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

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

Rockies Express Pipeline LLC — Docket Nos. RP13-423-002, RP12-765-002

ORDER DENYING REHEARING

(Issued September 19, 2013)

1. On December 12, 2012, Rockies Express Pipeline LLC (Rockies Express) filed tariff records to further modify its reservation charge crediting provisions to incorporate a Monthly Maintenance Schedule and an anti-gaming limitation. Indicated Shippers[1] protested the filing urging that for *force majeure* outages, Rockies Express should be directed to adopt the No-Profit Method instead of the Safe Harbor Method [2] that is currently in its tariff.

2. By order issued January 31, 2013,[3] the Commission accepted the proposed tariff records to be effective February 1, 2013, subject to Rockies Express making further revisions as set forth in the order.[4] Indicated Shippers request rehearing of the

[1] Indicated Shippers for the purposes of this proceeding are BP America Production Company, BP Energy Company, Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Gas & Power Marketing Company, Marathon Oil Company, Shell Energy North America (US), L.P., and WPX Energy Marketing, LLC.

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

[3] *Rockies Express Pipeline LLC*, 142 FERC ¶ 61,075 (2013) (January 2013 Order).

[4] On February 15, 2013, Rockies Express made a compliance filing, which was not protested. That filing was accepted by a delegated letter order issued March 13, 2013.

January 2013 Order's decision not to require Rockies Express to revise its tariff to require use of the No-Profit Method in calculating reservation charge credits for *force majeure* events. For the reasons sets forth below, the Commission denies rehearing.

**Background**

3. A June 29, 2012 Commission order[5] expressed concern about the large number of *force majeure* events on Rockies Express' system and the contention by shippers that Rockies Express was utilizing the Safe Harbor Method to avoid paying reservation charge credits. The order directed Rockies Express to provide the Commission with further information detailing the number of *force majeure* events on its system for the past three years, the reason for invocation of *force majeure*, the length of the *force majeure* event, the impact on the pipeline's capacity, and whether any reservation charge credits were provided to shippers.

4. On July 30, 2012, Rockies Express filed the requested information and listed nineteen *force majeure* events on its system during the period November 2009 through June 2012. Rockies Express did not grant any reservation charge credits on eighteen of the outages which had an impact of 15,126 MDth. In response Indicated Shippers argued that Rockies Express' filing clearly demonstrated the problem with Rockies Express' use of the Safe Harbor Method on its system. While Indicated Shippers did not challenge any of these events as not being *force majeure*, they pointed out that in the nineteen *force majeure* events that were reported, Rockies Express granted reservation charge credits for only one event, because only one event went beyond the 10-day safe harbor period. They contend this was hardly consistent with the Commission's reasoning that during *force majeure* events pipelines and shippers should share the burden because *force majeure* is a no-fault occurrence, and reservation charge credits should be granted in a meaningful way. Here, Indicated Shippers argue, due to the frequency and short duration of eighteen of the nineteen *force majeure* outages, Rockies Express' firm shippers alone have borne the burden by paying for capacity that was not available to them due to *force majeure* events. Indicated Shippers assert that if the No-Profit Method had been in place, Rockies Express would have borne some of the burden of the *force majeure* outages by granting some credit, while firm shippers who paid the reservation charge for capacity that was not available to them would at least receive partial credit.

5. The January 2013 Order held that the Commission would not require Rockies Express to change its tariff to use the No-Profit Method rather than the Safe Harbor Method currently in its tariff. The order stated that while an overwhelming number of *force majeure* outages on Rockies Express have been resolved in less than

[5] *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275 (2012).

ten days, this does not override Commission policy that permits a pipeline to choose which method to adopt. The Commission added that it would be responsive to shippers who raise credible concerns about a pipeline's exercise of discretion in declaring an outage as a *force majeure* event.

## Rehearing Request

6. In its rehearing request Indicated Shippers state that in addition to the outages listed on the July 31, 2013 filing, Rockies Express announced another *force majeure* outage from September 21, 2012 through September 25, 2012, with an additional impact of 410 MDth, and refers to twenty *force majeure* outages. Indicated Shippers assert that as no reservation charge credits were granted to Rockies Express' primary firm shippers, in all except one of the twenty *force majeure* outages on the Rockies Express system between January 2010 and September 25, 2012, the Commission should have required Rockies Express to adopt the No-Profit Method to ensure Rockies Express shares the burden of *force majeure* curtailments. Indicated Shippers argue that as a result of the *force majeure* curtailments where no reservation charge credits were provided, Rockies Express failed to provide service for requested capacity up to 15,126 MDth.[6] Indicated Shippers calculate the purported monetary impact of the outages by applying the various recourse rates in effect on the Rockies Express system to 15,126 MDth, resulting in a total dollar impact on its primary firm shippers within a range of $6 million to $25 million.

