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

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Texas Eastern Transmission, LP — Docket Nos. RP12-318-003, RP12-318-005

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued November 20, 2014)

Paragraph Numbers

1. On October 22, 2012, Texas Eastern Transmission, LP (Texas Eastern) filed *pro forma* tariff records (October 2012 Compliance Filing) to comply with the order on rehearing and compliance filing issued on September 20, 2012, in the above-referenced proceeding[1] and a request for rehearing of that order (Request for Rehearing). The Interstate Natural Gas Association of America (INGAA) also filed a request for rehearing. On November 26, 2012, Texas Eastern filed substitute *pro forma* tariff records[2] which superseded and replaced its October 2012 Compliance Filing (November 2012 Compliance Filing). For the reasons discussed below, the Commission denies the requests for rehearing and approves the *pro forma* tariff records subject to Texas Eastern submitting a compliance filing containing matching tariff records consistent with the discussion and conditions set forth in this order.

I. Background

2. In this proceeding, the Commission has sought to bring Texas Eastern'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.[3] 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.[4] 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).[5] In *North Baja Pipeline, LLC v. FERC*,[6] the United States Court of Appeals for the

---

[1] *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216 (2012) (September 2012 Order).

[2] *See* Appendix.

[3] *See, e.g., Tennessee Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express I*).

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

[5] The Commission has also stated that pipelines may use some other method that

(continued...)

District of Columbia Circuit affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

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.*,[7] 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.[8]

4. Since 2011, a number of pipelines have voluntarily filed to bring their tariffs into compliance with the Commission's reservation charge crediting polices.[9] Other pipelines

---

achieves equitable sharing reasonably equivalent to the two specified methods.

[6] 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*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

[7] 135 FERC ¶ 61,055, at P 2 (*NGSA*), *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA Rehearing Order*).

[8] The Commission cited *Kern River Transmission Co.*, 129 FERC ¶ 61,262, at P 22 (2009), *order on reh'g*, 132 FERC ¶ 61,111 (2010) (*Kern River I*), 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.

[9] *See, e.g.*, *Paiute Pipeline Co.*, 137 FERC ¶ 61,164 (2011), *order on technical conference*, 139 FERC ¶ 61,089 (2012), *order on reh'g*, 142 FERC ¶ 61,021 (2013) (*Paiute*); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*); *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224 (2012), *order on reh'g and compliance*, 144 FERC ¶ 61,215 (2013) (*Gulf South*); *Gulf Crossing Pipeline LLC,* 141 FERC ¶ 61,222 (2012), *order on reh'g and compliance*, 145 FERC ¶ 61,021 (2013) (*Gulf Crossing*); *Texas Gas Transmission LLC*, 141 FERC ¶ 61,223 (2012), *order on reh'g and*

(continued...)

have complied with Commission orders requiring them to modify their tariffs consistent with Commission policy.[10] Texas Eastern, however, continues to assert that it should be permitted to retain its existing reservation charge crediting provisions approved during its Order No. 636 restructuring proceeding,[11] despite the fact that the Commission subsequently modified its reservation charge crediting policy and in 2003 rejected another pipeline's proposal to implement reservation charge crediting provisions modeled on those of Texas Eastern.[12]

A. <u>Texas Eastern's Reservation Charge Crediting Provisions and the February 2012 Order</u>

5. Texas Eastern's existing Rate Schedules for firm transportation, CDS, FT-1, FTS, FTS-2, FTS-4, FTS-5, FTS-7, FTS-8, SCT, LLFT, VKFT, and MLS-1, and firm storage,

---

compliance, 145 FERC ¶ 61,100 (2013) (*Texas Gas*); *National Fuel Gas Supply Corp.*, 143 FERC ¶ 61,103 (2013) (*National Fuel*); *TransColorado Gas Transmission Co LLC.*, 139 FERC ¶ 61,229 (2012), *order on reh'g*, 144 FERC ¶ 61,175 (2013) (*TransColorado*); *Gas Transmission Northwest LLC*, 141 FERC ¶ 61,101 (2012); *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) (*Dominion*); *ANR Pipeline Co*., 145 FERC ¶ 61,182 (2013) (*ANR*); *Iroquois Gas Transmission System, L.P.*, 145 FERC ¶ 61,233 (2013) (*Iroquois*); *Vector Pipeline L.P.*, accepted by unpublished delegated letter order dated August 25, 2014 in Docket Nos. RP14-1111-000 and RP14-1111-001; *Equitrans, L.P.*, 148 FERC ¶ 61,250 (2014); *National Grid LNG, LLC*, 149 FERC ¶ 61,117 (2014).

[10] *See, e.g.*, *Northern Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 (2011), *order on reh'g and compliance*, 141 FERC ¶ 61,221 (2012) (*Northern*); *Kern River I*, 129 FERC ¶ 61,262, *order on reh'g*, 132 FERC ¶ 61,111; *Panhandle Eastern Pipe Line Co.*, 138 FERC ¶ 61,245 (2012), *order on reh'g*, 143 FERC ¶ 61,041 (2013), *order on reh'g and compliance*, 148 FERC ¶ 61,025 (2014) (*Panhandle*).

[11] *Texas Eastern Transmission Corp*., 62 FERC ¶ 61,015, at 61,089-90, *order on reh'g*, 63 FERC ¶ 61,100, at 61,433-35, *order on reh'g*, 64 FERC ¶ 61,305, at 63,265-66 (1993) (*Restructuring Orders*).

[12] *Natural Gas Pipeline Co. of America*, 102 FERC ¶ 61,326 (2003), *order on reh'g*, 106 FERC ¶ 61,310, at PP 13-15, *order on reh'g*, 108 FERC ¶ 61,170 (2004) (*Natural*).

FSS-1, SS, and SS-1 contain reservation charge crediting provisions. Sections 3.3, 3.4, or 3.5 of each firm rate schedule provides that Texas Eastern will provide reservation charge credits if it delivers less than 95 percent of the firm shipper's nominated volumes at its primary delivery points (95 Percent Requirement). Paragraph (B) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold a reservation charge credit if the failure to deliver "is the result of Pipeline having operational flow orders [OFO] in effect on such Day" (the OFO Exemption). Paragraph (C) of sections 3.4, 3.5, or 3.6 of each firm rate schedule provides that Texas Eastern can withhold the reservation charge credit if the outage is due to "routine operational maintenance and repair" during the period from May 1 through November 1 of any year (the Routine Maintenance Exemption). Paragraph (D) provides that Texas Eastern need not provide credits if the failure to deliver is the result of Texas Eastern "performing at any time repair and maintenance of its facilities to comply with regulatory requirements" (the Regulatory Requirements Exemption). Finally, paragraph (E) provides that Texas Eastern need not provide credits during the first ten days of a *force majeure* event outage.

6. Section 17, Force Majeure, of Texas Eastern's General Terms and Conditions (GT&C) enumerates various *force majeure* events in section 17.1, including "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means." In addition, section 17.1 provides that *force majeure* events include outages resulting from "any other cause, whether of the kind herein enumerated, or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome." Finally, section 17.3, Scheduling of Routine Maintenance, provides:

> Pipeline shall have the right to curtail, interrupt, or discontinue service in whole or in part on all or a portion of its system from time to time to perform *routine repair and maintenance* on Pipeline's system as necessary to maintain the operational capability of Pipeline's system or to comply with applicable regulatory requirements. Pipeline shall exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and shall provide reasonable notice of the same to Customers [emphasis added].

7. In a protest of Texas Eastern's January 2012 filing to revise its Rate Schedule FTS-5 *pro forma* service agreement, Indicated Shippers[13] raised the issue of Texas Eastern's failure to comply with the Commission's reservation charge crediting policies.

[13] Indicated Shippers consisted of BP America Production Company, BP Energy Company, Hess Corporation, and SWEPI LP.

In our February 2012 order accepting Texas Eastern's revised *pro forma* service agreement,[14] the Commission found that the 95 Percent Requirement, the Routine Maintenance Exemption, the Regulatory Requirements Exemption, and the OFO Exemption conflicted with the Commission's reservation charge crediting policies.[15] The Commission explained that each of these provisions was contrary to decisions of the Commission in various individual adjudications. The Commission cited its decisions in *Southern*,[16] *Portland*,[17] and *Natural*, and *North Baja* as examples of its prior adjudications.[18] The Commission concluded that "at least a *prima facie* showing had been made that Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable."[19] Accordingly, the Commission initiated a section 5 proceeding and directed Texas Eastern either to file revised tariff records consistent with the Commission's reservation charge crediting policies or explain why it should not be required to do so.

B. <u>The September 2012 Order</u>

8. Texas Eastern requested rehearing of the February 2012 Order and filed a response (Response) contending that its existing reservation charge crediting provisions are just

---

[14] *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126 (2012) (February 2012 Order).

[15] The Commission also required Texas Eastern to remove references to routine repair and maintenance from subsection 3 of section 17 of its GT&C, entitled Force Majeure. The Commission stated that those references should be removed from section 17.3, because such routine repair and maintenance is not a *force majeure* event. However, the Commission granted rehearing of that requirement, finding that section 17.3 contains no provision concerning the issue of when Texas Eastern must provide reservation charge credits for a failure to schedule primary firm service, and therefore there is nothing in that section contrary to Commission policy concerning reservation charge credits.

[16] *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *Northern*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 .

[17] *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123 (1996) (*Portland*).

[18] *See* September 2012 Order, 140 FERC ¶ 61,216 at PP 22-23.

[19] *Id*. P 11.

and reasonable and should not be modified under NGA section 5. Texas Eastern contended that comparing its tariff to the policy set forth in *NGSA* does not establish the evidence required before the burden of going forward can be shifted to the pipeline in a section 5 proceeding. Texas Eastern further contended that the Commission had previously found Texas Eastern's reservation charge crediting provisions to be just and reasonable in the Texas Eastern *Restructuring Orders*.

9. In the September 2012 Order, the Commission denied Texas Eastern's request for rehearing, except as noted in footnote 15 *supra.* The September 2012 Order held that the February 2012 Order had correctly found that a *prima facie* showing had been made that Texas Eastern's reservation charge crediting provisions are contrary to Commission policy and therefore the Commission properly initiated an investigation pursuant to NGA section 5 into whether Texas Eastern's reservation charge crediting provisions are unjust and unreasonable and must be modified. The September 2012 Order explained that Texas Eastern's rehearing request had mischaracterized the February 2012 Order as simply comparing its tariff to the *NGSA* policy statement. Rather, the February 2012 Order found that each of the relevant tariff provisions conflicted with binding precedents established in adjudications concerning the reservation charge crediting provisions of individual pipelines.[20] 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*,[21] 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."[22]

10. Therefore, the September 2012 Order concluded that the February 2012 Order's finding that the failure of Texas Eastern's tariff, on its face, to conform to the binding precedent in the prior adjudications was sufficient to establish a *prima facie* case that

[20] *See* February 2012 Order, 138 FERC ¶ 61,126 at PP 10-13.

[21] *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D. C. Cir. 1974) (*PG&E v. FPC*) (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").

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

Texas Eastern's tariff was unjust and unreasonable. Citing *East Tennessee Natural Gas Co. v. FERC*,[23] 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 September 2012 Order concluded that the February 2012 Order had properly required Texas Eastern 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.

11. The September 2012 Order also recognized that, even though the February 2012 Order reasonably initiated a section 5 investigation of Texas Eastern's tariff and imposed a burden of producing evidence on Texas Eastern, the Commission continues to have the burden of persuasion under NGA section 5 to demonstrate both that: (1) the existing reservation charge crediting provisions in Texas Eastern's firm rate schedules are unjust and unreasonable; and (2) any replacement tariff provisions the Commission imposes are just and reasonable.[24] Therefore, the September 2012 Order next considered the issue of whether it could satisfy the burden of persuasion with respect to each of the relevant provisions of Texas Eastern's tariff.

