145 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.

Chesapeake Energy Marketing, Inc.
v.
Midcontinent Express Pipeline LLC

Docket No. RP13-1080-000

ORDER ON COMPLAINT

(Issued October 17, 2013)

1. On July 17, 2013, Chesapeake Energy Marketing, Inc., (Chesapeake) filed a complaint (Complaint) pursuant to Rule 206 of the Commission's Rules[1] against actions taken by Midcontinent Express Pipeline LLC (Midcontinent). Chesapeake requests that the Commission reject the efforts of Midcontinent to deny Chesapeake reservation charge credits allegedly due it under the provisions of Midcontinent's tariff during a period of time Midcontinent was unable to provide service from Chesapeake's primary receipt points to its primary delivery points under a service agreement for firm transportation service.

2. Pursuant to the Commission's Rules[2] on August 6, 2013, Midcontinent filed an answer to Chesapeake's Complaint requesting that the Commission dismiss the Complaint without merit or, in the alternative, deny the Complaint on the record of the pleadings.

3. As discussed below, the Commission grants the requested Complaint and finds that Midcontinent's existing tariff requires it to provide reservation charge credits for the period when Midcontinent was unable to schedule the primary firm service nominated by Chesapeake. Pursuant to section 5 of the Natural Gas Act (NGA), the Commission also requires that Midcontinent either to modify one aspect of its existing reservation charge crediting provisions or explain why it should not be required to do so.

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[1] 18 C.F.R. § 385.206 (2013).

[2] 18 C.F.R. §§ 385.206, 212, 213, and 217 (2013).

Background

4. Chesapeake's complaint arises from the following undisputed facts. Midcontinent is a 506 mile interstate pipeline extending from southeastern Oklahoma to an interconnection with Transcontinental Gas Pipe Line Corporation (Transco) at Transco's Station 85 near the town of Butler, Alabama. The Commission issued a certificate for the construction of Midcontinent in July 2008.[3] In that order, the Commission also authorized Enogex, Inc. (Enogex) to lease up to 272,000 Dth/day of capacity on its intrastate pipeline system in Oklahoma to Midcontinent. Midcontinent has three rate zones: the Leased Capacity in Oklahoma; Zone 1, which extends from Bennington, Oklahoma to an interconnect with Columbia Gulf Transmission (Columbia Gulf) near Delhi, Louisiana; and Zone 2, which extends from Delhi to Transco's Station 85 in Alabama.

5. Midcontinent's tariff includes cost-based rates for firm service in its Zones 1 and 2, using a Straight-Fixed Variable (SFV) rate design. In addition, section 1.23 of Midcontinent's General Terms and Conditions (GT&C) provides for it to charge separate "incremental Leased Capacity Charges in addition to any applicable charges for Zone 1 and/or Zone 2." The Leased Capacity Charges are designed to pass through to the shippers who use the Leased Capacity the cost of Midcontinent's lease payments to Enogex. The Lease Agreement provides for Midcontinent to receive a credit if Enogex fails to make the Enogex Leased Capacity available.[4] Midcontinent states that it then passes any such Enogex credits through to the shippers without offset.

6. Section 2.2(d) of Midcontinent's GT&C requires it to provide reservation charge credits to its firm shippers as follows:

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[3] *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008), *reh'g denied*, 127 FERC ¶ 61,164 (2009), *order on remand*, 134 FERC ¶ 61,155 (2011).

[4] Section 5.4 of the Midcontinent's lease agreement with Enogex provides:

> [T]o the extent that Enogex on any day fails to make all of the Lease Capacity available to [Midcontinent] on a firm basis, regardless of whether the cause of such failure is an event of force majeure, planned maintenance or repair activities or any other cause, [Midcontinent] shall provide Enogex with a statement specifying the amount of credit owed to [Midcontinent] against the Monthly Lease Charges that would have otherwise been due and payable by [Midcontinent] but for Enogex's failure to make Lease Capacity available to [Midcontinent] hereunder.

> 2.2 REDUCTIONS IN FIRM SERVICES
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> (d)(1) As used in this subsection (d), Firm Daily Volume shall mean the volume of gas which MEP is obligated to deliver on a firm basis for Shipper at primary Delivery Point(s) under a firm contract on a Day, based on nominations for firm service within firm contract rights at such primary points which could be confirmed. Except as provided in subsection (d)(2), in the event MEP fails to deliver on any Day under any firm contract all of Shipper's Firm Daily Volume for that Day, then the applicable Reservation Charges and any related reservation based surcharges shall be eliminated for the quantity of gas not delivered by MEP within the Shipper's Firm Daily Volume under the contract; provided, however, that these charges shall not be eliminated to the extent that the Shipper uses secondary point service.
>
> (2) MEP shall not be obligated to adjust the Reservation Charge and any related reservation-based surcharges under any contract when MEP's failure to deliver on any Day at least 98% of the Firm Daily Volume:
>
> (i) is the result of the conduct of Shipper or the downstream operator of the facilities at the Delivery Point; or
>
> (ii) occurs either (a) within ten (10) days following a force majeure event as contemplated by Section 20 of the General Terms and Conditions, or (b) prior to the date MEP has or should have, in the exercise of due diligence, overcome the force Majeure event, whichever occur first.[5]

7. Chesapeake has a service agreement with Midcontinent for firm transportation service under Rate Schedule FTS (firm transportation service). That service agreement includes primary receipt points on the Leased Capacity portion of Midcontinent's system (100,000 dekatherms per day at the Waynoka Plant and 100,000 dekatherms per day at the West Pool), as well as primary receipt capacity in Zone 1 (312,000 dekatherms per day). Chesapeake has primary delivery points in Zone 1 (256,000 dekatherms per day) and in Zone 2 (256,000 dekatherms per day).

