allow Panhandle to rely on orders from 20 years ago that predate the Commission's reservation charge credit policy. ProLiance notes that pipelines are frequently required to modify their tariffs when circumstances and marketing conditions change. For example, ProLiance states, a pipeline's rates may become unjust and unreasonable, and the Commission has the authority under section 5 of the NGA to order the pipeline to modify its tariff. In addition, ProLiance notes it is not seeking rehearing of the *Restructuring Orders*, but is challenging the tariff language, and the lack of tariff language, that clearly violates Commission policy.

### **Commission Determination**

39. The Commission's approval of section 20 of Panhandle's GT&C twenty years ago during Panhandle's Order No. 636 restructuring proceeding does not justify Panhandle's retention in its tariff today of a provision placing the entire risk of *force majeure* outages on its shippers in direct contravention of longstanding Commission policy. As Panhandle states, in December 1992, the Commission denied protests to GT&C section 20's requirement that shippers continue to pay reservation charges during *force majeure* outages, in its initial order on Panhandle's filing to restructure its services in compliance

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<sup>44</sup> Citing *Panhandle Eastern Pipeline Co.*, 61 FERC ¶ 61,357, at 62,431 (1992), *reh'g denied*, 62 FERC ¶ 61,288, at 62,878, *reh'g denied*, 64 FERC ¶ 61,009, at 61,067 (1993).

<sup>45</sup> Panhandle's Request for Rehearing at P 19.

<sup>46</sup> Panhandle's Request for Rehearing at P 18.

with Order No. 636.<sup>47</sup> The Commission stated that in the past it had recognized that “all parties bear the risk of *force majeure* events and in such cases no fees should be credited.”<sup>48</sup> The Commission stated that GT&C section 20 was consistent with that holding and was the same as the language currently approved in its tariff. Therefore, the Commission found no basis to modify Panhandle’s proposal to retain that provision after restructuring. The Commission denied rehearing of this ruling in March 1993,<sup>49</sup> and again in July 1993.<sup>50</sup>

40. The Commission issued its orders in Panhandle’s Order No. 636 restructuring proceeding before it considered the issue of how Order No. 636’s requirement that pipelines adopt a Straight Fixed Variable (SFV) rate design should affect its reservation charge crediting policy. During the restructuring proceedings, the Commission focused on the fundamental requirements of Order No. 636, including the unbundling of the pipeline’s transportation services from their sales services, the adoption of capacity release and flexible point rights, and the shift to an SFV rate design. It was only after the Commission had completed processing the pipeline filings to comply with Order No. 636 and pipelines had gained some experience with their restructured operations, that the Commission confronted the issue of reservation charge crediting in the post-Order No. 636 world.

41. In July 1996, in Opinion No. 406,<sup>51</sup> the Commission recognized that Order No. 636’s requirement that pipelines shift to an SFV rate design had the effect of shifting the risk of *force majeure* outages entirely to the shippers. The Commission explained that under an SFV rate design in which all of the pipeline’s fixed costs are included in the pipeline’s reservation charge, the pipeline continues to recover its entire cost of service, including its return on equity, during a *force majeure* outage, while its shippers fail to receive access to the capacity assured them by their payment of reservation charges. Therefore, Opinion No. 406 found that Tennessee Gas Pipeline Company’s (Tennessee) existing tariff provision excusing it from providing any reservation charge credits during *force majeure* outages placed all the risk of *force majeure* outages on its shippers. By

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<sup>47</sup> *Panhandle Eastern Pipeline Co.*, 61 FERC at 62,431.

<sup>48</sup> *Id.*, quoting *Northern Natural Gas Co.*, 59 FERC ¶ 61,379, at 62,461 (1992).

<sup>49</sup> *Panhandle Eastern Pipeline Co.*, 62 FERC at 62,878.

<sup>50</sup> *Panhandle Eastern Pipeline Co.*, 64 FERC at 61,067. In this order the Commission clarified that parties could raise this issue again in Panhandle’s current general section 4 rate case.

<sup>51</sup> Opinion No. 406, 76 FERC at 61,088-89.

contrast, under the Modified-Fixed Variable (MFV) rate design in effect before Order No. 636, in which return on equity and associated income taxes were included in the usage charge, “there was a built-in sharing of the risk because the pipeline’s recovery of its return on equity and taxes was dependent on its throughput.”<sup>52</sup>

42. Citing the same *Northern Natural Gas Company* order cited in the initial order on Panhandle’s Order No. 636 compliance filing, Opinion No. 406 stated that the Commission had “previously recognized that a *force majeure* interruption is a no-fault occurrence, by ruling in prior cases that all parties should bear the risk of *force majeure* events.”<sup>53</sup> The Commission concluded that, because the shift from an MFV to an SFV rate design had shifted the entire risk of force majeure outages to Tennessee’s shippers, its existing tariff provision excusing it from providing any reservation charge credits during force majeure outages was no longer just and reasonable. For that reason, the Commission affirmed the ALJ’s requirement that Tennessee provide partial credits equal to Tennessee’s return on equity and associated income taxes. The Commission observed that this requirement “returns the balance of risk back to the *status quo* before the Commission mandated the use of the SFV rate design.”<sup>54</sup> The Commission also stated that, in addition to the No Profit Method adopted by Opinion No. 406, other risk sharing methods such as the Safe Harbor Method approved in *Texas Eastern Transmission Corp.*<sup>55</sup> could also be reasonable. As described above, in *North Baja Pipeline, LLC v. FERC*,<sup>56</sup> the court affirmed the Commission order requiring a pipeline to modify its tariff to provide partial reservation charge credits during *force majeure* outages pursuant to the No Profit Method, the Safe Harbor Method, or some other method which achieves equitable sharing in the same ball park as the first two methods.

43. The Commission concludes that Panhandle’s existing tariff provision in GT&C section 20 excusing it from providing any reservation charge credits during *force majeure* outages is unjust and unreasonable for the same reasons Opinion No. 406 held that Tennessee’s similar provision was unjust and unreasonable. Because Panhandle uses an SFV rate design, that tariff provision places the entire risk of *force majeure* outages on its shippers. That is not only contrary to the Commission’s current policy requiring a

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<sup>52</sup> *Id.* at 61,089.

<sup>53</sup> *Id.* at 61,088.

<sup>54</sup> *Id.* at 61,089.

<sup>55</sup> 62 FERC ¶ 61,015, at 61,089-91, *reh’g*, 63 FERC ¶ 61,100, at 61,433-35 (1993).