12. The September 2012 Order first addressed the Routine Maintenance Exemption, which exempts Texas Eastern from providing any reservation charge credits if its failure to deliver is due to "routine operational maintenance and repair" during the period from May 1 through November 1 of any year. The Commission found that this provision was contrary to the Commission's policy requiring full reservation charge credits for all non-*force majeure* outages of primary firm service. The September 2012 Order explained that the Commission had established this policy in the mid-1990s shortly after completing the processing of pipelines filings to restructure their services in compliance with Order No. 636, where the Commission rejected a proposal by Tennessee Gas Pipeline Co. not to provide reservation charge credits for scheduled maintenance conducted during the off-peak period from May 1 through November 1, on the ground that "pipelines should be able to provide the service that they have contracted to perform," absent a *force majeure*

---

[23] 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.

[24] *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 (D.C. Cir. 1993) (*Western Resources*).

event.[25] A year later, the Commission reaffirmed its policy of requiring full reservation charge credits for routine maintenance in Opinion No. 406,[26] and the September 2012 Order pointed out that the D.C. Circuit had affirmed orders applying this policy in *North Baja v. FERC*.[27]

13. The Commission then rejected Texas Eastern's various contentions as to why the policy affirmed by the D.C. Circuit in *North Baja v. FERC* is wrong or should not be applied to it. The Commission rejected Texas Eastern's contention that the policy of requiring full reservation charge credits for routine maintenance outages is limited to cases of "mismanagement," finding based on a review of Commission precedents after Opinion No. 406[28] that the policy is applicable regardless of whether such outages are avoidable. For example, the September 2012 Order pointed out that, in affirming the Commission's *North Baja* orders, the court recognized that the Commission's policy extended to scheduled maintenance interruptions that are not controllable,[29] and the court concluded that "[t]here is nothing unreasonable about FERC's policy that pipelines' rates should incorporate costs associated with a pipeline 'operating its system so that it can meet its contractual obligations,' and that a cost-sharing mechanism should be reserved for uncontrollable *and unexpected* events that temporarily stall service."[30] The Commission found no reason to modify its policy requiring full reservation charge credits for outages due to routine maintenance, as affirmed by the court, holding 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.

[25] *Tennessee Gas Pipeline Co*., 71 FERC ¶ 61,399 at 62,580, *reh'g denied*, 73 FERC ¶ 61,083 (1995) (*Tennessee I*).

[26] Opinion No. 406, 76 FERC ¶ 61,022 at 61,086.

[27] September 2012 Order, 140 FERC ¶ 61,216 at PP 53-54 (citing *North Baja v. FERC*, 483 F.3d at 822-823).

[28] September 2012 Order, 140 FERC ¶ 61,216 at PP 49-53 and 56-58.

[29] *North Baja v. FERC*, 483 F.3d at 823.

[30] *Id*. (emphasis added).

14. The Commission also provided a detailed response to Texas Eastern's contentions that the Commission's policy could require it to build inefficient and redundant facilities,[31] that *North Baja v. FERC* is distinguishable from its case,[32] that application of the Commission's policy to Texas Eastern would undermine the pro-shipper reliability protections built into its tariff,[33] and that it should be exempted from the policy because the Commission approved the Routine Maintenance Exemption in its Restructuring Orders.[34]

15. The Commission next addressed the Regulatory Requirement Exemption, excusing Texas Eastern from providing any reservation charge credits when it is performing repair and maintenance to comply with regulatory requirements. The Commission found that provision unjust and unreasonable, because it imposes on shippers the entire risk of any service interruption to comply with "regulatory requirements," contrary to longstanding Commission precedent requiring pipelines to provide firm shippers with either full reservation charge credits for non-*force majeure* outages or partial credits for *force majeure* outages.[35] The September 2012 Order explained that the Commission has applied this policy to all interruptions of primary firm service, including those attributable to government actions.[36] Thus, whether a pipeline must provide full or partial credits for an interruption of service caused by a government action turns on whether the particular government action is considered a *force majeure* or non-*force majeure* event. For example, outages due to scheduled or routine maintenance necessary to comply with regulatory requirements are not *force majeure* events, and thus the pipeline must provide full reservation charge credits for any such outages.[37]

[31] September 2012 Order, 140 FERC ¶ 61,216 at PP 60-63.

[32] *Id*. PP 64-66.

[33] *Id*. PP 67-71.

[34] *Id*. PP 72-76.

[35] *See, e.g.*, *Southern*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050; *Northern*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202; *Midwestern*, 137 FERC ¶ 61,257.

[36] *Tennessee Gas Pipeline Co*., 135 FERC ¶ 61,208 (2011), *order on clarification*, 139 FERC ¶ 61,050, at PP 80-82 (2012) (*Tennessee II*). *Rockies Express Pipeline LLC*, 139 FERC ¶ 61,275, at P 19 (2012) (*Rockies Express II*).

[37] *Natural*, 106 FERC ¶ 61,310, at P 15; *Florida Gas Transmission Co.*,

(continued...)

However, when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and are unexpected, any resulting outage may be treated as resulting from a *force majeure* event for which partial reservation charge credits are required.[38]

16. Consistent with this discussion, the September 2012 Order also found unjust and unreasonable the provision in section 17.1 of Texas Eastern's GT&C defining "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable means" as *force majeure*. The Commission stated that it had required identical language in other tariffs to be clarified to ensure that routine testing and maintenance required to comply with government action are not treated as *force majeure* events.[39]

17. For similar reasons the September 2012 Order found Texas Eastern's OFO Exemption to be unjust and unreasonable. Because Commission policy requires pipelines to provide some level of reservation charge credits whenever the pipeline is unable to schedule primary firm service, the issuance of an OFO cannot justify a complete exemption from reservation charge crediting. The only issue is whether the issuance of the OFO is the result of a *force majeure* situation outside the pipeline's control, in which case only partial credits are required. Therefore, the cause of OFO interruptions is only relevant to the amount of the required credit and there is no basis for an exemption from the Commission's current reservation charge crediting policy for OFO outages.

18. Next, the Commission found the 95 Requirement, allowing Texas Eastern a 5 percent tolerance before it must provide reservation charge credits, to be unjust and unreasonable. The September 2012 Order pointed out that, in a 2006 order in *Rockies Express I*, the Commission held that such a tolerance before reservation charge credits are

---

105 FERC ¶ 61,171 (2003), *order on reh'g*, 107 FERC ¶ 61,074, at PP 28-29 (2004) (*Florida Gas*); *Tennessee II*, 139 FERC ¶ 61,050 at P 81. *See* also *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at PP 6, 11 (2003) (*El Paso*), holding that scheduled maintenance is within the control of the pipeline despite the El Paso Natural Gas Company's contention that such maintenance may be required by government agencies.

[38] *See Florida Gas*, 107 FERC ¶ 61,074 at P 32; *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*).

[39] September 2012 Order, 140 FERC ¶ 61,216 at P 88 (citing, *e.g.*, *Tennessee II*, 139 FERC ¶ 61,150 at P 82).

provided for non-*force majeure* outages is contrary to the Commission's policy that pipelines must bear the full risk of non-*force majeure* outages of primary firm service.[40]

19. Finally, the September 2012 Order found Section 17.3 unjust and unreasonable to the extent that it authorizes Texas Eastern to "curtail" service to perform routine repair and maintenance. The Commission explained that pipelines may only "curtail" service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service.[41] Because routine repair or maintenance is not an emergency situation or an unexpected loss of capacity, the pipeline should take outages required for routine repair and maintenance into account when it is scheduling service, rather than curtailing service after it is scheduled.

20. Pursuant to NGA section 5, the September 2012 Order directed Texas Eastern to file revised tariff records to eliminate: (1) the Routine Maintenance Exemption; (2) the Regulatory Requirements Exemption; (3) the OFO Exemption, and (4) the 95 Percent Requirement. Further, Texas Eastern was required to clarify GT&C section 17.1 of its tariff to be consistent with the Commission policy concerning what constitutes a *force majeure* event and section 17.3 to be consistent with Commission curtailment policy.

21. On October 22, 2012, Texas Eastern requested rehearing of the September 2012 Order and filed *pro forma* tariff records to comply with that order. In addition, INGAA filed a late motion to intervene in this proceeding[42] and a request for rehearing of the

---

[40] *Rockies Express I*, 116 FERC ¶ 61,272 at P 63.

[41] *See, e.g., Portland*, 76 FERC ¶ 61,123 at 61,663; *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at P 68 (2011) (*Ryckman Creek*).

[42] The Municipal Defense Group (MDG) and Natural Gas Supply Association, Independent Petroleum Association of America, Process Gas Consumers Group (PGC), American Forest & Paper Association (collectively the Associations) oppose INGAA's late motion to intervene. However, in the order on rehearing in *NGSA*, the Commission reasoned that parties were not aggrieved because they could address the important policy issues discussed in that order "in future adjudications concerning the reservation charge crediting provisions of specific pipelines." (*See* 137 FERC ¶ 61,051 at PP 20-26). The Commission finds it reasonable to allow INGAA to intervene in this adjudication so that it can present the views of its member interstate pipelines. *See, e.g., Southern Natural Gas Co.*, 130 FERC ¶ 61,193, at P 7 (2010). The Commission further finds that granting the motions of INGAA and the other petitioners filing late motions to intervene will not cause any undue prejudice to other parties as Rule 385.214(d)(3)(ii) of the Commission's Rules of Practice and Procedure provides that a late intervenor must accept the record as

(continued...)

September 2012 Order.[43] On November 26, 2012, Texas Eastern filed revised *pro forma* tariff records, modifying its proposed compliance filing in response to protests to its original compliance filing. The revised *pro forma* tariff records supersede and replace the *pro forma* tariff records it had provided in the October 2012 Compliance filing.

II. Rehearing of the September 2012 Order

22. On rehearing, Texas Eastern and INGAA do not contest the September 2012 Order's findings that Texas Eastern's existing reservation charge crediting provisions are contrary to the precedents cited in that order. However, they contend that the Commission's reliance on those precedents is insufficient to satisfy its burden under NGA section 5 to show that Texas Eastern's existing tariff is unjust and unreasonable. They attack the September 2012 Order's treatment of the reservation charge crediting policies developed in the cited adjudications as "binding precedent having the force of law,"[44] and assert that the Commission found Texas Eastern's tariff unjust and unreasonable based solely on a finding that Texas Eastern's tariff was inconsistent with those policies, without considering any specific facts concerning circumstances on Texas Eastern's system. They argue that this amounts to imposing a rule without conducting the notice and comment required by the Administrative Procedures Act (APA).

23. Texas Eastern states that the United States Court of Appeals for the Fifth Circuit has held that when the Commission establishes a rule in individual adjudications, "due process requires that the affected parties be allowed to challenge the basis of the rule," and the Commission must in each case substantiate the application of its policy "either through the development of specific facts or by making a reasoned explanation."[45] Texas

---

developed prior to its late intervention. Therefore, we will grant the late motions to intervene.

[43] Indicated Shippers filed an answer to Texas Eastern's Request for Rehearing, and Texas Eastern filed an answer to Indicated Shippers' answer. The Associations filed an answer to INGAA's request for rehearing. The Commission's Rules of Practice and Procedure do not permit answers to requests for rehearing or answers unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2) (2014). Therefore, the Commission rejects the answers to Texas Eastern's and INGAA's requests for rehearing and Texas Eastern's answer to the answer to its request for rehearing.

[44] September 2012 Order, 140 FERC ¶ 61,216 at P 27.

[45] Texas Eastern Request for Rehearing at 13, quoting *Florida Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989) (*Florida Gas*). Texas Eastern also cites *Shell Oil Co. v. FERC*, 707 F.2d 230 (5th Cir. 1983) (*Shell Oil*).