8. On April 24, 2013, Midcontinent notified its customers, through its web site, that beginning May 16, 2013 and until further notice, Enogex would perform remediation

[5] Midcontinent FERC GAS TARIFF GT&C 2.2.

work on a portion of the Leased Capacity Line 21. Midcontinent stated that this work would result in a reduction of Line 21's capacity to zero for the duration of the work. The April 24, 2013 Notice also stated that:

> This remediation work is solely on Enogex's system. As a result, to the extent Enogex does not assess [Midcontinent] the Leased Capacity Charges during the outage period, [Midcontinent] will not assess the Enogex Leased Capacity Shippers the Leased Capacity Charges on such days pursuant to the applicable flow-through provisions of [Midcontinent's] Tariff (GT&C Section 1.23 (e)). All Shippers including Enogex Leased Capacity Shippers will have available to them their full MDQ in Zone 1 and Zone 2 of [Midcontinent's] system during this outage. All charges other than the Leased Capacity Charges as noted above shall apply.

9. On April 29, 2013, Chesapeake sent Midcontinent a letter, opposing the statement in the notice that shippers must continue to pay the Zone 1 and Zone 2 rates during the remediation work. Chesapeake stated that the remediation work on the Lease Capacity would prevent it from scheduling service from its primary receipt points on the Leased Capacity to its primary delivery points in Zones 1 and 2. Chesapeake asserted that Midcontinent's tariff required it to provide reservation charge credits for its entire transportation path, if any portion of that path was unavailable. Chesapeake stated that it would not have contracted for the additional 200,000 Dth per day on the Midcontinent mainline without access to capacity on the Leased Capacity, and the loss of effective use of that capacity would cause Chesapeake to incur additional costs and lose revenues.[6]

10. On May 6, 2013, Midcontinent rejected Chesapeake's interpretation of Midcontinent's Tariff and restated its position as set forth in the Notice.[7] Midcontinent stated that the only capacity that would not be available to Chesapeake is that on the Enogex system "which is solely within the control of Enogex, and for which [Midcontinent's] tariff contains separate reservation charges and for which credits will be provided to Chesapeake by Enogex (via [Midcontinent])."[8] Midcontinent stated that no costs relating to the Enogex lease are included in the calculation of the Zone 1 or Zone 2 reservation charges, and the reservation charge crediting provision in section 2.2 of its

[6] Letter from A. Levine, Vice-President-Trans., to D. Bisett, Dir., Account Servs., Kinder Morgan Energy Partners, L.P., (April 29, 2013).

[7] Letter from D. Bisett, Dir., Account Servs., Kinder Morgan Energy Partners, L.P., to A. Levine, Vice President - Transp., CEMI (May 6, 2013).

[8] *Id*. at p. 2.

GT&C applies only to "situations in which [Midcontinent's] system is unavailable." Midcontinent further stated, "Indeed, [Midcontinent's] system is ready and able to deliver volumes on its system. There is no provision of [Midcontinent's] Tariff that provides that the unavailability of Leased Capacity impacts the availability of [Midcontinent's] system. [Midcontinent's] Tariff provides for reservation charge crediting; however, such provision applies to situations when [Midcontinent's] system is unavailable."[9]

11. Chesapeake then invoked the complaint procedures under GT&C 28.1(a) of Midcontinent's tariff and on June 12, 2013, Midcontinent rejected Chesapeake's complaint and restated its position that because "[t]he only capacity that is unavailable to [Chesapeake] during the Enogex outage is the Enogex Leased Capacity," Chesapeake is not entitled to reservation charge credits for Zones 1 and 2.[10]

12. The outage of the Enogex Leased Capacity lasted from May 16, 2013 through June 18, 2013. Each day during that period, Chesapeake nominated a total of 200,000 dekatherms per day from its Primary Receipt Points located on the Leased Capacity to its Primary Delivery Points in Zones 1 and 2. This constituted its full Maximum Daily Quantity (MDQ) for firm transportation service from the relevant Primary Receipt Points to the relevant Primary Delivery Points. Midcontinent did not schedule any of the nominated service. Midcontinent has billed Chesapeake for $3,379,069.78 for service during the period Midcontinent did not schedule the service Chesapeake nominated. [11]

Chesapeake's Complaint

13. On July 17, 2013, Chesapeake filed the instant complaint, alleging that Midcontinent's failure to provide reservation charge credits equal to the reservation charges it paid for primary firm service in Zones 1 and 2 for the period in question violated Midcontinent's tariff and Commission policy. Chesapeake states that it has undertaken massive investments in the development of natural gas supplies, including major sources of natural gas from Oklahoma. It states that it relies on the entire Midcontinent system, including the Leased Capacity and Zones 1 and 2, to ship natural gas supplies from Oklahoma to markets in the southeastern United States. Chesapeake contends that section 2.2(d) of Midcontinent's GT&C requires Midcontinent to provide full Zones 1 and 2 reservation charge credits against all reservation charges otherwise due for the primary firm service Midcontinent failed to schedule in those zones because of the Enogex Lease outage.