<sup>56</sup> *North Baja*, *see supra* note 7.

sharing of the risk of *force majeure* outages, but also contrary to the same risk sharing policy in effect before Order No. 636 required a shift to an SFV rate design, as reflected in the *Northern Natural Gas Company* order cited by the December 1992 order on Panhandle's filing to comply with Order No. 636. That the Commission's orders in Panhandle's Order No. 636 restructuring proceeding failed to recognize this fact is no reason why Panhandle should be permitted, twenty years later, to retain a tariff provision that is plainly contrary to the policy set forth in Opinion No. 406, several years after the restructuring orders relied on by Panhandle.<sup>57</sup> Nor has Panhandle provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the policy we have applied consistently and uniformly to other pipelines.

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

44. Panhandle's tariff also contains no provision for any reservation charges during non-*force majeure* outages. In contending that it should not be required to modify its tariff to provide any credits during non-*force majeure* outages, Panhandle relies on the fact that the Commission's orders accepted its Order No. 636 compliance filing without requiring it to provide any reservation charge credits during non-*force majeure* outages. Panhandle asserts that no evidence has been presented to show how circumstances may have changed on the system from a legal, operational, market or other basis, since the Commission found the lack of any reservation charge crediting provision just and reasonable.<sup>58</sup> Thus, according to Panhandle, without any evidence in the record specific to Panhandle, there is no evidentiary basis for modifying its tariff to require it to provide full reservation charges during non-*force majeure* outages.

45. Panhandle recognizes that in Opinion No. 406<sup>59</sup> the Commission reaffirmed a policy established in another Tennessee proceeding of requiring full reservation charge credits for non-*force majeure* service outages, including scheduled maintenance.<sup>60</sup> However, Panhandle contends that the premise of that policy is Opinion No. 406's

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<sup>57</sup> Panhandle suggests that ProLiance's raising of this issue in this proceeding somehow constitutes an untimely request for rehearing of the orders in Panhandle's Order No. 636 compliance proceeding. However, the fact the Commission rejected ProLiance's contentions in the restructuring orders in no way bars ProLiance from now raising the issue whether Panhandle's tariff is consistent with policies the Commission developed in subsequent orders.

<sup>58</sup> Panhandle's Request for Rehearing at P 18.

<sup>59</sup> Opinion No. 406, 76 FERC at 61,086.

<sup>60</sup> *Tennessee Gas Pipeline Co.*, 71 FERC ¶ 61,399 at 62,580, *reh'g*, 73 FERC ¶ 61,083 (1995) (*Tennessee*).

mistaken characterization of scheduled maintenance as the result of pipeline mismanagement.<sup>61</sup>

46. Panhandle contends it is unreasonable to characterize regulatory compliance activities in response to recent changes in federal safety and maintenance standards as controllable and expected, such that any resulting outages would constitute mismanagement. Panhandle states that the safety of its system is of primary importance yet Panhandle does not control what safety compliance activities will be required or modified or when they will have to be undertaken.<sup>62</sup> Panhandle contends the Commission has made no finding in this proceeding that Panhandle has mismanaged its system, but it is nevertheless imposing a requirement for providing reservation charge credits based on the assumption that service outages for maintenance are caused by pipeline mismanagement. Panhandle argues the Commission has failed to take into consideration that service interruptions are generally the result of Panhandle performing mandated testing, inspection, and/or replacement required by U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations. Panhandle argues that Opinion No. 406 is not applicable to Panhandle as current PHMSA safety requirements are more comprehensive than those that existed in 1996 when Opinion No. 406 was issued. Panhandle states that it is not reasonable or fair for pipelines to be penalized alone for compliance with applicable safety regulations that benefit all.<sup>63</sup>

47. Panhandle also states that Congress recently enacted the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act) which will lead to new pipeline safety mandates to be administered by PHMSA. Panhandle contends that section 5 of that Act requires PHMSA to evaluate whether pipeline integrity management requirements should be expanded. Panhandle also points out that in August 2011 PHMSA issued an Advance Notice of Proposed Rulemaking (ANOPR),<sup>64</sup> requesting comment on various potential changes in PHMSA's gas pipeline safety regulations. Panhandle states that PHMSA requested comment on strengthening of PHMSA's existing integrity management (IM) regulations and modifying pipeline repair criteria. Panhandle

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<sup>61</sup> Panhandle's Request for Rehearing at PP 29, 33-34 (citing Opinion No. 406, 76 FERC at 61,086; *NGSA*, 135 FERC ¶ 61,055 at P 20).

<sup>62</sup> Panhandle's Request for Rehearing at P 29.

<sup>63</sup> Panhandle's Request for Rehearing at P 34.

<sup>64</sup> (Citing PHMSA, Pipeline Safety: Safety of Gas Transmission Pipelines, Advance Notice of Proposed Rulemaking, 76 Fed. Reg. 5308 (August 25, 2011)).

states that it appears likely that these initiatives will increase its already significant annual expenditures to comply with existing PHMSA IM standards.

48. PGC counters the Panhandle position, and argues the Commission has a longstanding policy requiring reservation charge credits, and such credits are not penalties for mismanagement but rather are refunds for a service that was not provided.

### **Commission Determination**

49. Panhandle's failure to provide any reservation charge credits during non-*force majeure* outages is unjust and unreasonable and contrary to longstanding Commission policy. In arguing that it should not be required to provide such credits, Panhandle relies on the fact our orders on its filing to comply with Order No. 636 did not require it provide such credits. When the Commission processed the pipelines' filings to restructure their services in compliance with Order No. 636, the Commission had no stated policy requiring reservation charge credits during non-*force majeure* outages.<sup>65</sup> However, as experience was gained with pipelines' restructured operations, the Commission moved toward requiring pipelines to provide full reservation charge credits for non-*force majeure* interruptions of a shipper's primary firm service.

50. In June 1995, the Commission rejected a proposal by Tennessee under which Tennessee 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.<sup>66</sup> 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.<sup>67</sup> Accordingly, the Commission limited the pipeline's obligation to provide reservation charge credits to situations where the pipeline failed to satisfy its contractual obligation to provide nominated primary firm service.

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<sup>65</sup> *Texas Gas Transmission Corp.*, 70 FERC ¶ 61,217, at 61,684-85 (1995).

<sup>66</sup> *Tennessee*, 71 FERC at 62,580.

<sup>67</sup> *Tennessee*, 73 FERC 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.").