Eastern and INGAA interpret these requirements as prohibiting the Commission from adopting a policy in an individual adjudication that, like our reservation charge crediting policies, is not dependent upon the specific operating conditions of each pipeline. Texas Eastern and INGAA contend that, by adopting a policy that is not dependent on the operating conditions of each pipeline, the Commission has denied Texas Eastern and other pipelines the opportunity to challenge the basis of the rule. In addition, they argue that the Commission has failed to substantiate its application of that policy to Texas Eastern based on findings of fact concerning specific operating conditions of Texas Eastern's system. Moreover, Texas Eastern contends that the Commission committed the same errors in the prior cases on which it relied in this case, such as Opinion No. 406, *Natural*, and *Florida Gas*, because in none of those cases did the Commission consider the pipeline's specific operating conditions.[46] Texas Eastern and INGAA conclude that if the Commission wants to establish a policy requiring pipelines to provide reservation charge credits, which cannot be challenged based on the specific operating conditions of the pipeline, it must proceed through a rulemaking proceeding.

24. Texas Eastern and INGAA also assert that the September 2012 Order violated NGA section 5 in several other ways. They contend that the Commission improperly shifted to Texas Eastern the burden of producing evidence of unique circumstances on its system to justify retention of its existing reservation charge crediting provisions, contrary to section 5's requirement that the Commission bear the burden of showing that Texas Eastern's tariff is unjust and unreasonable. Moreover, they argue that the Commission failed to recognize that more than one just and reasonable alternative is permitted for any given rate or tariff provision. They argue that the September 2012 Order improperly required Texas Eastern to modify its existing tariff based on a finding that the Commission's reservation charge crediting policy is just and reasonable, without ever supporting a finding that Texas Eastern's tariff provisions are unjust and unreasonable.

25. For the reasons discussed below, we deny rehearing. We find that we have acted consistent with both NGA section 5 and the APA and accordingly reaffirm our findings that each of the provisions of Texas Eastern's tariff discussed in the September 2012 Order is unjust and unreasonable, including (1) the Routine Maintenance Exemption; (2) the Regulatory Requirements Exemption and the related *force majeure* definition in GT&C section 17.1; (3) the OFO Exemption, and (4) the 95 Percent Requirement.

26. Below, we first discuss the *Shell Oil* and *Florida Gas v. FERC* decisions of the Fifth Circuit, on which Texas Eastern places its primary reliance in contending that the September 2012 Order violated NGA section 5 and the APA. We find that those cases relate to the due process the Commission must provide when it proceeds by adjudication,

---

[46] Texas Eastern Request for Rehearing at 14-17.

and not the substantive nature of the rules that may be adopted by adjudication. Thus, in each adjudication, the Commission must: (1) give the affected parties an opportunity to challenge the basis of the rule and (2) substantiate the application of the rule in each case. So long as the Commission is able to satisfy these due process requirements, the Commission may adopt a substantive rule in an adjudication that will apply to all pipelines regardless of their operating conditions.

27. We then turn to a discussion of the Commission's compliance with these requirements in this case. We first find that we have provided Texas Eastern a full opportunity to challenge the basis of each of the reservation charge crediting policies at issue in this case. We then substantiate the application of our reservation charge crediting policies with respect to each of Texas Eastern's tariff provisions found unjust and unreasonable by the September 2012 Order. Finally, we address the remaining contentions by Texas Eastern and INGAA concerning the Commission's compliance with NGA section 5.

A. The Commission's Burden When It Proceeds by Adjudication

28. Contrary to the contentions of Texas Eastern, the Fifth Circuit's decisions in *Shell Oil* and *Florida Gas v. FERC* do not require that the application of all substantive rules adopted in adjudications turn on the specific operating conditions of each natural gas pipeline. Rather, as discussed below, the court's concern related to the due process required when the Commission proceeds by adjudication. So long as the Commission permits affected parties in subsequent adjudications to challenge the basis of the rule, and the Commission substantiates application of the precedent in each case, the Commission may adopt a substantive rule in an adjudication that will apply to all pipelines regardless of their operating conditions.

29. *Shell Oil*, the first case cited by Texas Eastern, concerned whether Shell Oil's production from its "sidetracked" wells was entitled to a new vintage price which was higher than the old vintage price applicable to the existing well used in the sidetracking operation. In a prior adjudication, the Commission held that sidetracked wells are not eligible for a new vintage price, because producers undertaking sidetracking operations are able to utilize existing well footage to a great degree. In requesting a new vintage price for its sidetracked wells, Shell Oil contended that, while the well in the prior case had utilized existing well footage to a great degree, that fact was not true of its wells. Shell Oil sidetracked its wells from points only slightly below the surface and thus did not utilize existing well footage to a great degree. Nevertheless, the Commission denied Shell Oil a new vintage price for its sidetracked wells.

30. On appeal to the Fifth Circuit, the Commission defended its action on the ground that Shell Oil was seeking to "reargue a matter that has been considered and settled by the Commission on general policy grounds."[47] The Commission asserted that, having failed to intervene in the earlier case, Shell Oil had forfeited any opportunity to challenge the rule established in that case. The court disagreed. The court recognized that "agencies may establish rules of general application in a statutory rulemaking or an individual adjudication. The choice of methods is a matter within the agency's informed discretion."[48] However, the court stated, "we must be mindful that these two methods of making rules differ fundamentally in the due process safeguards they provide."[49] While all interested parties may file comments in a rulemaking proceeding, "no due process guarantees are extended to non-parties in an individual adjudication, although non-parties may be greatly affected by a general rule an agency adopts in such a proceeding."[50] The court held that Shell Oil had not been afforded any meaningful opportunity in the earlier Commission adjudication to challenge the key factual assumption underlying the rule adopted in that case – that sidetracked wells utilize existing well footage to a great degree. The court concluded that "due process requires that Shell be allowed to challenge that assumption here and now."[51] Because the Commission failed to substantiate the factual assumption upon which its rule rested, the court vacated the Commission's denial of a new vintage price for Shell Oil's wells and remanded the case.[52]

31. *Florida Gas v. FERC*, the second case cited by Texas Eastern, concerned applications for five individual certificates to perform interruptible transportation service for particular customers filed by Florida Gas Transmission Co. (Florida Gas) during the transition to open access transportation under Order No. 436. In a prior case, involving a pipeline which had already applied for an open access transportation blanket certificate but whose blanket certificate had not yet been granted, the Commission limited the terms of similar individual certificates to the earlier of one year or until the pipeline accepted a blanket certificate. In that case, the Commission held that the term limit was necessary to

[47] *Shell Oil*, 707 F.2d at 235.

[48] *Id*.

[49] *Id*.

[50] *Id.*

[51] *Id.* 236.

[52] *Id.* 235-36.

avoid undue discrimination that could occur if some shippers received service under individual certificates, while others received open access transportation under a blanket certificate, and the D.C. Circuit affirmed the Commission's action in that case in *New Jersey Zinc Co. v. FERC*.[53] However, unlike the pipeline *New Jersey Zinc*, Florida Gas had not yet applied for a blanket open access certificate. Nevertheless, the Commission imposed the same term limit on the individual certificates in *Florida Gas v. FERC*, as it did in *New Jersey Zinc*.

32. On appeal, the Fifth Circuit stated that the Commission "justifies its action in this case solely on the grounds of a 'policy' which would limit the duration of every individual transportation certificate to a one year term. FERC did not hear evidence on the need for, or the effect of, this one year limit in these five instances, but instead rested its decision on the stated policy alone."[54] As in *Shell Oil*, the court again recognized that the Commission "is not required to decide every case on the individualized facts. It may invoke rules of general application in individual cases."[55] However, the court stated, when that "rule is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule. FERC must be able to substantiate the general rule."[56] The court found that the Commission had not substantiated applying the one-year limit to Florida Gas "either through the development of specific facts or by making a reasoned explanation."[57] The court further found that the facts in this case were substantially different from the facts in the earlier *New Jersey Zinc* case, because unlike Florida Gas the pipeline in *New Jersey Zinc* had already applied for a blanket certificate and a long term individual certificate may have frustrated its ongoing conversion to open access transportation.[58] The court stated that the Commission had not explained why, when a pipeline had not yet applied for a blanket open access certificate, the Commission's concerns about undue discrimination could not be addressed solely by a condition terminating the individual certificate upon acceptance of a blanket certificate, without further limiting the term of the certificate to one year.

---

[53] 843 F.2d 1497 (D.C. Cir. 1988) (*New Jersey Zinc*).

[54] *Florida Gas v. FERC*, 876 F.2d at 44.

[55] *Id*.

[56] *Id.* 44 (citing *Shell Oil*, 707 F.2d at 235-236).

[57] *Id.* 45.

[58] *Id.* 44.

33. On remand from the court's decision in *Florida Gas v. FERC*, the Commission again limited the subject individual certificates to one-year terms, with an explanation of why circumstances on the Florida Gas system justified a need for an annual review of individual certificates to ensure against undue discrimination.[59] The Fifth Circuit affirmed the remand order in *Monsanto Co. v. FERC*, 963 F.2d 827, 830 (5th Cir. 1992) (*Monsanto*), explaining that its concerns in its *Florida Gas v. FERC* decision related to the due process that must be provided parties in adjudicatory proceedings, not the substantive nature of rules that may be adopted in adjudications. The court stated:

> We 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. The Commission's original orders had simply stated that the Commission was applying a standing, prophylactic rule of limiting individual certificates to one-year terms. We held that 'FERC must be able to substantiate the general rule' with respect to Florida Gas so that the affected parties might be allowed to challenge the basis of the rule. . . O*ur holding in Florida Gas was that FERC had violated Florida Gas's due process rights by failing to substantiate its policy with respect to Florida Gas, not that the policy was arbitrary per se*."[60]

The court concluded that the order on remand from *Florida Gas v. FERC* had provided the reasoned explanation of the application of its policy in a non-arbitrary way and had rehabilitated the Commission's decision.

34. Thus, in both *Shell Oil* and *Florida Gas v. FERC*, the court expressly recognized that the Commission is not required to decide every case "on the individualized facts"[61] and that the Commission "may establish rules of general application in a statutory rulemaking *or an individual adjudication*."[62] The distinction the court drew between rules adopted in adjudications versus rulemakings related to the procedural due process the Commission must provide when it applies a rule of general application in an

---

[59] *Florida Gas Transmission Co.*, 49 FERC ¶ 61,375 (1989); *See also, Florida Gas Transmission Co.*, 50 FERC ¶ 61,082 (1990).

[60] *Monsanto*, 963 F.2d at 830 (footnotes omitted) (emphasis added).

[61] *Florida Gas v. FERC*, 876 F.2d at 44.

[62] *Shell Oil*, 707 F.2d at 235 (emphasis added).

individual case, not to the substantive nature of the rule that the Commission may adopt in each type of process. In particular, the court found that, when the Commission adopts a rule in an adjudication, parties in subsequent adjudications where the rule is applied must have an opportunity to challenge the basis of the rule, because unlike in a rulemaking proceeding they did not have such an opportunity in the first adjudication. For that opportunity to be meaningful, any such challenge would require the Commission to "substantiate" application of the general rule in each case "either through the development of specific facts or by making a reasoned explanation."[63]

35. In both *Shell Oil* and *Florida Gas v. FERC*, the court found that the Commission had erred, because (1) it had applied a rule adopted in a prior adjudication in a subsequent adjudication without allowing the affected party to challenge the validity of that rule and (2) it had not substantiated the application of relevant rules in the subsequent adjudication because those rules were premised on factors that were not present in the subsequent adjudication – the ability for sidetracked wells to use existing well footage to a great degree in *Shell Oil* and the status of the pipeline's transition to providing open access transportation service pursuant to blanket certificate in *Florida Gas v. FERC*. By contrast, as the Commission discusses in detail in the next two sections of this order, in this case, we have complied with the requirements of *Shell Oil* and *Florida Gas v. FERC* by (1) allowing Texas Eastern a full opportunity to present evidence and argument in order to challenge the validity of the reservation charge crediting policies at issue in this case and their application to Texas Eastern and (2) substantiating our application of those policies to Texas Eastern with substantial evidence and a reasoned explanation.

