

148 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Panhandle Eastern Pipe Line Company, LP

Docket Nos. RP12-455-002
RP12-455-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued July 17, 2014)

1. On April 17, 2013, the Commission issued an order¹ denying Panhandle Eastern Pipe Line Company, LP's (Panhandle) request for rehearing of the Commission's March 2012 order² and directing Panhandle to file revised tariff records providing reservation charge credits when firm service is curtailed, consistent with Commission policy, and also to revise its tariff's definition of *force majeure*. On May 17, 2013, in Docket No. RP12-455-002, Panhandle requested rehearing³ of the Commission's April 2013 Order, and on May 20, 2013, in Docket No. RP12-455-003, Panhandle filed tariff records in compliance with the April 2013 Order. As discussed more fully below, we deny Panhandle's May 2013 rehearing request of the April 2013 Order, and we find that Panhandle's revised tariff records generally comply with the Commission's policy on reservation charge crediting, *force majeure* and our rulings in the April 2013 Order.

¹ *Panhandle Eastern Pipe Line Co., LP*, 143 FERC ¶ 61,041 (2013) (April 2013 Order).

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

³ To avoid confusion between Panhandle's two rehearing requests in this docket, we will refer to Panhandle's request for rehearing of the March 2012 Order as the April 2012 rehearing request and Panhandle's request for rehearing of the April 2013 Order will be referred to as the May 2013 rehearing request.

However, we find that Panhandle must make two modifications to those tariff records in order to render them fully just and reasonable. Therefore, we require Panhandle to file revised tariff records consistent with the discussion below within 20 days of the date of this order.

I. Background

2. In this proceeding, the Commission has sought to bring Panhandle's tariff into compliance with the Commission's reservation charge crediting policy. 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, where the outage occurred due to circumstances within the pipeline's control, including planned or scheduled maintenance.⁴ 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.⁵ 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).⁶ In *North Baja Pipeline, LLC v. FERC*,⁷ the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's orders requiring a pipeline to modify its tariff to conform to these policies.

⁴ See, e.g., *Tennessee Gas Pipeline Co.*, Opinion No. 406, 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*).

⁵ The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. Opinion No. 406, 76 FERC at 61,088.

⁶ The Commission has also stated that pipelines may use some other method that achieves equitable sharing reasonably equivalent to the two specified methods.

⁷ 483 F.3d 819, 823 (D.C. Cir. 2007) (*North Baja v. FERC*), *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*).

3. In 2010, five trade associations representing producers, local distribution companies, and natural gas consumers filed a petition asserting that many pipelines were not in compliance with the Commission's reservation charge crediting policies and requesting that the Commission take action to bring the pipelines into compliance. In *Natural Gas Supply Association, et al.*,⁸ the Commission responded by encouraging interstate pipelines to review their tariffs to determine whether they were 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 could file a complaint alleging non-compliance and seek relief under section 5 of the Natural Gas Act (NGA), or raise the issue in any NGA section 4 filing by the pipeline, including where the issue was not directly related to the pipeline's tariff proposal.⁹

4. Since 2011, a number of pipelines have voluntarily filed to bring their tariffs into compliance with the Commission's reservation charge crediting policies.¹⁰ Other pipelines have complied with Commission orders requiring them to modify their tariffs

⁸ 135 FERC ¶ 61,055, at P 2 (*NGSA*), *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA Rehearing Order*).

⁹ 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.

¹⁰ See, e.g., *Paiute Pipeline Co.*, 137 FERC ¶ 61,164 (2011), *order on reh'g*, 142 FERC ¶ 61,021 (2013); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011); *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224 (2012), *order on reh'g and compliance filing*, 144 FERC ¶ 61,215 (2013) (*Gulf South*); *Gulf Crossing Pipeline L.L.C.*, 141 FERC ¶ 61,222 (2012), *order on reh'g*, 145 FERC ¶ 61,021 (2013) (*Gulf Crossing*); *Texas Gas Transmission LLC*, 141 FERC ¶ 61,223 (2012), *order on reh'g*, 145 FERC ¶ 61,110 (2013) (*Texas Gas*); *National Fuel Gas Supply Corp.*, 143 FERC ¶ 61,103 (2012); *TransColorado Gas Transmission Co.*, 139 FERC ¶ 61,229 (2012) *order on reh'g*, 144 FERC ¶ 61,175 (2013); *Rockies Express Pipeline LLC*, 142 FERC ¶ 61,075, *order on reh'g*, 144 FERC ¶ 61,216 (2013); *Viking Gas Transmission Co.*, 142 FERC ¶ 61,054 (2013); *Dominion Transmission Inc.*, 142 FERC ¶ 61,154 (2013), *order on reh'g*, 146 FERC ¶ 61,101 (2014); *Portland Natural Gas Transmission Sys.*, 143 FERC ¶ 61,181 (2013); *ANR Pipeline Co.*, 145 FERC ¶ 61,182 (2013).

consistent with Commission policy.¹¹ Panhandle, however, continues to assert that its tariff should not include any reservation charge crediting provisions.

5. Panhandle's existing tariff does not contain any provision requiring it to provide reservation charge credits to firm shippers during either *force majeure* or non-*force majeure* outages, when it fails to provide primary firm service nominated by the shipper. Indeed, section 20 of the General Terms and Conditions (GT&C) of Panhandle's tariff concerning *force majeure* expressly provides that the firm shipper's 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. The Commission approved those provisions in December 1992 during Panhandle's Order No. 636 restructuring proceeding.¹²

6. In a protest of Panhandle's March 2012 fuel reimbursement filing, ProLiance Energy, LLC (ProLiance) raised the issue of Panhandle's failure to comply with the Commission's reservation charge crediting policies. In our March 2012 Order accepting Panhandle's revised fuel reimbursement percentages, the Commission directed Panhandle to file tariff language to provide reservation charge credits consistent with Commission policy when firm service is curtailed or explain why it should not be required to do so. On April 30, 2012, Panhandle requested rehearing of the March 2012 Order. On the same date, Panhandle also filed its show cause response to the March 2012 Order. In both pleadings, Panhandle made essentially the same arguments, contending among other things 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; and (3) the Commission failed to acknowledge that the absence of reservation charge crediting exists as just one consideration of Panhandle's Commission-approved settlement rates.

¹¹ See, e.g., *Northern Natural Gas Co.*, 135 FERC ¶ 61,280, *order on reh'g*, 137 FERC ¶ 61,202 (2011); *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,262 (2009), *order on reh'g*, 132 FERC ¶ 61,111 (2010); *Gas Transmission Northwest, LLC*, 137 FERC ¶ 61,115 (2011), *order on reh'g*, 141 FERC ¶ 61,101 (2012).

¹² *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).

7. In the April 2013 Order, the Commission denied rehearing of the March 2012 Order and held that the absence of any reservation charge crediting provision in Panhandle's tariff was unjust and unreasonable. The April 2013 Order first reviewed the March 2012 Order's initiation of an investigation pursuant to NGA section 5 into whether Panhandle's tariff was unjust and unreasonable, and showed that the March 2012 Order established the procedures to develop a record to satisfy the Commission's burdens under NGA section 5 to justify requiring Panhandle to change its existing tariff provisions concerning reservation charge crediting. Next, the April 2013 Order addressed what the Commission relied on in establishing the NGA section 5 proceeding. Rather than merely relying on policy in *NGSA*, as Panhandle contended, the March 2012 Order cited to the Commission policy developed in a series of individual adjudications that the Commission held can be relied on as precedent because they have the force of law. These individual adjudications included the *North Baja* orders affirmed by the D.C. Circuit in *North Baja v. FERC*. Consistent with *PG&E v. FPC*,¹³ the Commission held that those adjudications constitute "binding precedent" that has the "force of law." Moreover, the Commission pointed out that, while the *NGSA Rehearing Order* stated that the summary of its reservation charge crediting policy in *NGSA* was a policy statement, the *NGSA Rehearing Order* also stated that "the Commission may in future cases treat its decisions in the adjudications described in [*NGSA*] as binding precedent."¹⁴

8. Therefore, the April 2013 Order concluded that the March 2012 Order's finding that the failure of Panhandle's tariff, on its face, to conform to the binding precedent in the prior adjudications was sufficient to establish a *prima facie* case that Panhandle's tariff was unjust and unreasonable. Citing *East Tennessee Natural Gas Co. v. FERC*,¹⁵ the Commission held that, once a *prima facie* case is made that a pipeline's tariff is unjust and unreasonable, the Commission may, consistent with its burden of persuasion under NGA section 5, impose on a pipeline the burden of producing evidence justifying the tariff provision. Therefore, the April 2013 Order concluded that the March 2012 Order

¹³ 506 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").

¹⁴ *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26 n.20.

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

had properly required Panhandle either to file revised tariff records to provide reservation charge credits consistent with Commission policy or explain why it should not be required to do so.

9. The April 2013 Order also recognized that, even though the March 2012 Order reasonably initiated an NGA 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.¹⁶ Therefore, the April 2013 Order next considered the issue of whether it could satisfy the burden of persuasion on these issues.

10. The April 2013 Order first found 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. The Commission held that its approval of that section twenty years ago during Panhandle's Order No. 636 restructuring proceeding did not justify Panhandle's retention today of a provision placing the entire risk of *force majeure* outages on its shippers in direct contravention of longstanding Commission policy. The Commission explained that, in 1996, or several years after the orders in Panhandle's restructuring proceeding, Opinion No. 406 had recognized that Order No. 636's requirement that pipelines shift from a Modified Fixed Variable (MFV) rate design to a Straight Fixed Variable (SFV) rate design had shifted the entire risk of *force majeure* outages to the shippers, and therefore, the Commission had modified its policy to require partial reservation charge crediting for such outages. The Commission also stated that the D.C. Circuit had affirmed a Commission order requiring a pipeline to modify its tariff to provide partial reservation charge credits in *North Baja v. FERC*. The Commission opined that Panhandle had not provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the policy the Commission has applied consistently and uniformly to other pipelines. Accordingly, the Commission found that section 20 of Panhandle's GT&C is unjust and unreasonable.