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[9] *Id.*

[10] Letter from J. Brett, Vice President, Bus. Mgmt., Kinder Morgan Energy Partners, L.P., to A. Levine, Vice President - Transp., Chesapeake at 1 (June 12, 2013).

[11] Chesapeake Complaint at p. 9.

14. Chesapeake argues that Midcontinent refused to provide it with Zone 1 and 2 reservation charge credits for the period it was denied service because, according to Midcontinent, GT&C 2.2(d) "does not require" it "to provide reservation charge credits on Zones 1 and 2 for an inability to receive gas at primary Receipt Points" but that its "obligation to provide reservation charge credits applies only to [Midcontinent's] failure to deliver all of Shipper's Firm Daily Volume at primary Delivery Points under a firm contract."[12] Therefore, Chesapeake argues that Midcontinent's position is that its tariff does not require it to credit reservation charges for primary receipt point outages so long as a shipper's delivery points remain open. Moreover, Chesapeake adds that Midcontinent also contends that because the Leased Capacity is not within Midcontinent's control, it should not be obligated to provide reservation charge credits when it cannot provide service on a firm shipper's full primary path where an outage only affects the Leased Capacity.

15. Chesapeake asserts that Midcontinent's tariff defines Midcontinent's system as including the Leased Capacity and that GT&C 2.2(d)(1) of Midcontinent's tariff states that Midcontinent will provide relief from Reservation Charges, when the conditions of this section are met, including Reservation Charges for Zone 1 and Zone 2 capacity.

16. Chesapeake asserts that Midcontinent contended in its June 12, 2013 letter that because shippers pay separate Leased Capacity charges, which include "Reservation Charges for firm service, a rate per Dth for interruptible service, a rate for fuel which includes unaccounted for gas, and Leased Capacity Activity Charges," and "which are designed to achieve a flow-through by MEP of charges paid Enogex," Chesapeake asserts that Midcontinent maintained that it has no obligation to provide reservation credits for service it is subsequently unable to provide in Zones 1 and 2.[13]

17. Chesapeake states that Midcontinent's argument fails because the Leased Capacity is not a separate rate contract, but part of Midcontinent's system to which the provisions of its tariff are applicable. Chesapeake points out that the Leased Capacity has a separately stated reservation charge to protect shippers who do not use the Leased Capacity from having to pay costs associated with that capacity not to permit Midcontinent to disadvantage leased-capacity customers and charge them for service that it cannot provide to them. Moreover, Chesapeake argues that Midcontinent's attempt to read Midcontinent's ability to *receive* gas at primary receipt points out of this provision

[12] Chesapeake Complaint at p. 13 (citing Letter from J. Brett, Vice President, Bus. Mgmt., Kinder Morgan Energy Partners, L.P., to A. Levine, Vice President – Transp., Chesapeake, at 3 (June 12, 2013)).

[13] Letter from J. Brett, Vice President, Bus. Mgmt., Kinder Morgan Energy Partners, L.P., to A. Levine, Vice President – Transp., Chesapeake at 2 (June 12, 2013).

makes little sense. Chesapeake argues that if Midcontinent cannot receive gas, it cannot deliver the gas, therefore it cannot offer shippers any service.[14]

18. Lastly, Chesapeake argues that Midcontinent has argued that because it has no right to operate or maintain the Leased Capacity requiring it to providing reservation charge credits would be inconsistent with the Commission's policy that a pipeline is to provide reservation charge credits for outages where the failure to deliver is due to events within the pipeline's control. However, Chesapeake asserts that the Commission "views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline," and that "[o]nce acquired, the lessee in essence, owns that capacity and the capacity is subject to the lessee's tariff."[15] Chesapeake argues that while the lessee does not operate the leased capacity, the lessee nonetheless "in essence owns" that capacity, [16] and it becomes part of the lessee's "System" and "subject to the lessee's tariff." [17]

19. Thus, Chesapeake argues that under the Commission's policy, the risk of an outage in the Leased Capacity is allocated to the lessee, because that capacity is treated as part of the pipeline system. Reservation charge credits are based on the failure of a pipeline to provide service, not fault or control. Chesapeake argues that a pipeline's customers that use capacity leased by the pipeline take service under the tariff of the subject pipeline and that if there is an interruption of service on the leased capacity, the pipeline must provide reservation charge credits to shippers that were curtailed pursuant to the terms and conditions of its tariff, the same as it would credit shippers for any other interruption of service on its system.[18]

[14] Chesapeake points out that section 2.3 of Rate Schedule FTS specifically provides that "Service hereunder shall consist of the acceptance by [Midcontinent]of Gas tendered by Shipper or for Shipper's account for transportation at Receipt Points specified in or applicable to the FTS Agreement, the transportation of that Gas through [Midcontinent's] pipeline System, and the delivery of that Gas by [Midcontinent] to Shipper or for Shipper's account at the Delivery Points specified in or applicable to the FTS Agreement." Chesapeake Complaint at pp. 15-16 11 (citing Midcontinent's FERC GAS TARIFF, Rate Schedule FTS, section 2.3).