B. <u>Opportunity to Challenge Reservation Charge Crediting Precedent</u>

36. In the *NGSA Rehearing Order* (at n.20), the Commission stated that in future cases it may treat its prior decisions in adjudications concerning the justness and reasonableness of the reservation charge crediting provisions of individual pipelines "as binding precedent," consistent with the court's statement in *PG&E v. FPC*,[64] that an "agency may establish binding policy... through adjudications which constitute binding precedents." The Commission then stated:

> As with any such precedent, parties are free to argue in particular proceedings that the Commission should modify the policies established in such precedents because of changed circumstances or other reasons. However, as the courts have held many times, the

---

[63] *Florida Gas v. FERC*, 876 F.2d at 45; *Monsanto*, 963 F. 2d 827.

[64] 506 F.2d at 38.

> Commission may not depart from established policies without providing an explanation of the reasons for doing so.[65]

37. The Commission's February 2012 Order in this case required Texas Eastern either to conform its tariff to the Commission's reservation charge crediting policy established in prior cases or explain why it should not be required to do so. As described in the September 2012 Order,[66] Texas Eastern's Response to the February 2012 Order[67] focused primarily on the issue of whether it should be required to provide full reservation charge credits for primary firm outages required for the performance of routine maintenance, including outages to comply with government requirements. Texas Eastern presented detailed arguments in support of its contention that the Commission's policy requiring full reservation charge credits for such outages is incorrect and, in any event, does not justify a finding that its Routine Maintenance and Regulatory Maintenance Exemptions are unjust and unreasonable. The Commission then addressed at length each of Texas Eastern's contentions as to why the Commission policies concerning routine maintenance outages and outages to comply with government requirements should be modified or not applied to it.[68] After stating that the courts have held that "the Commission may not depart from established policies without providing an explanation of the reasons for doing so," the Commission concluded that "Texas Eastern has not persuaded us to modify our existing policy requiring full reservation charge credits for routine maintenance outages of primary firm service, which the D.C. Circuit affirmed in *North Baja v. FERC*."[69]

38. Texas Eastern's Response also included contentions that its tariff, as approved in its *Restructuring Orders*, contained various provisions that provide an alternative just and reasonable manner of addressing reservation charge credits for all outages, including

---

[65] *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26 n.20, (citing *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (*Wisconsin Valley* v. FERC)).

[66] Those arguments are summarized in the September 2012 Order, 140 FERC ¶ 61,216 at PP 38-42, PP 79-80.

[67] *See* March 19, 2012 Response at 10-20. In that Response, Texas Eastern stated (at n.3) that it used the term "Maintenance Exemption" to refer to both the Routine Maintenance and Regulatory Requirements Exemptions.

[68] *See* September 2012 Order, 140 FERC ¶ 61,216 at PP 45-77, PP 82-88.

[69] *Id*. P 76.

those resulting from OFOs, as well as from routine maintenance.[70] The September 2012 Order addressed the merits of these contentions, explaining why the Commission did not find these contentions persuasive.[71]

1. <u>Rehearing Requests</u>

39. Texas Eastern and INGAA contend that, by treating our reservation charge crediting decisions in prior adjudications as "binding precedent having the force of law," the September 2012 Order improperly departed from the Commission's statement in the *NGSA Rehearing Order* that parties would be "free to argue in particular proceedings that the Commission should modify the policies established in such precedents because of changed circumstances or other reasons." They contend that the Commission disallowed any opportunity for Texas Eastern to argue that the Commission should modify its policy requiring full reservation charge credits for routine maintenance outages of primary firm service. They also contend that, while the Commission stated in the *NGSA Rehearing Order* that parties would have the opportunity to present the facts and circumstances of each case, "the result of the Commission's fundamental shift in the September [2012] order to apply the policy statement as having 'the force of law' is that no pipeline will ever be able to present individual facts or circumstances that persuade the Commission to depart from its policy statement."[72] They contend that this violates the holdings of *Shell Oil* and *Florida Gas v. FERC* that the Commission must allow Texas Eastern to challenge the factual basis of rules developed in adjudications.

2. <u>Discussion</u>

40. Consistent with the requirements of *Shell Oil* and *Florida Gas v. FERC* and the *NGSA Rehearing Order*, the Commission has provided Texas Eastern a full opportunity in this proceeding to present evidence and argument in order to challenge the validity of our reservation charge crediting policies and their application to Texas Eastern. The Commission's February 2012 Order in this case required Texas Eastern "*either* to file revised tariff records to conform with the Commission's reservation charge crediting policy, consistent with the discussion in this order, *or* explain why it should not be required to do so."[73] In its response to this requirement, Texas Eastern was free to submit

[70] *See* March 19, 2012 Response at 12, 14, and 20-23.

[71] *See* September 2012 Order, 140 FERC ¶ 61,216 at PP 67-71, PP 89-95.

[72] Texas Eastern Request for Rehearing at 24.

[73] 138 FERC ¶ 61,126 at P 15 (emphasis added).

whatever evidence and argument it desired in order to challenge the validity of the Commission's reservation charge crediting policies and their application to Texas Eastern.

41. Texas Eastern took advantage of this opportunity primarily to attack our policy requiring full reservation charge credits for routine maintenance outages, including those resulting from compliance with government requirements. Texas Eastern contended that (1) some outages for routine maintenance are unavoidable, including those required to perform maintenance required by government regulations, and reservation charge credits should be limited to situations of mismanagement,[74] (2) the Commission's policy could require a pipeline to build inefficient and redundant facilities,[75] (3) full credits during peak periods, as required by Texas Eastern's tariff, provide sufficient protection to firm shippers, without the need to require such credits during off-peak periods,[76] and (4) a tariff requirement to use due diligence to schedule routine maintenance to minimize disruptions and to provide reasonable notice of such outages should be sufficient.[77] Texas Eastern also argued that removing its Regulatory Requirements Exemption would penalize it for compliance with safety regulations and pointed out that PHMSA is expected to issue more stringent safety regulations in compliance with the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (2011 Act).

42. In the September 2012 Order, the Commission did not dismiss these contentions as impermissible challenges to precedent established in prior cases or rely on any other procedural ground to reject the contentions. To the contrary, consistent with the statement in the *NGSA Rehearing Order* that parties in individual proceedings applying the policy would be given the opportunity to argue that the Commission's policy should be modified because of changed circumstances or other reasons, the Commission addressed each of Texas Eastern's contentions on the merits.[78] After considering Texas Eastern's contentions on the merits, the September 2012 Order concluded that "Texas Eastern has not persuaded us to modify our existing policy requiring full reservation

---

[74] September 2012 Order, 140 FERC ¶ 61,216 at PP 55-59.

[75] *Id.* PP 60-63.

[76] *Id.* PP 64-66.

[77] *Id*. PP 67-71.

[78] *See* the sections of the September 2012 Order cited in the preceding four footnotes.

charge credits for routine maintenance outages of primary firm service, which the D.C. Circuit affirmed in *North Baja v. FERC*."[79]

43. Thus, the procedural defects the Fifth Circuit found in the *Shell Oil* case are not present in this case. In *Shell Oil*,[80] the Commission claimed that Shell Oil forfeited any opportunity to challenge the policy at issue in that case by failing to intervene in the prior adjudication where the Commission established that policy. Similarly, in *Florida Gas v. FERC*, the Commission applied its policy limiting individual certificates to one-year terms, without addressing the merits of the parties' contentions that the reasons for the policy were not applicable in the circumstances that case. In this case, the Commission has not made any claim that Texas Eastern forfeited its right to challenge the policies at issue here. Rather, the Commission has allowed Texas Eastern to challenge the validity of our reservation charge policies and their application to Texas Eastern. The September 2012 Order addressed Texas Eastern's contentions on the merits. Moreover, the Commission will address the merits of those contentions further in later sections of this order, including all contentions concerning why Texas Eastern's existing tariff provisions remain just and reasonable.

44. Texas Eastern and INGAA contend that the September 2012 Order's treatment of the rulings in our prior adjudications concerning reservation charge credits as constituting a "binding policy having the force of law"[81] amounts to a finding that pipelines may not, in subsequent adjudications such as the present one, challenge the validity of the reservation charge crediting policies established in our prior adjudications on this issue. This contention reflects a misunderstanding of the September 2012 Order. Characterizing precedent established in prior adjudications as binding policy having the force of law does not mean that such precedent is not subject to change. Any "binding policy having the force of law," whether established in a rulemaking proceeding or an adjudication, is subject to future changes, and thus is only "binding" until changed. While the Commission must conduct a new rulemaking proceeding in order to modify a binding policy established in a rulemaking proceeding, the Commission can change a binding policy established in an adjudication in any subsequent adjudication, subject to

[79] September 2012 Order, 140 FERC ¶ 61,216 at P 76 (citing *North Baja v. FERC*, 483 F.3d 819.

[80] 707 F.2d at 235.

[81] Texas Eastern Request for Rehearing at 23, quoting September 2012 Order, 140 FERC ¶ 61,216 at P 27.

the requirement that the Commission must provide a "reasoned explanation for its departure from established case law."[82]

45. The Commission recognized these principles in the *NGSA Rehearing Order*, when it stated that it might treat its decisions in adjudications concerning the reservation charge crediting provisions of individual pipelines as "binding precedent," but at the same time stated both (1) that "[a]s with any such precedent, parties are free to argue in particular proceedings that the Commission should modify the policies established in such precedents," and (2) "the Commission may not depart from established policies without providing an explanation of the reasons for doing so."[83] Contrary to Texas Eastern's contentions that the September 2012 Order constituted a departure from the approach the Commission stated it would take in the *NGSA Rehearing Order*, the Commission's actions in this proceeding are entirely consistent with that order. As the Commission stated it would in the *NGSA Rehearing Order*, the September 2012 Order treated its decisions in prior adjudications concerning the reservation charge crediting provisions of individual pipelines as binding precedent. However, as the Commission also stated it would in the *NGSA Rehearing Order*, the Commission has given Texas Eastern an opportunity to argue that the Commission should modify the policies established in those prior adjudications. After carefully considering Texas Eastern's contentions, the Commission has determined on the merits that there is not a persuasive reason to depart from its general policy of requiring full reservation charge credits for routine maintenance outages.

46. While the Commission has reaffirmed its general policy of requiring full reservation charge credits for routine maintenance, the Commission has adjusted aspects of its reservation charge crediting policies in response to the contentions of pipelines in various post-*NGSA* adjudications. For example, as discussed in detail later in this order, the Commission has expanded the types of government actions which may be treated as *force majeure* events for which pipelines need only provide partial credits. The Commission has also adjusted its policies in order to facilitate communication between the pipeline and its shippers concerning the timing of planned outages for routine maintenance, finding such communication benefits shippers by giving them time to plan for such outages and make alternative arrangements to obtain needed gas supplies during the period of the outage. Thus, in order to avoid discouraging pipelines from providing detailed advance notice of such outages out of a concern shippers could take advantage of

---

[82] *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 298 (5th Cir. 2007) (*Jupiter Energy Corp.*), *quoting EP Operating Co. v. FERC*, 876 F.2d 46, 48 (5th Cir. 1989) (*EP Operating Co.*). *See also Wisconsin Valley v. FERC*, 236 F.3d at 748.

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

the advance notice to maximize their credits, the Commission has permitted pipelines to base any reservation charge credits on usage during some comparable historical period before the advance notice is provided, for example usage during the same period of the preceding year.[84] In the September 2012 Order, the Commission expressly allowed Texas Eastern to propose a similar method in this case.[85] Similarly, the Commission has approved a tariff provision providing an exemption from crediting when the pipeline and a shipper mutually agree as to the timing of maintenance activities, so that such maintenance can be conducted at a time that is least disruptive to the shipper.[86] Thus, the Commission has not treated the reservation charge crediting policies established in individual adjudications as a rigid rule, but has been open to making changes in those policies in response to concerns raised in each adjudication.