¹⁶ See *East Tennessee*, 863 F.2d at 938 (FERC nonetheless retained the ultimate burden of persuasion); *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (1993) (*Western Resources*).

11. The April 2013 Order next found that Panhandle's failure to provide for full reservation charge credits for non-*force majeure* outages of primary firm service is also unjust and unreasonable. As with the partial crediting requirement for *force majeure* outages, the Commission found that, after Panhandle's Order No. 636 restructuring proceeding, Opinion No. 406 had modified Commission policy to require full reservation charge credits for non-*force majeure* outages, including scheduled or routine maintenance. The April 2013 Order pointed out that the D.C. Circuit approved this policy when it reviewed the Commission's *North Baja* orders. The court recognized that the Commission's reservation charge crediting policy extended even to scheduled maintenance interruptions that are not controllable because a pipeline operates at full capacity.¹⁷ The D.C. Circuit concluded, however, that "[t]here is nothing unreasonable about FERC's policy that pipelines' rates should incorporate costs associated with a pipeline 'operating its system so that it can meet its contractual obligations,' and that a cost-sharing mechanism should be reserved for uncontrollable *and unexpected* events that temporarily stall service."¹⁸ Moreover, the Commission found no reason to modify this court-affirmed policy.¹⁹ The Commission held 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.²⁰

12. In response to Panhandle's concern that actions the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) may take pursuant to the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act) could cause increased outages, the Commission pointed out that in several recent decisions,²¹ it had addressed similar concerns raised by other pipelines. In those

¹⁷ *North Baja v. FERC*, 483 F.3d at 823.

¹⁸ *Id.*

¹⁹ See *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at P 58 (2012) (*Texas Eastern*).

²⁰ *Id.*

²¹ April 2013 Order, 143 FERC ¶ 61,041 at PP 61-62 (citing *Gulf South*, 141 FERC ¶ 61,224 at PP 14-47; *Gulf Crossing*, 141 FERC ¶ 61,222; *Texas Gas*, 141 FERC ¶ 61,223).

orders, the Commission 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, because PHMSA has yet to issue any regulations pursuant to those provisions. However, the Commission announced a new policy of allowing 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 the 2011 Act. Section 60139(c) directs PHMSA to require pipelines who cannot verify their maximum allowable operating pressure (MAOP) to reconfirm that MAOP "as expeditiously as economically feasible," and directs PHMSA to determine what interim actions are necessary to maintain safety until a MAOP is confirmed. The Commission found that, unlike the other sections of the 2011 Act which require rulemaking proceedings before PHMSA modifies current requirements, section 60139(c) permits PHMSA to issue orders concerning MAOP to particular pipelines without any prior rulemaking proceeding. Also outages resulting from actions PHMSA takes pursuant to section 60139(c) are one-time non-recurring events distinguishable from the routine, periodic maintenance which the Commission has held must be treated as non-*force majeure* events. Accordingly, the April 2012 Order stated that Panhandle could include in its compliance 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.

13. The April 2013 Order held that Panhandle's 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.

14. Finally, the Commission rejected Panhandle's contentions that NGA section 5 action would improperly modify the 1996 settlement agreement (Settlement) in its last rate case²² and that 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. The Commission stated that the Settlement does not relate to Panhandle's reservation charge crediting provisions and allows Panhandle's shippers to seek changes in rates, terms, and conditions under NGA section 5. The Commission also stated that compliance with Commission policy on reservation

²² *Panhandle Eastern Pipe Line Co., LP*, 77 FERC ¶ 61,284 (1996) *order on reh'g*, 78 FERC ¶ 61,180 (1997) (Settlement Order). Panhandle filed its Offer of Settlement on September 12, 1996 in Docket No. RS92-22-000, *et al.* The Settlement also resolved judicial appeals of the Commission's orders in Panhandle's Order No. 636 restructuring proceeding.

charge crediting does not necessarily have any significant effect on a pipeline's costs and revenues. However, the Commission stated that, 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 such action.²³ To enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the April 2013 Order stated that 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 NGA section 5 investigations of the justness and reasonableness of a pipeline's overall rates. Alternatively, the pipeline could simply file a general NGA section 4 rate case to propose increasing its rates to recover the increased costs from compliance with that policy.

15. The April 2013 Order did 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 required Panhandle to file revised tariff language proposing how it desires to implement reservation charge credits consistent with Commission policy. The Commission stated that, consistent with NGA section 5, the Commission would establish a prospective effective date for the tariff changes required by the April 2013 Order when the Commission acts on Panhandle's compliance filing.

II. Request for Rehearing

16. Panhandle filed its May 2013 request for rehearing of the April 2013 Order in Docket No. RP12-455-002. In support of its rehearing request, Panhandle raises three issues with respect to the April 2013 Order, namely that: (1) the Commission's conversion of a policy statement to a rule that has the "force of law" without making any findings of fact as to Panhandle or following rulemaking procedures is arbitrary and capricious and in violation of section 706 of the Administrative Procedures Act (APA); (2) the Commission's failure to carry its burden of proof under section 5 of the NGA is arbitrary and capricious and in violation of section 706 of the APA; and (3) the Commission's application of a general rule to Panhandle without giving effect to the

²³ See *ANR Pipeline Co. v. FERC*, 863 F.2d 959, 962-64 (D.C. Cir. 1988).

entirety of Panhandle's Settlement rates and tariff is arbitrary and capricious and in violation of section 706 of the APA.

17. In its request for rehearing of the April 2013 Order, Panhandle essentially reasserts previous arguments weighed and rejected by the Commission in the April 2013 Order. Accordingly, for the reasons discussed more fully below, the Commission denies Panhandle's request for rehearing of the April 2013 Order.

A. The Commission's Use of Individual Adjudications to Develop and Apply its Reservation Charge Crediting Policy.

1. Panhandle's Argument

18. Panhandle contends that the Commission has improperly converted the *NGSA* policy statement into a rule that has the force of law, without either: (1) following the notice and procedures the APA requires for a rulemaking, or (2) making specific findings of fact as to Panhandle as required in an individual adjudication. Panhandle asserts that, under the APA, a court may set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁴ Panhandle states that, in construing this provision, courts have developed principles for evaluating agency decisions. In order for an agency decision to satisfy the arbitrary and capricious standard, Panhandle argues that the "agency must cogently explain why it has exercised its discretion in a given manner."²⁵ Panhandle argues that a summary conclusion without supporting analysis or explanation violates the APA because it fails to demonstrate a "rational connection between the facts found and the choice made."²⁶ Here, Panhandle avers that the Commission abruptly changed course from its prior statements without findings of fact or reasoned explanation.

19. Panhandle argues that, in response to the Commission order in *NGSA*, the Interstate Gas Association of America (INGAA) filed a request for clarification and rehearing urging the Commission to clarify whether its order was merely a statement of policy or a binding rule that would be coupled with enforcement power. Panhandle states that INGAA also argued that the Commission violated the APA by giving the reservation

²⁴ Panhandle May 2013 rehearing request at 6 (citing 5 U.S.C. § 706 (2013)).

²⁵ Panhandle May 2013 Rehearing Request at 6 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)).

²⁶ *Id.* (citing *Motor Vehicles*, 463 U.S. at 52).

charge crediting policy the force of regulations without first conducting notice and comment rulemaking.

20. Panhandle asserts that the Commission did not acknowledge that it was promulgating a rule and insisted that it was merely restating policy which “does not establish a binding norm” and “is not finally determinative of the issues or rights to which it is addressed.”²⁷ Panhandle contends that the Commission acknowledged that it would have an NGA section 5 burden in a future reservation charge credit proceeding by stating that “[i]n any such section 5 proceedings, the Commission will, of course, have the burden of showing that the pipeline’s existing reservation charge crediting provisions are unjust and unreasonable and that any replacement tariff provisions are just and reasonable.”²⁸ Despite these assurances, Panhandle states the Commission has reversed course and now asserts that its reservation charge credit policy has the force of law because it has “been established in numerous prior adjudications concerning the reservation charge crediting tariff provisions of particular pipelines.”²⁹ Panhandle contends that this change by the Commission is unsupported by record evidence in violation of the APA.

21. Panhandle argues that the Commission cites to several cases in the April 2013 Order in purported support for its reservation charge crediting policy. However, Panhandle avers that these cases suffer from the same fatal flaw as the Commission’s decision in the April 2013 Order in that these cases fail to make findings of fact based on record evidence. Panhandle claims that these cases perpetuate general statements of policy. For example, Panhandle states that in *Orbit Gas Storage, Inc.*,³⁰ a case cited by the Commission, the only support for requiring Orbit to change its pro forma tariff was reference to another order.³¹ Panhandle further argues that the April 2013 Order relies on *Florida Gas* to support its decision which referred only generally to “other proceedings” as support for requiring the pipeline to revise its *force majeure* definition.³² Panhandle

²⁷ *Id.* at 7 (citing *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 25).

²⁸ *Id.* (citing *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 23).

²⁹ *Id.* at 8 (citing April 2013 Order, 143 FERC ¶ 61,041 at P 29).

³⁰ *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009) (*Orbit*).

³¹ Panhandle May 2013 Rehearing Request at 8.

³² *Id.* (citing *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074 at PP 28-29 (2004) (*Florida Gas*)).

states the Commission did not substantiate the rules as applied to each individual case by applying the facts specific to each particular pipeline.