7. Indicated Shippers assert that rather than equitably apportioning the risk of *force majeure* curtailments, the Safe Harbor Method on Rockies Express has resulted in Rockies Express' primary firm shippers being solely at risk for the last 19 *force majeure* curtailments, at a cost to these shippers of somewhere between $6 million and $25 million.

8. Indicated Shippers conclude that given that Commission decisions must be based on substantial evidence, here, the overwhelming evidence in this proceeding supports revising Rockies Express' partial reservation charge crediting methodology from the Safe Harbor Method to the No-Profit Method. Accordingly, Indicated Shippers ask the Commission to grant rehearing and require Rockies Express to implement the No-Profit Method of partial reservation charge crediting for *force majeure* outages.

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[6] The 15,126 MDth figure is the combined total of the requests for service by primary firm shippers during the 18 short-term outages previously identified by Rockies Express in this proceeding. Indicated Shippers did not include the additional September 2012 *force majeure* outage in the calculations in the rehearing request although the request refers to 20 *force majeure* outages.

**Discussion**

9. The Commission will deny Indicated Shippers' rehearing because the request provides no basis for the Commission to change its policy of allowing a pipeline to choose which method to use for granting reservation charge credits for *force majeure* outages. Indeed, providing this option to pipelines was an important element in the court's rationale for affirming the Commission's reservation charge crediting policy in *North Baja.*[7] As the Commission has stated, the two methods yield different impacts on the pipeline depending on the length of the outage. Thus, as the Commission explained in *Northern Natural Gas Co.*, while both the Safe Harbor and the No-Profit Methods achieve an equitable sharing of the risks of *force majeure* outages, they allocate the risks of short and long-term outages in different ways.[8]

10. The Safe Harbor Method allocates the entire risk of *force majeure* outages of 10 days or less to the firm shippers. However, the requirement that the pipeline provide full credits after Day 10 of the outage then allocates to the pipeline a progressively greater share of the risk from the *force majeure* outage the longer the outage continues. By contrast, the No-Profit Method allocates the same proportionate risk to the pipeline regardless of the length of the *force majeure* outage because beginning on Day One of the outage, and continuing until the outage ends; the pipeline must provide a credit to shippers equal to its return on equity and associated income taxes. Unlike the Safe Harbor Method, the No-Profit Method requires the pipeline to bear some of the risk of short duration *force majeure* outages. However, since a pipeline's return on equity and associated income taxes in almost all cases constitute less than 50 percent of the pipeline's fixed costs, for long term *force majeure* outages the No-Profit Method allocates less of the risk to the pipeline than does the Safe Harbor Method.

11. Although not the basis of our decision here, we note that Indicated Shippers' position is based solely on the short *force majeure* outages Rockies Express experienced and ignores the *force majeure* outage listed as No. 1 on Rockies Express' July 30, 2012 Filing. That outage lasted from November 14, 2009, until February 6, 2010, a total of 84 days. Rockies Express calculated the impact from that one outage as 127,708 MDth, more than eight times the 15,126 MDth impact from all the other *force majeure* outages Indicated Shippers referred to. Thus, while Rockies Express' firm shippers may have borne the risk when there was a short *force majeure* outage, the pipeline bore a greater risk from any outage that was more than ten days because shippers received full reservation charge credits commencing on Day 11 until the outage ended. Here, the November 2009 to February 2010 *force majeure* outage lasted 84 days so shippers

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

[8] *Northern Natural Gas Co.*, 141 FERC ¶ 61,221 (2012).

received full reservation charge credits for 74 days, more than the total of 60 outage days from all the other outages combined, including the additional September 2012 outage. Since the No-Profit Method provides less than a 50 percent credit of the reservation charge, here shippers received more reservation charge credits from full credit for 74 days under the Safe Harbor Method rather than less than 50 percent credit for all 144 outage days if the No-Profit Method was applicable.

12. Accordingly, the Commission sees no reason to alter the Commission's established policy of granting the pipeline the option to choose which method to use for crediting *force majeure* outages, and will deny Indicated Shippers' request for rehearing.

<u>The Commission orders</u>:

Indicated Shippers' request for rehearing is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.