47. Texas Eastern and INGAA also suggest that precedent established in individual adjudications must be treated in much the same manner as a policy statement. For example, Texas Eastern asserts that, by treating the adjudications summarized in the *NGSA* order on petition as binding precedent with the force of law while the summary itself is treated as a policy statement, the Commission has effectively found that "the Order on Petition does not have the force of law, but *the statements of policy that are summarized in the Order on Petition do have the force of law because they came out of prior adjudications*."[87] Texas Eastern also contends that the September 2012 Order represented a fundamental shift from our *NGSA* orders because it applies "the policy statement as having the 'force of law.'"[88]

48. These contentions improperly conflate precedent established in an adjudication with a policy statement. As the Commission stated in the *NGSA Rehearing Order*, "The Commission precedents described in the [*NGSA* order on petition] were established in adjudications concerning the justness and reasonableness of the reservation charge

---

[84] *Dominion*, 142 FERC ¶ 61,154 at PP 35-41, *reh'g denied*, 146 FERC ¶ 61,101 at PP 28-30.

[85] September 2012 Order, 140 FERC ¶ 61,216 at P 69. As discussed below, Texas Eastern has relied on this determination to base credits on usage during the preceding year when its gives advance notice of more than seven days.

[86] *See*, e.g., *National Fuel*, 143 FERC ¶ 61,103 at P 45.

[87] Texas Eastern Request for Rehearing at 23 (emphasis added).

[88] *Id.* 24.

crediting provisions of specific pipelines."[89] A policy statement "is not finally determinative of the issue or rights to which it is addressed" and only "announces the agency's tentative intentions for the future."[90] By contrast, the Commission's orders in the adjudications summarized in the *NGSA* order on petition were finally determinative of the rights and obligations of the subject pipelines with respect to reservation charge credits and did not simply announce the Commission's intentions for future. While in future cases the Commission must support a policy set forth in a policy statement "as if the policy statement had never been issued,"[91] that is not true of precedents established in adjudications. Rather, as the Fifth Circuit has held, the Commission may not depart from prior precedent in future cases involving similar situations, unless the Commission is able to provide a reasoned explanation for its departure.

C. Substantiation of Reservation Charge Crediting Policies

49. Having rejected Texas Eastern's contention that we did not give it an opportunity to present evidence and argument challenging the validity and application of our reservation charge crediting policy, we now turn to Texas Eastern and INGAA's contentions that we failed to substantiate that policy, and its application to Texas Eastern, with substantial evidence and a reasoned explanation. For the reasons discussed below, we find that we have substantiated the validity and application of our reservation charge crediting policy with respect to each of Texas Eastern's exemptions at issue in this case, starting with the Routine Maintenance Exemption.

1. Routine Maintenance Exemption

50. This exemption provides for a total exemption from reservation charge crediting when Texas Eastern performs "routine operational maintenance and repair" during the period from May 1 through November 1.

51. In the September 2012 Order, the Commission found that Texas Eastern's Routine Maintenance Exemption is unjust and unreasonable, because it violates Commission precedent requiring pipelines to provide full reservation charge credits for all outages to

---

[89] *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26 n.20. Those precedents included Opinion No. 406 and the *North Baja* orders affirmed by the D.C. Circuit in *North Baja v. FERC*.

[90] *PG&E v. FERC*, 506 F.2d at 38.

[91] *Id.*

conduct routine maintenance.[92] The Commission explained that its precedent requiring full reservation charge credits for such outages is not dependent upon the specific operating conditions of the pipeline[93] and is applicable even when such outages are unavoidable and thus not the result of "mismanagement."[94] The September 2012 Order explained that, in those prior adjudications, the Commission had found that, regardless of operating conditions on a particular pipeline, full reservation charge credits for routine maintenance outages (1) provide a financial incentive for the pipeline to perform maintenance with minimal service disruption and (2) compensate shippers for any interruptions of their contracted for primary firm service. The September 2012 Order further stated that, because the policy of requiring full reservation charge credits for routine maintenance outages is applicable regardless of whether the outages are avoidable or attributable to mismanagement, there is no need in this proceeding to show that Texas Eastern could manage routine maintenance on its system so as to avoid any primary firm outages or to show that any failure to avoid such outages in the past or the future would constitute mismanagement.[95]

52. The September 2012 Order found that the requirement that pipelines provide full reservation charge credits for routine maintenance outages of primary firm service 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

---

[92] September 2012 Order, 140 FERC ¶ 61,216 at PP 45-77 (citing two cases (at P 65) where we found identical tariff exemptions for off-peak routine maintenance to be unjust and unreasonable, *Tennessee I*, 71 FERC ¶ 61,399 at 62,580, and *Natural*, 106 FERC ¶ 61,310 at PP 13-15, *reh'g denied*, 108 FERC ¶ 61,170, and other cases finding full credits must be provided for routine maintenance outages even when those outages are unavoidable, including *El Paso*, 105 FERC ¶ 61,262 at PP 14-15; *Florida Gas*, 105 FERC ¶ 61,171 at P 34, *order on reh'g*, 107 FERC ¶ 61,074 at PP 27-33; *North Baja*, 109 FERC ¶ 61,159 at P 12, *order on reh'g*, 111 FERC ¶ 61,101 at PP 15-19, *aff'd*, *North Baja v. FERC*, 483 F.3d at 823).

[93] September 2012 Order, 140 FERC ¶ 61,216 at P 50.

[94] *Id*. PP 49-54.

[95] *Id*. P 59.

associated with routine and regulatory maintenance necessary for a pipeline's safe and proper functioning.[96]

53. The September 2012 Order rejected Texas Eastern's contention that its routine maintenance reservation charge crediting policy was based on the incorrect factual premise that a pipeline can manage its system so as to avoid any outages for routine maintenance and thus any such outages must be the result of mismanagement. The Commission recognized that some interruptions of firm service for routine maintenance may be unavoidable to preserve the safety and integrity of the pipeline and thus not constitute mismanagement. However, the Commission nevertheless reaffirmed its rule requiring full reservation charge credits for such outages, explaining that its reservation charge crediting policy:

> has the important goal of providing pipelines an incentive to minimize any interruptions to their shippers' primary firm service which may be necessary to perform planned maintenance. Firm shippers pay reservation charges for a guaranteed firm right to ship gas, throughout the year, up to their mainline contract demand using the primary receipt and delivery points in their contracts. Therefore, they should be able to rely on the availability of that service whenever they request it to the maximum extent possible, consistent with safe operation of the pipeline. While some service disruptions may be unavoidable, the pipeline still exercises a "degree of control" over when it performs such maintenance, thus enabling it to minimize any necessary disruptions in response to the incentives created by the Commission's reservation charge crediting policy. When the pipeline is unable to satisfy its contractual obligation to provide the primary firm service for which the shippers pay reservation charges, it is reasonable to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided.[97]

54. The Commission also pointed out that in *North Baja v. FERC*, the D.C. Circuit affirmed our orders requiring another pipeline to modify its tariff to provide full reservation charge credits during outages for routine maintenance. In its opinion, the court recognized that the Commission's policy extended to scheduled maintenance interruptions that are not controllable, stating:

---

[96] *Id.* P 58.

[97] *Id.* P 57 (footnote omitted).

> Although some scheduled maintenance interruptions may be uncontrollable, they are certainly not unexpected.[98]

However, the court concluded that "[t]here is nothing unreasonable about FERC's policy that pipelines' rates should incorporate costs associated with a pipeline 'operating its system so that it can meet its contractual obligations,' and that a cost-sharing mechanism should be reserved for uncontrollable *and unexpected* events that temporarily stall service." [99]

55. The September 2012 Order next addressed Texas Eastern's contention that the Commission's policy could require a pipeline to build inefficient and redundant facilities for use solely during maintenance outages.[100] The Commission stated that its policy does not require pipelines to build redundant facilities so as to be physically capable of providing primary firm service at all times. The Commission recognizes that pipelines may have to interrupt firm service on occasion to perform routine maintenance. After describing possible back-up methods pipelines may employ to minimize outages for routine maintenance, the Commission stated that it is for each pipeline to make a prudent determination as to the most cost-effective method for it to minimize interruptions of primary firm service as much as possible. If the costs of continuing service during a particular maintenance outage are sufficiently high to outweigh the benefits to the affected shippers of continued service, then the pipeline may choose to interrupt service and give the shippers the required reservation charge credits. Moreover, the Commission stated that the pipeline may recover the prudently incurred costs of planned maintenance interruptions in its rates. For example, a pipeline could include in its cost of service a reasonable projection of its recurring cost of providing reservation charge credits,[101] including reservation charge credits caused by new regulatory requirements, or its cost of pursuing other strategies to minimize service interruptions.

56. The September 2012 Order next rejected Texas Eastern's contention that its tariff provision providing full credits during peak periods provides sufficient protection to firm shippers, without the need to require such credits during off-peak periods.[102] The

---

[98] *North Baja v. FERC*, 483 F.3d at 823.

[99] *Id*. (emphasis added).

[100] September 2012 Order, 140 FERC ¶ 61,216 at PP 60-63.

[101] *Northern*, 137 FERC ¶ 61,202 at P 36.

[102] September 2012 Order, 140 FERC ¶ 61,216 at PP 64-66.

Commission found that the existing tariff provision fails to provide Texas Eastern a sufficient financial incentive to perform routine maintenance with the minimum possible disruptions to primary firm service, and thus meet its contractual obligations to provide primary firm service to the maximum extent possible. The Commission explained that shippers pay reservation charges to reserve primary firm capacity for both peak and off-peak periods, and they should receive full credits whenever routine maintenance prevents them from obtaining the service they have paid for. While Texas Eastern's tariff gives it a financial incentive to avoid scheduled maintenance during the peak period, the total exemption from providing credits during the off-peak period allows it to perform maintenance at any time during the off-peak period without any financial penalty for disruptions of primary firm service.

57. The September 2012 Order also rejected Texas Eastern's contentions (1) that requiring full reservation charge credits would undermine the shipper protections in section 17.3 of its GT&C, which requires it to use due diligence to schedule routine maintenance to minimize disruptions and to provide reasonable advance notice of such outages and (2) that section 17.3 provides a sufficient incentive for it to minimize maintenance outages.[103] The Commission explained that it was not requiring elimination of section 17.3. The Commission also stated that, in order to avoid any disincentive for the pipeline to provide the most accurate possible advance notices of maintenance outages as a result of crediting, the Commission would permit Texas Eastern to calculate the credits based on the level of primary firm service the shippers used during a representative period before notice of the maintenance outage is given. Thus, far from undermining the pro-shipper reliability protections reflected in GT&C section 17.3, requiring Texas Eastern to provide full reservation charge credits for routine maintenance outages of primary firm service will provide an important additional financial incentive for it to minimize such service disruptions. The September 2012 Order concluded that the full crediting requirement is thus consistent with, complementary to, and will operate in conjunction with other incentives to provide an increased financial incentive to minimize all outages and complete regulatory requirements in an expeditious manner.

58. Finally, the Commission found that the absence of shipper complaints or assertions of lack of due diligence during the period Texas Eastern's Routine Maintenance Exemption has been in effect does not justify the retention of that provision. The Commission explained that it had changed its reservation charge crediting policy shortly after it approved Texas Eastern's existing provision, and had rejected proposals by other pipelines for similar exemptions from crediting.