22. Panhandle avers that the Commission's findings, both in the instant case and the other cases it cites, cannot cure the fact that the reservation charge credit rules were never subject to notice and comment rulemaking. Panhandle argues that the APA contains an express distinction between general statements of policy and substantive rules. In order to promulgate a substantive rule, Panhandle states the Commission must issue a notice of proposed rulemaking that describes the nature of the rule, reference the legal authority under which the rule is proposed, and contains the substance of the rule.³³ However, Panhandle states that general statements of policy are not subject to the notice and comment rulemaking requirement. In this proceeding, Panhandle argues that the Commission was very clear that it was not promulgating a general statement of policy, but rather a rule that has the force of law.³⁴ Therefore, Panhandle avers that the Commission's failure to follow proper APA notice and comment procedures is grounds for granting this request for rehearing.

23. Panhandle states that, as an alternative to notice and comment rulemaking, the Commission may establish a rule through individual adjudications. Panhandle states that this appears to be the chosen approach of the Commission in the April 2013 Order because it stated that it has "formulated the precedential parameters for applying its reservation charge crediting policy" and these parameters have the effect of a rule of law after having been established in numerous adjudications.³⁵ However, Panhandle argues that, in order to establish a rule through individual adjudications, the Commission must reexamine the factual circumstances in every proceeding in which the rule is applied.

24. Panhandle maintains that the Commission has continued to perpetuate a general statement of its policy without substantiating it by applying it to the facts of each individual pipeline. Panhandle states, the D.C. Circuit has held, "[a]n agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy."³⁶ Panhandle asserts that, in violation of the APA, the Commission undertook no analysis of

³³ *Id.* at 9 (citing 5 U.S.C. § 553(b) (2013)).

³⁴ *Id.* (citing April 2013 Order, 143 FERC ¶ 61,041 at P 29).

³⁵ *Id.* (citing April 2013 Order, 143 FERC ¶ 61,041 at P 29).

³⁶ *Id.* at 10 (citing *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

outages on Panhandle's system and presented no evidence, despite having access to a multitude of information available from Panhandle's numerous filings. Rather, Panhandle alleges that the Commission based its conclusions on references to prior cases and on general and unsupported claims made without affidavits or studies to support its assertions.

2. Commission Decision

25. In this case, the Commission has properly followed its longstanding practice of developing and applying its reservation charge crediting policies in individual adjudications. While the D.C. Circuit held in *PG&E v. FPC*³⁷ that policy statements do not establish a "binding norm," the court also stated that, in contrast to a policy statement:

[a]n 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.³⁸

26. Beginning with Opinion No. 406 in 1996, the Commission has consistently used the second of those two methods for formulating a reservation charge crediting policy that has the force of law: adjudications concerning the relevant tariff provisions of individual pipelines. The April 2013 Order provided a detailed history of the adjudications through which the Commission has developed its policy requiring pipelines to provide partial reservation charge credits during *force majeure* outages³⁹ and full

³⁷ 506 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").

³⁸ Similarly, in *Michigan Wis. Pipe Line Co.*, 520 F.2d 84, 89 (D.C. Cir. 1975), the court stated:

[t]here 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.

³⁹ April 2013 Order, 143 FERC ¶ 61,041 at PP 27-28 and 41-43.

reservation charge credits during non-*force majeure* outages,⁴⁰ together with citations to the key precedents.

27. Panhandle contends that the Commission's previous use of individual adjudications to implement its reservation charge crediting policies violates the APA because the Commission has failed to make findings of fact in those cases based on a factual record specific to the pipeline in question. Panhandle points to two of the cases cited by the April 2013 Order (i.e., *Florida Gas* and *Orbit*) as examples of prior cases suffering from this flaw. Specifically, Panhandle alleges that the *Orbit* decision references another proceeding as its sole support for requiring the pipeline to change its pro forma tariff.⁴¹ With regard to *Florida Gas*, Panhandle claims that the Commission referred generally to other proceedings as support for requiring the pipeline to revise its definition of *force majeure*.

28. These contentions by Panhandle are directly contrary to the decision of the D.C. Circuit in *North Baja v. FERC*, a case which we relied on in the April 2013 Order and which Panhandle completely ignores in its May 2013 rehearing request. In that case, as here, the Commission relied on its prior precedents concerning reservation charge crediting to require a pipeline to revise its tariff to provide partial reservation charge credits during *force majeure* outages and full reservation charge credits during non-*force majeure* outages.⁴² The Commission also relied on past precedent to require the pipeline to treat scheduled maintenance as a non-*force majeure* event requiring full reservation charge credits despite the fact that interruptions for scheduled maintenance were uncontrollable because the pipeline operated at full capacity.

⁴⁰ *Id.* PP 49-69.

⁴¹ Panhandle May 2013 rehearing request at 11 (citing *Orbit*, 126 FERC ¶ 61,095 at P 68).

⁴² While the pipeline in *North Baja v. FERC* made a tariff filing proposing reservation charge crediting provisions, the Commission's suspension order found that the pipeline's proposal failed to provide credits consistent with Commission precedent, and directed the pipeline either to modify its proposal consistent with precedent or provide further justification for its proposal. *North Baja*, 109 FERC ¶ 61,169 at P 15. Therefore, when the Commission in its order next required the pipeline to modify its proposal consistent with Commission precedent (*North Baja*, 111 FERC ¶ 61,101), the Commission was acting under NGA section 5, as here. *Western Resources*, 9 F.3d at 1577-1579 (D.C. Cir. 1993).

29. In *North Baja v. FERC*, the D.C. Circuit affirmed those orders, holding that the Commission reasonably required the pipeline to provide reservation charge credits consistent with the policies it had developed in prior adjudications. With regard to partial reservation charge crediting during *force majeure* outages, the court stated that the Commission had previously determined that two cost-sharing arrangements are equitable, the Safe Harbor Method first approved in *Texas Eastern* and the No Profit Method first approved in *Tennessee*, and North Baja's partial crediting proposal failed to provide for comparable sharing.⁴³ In affirming the Commission's rejection of that proposal, the court stated:

[t]here is nothing unreasonable about the Commission comparing North Baja's proposal to previously approved policies to determine if the proposal equitably shares the risk between North Baja and its shippers. The Commission has simply instructed North Baja to choose the *Texas Eastern* or *Tennessee* formulas or to propose a formula that achieves an equitable cost-sharing in the same ballpark as the *Texas Eastern* and *Tennessee* policies.⁴⁴

30. Similarly, in affirming the Commission's requirement that North Baja treat scheduled maintenance as a non-*force majeure* event for which full credits are required, the court explained:

[a]s a general matter, FERC has repeatedly reiterated that scheduled maintenance is not a force majeure event. *See Fl. Gas Transmission Co.*, 107 FERC ¶ 61,074 at 61,245 ¶¶ 28-29 (Apr. 20, 2003); *Alliance Pipeline L.P.*, 84 FERC ¶ 61,239, at 62,214 (Sept 17, 1998). In *El Paso Natural Gas Co.*, moreover, the Commission decided that the rule applies even to pipelines with little excess capacity. *See* 105 FERC ¶ 61,262 at 62,350 ¶ 7, 62,352 ¶ 15 (Nov. 28, 2003). FERC explained that "[t]he Commission's policy on this issue as set forth in the *Florida Gas* decision is not dependent upon specific operating conditions on the pipeline." *Id.* at 62,352 ¶ 14. In 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.⁴⁵

⁴³ The court also cited the discussion of those partial crediting methods in *Natural Gas Pipeline Co.*, 106 FERC ¶ 61,310, at P 5 (2004).

⁴⁴ *North Baja v. FERC*, 483 F.3d 819, 822.

⁴⁵ *Id.* at 822-823.

31. The court concluded that the Commission had reasonably explained its decision for purposes of the court's review under the APA.

32. In this case, we are relying on our past precedent to require Panhandle to modify its tariff in precisely the same manner as we did in our orders in *North Baja* which were affirmed by the D.C. Circuit in *North Baja v. FERC*. We have found that Panhandle's requirement that shippers pay their full reservation charges during *force majeure* outages violates the same precedents requiring an equitable sharing of that risk which the court found the Commission reasonably relied on in *North Baja v. FERC*. Similarly, we have found that Panhandle's failure to provide full reservation charge credits for non-*force majeure* outages, including outages for scheduled or routine maintenance, violates the same precedents requiring full credits during such outages which the court found the Commission reasonably relied on *North Baja v. FERC*. Indeed, on this issue, the court highlighted the same *Florida Gas* precedent which Panhandle claims is invalid because the Commission did not make findings of fact specific to that particular pipeline when it required that pipeline to revise its *force majeure* definition to comply with its general policy. The court cited *Florida Gas* as a case in which the Commission had held that scheduled maintenance is not a *force majeure* event and then pointed out that in *El Paso*,⁴⁶ the Commission had explained that its policy on this issue "as set forth in the *Florida Gas* decision is not dependent upon the specific operating conditions on the pipeline."⁴⁷ Thus, the court has affirmed our reliance on the *Florida Gas* precedent to treat outages for scheduled and routine maintenance as non-*force majeure* events requiring full reservation charge credits without regard to the "specific operating conditions on the pipeline."⁴⁸

33. Panhandle next contends that our treatment of Commission decisions in past adjudications concerning the reservation charge crediting provisions of individual pipelines as binding precedent with the force of law is contrary to our finding in the *NGSA Rehearing Order* that the summary of our reservation charge crediting policy in *NGSA* is a policy statement, which is not finally determinative of any issue concerning the justness and reasonableness of any pipeline's reservation charge crediting provisions.⁴⁹ However, as we already pointed out in the April 2013 Order, the *NGSA Rehearing Order* also made clear that:

⁴⁶ 105 FERC ¶ 61,262, at PP 7 and 15.

⁴⁷ See *North Baja v. FERC*, 483 F.3d at 822-823.

⁴⁸ *Id.*

⁴⁹ See *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26.