51. A year later, the Commission again considered this issue in Opinion No. 406, and held that a pipeline should provide full reservation charge credits if the pipeline is required to interrupt primary firm service due to an event within its control or maintenance, explaining:<sup>68</sup>

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

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.<sup>69</sup>

52. As described above, Panhandle argues that the Commission's policy in Opinion No. 406<sup>70</sup> requiring reservation charge credits for non-*force majeure* service outages is based on the mistaken characterization of scheduled maintenance as being the result of pipeline mismanagement.<sup>71</sup> Panhandle contends the Commission has made no finding in this proceeding that Panhandle has mismanaged its system, and has failed to take into consideration that service interruptions are often the result of Panhandle performing testing, inspection, and/or replacement required by PHMSA regulations. Panhandle

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<sup>68</sup> Opinion o. 406, 76 FERC at 61,086.

<sup>69</sup> *Alliance Pipeline, L.P.*, 84 FERC ¶ 61,239, at 62,214 (1998); *El Paso*, 105 FERC ¶ 61,262 at PP 14-15; *Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, at P 34, *order on reh'g*, 107 FERC ¶ 61,074, at PP 27-33 (2004); *Natural Gas Pipeline Co. of America*, 102 FERC ¶ 61,326, at PP 18-19, *order on reh'g*, 106 FERC ¶ 61,310, at PP 13-15 (2004); *North Baja*, 109 FERC ¶ 61,159 at P 12, *order on reh'g*, 111 FERC ¶ 61,101 at PP 15-19; *Rockies Express*, 116 FERC ¶ 61,272, at P 63; *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.

<sup>70</sup> *See supra* note 27.

<sup>71</sup> Panhandle's Request for Rehearing at PP 29, 33-34.

concludes that Opinion No. 406 should not apply to Panhandle because current PHMSA safety requirements are more comprehensive than those that existed in 1996 when Opinion No. 406 was issued. Panhandle has also attached to its Response to the March 2012 Order 29 notices it issued in the last three calendar years regarding replacement and repair of its pipeline pursuant to its pipeline integrity management program, some of which indicate that the availability of primary firm service could be affected.

53. After Opinion No. 406, several pipelines raised contentions similar to those raised by Panhandle in this case. Those pipelines argued that, contrary to Opinion No. 406's assumption that planned maintenance is within a 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.<sup>72</sup> In response to those contentions, the Commission has clarified that the policy announced in Opinion No. 406 is not limited to situations involving pipeline "mismanagement." While the Commission has recognized that some primary firm service interruptions for planned or routine maintenance are unavoidable, nevertheless the Commission requires pipelines to provide full reservation charge credits for any failure to meet their contractual obligations to firm customers in order to provide pipelines an incentive to minimize any such interruptions. Consistent with the fact that such maintenance does not constitute "mismanagement," the Commission has clarified that it will permit pipelines to include the cost of prudent planned maintenance interruptions in their rates.

54. First, 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 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.<sup>73</sup> The Commission also stated that its policy on this issue is not dependent upon the specific operating conditions on the pipeline.<sup>74</sup>

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<sup>72</sup> See *North Baja*, 111 FERC ¶ 61,101.

<sup>73</sup> *El Paso*, 105 FERC ¶ 61,262 at P 14.

<sup>74</sup> *El Paso*, 105 FERC ¶ 61,262 at P 15.

55. Second, in August 2004, in *Florida Gas*, the Commission addressed a pipeline's proposal to treat outages resulting from planned maintenance as non-discretionary *force majeure* events for which only partial reservation charge credits would be provided. In that case, as in *El Paso*, the pipeline stated that because it operates at a high annual load factor, it could not guarantee that there will be no service interruptions as a result of such planned maintenance. In addition, shortly before that case, 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 High Consequence Areas (HCA).<sup>75</sup> Those regulations took effect on January 14, 2004,<sup>76</sup> and specified 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. *Florida Gas* cited the requirement of those regulations as an example of periodic, non-discretionary activities which could impact its deliveries but are necessary for the safe operation of its system. The Commission nevertheless required the pipeline to treat all 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."<sup>77</sup> The Commission also held that outages 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 pipeline."<sup>78</sup> 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.<sup>79</sup>

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<sup>75</sup> An HCA is a location that is defined in the pipeline safety regulations as an area where pipeline releases would have greater consequences to the health, safety, or environment.

<sup>76</sup> See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 Fed. Reg. 69,778 (December 15, 2003).

<sup>77</sup> *Florida Gas*, 107 FERC ¶ 61,074 at P 29.

<sup>78</sup> *Id.* P 29.

<sup>79</sup> *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; *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008); *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011), *order on reh'g*, 139 FERC ¶ 61,050, at PP 80-82 (2012); *Texas Eastern* (continued...)

56. Finally, in *North Baja*, the pipeline also 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 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.”<sup>80</sup> However, North Baja contended that some planned repair and maintenance, such as periodic “pigging,” created 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 that:

[W]e 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 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.<sup>81</sup>

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*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).

<sup>80</sup> *North Baja*, 111 FERC ¶ 61,101 at P 15.

<sup>81</sup> *North Baja*, 111 FERC ¶ 61,101 at PP 18-19.

57. Thus, contrary to Panhandle's contentions, in cases after Opinion No. 406, the Commission has expressly held that the reservation charge credit policy set forth in that opinion applies to situations where some interruptions of primary firm service may be uncontrollable and thus do not arise from mismanagement. Moreover, the Commission has applied that policy to outages required to comply with PHMSA's current integrity management regulations. As the Commission explained in *North Baja*, while "control is an important principle, it is not the Commission's only consideration."<sup>82</sup> 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.<sup>83</sup> 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.

58. The D.C. Circuit approved this policy when it reviewed the Commission's *North Baja* orders, rejecting North Baja's contention that Opinion No. 406 emphasized "control" and therefore the opinion was inapplicable to a pipeline where outages for planned maintenance are uncontrollable because it operates at full capacity. The court recognized that the Commission's reservation charge crediting policy extended to scheduled maintenance interruptions that are not controllable, holding as follows:

Although some scheduled maintenance interruptions may be uncontrollable, they are certainly not unexpected.<sup>84</sup>

The D.C. Circuit 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

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<sup>82</sup> *Id.* P 14.

<sup>83</sup> *North Baja*, 111 FERC ¶ 61,101 at P 18.