[103] September 2012 Order, 140 FERC ¶ 61,216 at PP 67-71.

a. Rehearing Requests

59. Texas Eastern contends that, in order to implement its reservation charge crediting polices through adjudication, the Commission must compare the individual facts and circumstances of the subject pipeline with those of the pipelines in the prior adjudications. Texas Eastern asserts that this requires comparing "the pipelines' histories of scheduled maintenance and how much primary firm service was actually interrupted during those maintenance events."[104] Texas Eastern further argues that, by proceeding through adjudication, the Commission must present "facts to prove that Texas Eastern has engaged in mismanagement of its system and is requiring its customers to bear the risk associated with such mismanagement or that Texas Eastern is not managing its system in a manner to avoid interruptions and therefore needs an incentive to prevent service interruption."[105]

60. Texas Eastern and INGAA contend that, as in *Shell Oil* and *Florida Gas v. FERC*, the Commission has adduced no evidence to substantiate the basis for its rule requiring full reservation charge credits for routine maintenance outages, either in this proceeding or in the prior adjudications which established that rule. Texas Eastern asserts that the Commission has made no findings of fact regarding whether: (1) the current incentives in Texas Eastern's tariff for it to minimize service disruptions are sufficient, (2) the length of any historical outages have been minimized by the current provisions of Texas Eastern's tariff, or (3) the financial incentives in Texas Eastern's tariff to schedule maintenance at certain times have in fact minimized service disruptions. As a result, Texas Eastern argues, the Commission has presented no evidence on the need to apply its general rule on reservation charge crediting to Texas Eastern specifically, but instead has rested its decision on its policy alone. Texas Eastern asserts that the Commission must substantiate its policy in this case by coming forth with facts and applying such facts to prove that Texas Eastern engaged in mismanagement and is requiring its customers to bear the risk of such mismanagement or is not managing its system in a manner to avoid interruptions and needs an incentive to prevent outages.

61. Texas Eastern argues that the prior adjudications relied on by the September 2012 Order did not themselves include a substantiation of the application of the rule through the development of specific facts. Texas Eastern asserts that the Commission relied on Opinion No. 406 where the Commission established its policy related to non-*force majeure* events based on general propositions that: (i) it is inequitable for customers to bear the risk associated with the pipeline's mismanagement of its system, such as

[104] Texas Eastern Request for Rehearing at 25.

[105] *Id.* 19.

maintenance outages within its control; and (ii) providing reservation charge credits incentivizes a pipeline "to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system."[106] Texas Eastern contends that Opinion No. 406 did not support either of these general propositions with findings of fact based on record evidence.

62. Texas Eastern argues that the other orders relied upon by the Commission also did not make necessary findings of fact but simply relied on the policy from Opinion No. 406. For example, Texas Eastern contends that in *Natural*,[107] in which the Commission rejected a pipeline's proposal to adopt the same Routine Maintenance Exemption as in Texas Eastern's tariff, the Commission failed to make any findings of fact but simply relied on Opinion No. 406 as having changed Commission policy after the approval of Texas Eastern's provision. Texas Eastern contends the same is true of the Commission's orders in *Southern*[108] and *Portland*,[109] and that in *Southern* the Commission even stated that its crediting policy with respect to routine maintenance outages is not dependent on the specific operating conditions of the pipeline. Texas Eastern further contends that the orders relied on by the Commission did not involve facts similar to those in the present case. For example, unlike the pipelines in those cases, Texas Eastern has had its existing tariff provisions for nearly two decades and there is no indication that it mismanaged its system or unnecessarily interrupted service, nor have there been any complaints of unnecessary service interruptions or mismanagement.

63. Texas Eastern asserts that the Commission has failed to explain why the existing requirements in GT&C section 17.3 to exercise due diligence when scheduling routine repair and maintenance and provide reasonable notice prior to scheduling such activities are not a sufficient incentive to minimize outages. Texas Eastern asserts that if it fails to exercise the required due diligence, it must provide full reservation charge credits to its shippers. Texas Eastern contends that the September 2012 Order failed to explain why this unique financial incentive, which the Commission required Texas Eastern to implement in the *Restructuring Orders*, fails to satisfy the objectives underlying the Commission's reservation charge crediting policy. Texas Eastern further asserts that the Commission's finding that section 17.3 is just and reasonable conflicts with its finding that addition financial incentives are necessary.

---

[106] *Id.* 15 (citing Opinion No. 406, 76 FERC at 61,086).

[107] *Id.* (citing *Natural*, 106 FERC ¶ 61,310 at PP 13, 15).

[108] 137 FERC ¶ 61,050 at PP 24-27.

[109] 76 FERC at 61,663.

64. Texas Eastern contends that the Commission has recognized that Texas Eastern should have the flexibility to plan most or all routine maintenance for periods when shippers are not using their service, because its shippers do not use their full contract demand every day of the year.[110] Furthermore, Texas Eastern contends that section 17.3's requirement that it provide advance notice of outages for maintenance gives shippers the opportunity to work with Texas Eastern to minimize the impact of such outages on their service and allows shippers to schedule maintenance on their systems at the same time. Texas Eastern argues that the Commission's recognition that Texas Eastern has scheduled maintenance during a time when a shipper rarely nominated service, coupled with section 17.3's due diligence requirements, supports its position that it is currently acting under the appropriate financial incentives and appropriately minimizing disruptions on its system.

65. Finally, Texas Eastern contends that the September 2012 Order mistakenly relies on an incorrect premise that firm service means that customers are guaranteed to receive service 365 days per year. Texas Eastern asserts that the Commission relied on that premise to find that, when Texas Eastern is unable to provide primary firm service, "it is reasonable to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided."[111] Texas Eastern contends that section 284.7(a)(3) of the regulations[112] only requires that firm service be given the highest priority, not that it be guaranteed. Moreover, Texas Eastern points out that its tariff contains standard language permitting it to interrupt firm service to perform maintenance.

b. **<u>Discussion</u>**

66. In the September 2012 Order, the Commission held that its policy requiring full reservation charge credits for routine maintenance outages of primary firm service 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

---

[110] Specifically, Texas Eastern asserts (at 32-33) that the Commission recognized that Texas Eastern's scheduling of scheduled maintenance affecting ConocoPhillips Company (ConocoPhillips) was in a period when service is rarely nominated (citing September 2012 Order, 140 FERC ¶ 61,216 at P 61).

[111] September 2012 Order, 140 FERC ¶ 61,216 at P 57.

[112] 18 C.F.R. § 284.7(a)(3) (2014).

associated with routine and regulatory maintenance necessary for a pipeline's safe and proper functioning.[113] In this order, we reaffirm that policy and again hold that substantial evidence supports its application to Texas Eastern.

67. The primary purpose of our requirement that pipelines provide full reservation charge credits for routine maintenance is to ensure that shippers can rely on the availability of the primary firm service for which they have contracted to the maximum extent possible consistent with safe operation of the pipeline. Accordingly, we first discuss the nature of primary firm service provided by pipelines, including Texas Eastern, and why shippers must be able to rely on the availability of that service whenever they need it. We next discuss the role of reservation charge credits in providing a significant financial incentive for pipelines to minimize outages of primary firm service for routine maintenance to the maximum extent possible and the inadequacy of Texas Eastern's tariff in providing such a financial incentive. We then discuss the reasonableness of requiring Texas Eastern to provide shippers relief from the payment of reservation charges when routine maintenance causes an outage of the primary firm service for which those reservation charges are paid. Finally, we discuss the reasonableness of our policy of requiring full reservation charges for routine maintenance outages without regard to (1) the specific operating conditions on each individual pipeline and (2) the pipeline's past history of outages or evidence of lack of due diligence to minimize outages.

Reliance on Primary Firm Service

68. Primary firm transportation service is the highest priority service provided by pipelines.[114] A shipper's contract for primary firm service specifies its maximum entitlement to service and the receipt and delivery points at which the shipper will have primary firm rights. Consistent with the high priority nature of the service, the Commission has consistently described contracts for primary firm service as providing the shipper "a guaranteed firm right to ship gas up to its mainline contract demand from the designated primary receipt points to the designated primary delivery points."[115] For this right, shippers on pipelines with straight fixed variable rates, including Texas Eastern, must pay a reservation charge that includes all the pipeline's fixed costs, regardless of whether they actually use the service on any particular day. Shippers pay that reservation charge based on their maximum daily entitlements to service.

---

[113] September 2012 Order, 140 FERC ¶ 61,216 at P 58.

[114] 18 C.F.R. § 284.7(a)(3) (2014). *Tennessee II*, 139 FERC ¶ 61,050 at PP 14-18.

[115] *Tennessee II*, 139 FERC ¶ 61,050 at P 18.

69. Texas Eastern's firm shippers include major LDCs serving residential consumers, electric generators, and other high priority uses such as hospitals in Pennsylvania, New York, New Jersey and New England.[116] Other firm shippers on Texas Eastern include municipal gas companies,[117] electric generators,[118] and producers and marketers of natural gas whose gas sales include sales of natural gas to be used for high priority purposes.[119] Texas Eastern's firm shippers, like those on other pipelines, pay substantial reservation charges for primary firm service in order to have reliable access to natural gas to serve high priority needs, including needs affecting public safety. For example, PSEG Energy Resources & Trade LLC (PSEG ER&T), which supplies gas to its affiliated LDC over Texas Eastern, states:

> Pipeline customers value the right to firm capacity that those reservation charges pay for in order to serve local distribution companies that need a reliable flow of gas to serve high-priority residential and commercial customers, electric generation, and industrial feedstock customers, among others.[120]

70. Thus, the Commission's concern that interruptions of primary firm service be kept to an absolute minimum in order to avoid a serious risk of harm to the public applies equally to Texas Eastern as to the other pipelines we have required to comply with our reservation charge crediting policy.[121] Indeed, with the increased use of natural gas for

---

[116] *E.g.*, National Fuel Gas Distribution Corp., National Grid Gas Delivery Companies, Piedmont Natural Gas Co., Inc., Consolidated Edison Co. of New York (Con Ed), Orange and Rockland Utilities, Inc. Philadelphia Gas Works, New Jersey Natural Gas Co., and Peoples Natural Gas Co. and Peoples TWP LLC.

[117] Members of the Municipal Defense Group.

[118] Tennessee Valley Authority, NextEra Energy Resources, LLC.

[119] *E.g.*, Proliance Energy, LLC, and PSEG ER & T, Hess Corporation, BP America Production Co. and BP Energy Co., Statoil Natural Gas LLC (Statoil), ConocoPhillips Shell Energy North America (U.S.), LP., and ExxonMobil Gas & Power Marketing Co.

[120] PSEG ER&T November 7, 2012 Protest at 6.

[121] *See, e.g.*, *Panhandle*, 148 FERC ¶ 61,025 at P 55.

gas-fired electric generation,[122] this concern is even more compelling today than when we first established our reservation charge crediting policy. For example, Texas Eastern has stated that it designed its recently completed New Jersey-New York Expansion project "to transport critically needed natural gas supplies . . . to meet immediate and future load growth requirements within" the New York City metropolitan area, including "providing new and existing electric generation facilities with greater sources of natural gas supply."[123]

71. Moreover, even when harm to the public is not involved, a failure to provide primary firm service can cause significant 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. Industrial plants could be forced to curb their operations, reducing their output and sales. Producer-marketers may have to incur the expense of purchasing capacity on other pipelines in order to continue marketing their natural gas,[124] and/or they may be unable to deliver natural gas to their regular sales customers, thus disrupting their commercial relationships. In addition, as PSEG ER&T points out, when a shipper can find replacement capacity on another pipeline during a non-*force majeure* outage, the scarcity of such capacity could force a shipper to purchase capacity at a greater cost than the relief provided by reservation charge credits.[125]

---

[122] *See Coordination of Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, 79 Fed. Reg. 18,223 (Apr.1, 2014), FERC Stats. & Regs. ¶ 32,700, at P 5 and n.7 and n.8 (2014) (Gas-Electric NOPR).

[123] December 20, 2010 Docket No. CP11-56-000 certificate application at 2 and 5. The Commission issued a certificate for the project in May 2012. *Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138, at P 25 (2012). Moreover, Texas Eastern is an important link in transporting natural gas from producing areas to its affiliate, Algonquin Gas Transmission LLC, which serves gas-fired electric generators in New England. Reliance on gas-fired electric generation in New England increased from five percent in 1990 to 51 percent in 2011. Gas-Electric NOPR, FERC Stats. & Regs, ¶ 32,700 at P 5 n.7.

[124] Reducing production from a natural gas well during a pipeline outage risks damaging the well, and thus producers will seek to dispose of their gas production one way or another.

[125] PSEG ER&T November 7, 2012 Protest at 5 n.7.