[w]hile [NGSA] 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.⁵⁰

34. Therefore, the April 2013 Order’s reliance in this case on our decisions in past adjudications concerning the reservation charge crediting provisions of individual pipelines to find that Panhandle’s lack of these provisions is unjust and unreasonable is entirely consistent with what we said we would do in the *NGSA Rehearing Order*. Consistent with the *NGSA Rehearing Order*, we have not treated *NGSA* itself as a binding precedent or relied on that order in any way to find that Panhandle’s tariff is unjust and unreasonable.⁵¹ Rather, we have followed our longstanding practice, predating *NGSA* and, as discussed above, affirmed by the court in *North Baja v. FERC*, of deciding reservation charge crediting cases based on the precedents established in individual adjudications beginning with Opinion No. 406 in 1996 almost twenty years ago.

In the next two sections of this order, we will address Panhandle’s contentions that the Commission failed to substantiate its application of its reservation charge crediting policies to Panhandle by failing to examine specific factors related to Panhandle’s system.

B. Whether the Commission failed to carry its burden of proof under section 5 of the NGA in the April 2013 Order?

1. Panhandle Argument

35. Panhandle states that the Commission’s NGA section 5 burden in this proceeding consists of two parts: (1) showing that Panhandle’s tariff is unjust and unreasonable and, (2) if such a showing is made, then a subsequent showing that replacement tariff

⁵⁰ April 2013 Order, 143 FERC ¶ 61,041 at P 30.

⁵¹ *Id.* *NGSA* did not constitute an adjudication concerning the reservation charge crediting provision of any particular pipeline, since that order only discussed the procedures by which such adjudications could be commenced, rather than addressing the merits of any particular pipeline’s reservation charge crediting provisions.

provisions proposed by the Commission are just and reasonable.⁵² Under NGA section 5, Panhandle asserts that “[t]he unifying principle is that the proponent of change bears the burden.”⁵³ Panhandle argues that, under the first part of the NGA section 5 analysis, the Commission’s showing that Panhandle’s Commission-approved tariff is unjust and unreasonable must be supported by substantial evidence.⁵⁴ Panhandle contends that, here, the Commission uses its force of law argument rather than supporting its decision with substantial evidence.

36. Panhandle further argues that this lack of supporting evidence is consistent with the Commission’s approach in issuing the March 2012 Order in this proceeding because in that order, the Commission also failed to support its findings with record evidence. In response to Panhandle’s April 2012 rehearing request of the March 2012 Order, Panhandle asserts that the Commission stated that its order “did not make any final merits decision under NGA section 5” on the issues.⁵⁵ Panhandle argues that the Commission’s claim in the April 2013 Order that it had not previously made a section 5 finding with regard to Panhandle’s tariff is inaccurate because it is apparent on the face of the March 2012 Order that the Commission made definitive findings. Panhandle contends that the Commission clearly stated in the March 2012 Order that Panhandle’s approach to reservation charge credits “is unjust and unreasonable and contrary to Commission policy.”⁵⁶ Similarly, Panhandle states the Commission also found that “Panhandle’s tariff definition of *force majeure* is unjust and unreasonable and must be revised.”⁵⁷

37. Without any investigation, Panhandle argues that the Commission concludes in the April 2013 Order that, because the orders approving its tariff pre-dated the Commission’s consideration of how reservation charge crediting would operate under a SFV rate design, Panhandle’s tariff is unjust and unreasonable with regard to credits during *force majeure* outages.⁵⁸ Moreover, Panhandle states that, with respect to credits during non-*force*

⁵² Panhandle May 2013 Rehearing Request at 11 (citing 15 U.S.C. § 717d).

⁵³ *Id.* (citing *Public Service Comm’n of the State of New York v. FERC*, 866 F.2d 487, 488 (D.C. Cir. 1989)).

⁵⁴ *Id.* (citing *Western Resources*, 9 F.3d at 1580).

⁵⁵ *Id.* (citing April 2013 Order, 143 FERC ¶ 61,041 at P 23).

⁵⁶ *Id.* (citing March 2012 Order, 138 FERC ¶ 61,245 at P 9).

⁵⁷ *Id.* (citing March 2012 Order, 138 FERC ¶ 61,245 at P 10).

⁵⁸ *Id.* at 12 (citing April 2013 Order, 143 FERC ¶ 61,041 at PP 40-43).

majeure outages, the Commission concludes that, although Panhandle's tariff was previously accepted by the Commission, the Commission later moved toward a policy of requiring credits during non-*force majeure* outages.⁵⁹ Panhandle argues that the Commission gathered no information on outages, or lack thereof on its system nor did the Commission investigate how Panhandle's tariff and corresponding agreements with customers assign outage risk among the parties.

38. In addition, Panhandle states that no evidence was presented or considered by the Commission as to how circumstances may have changed on Panhandle's system from a legal, operational, market or other basis since the Commission found these same tariff provisions just and reasonable. Without any evidence in the record specific to Panhandle, Panhandle argues that there is absolutely no evidentiary basis for the Commission's conclusions that its tariff is no longer just and reasonable. Panhandle avers that the Commission continues to rely on generalized assertions of precedent and has not made the necessary statutory findings rooted in substantial record evidence as mandated by the APA.

39. Panhandle argues that the Commission improperly shifted its NGA section 5 burden to Panhandle when it stated in the April 2013 Order: "[n]or 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."⁶⁰ Panhandle contends that it is not its responsibility to put forth evidence supporting the Commission's own NGA section 5 burden. Rather, Panhandle maintains the Commission must analyze the unique facts of Panhandle's system and explain how its reservation charge credit rules apply to those facts.

2. Commission Decision

40. As the April 2013 Order recognized, the Commission has the burden of persuasion under NGA section 5 in this proceeding 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. The April 2013 Order focused on the first prong of this burden. The Commission 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, the Commission found that section 20 of Panhandle's GT&C

⁵⁹ *Id.* (citing April 2013 Order, 143 FERC ¶ 61,041 at P 49).

⁶⁰ *Id.* at 13 (citing April 2013 Order, 143 FERC ¶ 61,041 at P 43).

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 includes in the definition of *force majeure* 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. The April 2013 Order did not address the second prong of its NGA section 5 burden, but instead required Panhandle to make a compliance filing proposing just and reasonable replacement tariff provisions.

41. In this order, we reaffirm the April 2013 Order's finding that we have satisfied our burden of persuasion under NGA section 5 to show that the lack of any provisions for reservation charge crediting in Panhandle's existing tariff is unjust and unreasonable. In addition, we find later in this order that Panhandle's revised tariff records generally comply with the Commission's policy on reservation charge crediting, *force majeure* and our rulings in the April 2013 Order. However, we find that Panhandle must make two modifications to those tariff records in order to render them fully just and reasonable.

42. Panhandle contends that the April 2013 Order failed to satisfy the Commission's burden of persuasion to show that its existing tariff is unjust and unreasonable because it failed to consider the particular circumstances of Panhandle's system. Panhandle asserts that the Commission improperly failed to: (1) consider how Panhandle's tariff and corresponding agreements with its customers assign the risk of an outage among the parties; (2) gather any information on outages, or the lack thereof, on Panhandle's system; and (3) present evidence as to how circumstances may have changed on Panhandle's system from a legal, operational, market or other basis since the Commission found its existing tariff provisions just and reasonable.

43. We reject these contentions. The courts have held that, once the Commission makes a *prima facie* showing that the tariff is unjust and unreasonable, the Commission may, consistent with its burden of persuasion under NGA section 5, impose on the pipeline the burden of producing evidence justifying its tariff.⁶¹ As discussed in the

⁶¹ See *East Tennessee Natural Gas Co. v. FERC*, 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* showing is made that the minimum bill is anticompetitive and therefore *prima facie* unlawful. *Transwestern Pipeline Co. v FERC*, 820 F.2d 733 (5th Cir. 1987). See also *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), which, as described in the April 2013 Order, 143 FERC ¶ 61,041 at PP 31-32, upheld the Commission's ability in an NGA section 5 proceeding to require a pipeline either to revise its tariff consistent with Commission

(continued...)

preceding section, we have found that Panhandle's imposition of the entire risk of all *force majeure* and non-*force majeure* outages of primary firm service on its shippers is contrary to longstanding Commission precedent requiring partial credits for *force majeure* outages and full credits for non-*force majeure* outages. This finding constitutes a *prima facie* showing that Panhandle's existing tariff is unjust and unreasonable. Therefore, the Commission reasonably placed on the pipeline the burden of producing evidence justifying its imposition of the risk of all outages of primary firm service on its shippers. Panhandle has failed to produce any such evidence or make any other argument that would cause us to grant rehearing of our requirement that it modify its tariff to conform to Commission policy.

44. First, contrary to Panhandle's contentions, we have considered how Panhandle's tariff and corresponding agreements with its customers assign the risk of an outage among the parties.⁶² In fact, our *prima facie* showing that Panhandle's tariff is unjust and unreasonable, is based on the undisputed fact that Panhandle's tariff assigns the full risk of both *force majeure* and non-*force majeure* outages to its firm shippers, in direct violation of our reservation charge crediting policy, affirmed by the court in *North Baja v. FERC*. In addition, as we discussed in the April 2013 Order, Panhandle has no contractual provision with its customers insulating it from NGA section 5 action to bring its tariff and service agreements into conformance with Commission policy. The Commission found that the Settlement of Panhandle's last rate case, which is still in effect, allows either a sponsoring party or subject party of the Settlement to seek changes to Panhandle's rates or tariff provisions under section 5 of the NGA, and nothing in the Settlement restricts Panhandle's shippers' rights under NGA section 5 to seek a change in Panhandle's reservation charge crediting provisions. In addition, the Commission found that Panhandle's pro forma service agreements contain a provision incorporating the GT&C of Panhandle's tariff into its service agreements, and therefore any revised GT&C reservation charge crediting provisions the Commission may order pursuant to NGA section 5 automatically be incorporated into all its firm service agreements with its shippers. In Panhandle's May 2013 rehearing request, it does not contest our interpretation of either the Settlement or its existing service agreements.

policies having the force of law or explain why its system's configuration justified a different approach.