<sup>84</sup> *North Baja v. FERC*, 483 F.3d 819, 823.

stall service.” As the Commission stated recently in *Texas Eastern*, the Commission sees no reason to modify the policy concerning reservation charge credits for routine maintenance, affirmed by the court.<sup>85</sup> 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. As in *Texas Eastern*, 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 Panhandle 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.<sup>86</sup>

60. Panhandle also states that the 2011 Act, together with PHMSA’s August 2011 ANOPR, strongly suggests that additional safety requirements will be enacted that will expand the scope of integrity management assessments and testing required by PHMSA. For example, Panhandle states that section 5 of the 2011 Act requires PHMSA to evaluate whether pipeline integrity management requirements should be expanded. Panhandle also states that the ANOPR requested comment on strengthening of PHMSA’s existing integrity management regulations and modifying pipeline repair criteria. Panhandle states that diligent efforts to comply with these initiatives will unavoidably result in some interruptions of service, and it is not reasonable for pipelines alone to be penalized for compliance with applicable safety regulations that benefit all.

61. In several recent decisions, the Commission addressed the issue of whether pipelines should be permitted to provide partial reservation credits for outages related to compliance with new safety requirements which may be adopted pursuant to the 2011 Act.<sup>87</sup> In those orders, the Commission held that the nature and timing of any integrity management requirements PHMSA may adopt pursuant to section 5 of the 2011 Act or ongoing PHMSA rulemakings is too speculative at this time to justify modifying

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<sup>85</sup> *Texas Eastern*, 140 FERC ¶ 61,216 at P 58.

<sup>86</sup> *Id.* P 59.

<sup>87</sup> See *Gulf South Pipeline Co. L.P.*, 141 FERC ¶ 61,224, at PP 14-47 (2012) (*Gulf South*); *Gulf Crossing Pipeline L.L.C.*, 141 FERC ¶ 61,222 (2012); *Texas Gas Transmission LLC*, 141 FERC ¶ 61,223 (2012).

Commission policy to treat any outages resulting from such new requirements similarly to *force majeure* events at this time.

62. As the Commission stated in those orders, 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 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.

63. 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. In addition, the Commission stated that 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 rulemaking (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 uncertainty surrounding whether or how PHMSA may modify its integrity management regulations.

64. The Commission concluded that 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.<sup>88</sup>

65. 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 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.

66. While the Commission has held that it is premature to consider any changes in its reservation charge crediting policy as a result of the 2011 Act's provisions concerning integrity management, the Commission stated it would 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 of the United States Code, as added by section 23(a) of the 2011 Act, concerning the verification and confirmation of pipelines' maximum allowable operating pressure (MAOP). Section 60139(a) requires each owner and operator of a pipeline to conduct a verification of its records relating to pipeline segments in Class 1 and Class 2 HCAs and Class 3 and Class 4 locations<sup>89</sup> by

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<sup>88</sup> See INGAA submission responding to *The State of the National Pipeline Infrastructure – A Preliminary Report*, June 22, 2011, Docket No. PHMSA-2011-0127.

<sup>89</sup> Basically, these are areas with greater population density.

July 3, 2012. The purpose of this 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.”

67. The Commission found that, 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, 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.

68. In addition, the Commission found that outages resulting from actions PHMSA takes pursuant to section 60139(c) are distinguishable 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. These include: (1) that whatever actions PHMSA takes pursuant to section 60139(c) of the 2011 Act would be one-time non-recurring events, unlike the recurring requirements under ordinary integrity management programs; (2) the 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; and (3) 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.” Accordingly, when Panhandle files revised tariff language in compliance with this order, it may include in that filing a provision permitting partial reservation charge crediting, for a transitional period of two years for outages resulting from orders issued by PHMSA pursuant to section 60139(c) of the 2011 Act.

69. As the Commission stated in *Gulf South, et al.*, our holdings in this order are without prejudice to Panhandle's 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 understands the importance of these issues and will consider the need for further action as the impact of PHMSA's implementation process moves forward.

### **C. GTC Section 20 Definition of Force Majeure**

70. Section 20 of Panhandle's GT&C defines *force majeure* to include "the necessity for making repairs or alterations to wells, machinery, or lines of pipe." The Commission finds that this language unreasonably treats as *force majeure* events repairs and alterations to machinery or lines of pipe which are carried out as part of routine and scheduled maintenance of the pipeline.

71. 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.<sup>90</sup> The D.C. Circuit affirmed this policy in *North Baja v. FERC*. The court referred to Opinion No. 406 where the Commission defined *force majeure* events as events that are not only uncontrollable but also unexpected and to subsequent Commission decisions to the same effect, citing the rehearing order in *Florida Gas*, 107 FERC ¶ 61,704 at PP 28-29, and *Alliance* cases.<sup>91</sup> The court then stated that "[i]n its orders here, FERC expressly relied on these precedents and applied its well-established and reasonable definition of a *force majeure* event to the case before it."<sup>92</sup> The court held that, while some scheduled maintenance interruptions may be "uncontrollable," they are not "unexpected." In this case, we again rely on these precedents to require Panhandle to revise GT&C section 20 to be consistent with our "well-established and reasonable definition a *force majeure* event."

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<sup>90</sup> See, e.g., *Southern*, 135 FERC ¶ 61,056 at PP 24-27; see also similar cases cited *supra*.

<sup>91</sup> 483 F.3d at 822-23.

<sup>92</sup> 483 F.3d at 823.

72. Routine and scheduled maintenance may include repairs and alterations to machinery or lines of pipe. While some outages to make scheduled and planned repairs or alterations of pipelines may be “uncontrollable,” they are not “unexpected.” Insofar as the need to make such repairs has been anticipated, so that the repairs can be planned and scheduled, the repairs are not *force majeure* events. By contrast, unscheduled maintenance and repairs generally result from an operational problem and are therefore appropriately treated as no-fault, *force majeure* events.<sup>93</sup>

73. Therefore, the existing language in GT&C section 20 that defines all service interruptions for repairs and alterations of certain pipeline facilities as *force majeure* events, is overbroad and thus contrary to Commission policy. Accordingly, pursuant to section 5 of the NGA, Panhandle is directed to file revised tariff records clarifying that planned and scheduled repairs and alterations of pipelines are excluded from its definition of *force majeure*.

#### **D. Rate Case Settlement and Service Agreements**

74. Panhandle’s last general NGA section 4 rate case was resolved by a settlement approved on December 20, 1996.<sup>94</sup> The Panhandle settlement addressed all rate and refund matters in Panhandle’s general NGA section 4 rate cases in Docket Nos. RP91-229-000 and RP92-166-000 and some issues in its preceding section 4 rate case in Docket No. RP88-262-000. The settlement also resolved judicial appeals from Commission orders on Panhandle’s compliance with Order No. 636 in Docket No. RS92-22-000 and its recovery of Order No. 636 transition costs.