72. In these circumstances, the Commission concludes that the public interest requires that pipelines exercise the highest possible standard of care to ensure the reliability of primary firm transportation service in order to minimize harm to the public and financial injury caused by outages of that service.[126]

Financial Incentives

73. Our policy requiring pipelines to provide full reservation charge credits for routine maintenance outages is intended to ensure that pipelines exercise the highest standard of care possible to minimize outages of primary firm service. The full crediting requirement imposes an immediate financial cost on pipelines whenever they cannot provide primary firm service because of routine maintenance. This gives the pipeline a strong economic incentive to exercise the greatest care to minimize outages of primary firm service. In short, the full crediting requirement is an incentive mechanism to ensure the maximum reliability of primary firm service. That exposing the pipeline to financial loss whenever routine maintenance interrupts primary firm service will maximize the reliability of that service 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.[127] The need for such an incentive mechanism is particularly important because, as discussed above, a pipeline's failure to provide reliable primary firm service to its firm shippers entails a serious risk of harm to the public and financial costs to shippers.

74. At the same time, the Commission allows pipelines to include in their generally applicable rates the prudently incurred costs of operating their systems so as to minimize routine maintenance outages, including the cost of reservation charge credits.[128] As the September 2012 Order stated, pipelines may reflect the cost of reservation charge credits in their rates in a general section 4 rate case either by reducing the billing determinants

[126] *Centerpoint Energy Gas Transmission Co.*, 144 FERC ¶ 61,195, at P 62 (2013) (*Centerpoint*).

[127] *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 to 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.").

[128] September 2012 Order, 140 FERC ¶ 61,216 at P 58.

used to design the pipeline's rates or including a reasonable projection of the recurring cost of providing such credits in the cost of service.[129] Moreover, as the Commission has explained in several cases, if the pipeline thinks that an NGA section 5 requirement to revise its tariff consistent with Commission policy would result in its rates being too low to recover its overall cost of service, it may file to show why it believes that would be the consequence of that action and seek a rate adjustment in the section 5 proceeding.[130] Reflecting the cost of reservation charge credits in the pipeline's generally applicable rates ensures that the pipeline has an opportunity to recover its prudently incurred costs, without undercutting the pipeline's incentive to avoid the immediate financial cost of providing credits for any particular routine maintenance outage.

75. In *North Baja v. FERC*,[131] the court approved our policy of requiring full credits to provide "the pipeline . . . with an incentive to resolve the interruption as quickly as possible,"[132] stating:

> Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipelines' rates should incorporate the costs associated with a pipeline "operating its system so that it can meet its contractual obligations," and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service.[133]

76. The September 2012 order held that Texas Eastern's Routine Maintenance Exemption fails to provide Texas Eastern a sufficient financial incentive to perform routine maintenance with the minimum possible disruptions to primary firm service, and thus meet its contractual obligations to provide primary firm service to the maximum

---

[129] September 2012 Order, 140 FERC ¶ 61,216 at P 63.

[130] *Northern*, 137 FERC ¶ 61,202 at P 36, *order on reh'g*, 141 FERC ¶ 61, 221 at PP 46-50. *Panhandle*, 143 FERC ¶ 61,041 at P 81, *reh'g*, 148 FERC ¶ 61,025 at PP 59-60. *CenterPoint*, 144 FERC ¶ 61,195 at P 67. Those orders explain the evidentiary showing the pipeline would have to make to support such a rate adjustment.

[131] *North Baja v. FERC*, 483 F.3d at 822.

[132] Opinion No. 406, 76 FERC ¶ 61,022 at 61,089.

[133] *North Baja v. FERC*, 483 F.3d at 823.

extent possible.[134] The Commission explained that, while Texas Eastern's tariff gives it a financial incentive to avoid scheduled maintenance during the peak period, the total exemption from providing credits during the off-peak period allows it to perform maintenance at any time during the off-peak period without any financial penalty for disruptions of primary firm service.

77. On rehearing, Texas Eastern asserts that its existing GT&C section 17.3 already provides it a sufficient incentive to minimize outages. It asserts that, if it fails to exercise due diligence when scheduling routine repair and maintenance and provide reasonable notice prior to scheduling such activities as required by section 17.3, that section requires it to provide full reservation charge credits to its shippers. Texas Eastern contends that the September 2012 Order failed to explain why this provision is insufficient to provide a financial incentive to minimize outages, particularly when the Commission's own means of instilling such an incentive is the same as that it claims is already provided in Texas Eastern's rate schedules – providing reservation charge credits.

78. The Commission disagrees that section 17.3 already provides a sufficient financial incentive for Texas Eastern to minimize outages. The part of that section relied on by Texas Eastern provides in full,

> Pipeline shall exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and shall provide reasonable notice of the same to Customers.

Thus, that section simply directs Texas Eastern to exercise due diligence. It contains no express requirement that Texas Eastern pay reservation charge credits of any kind, nor does it contain any mechanism by which shippers could obtain such credits. At most, that section could provide a basis for a shipper to file a complaint with the Commission or a suit in court for damages, if it believed that Texas Eastern had failed to comply with section 17.3's due diligence and reasonable notice requirements. In any such proceeding, the burden would be on the shipper to show such lack of due diligence or failure to provide reasonable notice. Pursuing either a complaint or a court suit would be time consuming and costly for the shipper, with an uncertain outcome given the difficulties of demonstrating a pipeline's lack of due diligence. As a result, Texas Eastern would face little risk that it would ever be required to provide such credits when it fails to provide primary firm service during the off-peak period because of routine maintenance.

[134] September 2012 Order, 140 FERC ¶ 61,216 at P 66.

79. In short, Texas Eastern's existing tariff relies on the purely regulatory approach of a tariff provision mandating the exercise of "due diligence," followed by a complaint and litigation if a shipper alleges the pipeline failed to exercise due diligence. Such a regulatory approach to reservation charge credits, unsupported by the strong financial incentives provided by the automatic reservation charge crediting requirement, fails to ensure that the pipeline exercises the highest possible standard of care to ensure the reliability of primary firm service and is thus unjust and unreasonable.

80. By contrast, an express provision in Texas Eastern's tariff requiring it to provide full reservation charge credits during any routine maintenance outage consistent with Commission policy will provide a strong financial incentive for Texas Eastern to minimize such outages to the maximum extent possible. With such a requirement, Texas Eastern will know that any failure to schedule primary firm service because of the performance of routine maintenance will require the payment of reservation charge credits. The Commission expects that imposing such an immediate financial cost on Texas Eastern for a failure to provide primary firm service will inspire it to exercise the highest possible standard of care to avoid such outages – a standard that is even higher than the level of care sufficient to satisfy a "due diligence" tariff standard. As discussed above, our finding that the reservation charge crediting requirement will provide a strong incentive to minimize outages of primary firm service is a reasonable economic proposition on which the Commission may rely in deciding whether a pipeline's tariff is just and reasonable. Thus, the crediting requirement will help achieve the Commission's longstanding and important goal of minimizing outages of reserved primary firm service to the maximum extent possible.

81. The importance of providing Texas Eastern a financial incentive to minimize routine maintenance outages is buttressed by the fact that, while the Routine Maintenance Exemption only applies in the off-peak period, the Regulatory Requirements Exemption applies throughout the year. A significant portion of Texas Eastern's routine maintenance can also qualify for the Regulatory Requirement Exemption. PHMSA's integrity management regulations,[135] adopted pursuant to the Pipeline Safety Improvement Act of 2002, specify how pipeline operators must identify, prioritize, assess, evaluate, repair, and validate the integrity of gas transmission pipelines in High Consequence Areas[136] as part of their routine, periodic maintenance activities. Thus, the

[135] *See Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 FR 69778 (December 15, 2003). Those regulations took effect on January 14, 2004.

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

(continued...)

Regulatory Requirements Exemption undercuts whatever incentive the Routine Maintenance Exemption may provide for Texas Eastern to conduct routine maintenance in the off-peak period.

82. Texas Eastern asserts that the Commission's finding that its tariff lacks sufficient financial incentive for it to minimize outages is inconsistent with the finding in the April 1993 *Restructuring Order* that its reservation charge crediting provisions "serve to provide it with appropriate incentives."[137] Texas Eastern suggests that the tariff provisions approved in the *Restructuring Orders* are a just and reasonable alternative and that the Commission must find changed circumstances in order to find those existing provisions relied upon by its customers unjust and unreasonable.

83. However, the *Restructuring Orders* do not reflect current Commission policy on reservation charge crediting. When the Commission processed Texas Eastern and other pipelines' filings to restructure their services in compliance with Order No. 636, the Commission had no stated policy requiring reservation charge credits during non-*force majeure* outages.[138] The primary focus of those proceedings was ensuring pipeline compliance with the fundamental requirements of Order No. 636, including the unbundling of the pipelines' transportation services from their sales services, the adoption of capacity release and flexible point rights, and the adoption of a Straight Fixed-Variable (SFV) rate design. Accordingly, the Commission did not reexamine its reservation charge crediting policy in those proceedings or consider issues such as how the shift to an SFV rate design, guaranteeing full recovery of fixed costs during outages of primary firm service, should affect that policy.[139] It was only after the Commission had completed processing the pipeline filings to comply with Order No. 636 and pipelines had gained

---

environment.

[137] Texas Eastern Request for Rehearing at 30 (citing *Restructuring Orders*, 63 FERC at 61,435).

[138] *Texas Gas Transmission Corp.*, 70 FERC ¶ 61,217, at 61,684-85 (1995) ("The Commission has no stated policy with respect to the reservation charge credits for service interruptions, and therefore, has not required them in the past.").

[139] *See Panhandle*, 143 FERC ¶ 61,041 at PP 39-43, PP 49-51, *reh'g denied*, 148 FERC ¶ 61,025 at P 48, rejecting that pipeline's contention that it should be allowed to retain a tariff provision exempting it from any reservation charge crediting provision, because that tariff provision has been approved in its Order No. 636 restructuring proceeding.

some experience with their restructured operations, that the Commission confronted the issue of reservation charge crediting in the post-Order No. 636 world.

84. In June 1995, the Commission rejected a proposal by Tennessee to have the same exemption from providing reservation charge credits for scheduled maintenance conducted during the off-peak period from May 1 through November 1 as Texas Eastern seeks to retain in this proceeding. The Commission reasoned that "pipelines should be able to provide the service that they have contracted to perform," absent a *force majeure* event.[140] A year later, the Commission again considered this issue in Opinion No. 406, and reaffirmed its earlier holding that the pipeline should provide full reservation charge credits if the pipeline is required to interrupt primary firm service due to an event within its control or maintenance, explaining:

> Requiring Tennessee's customers to share in the risk of interruption that was caused by Tennessee through a partial reservation charge credit does not further these underlying objectives of providing adequate compensation to customers and adequate incentive for Tennessee to avoid interruptions within its control.[141]

85. Since Opinion No. 406, the Commission has consistently treated outages due to scheduled or routine maintenance as non-*force majeure* events for which the pipeline must give full reservation charge credits, including during the off-peak season.[142] In 2004, in *Natural*,[143] the Commission rejected a pipeline's reliance on the Texas Eastern *Restructuring Orders* to support a proposal for the same exemption from crediting for routine off-peak maintenance as Texas Eastern seeks to retain in this proceeding. The Commission held that the *Restructuring Orders* no longer reflected Commission policy,

---

[140] *Tennessee I*, 71 FERC at 62,580.

[141] Opinion No. 406, 76 FERC at 61,086.

[142] *Alliance Pipeline, L.P.*, 84 FERC ¶ 61,239 at 62,214 (1998); *El Paso*, 105 FERC ¶ 61,262 at PP 14-15; *Florida Gas*, 105 FERC ¶ 61,171 at P 34, *order on reh'g*, 107 FERC ¶ 61,074 at PP 27-33; *Natural*, 102 FERC ¶ 61,326, at PP 18-19, *order on reh'g*, 106 FERC ¶ 61,310 at PP 13-15; *North Baja*, 109 FERC ¶ 61,159 at P 12, *order on reh'g*, 111 FERC ¶ 61,101 at PP 15-19; *Rockies Express I*, 116 FERC ¶ 61,272 at P 63; *Southern*, 135 FERC ¶ 61,056 at PP 24-27; *Northern*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202 at PP 30-32.