⁶² April 2013 Order, 143 FERC ¶ 61,041 at PP 78-88.

45. Second, the pattern of outages on Panhandle's system is not relevant to the issue of whether Panhandle's failure to comply with our reservation charge crediting policy affirmed in *North Baja v. FERC*, is unjust and unreasonable. Therefore, the fact that we have not sought information about such outages does not undermine our finding that Panhandle's lack of reservation charge crediting provisions is contrary to Commission policy. With regard to *force majeure* outages, that policy requires the pipeline to provide partial reservation charge credits, so as to share equitably the risk of an event for which neither party is responsible. Whether Panhandle's system has had many, some, or no *force majeure* outages has no bearing on the issue of whether it is unjust and unreasonable for its tariff to continue to impose the full cost of all such future *force majeure* outages on its shippers. Regardless of the pipeline's past history of *force majeure* outages, it is inequitable to require Panhandle's shippers to be required to bear the full cost of any such future outage.

46. With regard to non-*force majeure* outages, the Commission's policy requiring full reservation charge credits for such outages "is not dependent upon specific operating conditions of the pipeline," as the court recognized in *North Baja v. FERC*.⁶³ Thus, again, the pattern of non-*force majeure* outages on Panhandle's system is not relevant to the issue of whether it is unjust and unreasonable for Panhandle to fail to provide full reservation charge credits for any non-*force majeure* outages that do occur. As the court held in *North Baja v. FERC*:

[t]here is nothing unreasonable about FERC's policy that pipeline's rates should incorporate costs associated with a pipeline 'operating its system so that it can meet its contractual obligations,' and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service.⁶⁴

The court, accordingly, affirmed our requirement that North Baja revise its tariff to provide full reservation charge credits for outages due to scheduled maintenance, despite the fact at least some such outages appeared to be inevitable because of the full utilization of the pipeline.

47. In this case, consistent with the fact we are proceeding through case-by-case adjudications, we have, nevertheless, given Panhandle an opportunity to produce evidence to show that unique circumstances on its system justify not applying our

⁶³ 483 F.3d at 823 (citing *El Paso*, 105 FERC ¶ 61,262 at P 15.)

⁶⁴ *Id.*

reservation charge crediting policy to it.⁶⁵ If Panhandle believed the pattern of outages on its system was relevant to a determination of whether its tariff was just and reasonable, it could have provided evidence of the pattern of outages on its system and explained why that pattern indicated our reservation charge crediting policy should not be applied. Information regarding the pattern of outages on Panhandle's system is in its possession, as the operator of its system. However, Panhandle chose not to submit any evidence concerning outages on its system, either to indicate that such outages are rare or non-existent or to indicate that such outages are significant and unavoidable. Nor has Panhandle provided any explanation of how whatever pattern of outages does exist on its system might be relevant to the issue of whether its lack of reservation charge crediting provisions is unjust and unreasonable. Instead, Panhandle has chosen to rely solely on its assertion that the entire burden of producing evidence, as well as the burden of persuasion, falls on the Commission in an NGA section 5 proceeding. However, as already discussed above, while the Commission does at all times bear the burden of persuasion in a section 5 proceeding, it may impose on the pipeline a burden of producing evidence once the Commission has made a *prima facie* showing that the pipeline's tariff is unjust and unreasonable, as the Commission has done here. Panhandle has not produced any evidence of circumstances on its system that would warrant an exception from our longstanding reservation charge crediting policy.

48. Finally, Panhandle contends that the Commission has failed to present evidence as to how circumstances may have changed on Panhandle's system from a legal, operational, market or other basis since the Commission found its existing tariff provisions just and reasonable during its Order No. 636 restructuring proceeding. However, the April 2013 Order explained at length how the Commission changed its reservation charge crediting policy starting with Opinion No. 406 several years after the Commission's orders in Panhandle's restructuring proceeding. The Commission explained how, in Opinion No. 406, the Commission recognized that the shift to a SFV rate design had the effect of imposing on shippers the full risk of *force majeure* outages, contrary to the situation before Order No. 636 when the MFV rate design caused pipelines to incur some of the risk of such outages. Similarly, Opinion No. 406 modified Commission policy concerning reservation charge credits during non-*force majeure* outages. The D.C. Circuit has affirmed our revised policy concerning reservation charge crediting. It is reasonable to require Panhandle to comply with current Commission policy on this issue, regardless of whether there have been any operational or market

⁶⁵ See March 2012 Order, 138 FERC ¶ 61,245 at P 11 (Commission expressly directed Panhandle *either* to revise its tariff *or* "explain why it should not be required to do so").

changes on Panhandle's system since the Commission approved Panhandle's current tariff during its Order No. 636 restructuring proceeding.

C. Whether the Commission's application of a general rule to Panhandle, without giving effect to the entirety of Panhandle's settlement rates and tariff, is arbitrary and capricious and in violation of section 706 of the APA.

1. Panhandle Argument

49. Panhandle argues the Commission violated the APA by failing to substantiate its general rule by application to the facts of this particular case. Panhandle avers that, while the Commission may invoke rules of general application in individual cases, the principles of due process guarantee "that parties who will be affected by the general rule be given an opportunity to challenge the agency's action."⁶⁶ Panhandle argues that, instead of undertaking notice and comment rulemaking, the Commission opted to establish the rules through adjudicatory proceedings. Therefore, Panhandle contends that "due process requires that affected parties be allowed to challenge the basis of the rule"⁶⁷ and "FERC must be able to substantiate the general rule."⁶⁸

50. Panhandle argues that courts have set aside Commission action when the Commission, as here, relied on rules established through adjudicatory proceedings without substantiating the rules by application of the facts of the case. Panhandle asserts that in *Shell Oil*,⁶⁹ the Fifth Circuit Court of Appeals vacated and remanded a Commission order because it was based on a general rule that the Commission "failed to support by substantial evidence."⁷⁰ Panhandle states the Commission relied on a "rule of general application it had established in a prior adjudication to which Shell was not a party."⁷¹ Panhandle asserts that Shell Oil Company (Shell) argued that the general rule

⁶⁶ Panhandle May 2013 rehearing request at 14 (citing *Florida Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989) (*Florida Gas v. FERC*)).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 15 (citing *Shell Oil Co. v. FERC*, 707 F.2d 230 (5th Cir. 1983) (*Shell Oil*)).

⁷⁰ *Id.* (citing *Shell Oil*, 707 F.2d 230, 236).

⁷¹ *Id.* (citing *Shell Oil*, 707 F.2d 230, 232).

was established through adjudicatory proceedings with factual contents different from the facts at issue in that proceeding. Panhandle states the Commission cited its authority to make rules of general application. While the Fifth Circuit acknowledged the Commission's authority to make such rules, Panhandle argues that the court found that due process requires it to apply the rule to the individual party, supported by substantial evidence.⁷²

51. Next, Panhandle states that in *Florida Gas v. FERC*, the pipeline challenged the Commission's application of a certificate policy that had not been substantiated based on the facts of the case at issue and the court reversed the Commission's ruling.⁷³ Panhandle asserts the Commission stated in that case that it did not consider it necessary "to rely on particular facts and circumstances."⁷⁴ Panhandle states the Fifth Circuit disagreed, holding that the Commission must be able to support the general rule and that the facts of the precedential case relied on by the Commission do not permit the extrapolation of a general rule.⁷⁵

52. Panhandle argues that the Commission's finding in the April 2013 Order that the definition of *force majeure* in its tariff must be revised did not take into account that reservation charge crediting was part of an integrated resolution reached with shippers in Panhandle's Order No. 636 proceeding. By resorting to sweeping statements of policy while failing to apply that policy, Panhandle contends that the Commission effectively unwound its Settlement with its shippers. Panhandle states, per the terms of its Settlement, its customers have benefitted and continue to benefit from its stable rates and services.⁷⁶ Panhandle claims that reservation charge crediting is just one element considered when agreeing to a rate level and must be evaluated and balanced, as the Settlement did, in the context of the system's overall design and operations. Panhandle states the Commission has held that reservation charge crediting is a rate issue.⁷⁷ As

⁷² *Id.* (citing *Shell Oil*, 707 F.2d 230, 236).

⁷³ *Id.* at 15-16 (citing *Florida Gas v. FERC*, 876 F.2d at 42).

⁷⁴ *Id.* at 16 (citing *Florida Gas*, 876 F.2d at 44).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 17 (citing *Texas Eastern Transmission, LP*, 63 FERC ¶ 61,100, at 61,434, *aff'd*, 62 FERC ¶ 61,105, at 61,090 (1993)).

such, Panhandle argues that the Settlement was an arrangement by the parties on all cost recovery and cost allocation matters, including reservation charge credits.

53. In addition, Panhandle asserts that the Commission failed to identify how the facts of the cases it cited in support of its findings compare to the realities of Panhandle's system. For instance, Panhandle states, with its market area being based on 100-mile increments, the Panhandle system is one of the most mileage-based pipelines in the United States. Panhandle argues that, such an intensive mileage-based rate structure results in shippers being able to choose from a matrix of rates and only being required to pay for the distance of transportation they use. Panhandle contends that this mileage-based rate structure was a factor in the Settlement and the absence of reservation charge credits.

2. Commission Decision

54. The Commission recognizes that, when it establishes binding precedents through individual adjudications, it must substantiate application of those precedents to the parties in each subsequent case. In its rehearing request, Panhandle has made no argument that would cause us to reconsider our long established precedent requiring partial reservation charge credits for *force majeure* outages and full credits for non-*force majeure* outages, nor has Panhandle provided any reason why that policy should not be applied to it.