[15] Chesapeake Complaint at p.19 (citing *Midcontinent Express Pipeline LLC, et al.*, 124 FERC ¶ 61,089, at P 30 (2008)).

[16] *Id.* at PP 30, 44.

[17] *Midcontinent Express Pipeline LLC, et al.*, 134 FERC ¶ 61,155, at P 3 (2011).

[18] Chesapeake Complaint at p.19 (citing *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at P 37 (2012) (*Texas Gas*)).

20. Accordingly, Chesapeake requests that the Commission find Midcontinent's application of its Tariff and practice of not crediting Zones 1 and 2 reservation charges to shippers whose receipt points are located exclusively within the Leased Capacity during total outages of service in the Leased Capacity to be contrary to the plain language of the Tariff and require that Midcontinent provide Chesapeake with the reservation charge credits due in accordance with GT&C 2.2.

21. Chesapeake also requests that in the event the Commission determines that Midcontinent's current tariff language permits it to withhold reservation charge credits for service in Zones 1 and 2 when service on the Leased Capacity is not available, the Commission exercise its authority under section 5 of the NGA to require Midcontinent to modify, on a prospective basis only, the language of Midcontinent's tariff to comply with the Commission's precedent regarding reservation charges.

Public Notice and Responsive Pleadings

22. Public Notice of Chesapeake's complaint was issued on July 17, 2013 with interventions or protest due in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211, 385.214). Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Pursuant to Rule 214, 18 C.F.R. § 385.214, all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. As required by Rule 385.213(a)(1) of the Commission's Rules of Practice and Procedure,[19] Midcontinent filed an answer to the complaint on April 21, 2010. Both Midcontinent and Chesapeake filed additional answers, however, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[20] prohibits an answer to an answer unless otherwise ordered by the decisional authority.

Midcontinent's Answer

23. In its Answer, Midcontinent argues that its tariff controls the manner in which the Enogex Leased Capacity will be governed and under what circumstances it is required to provide reservation charge credits. Midcontinent points out that it is undisputed that the remediation work in question was confined to the Enogex system and that this work resulted in the Enogex Leased Capacity being unavailable. Midcontinent asserts that it did not "perform, direct, manage or in any manner control Enogex's work on the Enogex system."[21] Midcontinent also asserts that it "stood ready, willing and able to provide

[19] 18 C.F.R § 385.213(a)(1) (2013).

[20] 18 C.F.R. § 385.213(a)(2) (2013).

[21] Midcontinent Answer at p. 14.

Chesapeake with full service from receipt points with available capacity in Zone 1 and Zone 2 to all primary and secondary delivery points in Zone 1 and Zone 2.[22] Midcontinent states that while Chesapeake asserts that GT&C Section 1.23 provides that the Enogex Leased Capacity "shall be treated as if it were [Midcontinent's] own capacity and shall be used by [Midcontinent] to provide the services set forth in the Rate Schedules and General Terms and Conditions herein," this provision does not change the language of GT&C Section 2.2(d), which governs when Midcontinent is required to provide reservation charge credits for failure to deliver gas, or change the reality that Enogex retains sole control of the facilities that provide the Enogex Leased Capacity.

24. Midcontinent asserts that Commission policy does not require reservation charge credits to be issued when an outage is due to the conduct of the downstream pipeline.[23] Midcontinent contends that this policy arises because the pipeline has no control over downstream operators.[24] Likewise, Midcontinent asserts that Commission policy also does not require credits if the disruption is caused by an upstream operator, like Enogex.[25] Midcontinent asserts that in the instant case, to carve out the responsibility related to upstream pipelines is not necessary because its tariff only requires reservation charge credits in certain instances of non-delivery to primary delivery points.

25. Midcontinent asserts that during the incident at issue, Chesapeake had its full MDQs in Zone 1 and Zone 2 available, as well as its primary delivery points. Midcontinent asserts that its facilities were unaffected by the outage and were ready and able to receive Chesapeake's gas for transportation service and that the outage impacted only the facilities on Enogex's system that provide the Enogex Leased Capacity.

[22] *Id.*

[23] Midcontinent Answer at p.15 (citing *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222, at P 68 (2012); *Tennessee Gas Pipeline Co. LLC*, 139 FERC ¶ 61,050, at P 101 (2012); *Natural Gas Pipeline Co. of America*, 106 FERC ¶ 61,310, at P 15, n.10 (2004)).

[24] *Id.* (citing *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at P 83 (2012) *Gas Transmission Northwest LLC*, 141 FERC ¶ 61,101, at P 40 (2012)).

[25] Id. (citing *Rockies Express Pipeline LLC*, 142 FERC ¶ 61,075, at P 15 (2013) ("Rockies Express is exempt from issuing reservation charge credits only if it was ready to perform, and its failure to schedule or deliver gas is due solely to the conduct of the shipper or upstream/downstream operator not controlled by Rockies Express."); *TransColorado Gas Transmission Co. LLC*, 139 FERC ¶ 61,229, at P 50 (2012) ("where only others are affected and TransColorado was ready and able to deliver nominated volumes TransColorado should not be required to grant credits.") (*Transcolorado*)).