75. Panhandle argues the Commission has failed to acknowledge that reservation charge crediting exists as just one consideration of Panhandle’s Commission-approved settlement rates.<sup>95</sup> Panhandle states that reservation charge credits are a rate issue and that Panhandle’s rates are governed by a black-box settlement that incorporated Panhandle’s existing tariff language at issue here.<sup>96</sup> Panhandle argues that the settlement rates are the currently effective rates on Panhandle’s system and that reservation charge

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<sup>93</sup> *El Paso*, 105 FERC at 62,351; *Natural Gas Pipeline Co. of America*, 108 FERC ¶ 61,170 at P 7.

<sup>94</sup> *Panhandle Eastern Pipe Line Company, LP*, 77 FERC ¶ 61,284 (1996) *reh’g*, 78 FERC ¶ 61,180 (1997) (Settlement). Panhandle filed its Offer of Settlement on September 12, 1996 in Docket No. RS92-22-000, *et al.*

<sup>95</sup> Panhandle’s Request for Rehearing at PP 41, 43.

<sup>96</sup> Panhandle’s Request for Rehearing at P 41.

crediting is one element considered when agreeing to a rate level. Panhandle contends that re-writing only one component of the settlement would upset the balance of issues that were resolved in an integrated fashion.<sup>97</sup> Panhandle thus maintains that the March 2012 Order's NGA section 5 proceeding would have the effect of abrogating the settlement. Panhandle also contends that modifying its reservation charge crediting provision outside of a general section 4 rate case would violate the Commission policy of avoiding a piecemeal modification of a pipeline's rates in limited section 4 policies, because there are many variables addressed in a general rate proceeding than can change overall rate levels.<sup>98</sup>

76. Panhandle also contends that Panhandle and its customers have allocated the risk of service interruptions through their service agreements and that by requiring reservation charge credits the Commission is reallocating the risk of interruption as agreed upon by the parties and rewriting the contractual agreements between Panhandle and its customers. Panhandle cites the *Mobile-Sierra* doctrine for the proposition that in order to modify a contractual agreement, the Commission must show the agreement seriously harms the public interest.<sup>99</sup>

77. In response to Panhandle's argument that reservation charge crediting exists as just one element of Panhandle's Commission approved settlement rates, ProLiance argues that nowhere in the settlement is language precluding parties from raising the reservation charge credit issue. Indeed, ProLiance notes that in the Order No. 636 restructuring proceeding the Commission ruled that it would not require Panhandle to modify its tariff on the reservation charge credit issue "at this time," suggesting that future review would be permitted.<sup>100</sup> In addition, ProLiance states, the Order No. 636 restructuring proceeding order cited by Panhandle provided the parties with the opportunity to raise the reservation charge credit issue in Panhandle's rate proceedings, but there was no requirement to do so. Moreover, ProLiance notes that the Panhandle

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<sup>97</sup> Panhandle's Request for Rehearing at P 42.

<sup>98</sup> Citing *CNG Transmission Corp.*, 63 FERC ¶ 61,330, at 63,192 (1993).

<sup>99</sup> Panhandle's Request for Rehearing at P 36, n.78 (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 551 (2008); see *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (collectively *Mobile-Sierra*)).

<sup>100</sup> ProLiance's Answer to Panhandle's Response at 6 (citing *Panhandle Eastern Pipe Line Co.*, 64 FERC at 61,067).

Settlement explicitly allows a Sponsoring Party or Subject Party to seek changes to Panhandle's rates or tariff provisions under section 5 of the NGA.<sup>101</sup>

### **Commission Determination**

78. Panhandle's Settlement, which is still in effect, does not relate to Panhandle's reservation charge crediting provisions and does not restrict Panhandle's shippers' rights under NGA section 5 to seek a change in Panhandle's reservation charge crediting provisions. In fact, Panhandle concedes that the Settlement does not preclude the Commission from using its NGA section 5 powers.<sup>102</sup> Indeed, ProLiance correctly points out that the settlement allows a Sponsoring Party or Subject Party to seek changes to Panhandle's rates or tariff provisions under section 5 of the NGA.

79. Panhandle argues reservation charge crediting is a rate matter that should only be addressed in a general rate proceeding, where all aspects of Panhandle's rates and terms and conditions of service can be reviewed.<sup>103</sup> The Commission rejects this contention. Permitting the reservation charge crediting issue to be addressed in a limited section 4 filing outside the context of a general section 4 rate case has been the Commission's policy for a substantial period of time.<sup>104</sup> Good reason exists why the Commission has adopted this policy. If the Commission had to wait for a pipeline to file a general section 4 rate case before that pipeline's compliance with the Commission's clear policy concerning reservation charge crediting could be addressed, compliance with that policy would be significantly delayed. Pipelines whose rates are currently fully recovering their cost-of-service have no incentive to file a section 4 rate case, and Order No. 636's elimination of the periodic rate re-filing requirement has resulted in many pipelines not filing new section 4 rate cases for a decade or more.<sup>105</sup>

80. In addition, compliance with Commission policy on reservation charge crediting does not necessarily have any significant effect on a pipeline's costs and revenues. Pipelines design their systems to be able to provide the primary firm service they have

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<sup>101</sup> ProLiance's Answer to Panhandle's Response at 6.

<sup>102</sup> Panhandle's Request for Rehearing at P 43.

<sup>103</sup> Panhandle's Request for Rehearing at PP 41-43.

<sup>104</sup> *Natural Gas Pipeline Co. of America*, 102 FERC ¶ 61,326 at P 19; *Tuscarora Pipeline Co.*, 120 FERC ¶ 61,022, at P 12 (2007); *Wyoming Interstate Company Ltd.*, 129 FERC ¶ 61,022 at P 11.

<sup>105</sup> *See Northern Natural*, 137 FERC ¶ 61,202 at P 33.

contracted to provide their firm shippers at all times. As the court in *North Baja* explained, in affirming the Commission's ruling that scheduled maintenance is not a *force-majeure* event, "[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.'"<sup>106</sup> In recognition of this principle, the Commission has imposed the reservation charge crediting requirement when a pipeline fails to provide nominated service only at a firm shipper's primary points due to a non-*force majeure* event. Thus, the Commission has rejected requests to extend the crediting requirement to failure to provide nominated service at a firm shipper's secondary points, thereby limiting the pipeline's cost of compliance with the reservation charge crediting policy.<sup>107</sup>

81. However, if Panhandle is concerned that Commission action under NGA section 5 requiring it to revise its tariff to be consistent with Commission policy will result in its rates being too low to recover its overall cost of service, it may present evidence in its filing to comply with this order to show why it believes that would be the consequence of that action.<sup>108</sup> To enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the pipeline would have to provide evidence of the number of non-*force majeure* outages it experienced during a past representative period, and the dollar amount of the credits it would have had to give. In addition, the pipeline would have to provide the Commission with the information necessary to determine whether the pipeline's existing rates are insufficient to recover any additional costs resulting from compliance. For example, the pipeline could file a full cost and revenue study consistent with what we have required in recent section 5 investigations of the justness and reasonableness of a pipeline's overall rates.<sup>109</sup>

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<sup>106</sup> *North Baja v. FERC*, 483 F.3d 819, 823.