55. As already discussed, in *North Baja v. FERC*, the D.C. Circuit found our reservation charge crediting policy to be reasonable with respect to both *force majeure* and non-*force majeure* outages. Because *force majeure* outages are no-fault occurrences, we continue to find it reasonable to require the pipeline to share the risk of such primary firm outages with its firm customers. We also continue to find it reasonable to require pipelines to provide full reservation charge credits for non-*force majeure* outages of primary firm service. Shippers contract for primary firm service to guarantee their ability to obtain natural gas during periods of peak demand. For example, local distribution companies contract for primary firm service in order to be able to serve residential consumers and other high priority users such as hospitals during the winter heating season. Natural gas is also increasingly used for gas-fired electric generation. A pipeline's failure to provide reliable primary firm service when needed by its firm shippers thus entails a serious risk of harm to the public. Such a failure to provide service can also cause substantial financial injury to businesses who use natural gas to run their plants and other industrial processes, as well as to producers and marketers who rely on primary firm transportation service to market their gas.

56. In these circumstances, regardless of whether the pipeline has a past history of significant service disruptions for routine maintenance or complaints about such disruptions, the requirement to provide credits provides the pipeline an important additional financial incentive to minimize, as much as possible, outages of primary firm

service for maintenance and any other non-*force majeure* event.⁷⁸ In addition, regardless of the goal of providing incentives to minimize outages, when a pipeline fails to provide the primary firm service on which its shippers rely to serve their high priority needs, it is reasonable to relieve those shippers from their obligation to make payments to reserve the capacity which the pipeline now cannot provide.⁷⁹

57. Panhandle contends that the Commission failed to support the application of this policy to it because the Commission did not take into account that reservation charge crediting was part of an integrated resolution reached with shippers in Panhandle's restructuring proceeding.⁸⁰ Panhandle also states that its customers have benefitted and continue to benefit from the stable rates and services provided by the Settlement. Panhandle claims that reservation charge crediting is just one element considered when agreeing to a rate level and must be evaluated and balanced, as the settlement agreement did, in the context of the system's overall design and operations. Panhandle states the Commission has held that reservation charge crediting is a rate issue. As such, Panhandle argues that its Settlement was an arrangement by the parties on all cost recovery and cost allocation matters, including reservation charge credits. Panhandle also states that the Settlement includes a mileage-based rate structure which permits shippers to choose from a matrix of rates so that they only pay for the distance of transportation they use. Panhandle asserts that this mileage-based rate structure was a factor in the parties' agreement to the Settlement and absence of reservation charge credits.

⁷⁸ *Id.* P 70. The Commission's finding that requiring pipelines to provide full reservation charge credits during non-*force majeure* outages will provide an incentive to minimize such outages is a reasonable economic proposition of the type the courts have held constitutes substantial evidence upon which the Commission may rely in deciding whether a pipeline's tariff is just and reasonable. *East Tennessee*, 863 F.2d at 939-940 ("FERC's adoption of an 'incentive theory,' that exposure of fixed costs attributable to a return on equity will improve the competitiveness of the natural gas industry, is a judgment well within its discretion in deciding what is a just and reasonable rate." *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1008-9 (D.C. Cir. 1987) ("Agencies do not need to conduct experiments in order rely on the prediction that an unsupported stone will fall, nor need they do so for predictions that competition will normally lead to lower prices.")).

⁷⁹ *Id.* P 71.

⁸⁰ Panhandle cites the Commission's 1992 order in its restructuring proceeding finding no basis to modify Panhandle's proposal with respect to reservation charge crediting. *Panhandle Eastern Pipeline Co.*, 61 FERC at 62,431.

58. As already discussed, Panhandle's Settlement did not contain a provision restricting the shipper's right under NGA section 5 to seek a change in Panhandle's tariff regarding reservation charge crediting.⁸¹ Thus, nothing in the Settlement suggests that the cost allocation and design of the Settlement rates is premised on the absence of any reservation charge crediting requirements. Moreover, Panhandle has provided no explanation why the reasons for our reservation charge crediting policy are any less applicable to a pipeline with mileage-based rates than to a pipeline without mileage-based rates.

59. Nevertheless, we also recognized in the April 2013 Order that reservation charge crediting can affect a pipeline's ability to recover its costs. Therefore, the April 2013 Order stated:

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. 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. 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

⁸¹ See April 2013 Order, 143 FERC ¶ 61,041 at PP 78-88.

⁸² *Id.* P 81 (citations omitted). The Commission cited the D.C. Circuit's decision in *ANR*, 863 F.2d at 962-64, requiring the Commission to permit a pipeline to make rate changes to reflect the effects of changes required pursuant to NGA section 5.

60. However, in its compliance filing, Panhandle did not take advantage of this opportunity and provided no evidence that implementation of reservation charge crediting provisions consistent with Commission policy on its system would affect its ability to recover its full cost of service. We thus find no factual basis in the current record not to apply our longstanding reservation charge crediting policy to Panhandle.

61. Panhandle's reliance on *Shell Oil* and *Florida Gas v. FERC* is misplaced. As we shall show, the court's concern with the Commission's rulings in those cases related to specific procedural defects which the court found were present in those proceedings. No such procedural defect exists in this case.

62. The courts in both *Shell Oil* and *Florida Gas v. FERC* recognized that when the Commission is proceeding against a specific party alleging that the party's tariff is defective, the Commission may invoke an existing Commission policy to support its position rather than through a formal rulemaking with notice and comment procedures. But in those cases the court found that the Commission had failed to substantiate its general policy either in those cases or in prior adjudications. In both, the court held that a prior Commission decision that the Commission relied on for its ruling did not, in fact, support the policy it was applying to the party in the proceeding on review. In contrast, the policy relied upon by the Commission in this matter is a longstanding Commission policy developed in numerous prior adjudications which contain reasonable explanations for the policy supported by substantial evidence, and in fact the court in *North Baja v. FERC* affirmed orders applying that policy.

63. *Shell Oil* concerned whether production from directionally or sidetracked wells was entitled to a new vintage price. Sidetracked wells are created by drilling part of an existing well and then sideways to new locations in the same proration unit.⁸³ *Shell Oil* contended its sidetracked wells should be eligible for a new vintage price based on the date of drilling the sidetracked well, and not the older vintage price applicable when the existing well was drilled. The Commission denied *Shell Oil*'s request for new vintage price treatment as inconsistent with a prior decision finding that a sidetracked well was not eligible for a new vintage price. The prior decision involved onshore wells, where the Commission found that the producer is able to utilize existing well footage to a great degree, and therefore, the Commission did not allow new vintage price treatment for these wells. However, *Shell Oil*'s wells were drilled from offshore platforms and sidetracked from points only slightly below the surface without utilizing existing well footage to a great degree. Thus, the court concluded that the general rule applied in onshore situations would not be a basis for ruling on offshore wells, and "the

⁸³ A proration unit is the area of a reservoir, as determined by state authorities, that can be drained adequately by one well.

Commission... failed to substantiate the single factor upon which the rule” it applied was based – the factual finding that sidetracked wells utilize existing well footage to a great degree⁸⁴ The court concluded that *Shell Oil* was given no meaningful opportunity to challenge the factual assumptions underlying the Commission ruling either in *Shell Oil* or in the prior case.

64. In this case, unlike in *Shell Oil*, we have provided Panhandle a full opportunity to explain why the reservation charge crediting policies established in our prior adjudications should not be applied to it. However, as discussed above, it has not suggested any relevant factual distinction from the prior adjudications on this issue or provided a basis for us to modify the policies established in those adjudications.

65. *Florida Gas v. FERC* is distinguishable on similar grounds. In that case, a pipeline sought five individual certificates authorizing interruptible transportation for terms of two to five years. The Commission limited the terms to one year or until the pipeline accepted a blanket certificate, whichever came first, based on a concern about the potential for undue discrimination, and also based on the fact that the industry was in a transition period pending implementation of a blanket transportation policy adopted in Order Nos. 436 and 500, the open access orders. The pipeline had not filed for such a blanket certificate.

66. The Commission defended its action in *Florida Gas v. FERC* on the ground it had similarly limited the term of individual certificates in other cases, and the D.C. Circuit had affirmed that action in *New Jersey Zinc Co. v. FERC*, 843 F.2d 1492 (D.C. Cir. 1988). The court held that the Commission had not substantiated the policy to limit individual certificates to one year with respect to Florida Gas. The court concluded that the Commission’s statement that there is a “prophylactic purpose to a limited term” was not a basis to reject the longer requested term in Florida Gas’ situation, particularly since the Commission’s order had real consequences for both the pipeline and its customers served under the subject individual certificates. With respect to the Commission’s concern about the effect that long-term certificates would have were the pipeline to accept a blanket certificate, the court stated the Commission could have added a condition terminating the certificate upon such acceptance without further limiting the term of the certificate to one year. The court recognized that in *New Jersey Zinc Co. v. FERC* another circuit had affirmed the Commission’s imposition of a one-year term, as it had done in *Florida Gas v. FERC*. The court stated that the facts in that case were different because there the pipeline had sought a blanket certificate and was in the midst of converting to open-access transportation. Limitation of one year was appropriate because a long-term individual certificate could frustrate that conversion. But in *Florida*

⁸⁴ *Shell Oil*, 707 F.2d 230, 235-36.

Gas v. FERC the pipeline never sought a blanket certificate. Panhandle does not suggest any comparable factual distinction between its situation and the prior adjudications where the Commission established its reservation charge crediting policies. Thus, *Florida Gas v. FERC* is limited as a precedent to the unusual facts presented in that proceeding.⁸⁵

67. In the instant proceeding, Commission policy has a rational basis and is consistent with rate making principles in general. Panhandle has not shown why what is applicable to all other pipelines should not be applicable to it.