26. Midcontinent states that under its Leased Capacity arrangement it will receive a credit if Enogex fails to make the Enogex Leased Capacity available. Midcontinent states that it then passes the Enogex credits to the shippers without offset. Midcontinent states that this is an important shipper protection because under the tariff reservation charge credit provision, Midcontinent is not required to provide credits for the first ten days of a *force majeure* event. However, Midcontinent asserts that this Safe Harbor is not applicable to the Enogex Leased Capacity because of the established pass-through mechanism. Midcontinent argues that this mechanism, therefore, conclusively demonstrates how Midcontinent and its shippers agreed to allocate the risk with respect to outages of the Enogex Leased Capacity.

27. Midcontinent argues that it is unfair for Chesapeake to demand the pass-through of the Enogex credits (required by the tariff) and also demand reservation charge credits for Zone 1 and Zone 2 (not required by the Tariff) when Midcontinent's system was ready and able to deliver Chesapeake's gas. Midcontinent asserts that there is no support in the tariff, Commission policy or Commission precedent to support Chesapeake's demand that Midcontinent be required to assume the risk of an outage on Enogex when all parties (and the Commission) agreed that Enogex Leased Capacity was to be a pass-through with no financial gain or loss to Midcontinent.

28. Midcontinent argues that its tariff is in full compliance with Commission policies and precedent with regard to reservation charge credits and that there is no basis for any prospective changes to its tariff. Midcontinent asserts that in non-*force majeure* situations, GT&C Section 2.2(d) provides that the applicable reservation charges and any related reservation-based surcharges "shall be eliminated for the quantity of gas not delivered by [Midcontinent] within the Shipper's Firm Daily Volume under the contract."

29. Midcontinent also asserts that Commission policy permits a pipeline to refrain from granting reservation charge credits in situations caused solely by another party's upstream or downstream facilities.[26] Midcontinent also points out that the Commission has also held that "[i]n a *force majeure* event, where only others are affected and [the pipeline] was ready and able to deliver nominated volumes [the pipeline] should not be required to grant credits."[27]

[26] Midcontinent Answer at p. 25 (citing *TransColorado Gas Transmission Co. LLC*, 139 FERC ¶ 61,229 (2012) ("it is reasonable for TransColorado's tariff to include an exemption from providing full reservation charge credits, where its failure to provide service is due to the conduct of the upstream or downstream operator of the facilities at the Receipt or Delivery Point, if those operators are outside of the control of TransColorado).") *Id*. P 50.

[27] *Id*. P 51.

<u>Discussion</u>

30. The Commission has a well-established policy concerning the reservation charge credits which all interstate pipelines must provide their firm shippers during both non-*force majeure* and *force majeure* situations. In general, during non-*force majeure* outages, the Commission requires pipelines to provide shippers a full reservation charge credit for the amount of primary firm service the shippers nominated but the pipeline failed to schedule and deliver.[28] During *force majeure* outages, the Commission requires the pipeline to provide partial reservation charge credits in order to share the risk of an event for which neither party is responsible. In *North Baja Pipeline, LLC v. FERC*,[29] the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

31. Since Midcontinent commenced service, it has had a tariff provision, section 2.2(d) of its GT&C, intended to implement these policies. Chesapeake contends section 2.2(d) requires Midcontinent to provide credits with respect to the primary firm service Chesapeake nominated during the May 16 through June 18, 2013 period, but Midcontinent failed to schedule and deliver. Midcontinent must, of course, charge only the rates on file with the Commission during relevant period. Thus, our decision on whether to grant Chesapeake's complaint turns solely on an interpretation of section 2.2(d) as in effect during that period. For the reasons discussed below, we interpret section 2.2(d) to require Midcontinent to provide credits equal to the Zones 1 and 2 reservation charges applicable to Chesapeake's service from May 16 through June 18, in addition to the pass through of Enogex's credits to Midcontinent with respect to the Leased Capacity.

32. GT&C Section 2.2(d)(1) contains the following general rule as to when Midcontinent will provide reservation charge credits:

> Except as provided in subsection (d)(2), in the event [Midcontinent] fails to deliver on any Day under any firm contract all of Shipper's Firm Daily Volume for that Day, then the applicable Reservation Charge and any related reservation-based surcharges shall be eliminated for the quantity of gas not delivered by [Midcontinent] within the

[28] *See, e.g., Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022 (1996) (Opinion No. 406), *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*).

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

> Shipper's Firm Daily Volume under the contract; provided, however, that these charges shall not be eliminated to the extent that the Shipper uses secondary point service.

The immediately preceding sentence of section 2.2(d)(1) defines "Firm Daily Volume" to mean:

> the volume of gas which [Midcontinent] is obligated to deliver on a firm basis for Shipper at primary Delivery Point(s) under a firm contract on a Day, based on nominations for firm service within firm contract rights at such primary points which could be confirmed.