<sup>107</sup> *Southern*, 137 FERC ¶ 61,050 at P 11-17.

<sup>108</sup> See *ANR Pipeline Co. v. FERC*, 863 F.2d 959, 962-64 (D.C. Cir. 1988).

<sup>109</sup> See *Ozark*, 133 FERC ¶ 61,150, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193; *Kinder Morgan*, 133 FERC ¶ 61,157, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,061; *Natural Gas*, 129 FERC ¶ 61,158, *reh'g denied*, 130 FERC ¶ 61,133; *Northern Natural*, 129 FERC ¶ 61,159, *reh'g denied*, 130 FERC ¶ 61,134; *Great Lakes*, 129 FERC ¶ 61,160, *reh'g denied*, 130 FERC ¶ 61,132. As the Commission explained in the *Natural* rehearing order, "[s]ections 10(a) and 14(a) of the NGA authorize the Commission to require [the pipeline] to submit the information required by the [order instituting investigation] in order to carry out its responsibility

(continued...)

Alternatively, the pipeline could simply file a general section 4 rate case to propose increasing its rates to recover the increased costs from compliance with that policy.

82. Panhandle relies on *Golden Triangle*,<sup>110</sup> for the proposition that the Commission “allowed pipelines with market-based rate authority to negotiate alternate forms of rate relief, such as reservation charge credits, in negotiated rate agreements because *such provisions are essentially a rate matter*.” Panhandle’s reliance on *Golden Triangle* is misplaced. In that case, the Commission originally required the pipeline to provide reservation charge credits where it curtails service in non-*force majeure* events. The pipeline sought rehearing, arguing that it had market-based authority and the reservation charge crediting was a rate issue since it was a matter of negotiation between it and its customers. It contended that certain customers may place no value on receiving reservation charge credits in non-*force majeure* situations and may wish to negotiate a lower rate for service that does not incorporate such credits. The Commission agreed and granted rehearing since the reservation charge crediting policy applied to pipelines with cost-based rates, while pipelines with market-based rate authority can negotiate alternate forms of rate relief. Panhandle has cost-based rates, and therefore the *Golden Triangle* precedent concerning pipelines with market-based rates is inapplicable to Panhandle.

83. Panhandle also argues that it has agreed with its shippers in its service agreements how to allocate the risk of service interruptions. Panhandle contends that the *Mobile-Sierra* doctrine requires that, in order to modify that agreement, the Commission must find that the agreement seriously harms the public interest. Panhandle’s reliance on *Mobile-Sierra* is misplaced.

84. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; the latter constitute tariff rates, terms, or conditions to which the *Mobile-Sierra* presumption

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under NGA section 5 to ensure that the pipeline’s rates are just and reasonable.” See, *Natural Gas*, 130 FERC ¶ 61,133 at P 16.

<sup>110</sup> 134 FERC ¶ 61,036.

does not apply, although the Commission may exercise its discretion to apply the heightened *Mobile-Sierra* standard.<sup>111</sup>

85. Under this framework, we find that requiring Panhandle to modify its generally applicable firm rate schedules and its GT&C to include reservation charge crediting provisions consistent with Commission policy does not entail modifying any contracts to which the *Mobile-Sierra* presumption applies. Consistent with the Commission's regulations, Panhandle's tariff includes *pro forma* service agreements, which set forth the standard contract Panhandle will enter into with all shippers under a rate schedule.<sup>112</sup> These *pro forma* service agreements uniformly state that "[t]he General Terms and Conditions of Panhandle's FERC Gas Tariff are applicable to this Rate Schedule and are hereby made a part hereof."<sup>113</sup> Indeed, Panhandle notes the existence of this very provision by stating that it "provides service pursuant to agreements which specifically incorporate the GT&C of Panhandle's tariff."<sup>114</sup> Moreover, Panhandle's *pro forma* service agreements contain no provision expressly referring to reservation charge credits or *force majeure*.

86. Therefore, Panhandle's standard service agreements automatically give shippers any increased rights which may be provided by changes in the terms and conditions of service in the pipeline's tariff. In this order, the Commission is requiring Panhandle to revise its generally applicable terms and conditions of service to provide reservation charge credits consistent with Commission policy. Because the service agreements incorporate the terms and conditions in the tariff, the right to reservation charge credits consistent with Commission policy will automatically flow through to the shippers without the need to modify any term in the shippers' service agreements. It follows that the Commission need not make any *Mobile-Sierra* public interest findings in order to require Panhandle to comply with its reservation charge crediting policies. The Commission reviews changes to a pipeline's generally applicable tariff pursuant to the

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<sup>111</sup> See *New England Power Generators Ass'n, Inc. v. FERC*, No. 11-1422, at 10-12 (D.C. Cir. Feb. 15, 2013).

<sup>112</sup> 18 C.F.R. § 154.110 (2012).

<sup>113</sup> See, e.g., Part V of Panhandle's FERC Gas Tariff, Rate Schedule FT, Firm Transportation Service, P 6; Part V of Panhandle's FERC Gas Tariff, Rate Schedule FHT, Hourly Firm Transportation Service, P 6.

<sup>114</sup> See Panhandle's Request for Rehearing at P 36.

ordinary just and reasonable standard in sections 4(e) and 5(a) of the NGA, without application of the *Mobile-Sierra* public interest presumption.<sup>115</sup>

87. Our approach here is consistent with our implementation of other policies by acting under NGA section 5 to modify the general terms and conditions of service in pipeline tariffs. For example, in our order responding to *INGAA*'s remand of Order No. 637's requirement that pipelines permit shippers to segment their capacity for the purpose of making forwardhauls and backhauls to the same point,<sup>116</sup> we explained that we have implemented our policies concerning flexible point rights and segmentation solely through section 5 action to modify the pipelines' general terms and conditions of service, without the need to modify shippers' contracts. The Commission explained that, because shippers' individual contracts with the pipeline provide for the customer to receive the service set forth in the general terms and conditions of the tariff, as those terms may be changed from time to time, it has not been necessary to change the individual contracts, nor has the Commission done so. The Commission concluded in its *Order No. 637 Order on Remand*, that it may require pipelines to permit backhauls and forwardhauls to the same point, each of which is up to the shipper's contract demand, by making the necessary findings under NGA section 5 to require the pipeline to revise its terms and conditions of service to permit this, without the need to make *Mobile-Sierra* public interest findings.