III. Compliance Filing

68. On May 20, 2013, Panhandle filed revised tariff records⁸⁶ in compliance with the April 2013 Order in this proceeding. For the reasons discussed below, we find that Panhandle's revised tariff records generally comply with the Commission's policy on reservation charge crediting, *force majeure* and our rulings in the April 2013 Order. However, we find that Panhandle must make two modifications to those tariff records in order to render them fully just and reasonable. Therefore, we require Panhandle to file revised tariff records consistent with the discussion below within 20 days of the date of this order. We will establish an effective date for Panhandle's reservation charge crediting provision and revised *force majeure* tariff language, when we act on Panhandle's filing to comply with this order.

⁸⁵ Similarly, the Fifth Circuit in *Monsanto Co. v. FERC*, 963.F2d 827, 830 (5th Cir. 1992) (*Monsanto*), stated:

[w]e did not hold in [*Florida Gas v. FERC*] that FERC's policy of one-year limitations on individual certificates could never be applied to Florida Gas. Rather we held that FERC had deprived Florida Gas of due process by not substantiating its standing policy with respect to Florida Gas.

⁸⁶ Panhandle Eastern Pipe Line Company, LP, FERC NGA Gas Tariff, Fourth Revised Volume No. 1, [Part I, Table of Contents, 1000.0.0](#); [Part VI, General Terms and Conditions, 1000.0.0](#); [GT&C Section 8., Nomination and Scheduling of Service, 1000.0.0](#); [GT&C Section 9., Curtailment and Interruption, 1000.0.0](#); [GT&C Section 10., Points of Receipt, 1000.0.0](#); [GT&C Section 15., Procedures for Capacity Release, 1000.0.0](#); [GT&C Section 20., Force Majeure, 1000.0.0](#); [GT&C Section 28., Reservation Charge Credit, 1000.0.0](#).

A. Details of Filing

69. Panhandle states that the April 2013 Order required it to file revised tariff records providing reservation charge credits when primary firm service is interrupted, consistent with Commission policy, and to modify the definition of force majeure to exclude planned and scheduled maintenance as a *force majeure* event. Panhandle states that, consistent with Commission policy and recent orders, a provision for reservation charge crediting is included as a new GT&C section 28 with a corresponding update to the Table of Contents and Index of the GT&C to reflect the new section. Also, Panhandle states that a phrase has been added to GT&C section 20 as directed by the Commission along with the flexibility to provide notice of a *force majeure* event by electronic communication.

70. Panhandle proposes to provide reservation charge credits to shippers with firm transportation service when Panhandle is unable to deliver quantities of gas from primary points of receipt to primary points of delivery. Panhandle states that it will not provide reservation charge credits when its inability to schedule or deliver gas is due to events related to conduct, activities or operations of a Shipper and/or up or downstream parties (including *force majeure* events affecting the Shipper or such parties) including, but not limited to, activities and/or events such as : (1) Shipper's failure to perform in accordance with the terms of its Service Agreement and Panhandle's tariff, including but not limited to, Operational Flow Orders and failure to meet all applicable gas quality specifications; or (2) failure of supply or transportation upstream of Panhandle's pipeline system; or (3) failure of market or transportation downstream from Panhandle's pipeline system.

71. GT&C section 28.1 requires Panhandle to provide full reservation charge credits during outages of primary firm service caused by non-*force majeure* events. Pursuant to GT&C section 28.1(a), the calculation of those credits depends upon the timing of the notification of service interruption for a non-*force majeure* event. When the notice of a non-*force majeure* interruption occurs after completion of the Timely Nomination Cycle, Panhandle states that the eligible quantity is based on shipper's scheduled quantity for that gas day. When Panhandle gives advance notice of an outage or scheduled maintenance before shipper has nominated for the day of the outage, the eligible quantity shall be the average of the scheduled quantity from primary points of receipt to primary points of delivery for the seven days prior to the announced outage. If Panhandle gives notice of an outage during the Timely Nomination Cycle, the eligible quantity is based on the quantity nominated and confirmed during the Timely Nomination Cycle. Panhandle asserts that the quantity established in the scenarios described above is reduced by the amount of gas delivered to all delivery points on shipper's service agreement for that gas day to determine the eligible quantity.

72. Panhandle asserts that the reservation rate component of the reservation charge credit calculation is set forth in GT&C section 28.1(b). Panhandle states that the applicable reservation rate shall be the reservation rate in shipper's service agreement stated on a daily basis. For capacity release replacement shippers, however, Panhandle states that the applicable reservation rate shall be the lower of the releasing shipper or replacement shipper's reservation rate. Panhandle asserts that the Commission has held that releasing shippers shall continue to receive credit for reservation charges paid by replacement shippers irrespective of any reservation charge credits that the replacement shipper may receive. Panhandle has included this clarification in the Procedures for Capacity Release GT&C section 15.6(b). Panhandle states that replacement shippers paying a volumetric rate are not eligible for reservation charge credits.

73. Panhandle asserts that reservation charge credits are calculated for each day of the non-*force majeure* outage by multiplying the eligible quantity determined in GT&C section 28.1(a) by the reservation rate per GT&C section 28.1(b). In accordance with Section 2 of Rate Schedule LFT,⁸⁷ reservation charge credits for shippers under Rate Schedule LFT shall be calculated for non-*force majeure* outages as well as *force majeure* outages after Panhandle's right not to schedule service for ten days in each month.

74. Panhandle is electing to use the "Safe Harbor" method for providing partial reservation charge credits during *force majeure* events as set forth in GT&C section 28.2. After a grace period of ten full consecutive days, Panhandle shall provide full reservation charge credits for each subsequent day of the *force majeure* outage. Panhandle states the eligible quantity shall be the average of the scheduled quantity from shipper's primary points of receipt to primary points of delivery during the seven days preceding the announced *force majeure* event, less the quantity of gas delivered at all points of delivery on shipper's service agreement for the day.

75. As permitted by the April 2013 Order, proposed GT&C section 28.3 provides for partial reservation charge credits during outages required to comply with PHMSA orders issued pursuant to section 60139(c) of Title 49 of the United States Code, Chapter 601. GT&C section 28.3 provides for partial reservation charge credits pursuant to the Safe Harbor method for a two-year period beginning on July 3, 2013. That section also provides that the notice of such outages will identify the specific PHMSA order causing the outage.

76. In accordance with proposed GT&C section 28.4, reservation charge credits will be included on shipper's subsequent invoice unless the service agreement is no longer in effect.

⁸⁷ "LFT" means Limited Firm Transportation.

77. Panhandle asserts that proposed section 28.5 provides that Panhandle and a shipper with a discounted or negotiated rate agreement may, in a not unduly discriminatory manner, agree to a different reservation charge crediting methodology.

78. Finally, Panhandle states that a modification of its scheduling provisions is required in conjunction with its implementation of reservation charge crediting. Consistent with Commission policy, Panhandle asserts that reservation charge credits are based on entitlements established with usage of primary points of receipt and primary points of delivery and do not apply to service at secondary points. As described further below, the changes in GT&C sections 8.2 (relocated paragraph to GT&C Section 8.8(d)), 8.8, 9.3, 10.1 and 10.4) ensure that primary firm transactions will have a scheduling priority over all other transactions consistent with Commission policy.

79. Lastly, Panhandle has modified the definition of *force majeure* in GT&C section 20 to add the specific language required in the April 2013 Order.

B. Public Notice and Comments

80. Public notice of Panhandle's compliance filing was issued on May 22, 2013. Protests were due as provided in section 154.211 of the Commission's regulations.⁸⁸ On June 3, 2013, ProLiance filed comments in response to the revised tariff records. On June 12, 2013, Panhandle filed an answer to ProLiance's comments.

81. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)(2) (2013)) prohibits answers unless ordered by the decisional authority. In this case, the Commission will accept Panhandle's answer because it has assisted the Commission in our decision-making process.

C. Discussion

1. Calculation Methodology

82. In its comments, ProLiance requests clarification of Panhandle's proposed calculation methodology. ProLiance asserts that Panhandle's proposed language for reservation charge credits in non-*force majeure* outages in new GT&C section 28.1(a)(1) provides that eligible quantities will be calculated by using a shipper's "scheduled Quantity of Gas from primary Points of Receipt (up to the Quantity stated on Shipper's Service Agreement Exhibit A for each primary Point of Receipt) to primary Points of Delivery (up to the Quantity stated on Shipper's Service Agreement Exhibit A for each

⁸⁸ 18 C.F.R. § 154.211 (2013).

primary Point of Delivery) less the Quantity of Gas delivered at all Points of Delivery on Shipper's Service Agreement for the Day.”⁸⁹ ProLiance states that the proposed language in GT&C section 28.1(a)(2) and *force majeure* outages in GT&C section 28.2(b) also allows Panhandle to reduce the volumes eligible for reservation charge credits by the amount of gas delivered at all Points of Delivery on the shipper's agreement.

83. ProLiance asserts that one interpretation of the above language is that Panhandle would have the ability to offset volumes, which might eliminate reservation charge credits entirely. As an example, ProLiance states that it might nominate 100,000 Dth for a day, of which 50,000 Dth is for primary firm service and the other 50,000 is for secondary firm service. Because of an outage, Panhandle can only deliver 25,000 Dth of the nominated primary firm service and 35,000 Dth of the nominated secondary firm service. ProLiance is concerned that, under Panhandle's proposed calculation method, Panhandle could subtract the 35,000 Dth of scheduled secondary firm service from the 25,000 Dth of primary firm service that was not delivered. Panhandle would thus provide no credits, despite the fact Panhandle failed to schedule 25,000 Dth of ProLiance's nominated primary firm service. ProLiance requests that the Commission carefully review the method to ensure it is consistent with Commission policy.