33. During each day from May 16 through June 18, Chesapeake submitted nominations for 200,000 Dth of firm transportation service from the primary receipt points on the Leased Capacity listed in its firm contract to the Zones 1 and 2 primary delivery points listed in its firm contract. There can be no question that Midcontinent was obligated under its firm contract with Chesapeake to deliver the quantities nominated by Chesapeake at the subject primary delivery points. However, each day from May 16 through June 18 Midcontinent failed to deliver any of the firm daily volume which Chesapeake had nominated under its firm contract. Therefore, section 2.2(d)(1) requires that "the applicable Reservation Charge and any related reservation-based surcharges shall be eliminated" for the undelivered quantities, unless one of the exceptions in sections 2.2(d)(1) or (2) applies.

34. We thus turn to those exceptions. First, section 2.2(d)(1) contains a proviso that there will be no credits "to the extent that the Shipper uses secondary point service." That exception does not apply because Chesapeake did not use any secondary point service on the days in question. Second, section 2.2(d)(2)(i) provides an exception where the failure to deliver "is the result of the conduct of Shipper or the downstream operator of the facilities at the Delivery Point." Here, the failure to deliver was the result of the remediation work on the capacity Midcontinent leased from Enogex, constituting the upstream most portion of Midcontinent's system. Thus, the failure to deliver was not the result of any conduct by Chesapeake or any downstream operator of the facilities at the Zone 3 delivery points.

35. Finally, section 2.2(d)(2)(ii) provides an exception where the failure to delivery "occurs either (a) within ten (10) days following a *force majeure* event as contemplated by section 20 of the General Terms and Conditions, or (b) prior to the date MEP has or should have, in the exercise of due diligence, overcome the force Majeure event, whichever occur first." Here, Midcontinent has made no assertion that its failure to deliver was the result of a *force majeure* event. Therefore, section 2.2(d)(2)(ii) also provides no basis for Midcontinent to refuse to provide reservation charge credits. It follows that none of the tariff exceptions from the crediting requirement apply.

36. Midcontinent makes various arguments as to why its tariff does not require it to provide reservation charge credits in the circumstances of this case. First, it points out that Chesapeake has already received the benefit of the credits that Enogex provides to Midcontinent eliminating Midcontinent's lease payments during an outage of the Leased Capacity. However, section 2.2(d)(1) requires that "the applicable Reservation Charge and any related reservation-based surcharges shall be eliminated for the quantity of gas not delivered by [Midcontinent] within the Shipper's Firm Daily Volume under the contract." The applicable reservation charge for the primary firm service not provided by Midcontinent includes not only the charges for the Lease Capacity, but also the Zones 1 and 2 reservation charges for the nominated service to the Zone 2 delivery points.

37. Midcontinent's other contentions all start from the premise that the Leased Capacity is not part of its system. Midcontinent argues that Chesapeake would "have Midcontinent serve as the guarantor of an upstream unaffiliated intrastate pipeline over which it has no control." [30] In fact, Midcontinent asserts that it did not "perform, direct, manage or in any manner control Enogex's work on the Enogex system."[31]

38. The Commission rejects Midcontinent's characterization of the Leased Facilities as somehow not a part of its system and its allegation that it has no control over these facilities. To the contrary, the Commission finds that the Leased facilities are an integral part of Midcontinent's system which must be considered within its control. In Midcontinent's April 23, 2008 Answer in the instant certificate proceeding Midcontinent acknowledged that:

> The Enogex lease is an integral part of the [Midcontinent] Application, as a portion of the [Midcontinent] system will be provided by the Enogex lease. The leased capacity will be treated as if it is [Midcontinent's] own and will provide a mechanism for [Midcontinent] to avoid wasteful construction of parallel duplicate facilities. [32]

39. In approving Midcontinent's acquisition of the Leased Capacity from Enogex, the Commission stated:

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[30] Midcontinent Answer at p. 12.

[31] Midcontinent Answer at p. 14.

[32] Midcontinent April 23, 2008 Answer at p. 11 (footnotes omitted); *see Also, Midcontinent Express Pipeline LLC*, Application for Certificates of Public Convenience and Necessity, Docket No. CP08-6-000, at p. 19 ("In general, the Enogex Leased Capacity will be treated as [Midcontinent's] own capacity and will be used to provide the service defined in the [Midcontinent]Tariff, consistent with the terms of that Tariff.").

> The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.[33] To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity. *Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff.* The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.[34]

40. Therefore, in acquiring the Leased Capacity at issue here, Midcontinent also obtained a property interest in the capacity of Enogex and now owns this capacity and provides service on this capacity for its customers under the provisions of its tariff. Consistent with this fact, section 1.23 of Midcontinent's GT&C provides that the Leased Capacity "shall be treated as if it were [Midcontinent's] own capacity and shall be used by [Midcontinent] to provide the services set forth in the Rate Schedules and General Terms and Conditions herein."[35]

41. Because Midcontinent is now the owner of the Leased Capacity, the Commission finds that this ownership of the facilities provides the control necessary to hold Midcontinent responsible for events on the Leased Capacity. The fact that Midcontinent, as part of its lease agreement with Enogex, agreed that Enogex will operate the Leased Capacity on Midcontinent's behalf and will provide Midcontinent a credit if Enogex fails to make the Enogex Leased Capacity available may control the relationship between Midcontinent and Enogex, but has no bearing on the fact that Midcontinent now owns the Leased Capacity and that capacity is part of Midcontinent's system. Accordingly, the Commission finds that Midcontinent controls the Leased Capacity and that service over such capacity is subject to Midcontinent's tariff.