88. In *American Gas Ass'n v. FERC*,<sup>117</sup> the D.C. Circuit affirmed the Commission's *Order No. 637 Order on Remand*, explaining,

Because FERC's backhaul/forwardhaul policy does not abrogate pipeline contracts, the Commission had no obligation to make . . . *Mobile-Sierra* . . . findings. Instead, to justify its new policy, the Commission needed to comply only with NGA § 5.

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<sup>115</sup> *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at PP 19-20 (2011).

<sup>116</sup> See *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062, *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 41 (D.C. Cir. 2002), *order on remand*, 101 FERC at 61,529, *rehearing denied*, 106 FERC ¶ 61,088, at PP 81-87 (2004).

<sup>117</sup> 428 F.3d 255, 263 (D.C. Cir. 2005).

Similarly, the Commission concludes here that it may require pipelines to file tariff language providing reservation charge credits when firm service is curtailed and also to revise its tariff's definition of *force majeure* to make the distinction between *force majeure* and non-*force majeure* scheduled maintenance events by making the necessary findings under the NGA section 5 to modify the pipelines' term and conditions of service. Thus, we reject Panhandle's reliance on the *Mobile-Sierra* public interest presumption.

**E. Ongoing Audit is No Bar to Commission Action**

89. Panhandle also argues the Commission's NGA section 5 action on its reservation charge crediting provisions is duplicative of an ongoing audit by Commission Staff questioning Panhandle's tariff sections governing reservation charge crediting policy. Panhandle reads *NGSA* as establishing a procedural framework -- audits of interstate pipelines conducted by the Division of Audits -- that should govern here.<sup>118</sup> Panhandle states it has already dedicated resources to respond to inquiries from audit staff. Panhandle claims that the Commission in *Southwest Power Pool (SPP)*,<sup>119</sup> recognized that when an audit is being performed with respect to an issue, there need not be a duplicative audit or proceeding covering the same ground as that would be administratively inefficient.<sup>120</sup> Panhandle contends it is unreasonable to issue a show cause order while the Commission's auditing efforts are underway and prior to their completion.

90. Panhandle argues the Commission was effectively precluded from taking NGA section 5 action on its reservation charge crediting compliance, because an ongoing audit by Commission Staff was looking into the same issue, among other things.

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<sup>118</sup> Panhandle's Request for Rehearing at P 37 (citing *NGSA*'s statement that "future audits of interstate pipelines conducted by the Division of Audits should include whether the tariff comply with the Commission's reservation charge crediting policy." *Natural Gas Supply Ass'n*, 135 FERC ¶ 61,055, at P 13 (*NGSA Order*); "[I]f the Division of Audits determines during an audit of an interstate pipeline that its reservation charge crediting tariff provisions do not comply with Commission policy, then the Division of Audits may work with the pipeline to obtain voluntary compliance and, if unsuccessful, recommend that the Commission initiate a section 5 proceeding." *NGSA Order*, 135 FERC ¶ 61,055, *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA Rehearing Order*).

<sup>119</sup> *Southwest Power Pool*, 124 FERC ¶ 61,220, at P 8 (2008) (*SPP*).

<sup>120</sup> Panhandle's Request for Rehearing at P 39.

91. ProLiance argues it is appropriate to address the reservation charge credit issue in this proceeding as expeditiously as possible, as opposed to deferring to the Commission's staff's non-public audit which would delay resolution. While ProLiance recognizes that the Commission audit includes reservation charge credit compliance, ProLiance states it is not a party to the audit and has no knowledge of the audit's status. ProLiance notes audits are conducted on a non-public basis. PGC also contends that the Commission's actions in this proceeding properly supersede any related Commission staff audit.

92. ProLiance also contends it is appropriate to address the reservation charge credit issue in this proceeding in light of the potential curtailments shippers may experience during Panhandle's summer maintenance. ProLiance notes Panhandle has curtailed shipper capacity during recent maintenance periods and it should not be allowed to avoid reservation charge credits by stalling the process. ProLiance argues Panhandle should be required to modify its tariff as expeditiously as possible so that shippers have relief in the event that capacity is curtailed during the summer.

### **Commission Determination**

93. As stated in the March 2012 Order, the Commission need not delay remedial action on Panhandle's non-compliance with the Commission's reservation charge credit policy. As discussed above, in *NGSA* 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.<sup>121</sup> At no time, in *NGSA* or elsewhere, has the Commission stated that the sole procedural framework for assessing compliance with the Commission's reservation charge credit policy is through an audit. To the contrary, as ProLiance correctly notes, the Commission also allows shippers to challenge a pipeline's non-compliance with the Commission's reservation charge crediting policy in the context of a pipeline's section 4 tariff filings, even if no change to reservation charge crediting provisions are proposed in a particular filing.<sup>122</sup>

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<sup>121</sup> *NGSA*, 135 FERC ¶ 61,055 at P 13.

<sup>122</sup> See, e.g., *Kern River Transmission Co.*, 129 FERC ¶ 61,262 at P 22, *Wyoming Interstate Company, Ltd.*, 129 FERC ¶ 61,022, at P 10 (2009). See also *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216 (2012) (*Texas Eastern*).

94. Moreover, there is ample authority for the proposition that the Commission is generally “master of its own calendar and procedures.”<sup>123</sup> As the Commission explained elsewhere when moving an issue from a declaratory order proceeding into a show cause proceeding, “[i]t is within the Commission’s purview to determine how best to allocate its resources for the most efficient resolution of matters before it.”<sup>124</sup> The Commission continued that “[t]o permit petitioner/investigatees to dictate procedure to the Commission and to allocate agency resources in conformance with the investigatee’s notions of efficiency would hamstring the agency in carrying out its statutory mandates.”<sup>125</sup> The Commission’s commencement of an NGA section 5 investigation is a reasonable procedural decision based on the concerns raised in ProLiance’s protest. Furthermore, the Commission’s commencement of the present NGA section 5 investigation will obviate the need for the Division of Audits to continue to investigate Panhandle’s compliance with the Commission’s reservation charge credit policy. As such, assertions that the Commission’s commencement of this NGA section 5 investigation was improper and unnecessarily duplicative are without merit.