84. In response, Panhandle states that its tariff changes are fully consistent with Commission policy and in compliance with the April 2013 Order. Panhandle states that a shipper pays reservation charges based on quantities assigned to particular points of receipt and delivery (primary points). Panhandle states that the contracted quantity for each primary point of receipt and each primary point of delivery is stated in the service agreement between the shipper and Panhandle. Panhandle states that a firm shipper has a guaranteed firm contractual right to service only at its primary points.⁹⁰ Panhandle further states the Commission has held that the pipeline's service obligation on a particular gas day is not restricted to primary points, but that shippers can utilize secondary points, if capacity is available.⁹¹

⁸⁹ ProLiance Comments at 2.

⁹⁰ Panhandle Reply at 2 (citing *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 69 (2011)).

⁹¹ *Id.* at 2-3 (citing *Tennessee Gas Pipeline Co.*, 73 FERC ¶ 61,083, at 61,206 (1995)).

85. The Commission requires Panhandle to revise proposed sections 28.1(a)(1), (2), and (3) and 28.2(b) to address ProLiance's concern. It is reasonable for Panhandle to reduce any reservation charge credits by the amount of secondary firm service a shipper nominates to replace the primary firm service that the shipper would have used absent the outage of primary firm service.⁹² However, as illustrated by ProLiance's example in its protest, Panhandle's proposed tariff language could allow it to reduce the credits for outages of primary firm service by any amount of secondary firm service provided, regardless of whether such secondary firm service replaced the primary firm service that the shipper otherwise would have used. Accordingly, Panhandle must revise its proposed tariff language in order to limit the reduction in credits to the amount of secondary firm service used as an alternative to the primary firm service not provided.⁹³

2. Exemptions from Crediting

86. Panhandle proposes various exemptions from providing reservation charge crediting: (1) when the shipper fails to perform in accordance with the terms of its Service Agreement and Panhandle's tariff, including but not limited to, Operational Flow Orders and failure to meet all applicable gas quality specifications; or (2) when the outage is due to failure of supply or transportation upstream of Panhandle's pipeline system; or (3) when the outage is due to failure of market or transportation downstream from Panhandle's pipeline system.

87. Commission policy requires the pipeline to provide credits when the failure to provide service is due to events within the pipeline's control. On the other hand, when a pipeline cannot deliver the service solely because of the conduct of others outside its control, the pipeline is not required to provide credits. Consistent with this policy, the Commission has required pipelines to clarify that proposed exemptions from crediting are limited to situations where the pipeline's failure to deliver gas was due *solely* to the conduct of others or events not controllable by the pipeline.⁹⁴ Accordingly, the Commission requires Panhandle to clarify GT&C section 28 consistent with this policy.

⁹² See *Gulf South*, 141 FERC ¶ 61,224 at PP 68-70.

⁹³ See, e.g., section 34.4 of the General Terms and Conditions of the tariff of Viking Gas Transmission Co., which was accepted by the Commission in *Viking Gas Transmission Co.*, 142 FERC ¶ 61,054 (2013).

⁹⁴ See, e.g., *Gulf South*, 141 FERC ¶ 61,224 at P 84.

3. Sections 8.8(a)(2) and 8.8(b)(2)

88. Sections 8.8(a) and (b) of Panhandle's existing tariff set forth the priorities Panhandle uses to schedule receipts and deliveries respectively, when there are constraints at those points. At present, the priorities in sections 8.8(a) and (b) give firm service from or to primary points priority over all firm service from or to secondary points. In addition, section 8.8(a) of Panhandle's current tariff provides that firm service from or to secondary points within a shipper's contract path is scheduled before firm service from secondary receipt points outside a shipper's path. Within each of the two secondary receipt point categories, scheduling is by rate paid. Section 8.8(b) of Panhandle's current tariff provides that firm service to secondary delivery points within a shipper's contract path is scheduled before firm service to secondary delivery points outside a shipper's contract path. Again, within each of the two secondary delivery point categories, scheduling is by rate paid.

89. Section 8.8(c) of Panhandle's current tariff applies when there is a constraint at a point other than the points of receipt and delivery in the service agreement and Panhandle is unable to schedule all nominated quantities. In those circumstances, if the constraint point is west of Haven, Kansas, Panhandle will schedule firm service from a secondary receipt point equally with firm service from a primary receipt point, if the constraint point is within the primary path of the service using the secondary point. Similarly, if the constraint point is east of Haven, Kansas, Panhandle will schedule firm service to a secondary delivery point equally with firm service at a primary point, if the constraint point is within the primary path of the service using the secondary point.

90. Panhandle proposes to revise section 8.8 to clarify that the highest priority level will always be for service from primary receipt points to primary delivery points. It proposes to revise GTC section 8.8(a) to clarify that, when scheduling service at a receipt point, transactions using that point as a primary receipt point and going to a primary delivery point will have priority over transactions using a secondary receipt or delivery point. Panhandle proposes to revise section 8.8(b) to clarify that, when scheduling service at a delivery point, transactions using that point as a primary delivery point and originating at a primary receipt point will have priority over transactions using a secondary receipt or delivery point. Finally, Panhandle proposes to revise section 8.8(c) so that when there is a constraint at a point other than the points of receipt or delivery in a service agreement, the highest priority will be given to transactions from a primary receipt point to a primary delivery point, the next highest priority will be given to firm transactions using a secondary point within the shipper's primary path, and the next highest priority after that will be for firm transactions using an out-of-path secondary point.

91. ProLiance is concerned about the revisions to sections 8.8(a) and 8.8(b) and how they might affect ProLiance's ability to schedule gas. ProLiance argues that it is unclear why the revisions to these sections are needed and ProLiance requests that Panhandle clarify why it is proposing these changes.

92. In reply, Panhandle states that, in order to calculate reservation charge credits and consistent with the Commission's policy on scheduling priority set out in GT&C section 8.8(c)(1), modifications to GT&C sections 8.8(a) and 8.8(b) are necessary. Panhandle argues that, under its existing approved and governing tariff, the scheduling priority at a particular point depends on whether the point is a primary point or a secondary point on the shipper's service agreement. Panhandle also states that when the point is a secondary point, then the scheduling priority further depends on whether the point being scheduled is located inside the shipper's primary path or outside the primary path. Consistent therewith, Panhandle states that it proposed to modify GT&C sections 8.8(a)(1) and 8.8(b)(1) to clarify that nominated and scheduled firm service between primary points of receipt and primary points of delivery receives first priority. Panhandle states that the new GT&C sections 8.8(a)(2) and 8.8(b)(2) are needed to clarify the priority when the point being scheduled is a primary point but the other end of the transportation is a secondary point.

93. The Commission finds that Panhandle's proposed revisions to GT&C section 8.8 are reasonable. The revisions will ensure that transactions from primary receipt points to primary delivery points will always have the highest scheduling priority, consistent with the Commission's policy.⁹⁵ This will maximize Panhandle's ability to schedule primary firm service and thus minimize the situations when it will have to provide reservation charge credits for outages of primary firm service.

4. Section 28.3 (PHMSA Orders)

94. ProLiance states that Panhandle proposes to add a new section 28.3 to address outages to comply with PHMSA orders pursuant to section 60139(c) of Title 49 of the United States Code, Chapter 601. ProLiance states that the issue of outages due to PHMSA orders pursuant to section 60139(c) is still pending in the *Gulf South*, *Gulf Crossing*, and *Texas Gas*⁹⁶ proceedings cited by Panhandle in its compliance filing and that several parties have filed rehearing requests in those proceedings. ProLiance

⁹⁵ *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at PP 22-27 (2011), *reh'g denied*, 139 FERC ¶ 61,050, at PP 14-26 (2012).

⁹⁶ ProLiance Comments at 3 (citing *Gulf South*, 141 FERC ¶ 61,224, *Gulf Crossing*, 141 FERC ¶ 61,222, and *Texas Gas*, 141 FERC ¶ 61,223).

requests that it may be more appropriate for the Commission to hold off on approving the proposed GT&C section 28.3 until a final order on rehearing has been issued in those proceedings.

95. Panhandle states that the proposed GT&C section 28.3 is consistent with the tariff language approved by the Commission in the *Gulf South*,⁹⁷ *Gulf Crossing*,⁹⁸ and *Texas Gas*⁹⁹ orders. Panhandle states that no party has sought a stay of those orders; therefore they are binding Commission orders. Additionally, in the April 2013 Order, Panhandle states that the Commission specifically found that “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.”¹⁰⁰ Panhandle states that this is exactly what it has done. Panhandle further states that ProLiance did not seek rehearing or a stay of the April 2013 Order.

96. The Commission finds that the language proposed in the new GT&C section 28.3 is consistent with tariff language previously approved by the Commission. The Commission has denied the requests for rehearing in *Gulf South, et al.*, that were pending at the time ProLiance filed its protest of Panhandle’s compliance filing and the Commission reaffirmed its policy of allowing partial reservation charge crediting for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) for a transitional two-year period.¹⁰¹ The Commission found that such outages are comparable to those for which partial crediting is allowed as *force majeure* events.

The Commission orders:

(A) Panhandle’s request for rehearing of the April 2013 is denied as discussed in the body of this order.

⁹⁷ Panhandle Reply at 4 (citing *Gulf South*, 141 FERC ¶ 61,224 at P 40).

⁹⁸ *Id.* (citing *Gulf Crossing*, 141 FERC ¶ 61,222 at P 40).

⁹⁹ *Id.* (citing *Texas Gas*, 141 FERC ¶ 61,223 at P 39).

¹⁰⁰ April 2013 Order, 143 FERC ¶ 61,041 at P 68.

¹⁰¹ See *Gulf South*, 144 FERC ¶ 61,215; *Gulf Crossing*, 145 FERC 61,021; *Texas Gas Transmission LLC*, 145 FERC ¶ 61,110.

(B) Panhandle must file revised tariff records consistent with the discussion in the body of this order on or before 20 days from the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.