42. Next, the Commission finds that the cases cited by Midcontinent which state that a pipeline is not required to provide reservation charge credits with respect to outages due to problems on upstream or downstream pipelines are not applicable in this instance. As

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[33] *Midcontinent Express Pipeline Inc.*, 124 FERC ¶ 61,089 at P 31 (citing *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at 61,530 (2001)).

[34] *Id*. (citing *Texas Gas Transmission, LLC*, 113 FERC ¶ 61185, at P 10 (2005)). (emphasis added).

[35] Midcontinent's FERC GAS TARIFF GT&C 1.23.

Midcontinent points out, in *TransColorado Gas Transmission Co. LLC,*[36] the Commission held that "if a pipeline cannot deliver service because of non-*force majeure* events not within the pipeline's control, *i.e*. due to the conduct of the shipper or the operator of the upstream or downstream facilities, the pipeline should not be required to grant credits." Here, however, Midcontinent's inability to provide primary firm service to Chesapeake was because of an outage on its own system, not on upstream or downstream facilities owned by someone else. Moreover, the Commission required TransColorado to modify its tariff to "limit the exemption from crediting to point operators who are outside TransColorado's control." Enogex, as the operator of leased capacity which is owned by Midcontinent and is part of its system cannot be considered outside Midcontinent's control.

43. Our holding in this regard is buttressed by the fact that GT&C section 2.2(d)(2)(i) only provides an exemption from crediting for outages that are the result of "the conduct of Shipper or *the downstream operator of the facilities at the Delivery Point* [emphasis supplied]." Thus Midcontinent's tariff only provides an exemption from crediting related to the conduct of the downstream operator of facilities, not the upstream operator. The Leased Capacity constitutes the upstream most portion of Midcontinent's system. Thus, even if Enogex was considered the operator of upstream facilities not a part of Midcontinent's system, the tariff does not provide any exemption from crediting for outages due to its conduct.

44. Midcontinent argues that section 2.2(d)(1) does not require reservation charge credits in this instance because that section focuses on its failure "to deliver on any Day" nominated volumes. Midcontinent states that this focus on the delivery of gas is important in this instance because it stood ready, willing and able to provide Chesapeake with full service from receipt points with available capacity in Zone 1 and Zone 2 to all primary and secondary delivery points in Zone 1 and Zone 2. Midcontinent asserts that its facilities were unaffected by the outage and that the outage impacted only the facilities on Enogex's system that provide the Enogex Leased Capacity. Therefore, Midcontinent argues that it is unfair for Chesapeake to demand the pass-through of the Enogex credits as required by the tariff and to also demand reservation charge credits for Zone 1 and Zone 2 which the tariff does not provide for when Midcontinent's system was ready and able to deliver Chesapeake's gas.

45. In essence, Midcontinent asserts that this tariff language means that because Midcontinent was able to receive gas at receipt points with available capacity in Zones 1 and 2 during the outage of service in question and deliver such gas to all primary and secondary receipt points in Zones 1 and 2, reservation credits are not mandated by the

[36] *TransColorado*, 139 FERC ¶ 61,229, at P 50 (2012).

tariff language in this instance. The Commission does not agree with Midcontinent's interpretation of its tariff.

46. GT&C section 2.2(d)(1) requires Midcontinent to provide reservation charge credits for the "Shipper's Firm Daily Volume" which it "fails to deliver." Section 2.2(d)(1) defines the shipper's firm daily volume as "the volume of gas which [Midcontinent] is obligated to deliver on a firm basis for Shipper at primary Delivery Point(s) *under a firm contract* on a Day, *based on nominations for firm service within firm contract rights at such primary points* which could be confirmed." Thus, Midcontinent's obligation to provide credits is keyed to its failure to deliver gas which the shipper nominated within its firm contract rights. Chesapeake nominated deliveries at its Zones 1 and 2 primary delivery points within its firm contract rights, and Midcontinent failed to make those deliveries.

47. Midcontinent argues, in essence, that it should not be required to provide credits because it could have delivered gas to Chesapeake, if Chesapeake had nominated a different transaction than it actually nominated -- i.e. from secondary receipt points in Zones 1 or 2, rather than from the primary receipt points on the Leased Capacity listed in Chesapeake's contract. However, section 2.2(d)(1) requires Midcontinent to provide credits based on service the shipper actually nominated within its firm contract rights. Chesapeake's actual nominations were within its firm contract rights, because they were for the primary firm service guaranteed by its contract from its primary receipt points in Oklahoma where it has developed major sources of natural gas to its primary delivery points.[37]

48. Section 2.2(d)(1) does exempt Midcontinent from providing credits "to the extent that the Shipper uses secondary point service." However, this language only applies when the shipper actually "uses" secondary service, not when the shipper "could have used" secondary service. Chesapeake chose not to use secondary firm service in Zones 1 and 2 during the period the Leased Capacity was out of service. Nothing in section 2.2(d) deprives Chesapeake of its right to reservation charge credits, simply because it chose not to use secondary firm service in Zones 1 and 2 under a firm contract it entered into in order to transport gas produced in the vicinity of its primary receipt points on the Leased Capacity to primary delivery points in Zones 1 and 2.