95. Panhandle’s reliance on *SPP*<sup>126</sup> is also misplaced. In *SPP*, the Commission waived SPP’s routine compliance, self-audit as the Commission was conducting its own audit of the Regional Transmission Organization’s independence from market participants. Unlike SPP, Panhandle was not conducting its own, routine self-audit. Rather, in the current proceeding, the Commission initiated an NGA section 5 investigation based on a shipper’s allegation regarding the pipeline’s non-compliance with Commission policy. The Commission’s commencement of an NGA section 5 investigation based on the concerns raised in ProLiance’s protest was not barred by the audit staff’s inquiry, and is a reasonable exercise of the Commission’s discretion to expedite resolution of issues before it in the most efficient manner.

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<sup>123</sup> *Stowers Oil and Gas Co., et al*, 27 FERC ¶ 61,001 (1984) (*Stowers*); *Richmond Power & Light Co. v. FERC*, 574 F.2d 610, 624 (D.C. Cir. 1978) (“Agencies have wide leeway in controlling their calendars,” citing *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967)).

<sup>124</sup> *Stowers*, 27 FERC ¶ 61,001 (citing *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1252 (D.C. Cir. 1973) (“the Commission should realistically tailor the proceedings to fit the issues before it”).

<sup>125</sup> *Stowers*, 27 FERC ¶ 61,001.

<sup>126</sup> *SPP*, 124 FERC ¶ 61,220.

**F. Commission Need Not Consider Answers to Protests**

96. Panhandle argues it was arbitrary and capricious for the Commission to accept ProLiance's late protest but not consider Panhandle's answer. Panhandle notes the Commission often allows answers to protests if they aid the Commission in the decision-making process or provide a more complete record upon which a decision can be made.<sup>127</sup>

97. Under the Commission's regulations answers to protests are prohibited unless otherwise ordered by a decisional authority. Here, the Commission properly exercised its broad discretion to reject Panhandle's answer consistent with Rule 213(a)(2).<sup>128</sup> Panhandle has not demonstrated any basis for the proposition that the Commission must waive its regulation and allow a particular answer. This is solely a matter of discretion and the rule barring answers governs absent the decisional authority's determination to accept an otherwise barred answer. Moreover, the March 2012 Order established procedures through which Panhandle would be able to explain why it should not be required to revise its tariff provisions. Panhandle has therefore been free to raise any and all concerns with the arguments set forth in ProLiance's protest through these supplemental procedures.<sup>129</sup>

98. With respect to Panhandle's argument that the Commission erred in accepting ProLiance's late protest, the Commission also disagrees. ProLiance's protest was submitted one-day late. ProLiance's protest raised valid concerns that warranted analysis and investigation. In addition, the Commission in *NGSA* "urge[d] all pipelines to review their tariffs to determine whether their individual tariff is in compliance [with Commission policy on reservation charge crediting], and if not, make an appropriate filing to come into compliance."<sup>130</sup> Also in *NGSA*, 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. It is disingenuous for Panhandle to suggest it was surprised, unprepared, or somehow prejudiced by ProLiance's late protest, which though

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<sup>127</sup> Panhandle's Request for Rehearing at PP 45-46 (internal citations omitted).

<sup>128</sup> 18 C.F.R. § 385.213(a)(2)(2012).

<sup>129</sup> We further note that Panhandle's rehearing request and its response to the March 12 Order raise substantially the same issues that Panhandle raised in its rejected answer. Because we address those issues here, we disagree with Panhandle's contention it has somehow been aggrieved by the Commission's rejection of its answer.

<sup>130</sup> *NGSA*, 135 FERC ¶ 61,055 at P 13.

one day out of time was filed early in the proceeding. In light of the early stage of this proceeding and the *NGSA* order's urging shippers to bring this issue to the Commission's attention, the Commission properly accepted the ProLiance protest.

## V. Directions for Compliance

99. In the preceding sections of this order, the Commission has found that Panhandle's existing tariff is unjust and unreasonable because it fails to include any provision providing for full reservation charge credits for non-*force majeure* outages of primary firm service. In addition, section 20 of Panhandle's GT&C concerning *force majeure* is unjust and unreasonable in two respects. First, it provides that firm shippers must continue to pay their full reservation charges during *force majeure* outages. Second, it defines all repairs and alterations to wells, machinery, or lines of pipe in the definition, without excluding from the definition repairs and alterations made as part of routine and scheduled maintenance.

100. In this order, we are not fixing just and reasonable replacement tariff provisions providing for reservation charge credits pursuant to the second prong of NGA section 5. As described above, Commission policy provides pipelines various options as to how to provide for reservation charge credits. For example, the Commission permits pipelines to provide partial reservation charge credits during *force majeure* outages under either the No Profit or Safe Harbor methods or another method that provides for risk sharing in the same ball park as the first two methods. Similarly, the Commission gives pipelines some flexibility concerning the measurement of the full reservation charges to be provided during non-*force majeure* outages. For example, in order to avoid discouraging pipelines from giving detailed advance notice of the timing of future outages for maintenance activities, the Commission permits pipelines to base credits on a shipper's historical usage of the subject facilities during a representative period before the pipeline gave such notice of the maintenance activity.<sup>131</sup> Therefore, before fixing just and reasonable reservation charge crediting tariff provisions to be included in Panhandle's tariff, the Commission will first give Panhandle an opportunity to propose how it desires to provide such credits consistent with Commission policy. Therefore, pursuant to NGA section 5, the Commission requires that, within 30 days of this order, Panhandle must file revised tariff records providing for full reservation charge credits when primary firm service is interrupted by a non-*force majeure* event, consistent with Commission policy. Panhandle must also revise its tariff to provide for partial reservation charge credits during *force majeure* outages and modify its tariff definition of *force majeure* so that planned and scheduled maintenance is not included as a *force majeure* event.

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<sup>131</sup> See *TransColorado Gas Transmission Co., LLC*, 139 FERC ¶ 61,229, at PP 35-42 (2012).

The Commission orders:

(A) Panhandle's request for rehearing in this proceeding is denied as discussed in the body of this order.

(B) Panhandle is directed, within 30 days of this order, pursuant to NGA section 5, to file revised tariff records providing reservation charge credits when firm service is interrupted, consistent with Commission policy, and also to modify its tariff definition of *force majeure* so that planned and scheduled maintenance is not included as a *force majeure* event.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,  
Deputy Secretary.