49. The Commission cannot find any compelling support for Midcontinent's interpretation of the tariff. Accordingly, the Commission grants Chesapeake's complaint and finds that reservation credits are due to Chesapeake consistent with this discussion.

[37] *Southern Natural Gas Co*, 137 FERC ¶ 61,050, at P 15 (2011).

NGA Section 5 Reservation Charge Credit Finding

50. We have granted Chesapeake's complaint based on an interpretation of section 2.2(d) of Midcontinent's GT&C as it existed during the period May 16 through June 18, 2013. However, in our consideration of that complaint, we have noted one aspect of section 2.2(d) as approved in its certificate proceeding which is inconsistent with Commission policy. Therefore, pursuant to NGA section 5, we require Midcontinent either to modify that aspect of section 2.2 or explain why it should not be required to do so.

51. In granting Midcontinent certificate authorization for its system the Commission also reviewed the proposed reservation charge crediting provisions of its tariff. In reviewing these provisions that Commission stated that:

> Section 2.2(d)(2) also requires Midcontinent to provide a full reservation charge credit in a Force Majeure situation if Midcontinent is not able to schedule 95 percent of the firm daily volume. In Opinion No. 406, [*Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022 (1996); *order on reh'g*, 80 FERC ¶ 61,070 (1997)] the Commission denied the pipeline's proposal to reduce its reservation charge credit threshold from 98 percent to 95 percent and required the pipeline to provide full reservation charge credits when it failed to provide 98 percent of scheduled volumes. *We see no reason to permit the lower percentage amount here and direct Midcontinent to revise its tariff to provide a full reservation charge credit if Midcontinent is not able to deliver 98 percent of firm scheduled volumes.*[38] (emphasis added)

Upon review of Midcontinent's current tariff provisions regarding reservation charge crediting the Commission finds that consistent with the above directive, GT&C section 2.2(d) (2) provides that:

> (2) [Midcontinent] shall not be obligated to adjust the Reservation Charge and any related reservation-based surcharges under any contract *when [Midcontinent's] failure to deliver on any Day at least 98% of the Firm Daily Volume:*
>
> (i) is the result of the conduct of Shipper or the downstream operator of the facilities at the Delivery Point; or

[38] *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 at P 131.

> (ii) occurs either (a) within ten (10) days following a force majeure event as contemplated by Section 20 of the General Terms and Conditions, or (b) prior to the date [Midcontinent] has or should have, in the exercise of due diligence, overcome the force Majeure event, whichever occurs first. (emphasis added)

52. The Commission first established its policy regarding the 98 percent requirement in Rockies Express Pipeline, LLC where the Commission explained:

> The Commission's policy regarding reservation charge adjustments is that where scheduled gas is not delivered due to a non-*force majeure* or planned maintenance event, there must be a full reservation charge adjustment as to the undelivered amount. This is because the failure was due to the pipeline's conduct and was within its control. We agree with BP that Rockies Express' proposal not to provide reservation charge credits when it schedules at least 98 percent of a shipper's nominations in non-*force majeure* situations does not adequately comply with Commission policy. We acknowledge that we accepted a similar proposal in *Tennessee* [Opinion No. 406], but in that case the Commission did not specially address the merits of that provision. Upon consideration here, we find that Rockies Express' proposal is unjust and unreasonable because it requires its customers to bear the risk associated with interruption of service within the pipeline's control. [39]

53. In subsequent cases, the Commission has consistently followed the holding and reasoning as expressed in Rockies Express.40 Accordingly, while we recognize that we approved Midcontinent's existing 98 percent threshold in its certificate proceeding, the Commission finds that for the reasons expressed in the cases cited herein that the 98 percent threshold for reservation charge credits is unjust and unreasonable and inconsistent with the Commission precedent concerning its reservation charge credit policy because it requires customers to bear the risks associated with the interruption of service within the pipeline's control. Therefore, the Commission directs Midcontinent to eliminate the 98 percent requirement and revise its tariff to provide reservation charge credits when it does not provide 100 percent of scheduled service consistent with

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[39] *Rockies Express Pipeline, LLC*, 116 FERC ¶ 61,272 at P 63. (*Rockies Express*).

[40] *See Southern Natural Gas Co.*, 135 FERC ¶ 61,056 (2012), *order on reh'g*, 137 FERC ¶ 61,050 (2013); T*ennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011); *Petal Gas Storage, L.L.C.*, 126 FERC ¶ 61,199, at PP 25-26 (2009); *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095 (2009); *SG Resources Mississippi*, L.L.C, 122 FERC ¶ 61,180 (2008).

Commission policy, as discussed above or provide a further explanation why that policy should not be applied to it.

The Commission orders:

(A) Chesapeake's complaint is granted consistent with the discussion contained in the body of this order.

(B) Midcontinent is directed to file revised tariff sheets to eliminate the 98 percent requirement as discussed above within 30 days of the issuance of this order or explain why the Commission's policies should not apply to it in this regard.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.