[143] *Natural*, 102 FERC ¶ 61,326, *order on reh'g*, 106 FERC ¶ 61,310.

and, therefore, that Natural's proposed tariff provisions were not just and reasonable.[144] The Commission reasoned that:

> While the Commission accepted Texas Eastern's reservation charge credit provisions in Texas Eastern's Order No. 636 restructuring proceedings, subsequent to that proceeding the Commission clarified its policy on reservation charge credits in Opinion No. 406.[145]

86. For the reasons discussed above, we find that, contrary to the April 1993 *Restructuring Order* relied on by Texas Eastern, its existing tariff does not provide a sufficient financial incentive for it to keep outages for routine maintenance to an absolute minimum. Texas Eastern's existing tariff imposes on shippers a burdensome process of proving lack of due diligence to obtain any reservation credits for off-peak routine maintenance outages of primary firm service, whereas Commission policy since 1995 has required that pipelines automatically provide credits for any such outage.

87. Texas Eastern next points out that the September 2012 Order held that section 17.3's due diligence and reasonable notice requirements are just and reasonable.[146] It contends that holding is inconsistent with the finding that Texas Eastern's tariff lacks sufficient financial incentives to minimize routine maintenance outages. There is no inconsistency between these holdings. The September 2012 Order found that section 17.3's due diligence and reasonable notice requirements are just and reasonable, because "advance notice of outages due to routine maintenance, including details as to the timing of the outages and specific facilities, provides important benefits to shippers and the market" by giving them "time to plan for each outage and make alternative arrangements to obtain needed gas supplies during the period of the

---

[144] *Natural*, 106 FERC ¶ 61,310 at PP 13-15.

[145] *Id*. P 13.

[146] Texas Eastern cites the September 2012 Order, 140 FERC ¶ 61,216 at P 68, in which the Commission stated,

> While we are requiring Texas Eastern to eliminate its Routine Maintenance Exemption, we are not requiring Texas Eastern to remove section 17.3 of its GT&C. The requirements in that section for Texas Eastern to minimize, and give reasonable notice of, service interruptions due to routine repair and maintenance are just and reasonable and *will remain in effect* [emphasis added].

outage."[147] Thus, the Commission did not find section 17.3 just and reasonable because it provided Texas Eastern an adequate financial incentive to minimize outages, but because of the benefits to shippers of section 17.3's advance notice provisions. Moreover, the Commission found that requiring full reservation charge credits would not undermine the prior notice benefits of section 17.3,[148] but rather would provide an important additional financial incentive for Texas Eastern to minimize such outages.[149]

88. Texas Eastern argues that the Commission's finding that Texas Eastern's tariff lacks an adequate financial incentive to minimize outages of primary firm service is contrary to evidence that Texas Eastern is currently acting under correct incentives to minimize disruptions of service, citing the Commission's response to a ConocoPhillips pleading. As Texas Eastern asserts, the Commission did find that pipelines such as Texas Eastern, whose firm shippers do not use their full contract demand every day during the year, should have the flexibility to plan for most or all routine maintenance.[150] The Commission also noted that Texas Eastern stated in its answer to the ConocoPhillips pleading that it had scheduled the maintenance complained of by ConocoPhillips during a period when ConocoPhillips rarely nominates service.[151] However, Texas Eastern has also stated during this proceeding that its system is not designed so that it can perform all the routine maintenance necessary to ensure reliable operation of its system without any interruption of primary firm service, and that more stringent safety requirements expected to be imposed by PHMSA will likely require more such outages.[152]

89. Thus, the facts concerning Texas Eastern's system are similar in all relevant respects to the facts presented by such cases as *North Baja*, where there was also no evidence of a lack of prior diligence in minimizing outages. While some outages of primary firm service for routine maintenance may be unavoidable, the pipeline has a

[147] September 2012 Order, 140 FERC ¶ 61,216 at P 68.

[148] The Commission also described how Texas Eastern could base full reservation charge credits on shipper usage before any advance notice of a maintenance outage is given, so as to avoid shippers taking advantage of the prior notice to increase their credits. *Id*. P 69.

[149] *Id.* PP 69-70.

[150] *Id.* P 61.

[151] *Id*.

[152] March 19, 2012 Texas Eastern Response at 12-13 and 14-15.

degree of control over their timing, giving it the ability to minimize any necessary outages for routine maintenance. It is exactly this situation that creates the greatest need for, and potential benefit from, a tariff provision creating a strong financial incentive for the pipeline to minimize any necessary outages.

90. Finally, we note that we have stated that, if a pipeline produces evidence that requiring it to comply with the Commission's reservation charge crediting policy could cause it to incur significant additional costs which the pipeline might not be able to recover absent a significant increase in rates, the Commission and other interested parties could consider whether to proceed with section 5 action to modify the pipeline's crediting provisions.[153] While Texas Eastern suggested in its response to the February 2012 Order that operating its system so as to meet its primary firm obligations at all times would be cost-prohibitive, the September 2012 Order found no evidence that requiring Texas Eastern to comply with its reservation charge crediting would significantly increase Texas Eastern's costs.[154] However, the Commission also stated that pipelines may include in their rates the recurring cost of reservation charge credits or the cost of pursuing other strategies to minimize service interruptions.

91. In its request for rehearing of the September 2012 Order, Texas Eastern does not contest that order's finding that modifying its tariff to require full reservation charge credits for routine maintenance outages should not cause it to incur significant additional costs. In addition, in its filing to comply with the September 2012 Order, Texas Eastern has not taken advantage of the opportunity we have provided it to present evidence that compliance with the Commission's reservation charge crediting policy will affect its ability to recover its full cost of service. Accordingly, we find no basis in the current record not to apply our longstanding policy of requiring full reservation charge credits for routine maintenance outages to Texas Eastern.[155]

Compensation for Unavailability of Primary Firm Service

92. Aside from the role of the full crediting requirement in providing an incentive for the pipeline to minimize routine maintenance outages, as discussed above, full reservation charge credits are also necessary to provide firm shippers rate relief and compensation for costs incurred as a result of the pipeline's failure to provide the service for which the shipper is paying its reservation charge.

---

[153] *Northern*, 141 FERC ¶ 61,221 at P 50.

[154] September 2012 Order, 140 FERC ¶ 61,216 at PP 61-63.

[155] *Panhandle*, 148 FERC ¶ 61,025 at P 60.

93. In this respect, the Commission's reservation charge crediting policy is based on the basic ratemaking principle that a utility must provide the service for which its customers have paid in their rates. Shippers pay a reservation charge for the firm transportation of gas. Therefore, when a shipper nominates gas up to the daily maximum volume to be transported in accordance with the reserved firm service for which it has paid and the pipeline fails to provide that service, the Commission's policy reasonably requires that the pipeline provide credits to the shipper for the reserved service which was paid for by the shipper and the pipeline failed to provide. Such credits help compensate the shipper for costs incurred when the service for which it is paying reservation charges is not available, including any costs incurred to purchase capacity on other pipelines or alternative energy supplies and, for industrial or producer-marketer shippers, the cost of lost business opportunities. A pipeline's rates must contain reservation charge crediting provisions consistent with this policy in order to meet the statutory requirement in sections 4 and 5 of the NGA that its rates are just and reasonable.

94. Texas Eastern argues that the September 2012 Order's holding that "it is reasonable to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided"[156] is based on the incorrect premise that firm service means that customers are "guaranteed" service 365 days per year.[157] Texas Eastern points out that existing section 17.3 of its GT&C, which the September 2012 Order found to be just and reasonable, allows Texas Eastern to interrupt service to perform routine repair and maintenance or comply with governmental requirements with reasonable notice and due diligence to minimize the outages.[158] In addition, its existing tariff includes exemptions from reservation charge crediting for routine maintenance performed in off-peak periods.

95. The Commission recognizes, as Texas Eastern asserts, that although primary firm service is a pipeline's highest priority transportation service, even that service may be interrupted or reduced under a pipeline's tariff due to certain conditions, i.e., to perform required maintenance, as Texas Eastern's GT&C section 17.3 allows. In that sense, the service is not "guaranteed." However, the contract of each firm shipper on Texas Eastern

[156] September 2012 Order, 140 FERC ¶ 61,216 at P 57.

[157] Texas Eastern Request for Rehearing at 33 and n.95 (citing the statement in the September 2012 Order that "Firm shippers pay reservation charges for a guaranteed firm right to ship gas, throughout the year, up to their mainline contract demand using the primary receipt and delivery points in their contracts." September 2012 Order, 140 FERC ¶ 61,216 at P 57).

[158] September 2012 Order, 140 FERC ¶ 61,216 at P 31.

includes a maximum daily contractual entitlement (Maximum Daily Quantity or MDQ) to service, and each shipper pays a reservation charge for each Mcf of that contractual entitlement to service. Texas Eastern, in section 1, Definitions, of its GT&C, defines the term "Maximum Daily Quantity" as the "maximum quantity of natural gas which Pipeline shall be *obligated* to deliver in any day to Customer"[159] as specified in an executed service agreement. Thus, when a firm shipper is unable to schedule primary firm service within its contractual entitlement to service, it is not receiving the service for which it is paying or which Texas Eastern is "obligated" to provide. As described above, the shipper's inability to receive its contracted for service entails significant risks of harm to the public and financial costs to the shipper. While Texas Eastern's Routine Maintenance Exemption only applies during the May 1 through November 1 off-peak period, shippers pay reservation charges to reserve primary firm capacity for both peak and off-peak periods. A failure to receive required service during the off-peak period can cause the same problems as a failure to receive such service during the peak period.

96. Thus, we continue to find that, when routine maintenance prevents Texas Eastern from providing primary firm service to a shipper within the contractual entitlement set forth in its contract, it is unreasonable not to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided.

Lack of Evidence of Number of Outages or of Mismanagement

97. In the September 2012 Order, the Commission held that its policy of requiring full reservation charge credits for routine maintenance outages is applicable regardless of whether a pipeline can avoid such outages or has allowed such outages to occur through "mismanagement" of its system.[160] Accordingly, the September 2012 Order held that there was no need to show that Texas Eastern could manage routine maintenance on its system so as to avoid any primary firm service outages or to show that any failure to avoid such outages in the past or the future would constitute mismanagement.[161] The Commission explained that, in such cases as *El Paso*, *Florida Gas*, and *North Baja*,[162] the Commission clarified that the policy set forth in Opinion No. 406 is not limited to situations involving pipeline "mismanagement." The September 2012 Order also pointed

[159] Emphasis added.

[160] September 2012 Order, 140 FERC ¶ 61,216 at PP 47-59. *See also Centerpoint*, 144 FERC ¶ 61,195 at PP 59-63.

[161] September 2012 Order, 140 FERC ¶ 61,216 at P 59.

[162] *El Paso*, 105 FERC ¶ 61,262 at P 14; *Florida Gas*, 105 FERC ¶ 61,171, *order on reh'g*, 107 FERC ¶ 61,074 at P 29; and *North Baja*, 111 FERC ¶ 61,101 at P 15.

out that in *El Paso*, the Commission stated that its policy on this issue is not dependent upon the specific operating conditions on the pipeline,[163] and that the D.C. Circuit affirmed the policy of requiring full reservation charge credits for all routine maintenance outages of primary firm service in *North Baja v. FERC*.

98. Texas Eastern contends that it is impermissible for the Commission to establish a policy in individual adjudications which is not dependent upon the specific operating conditions on the pipeline or whether there is any evidence that the pipeline has failed to exercise due diligence to minimize routine maintenance outages. Texas Eastern interprets *Shell Oil* and *Florida Gas v. FERC* as requiring that any reservation charge crediting rule adopted in an adjudication permits each pipeline to challenge the crediting requirement based on the specific operating conditions on its system. Texas Eastern complains that, because the Commission's policy requiring pipelines to provide full reservation charge credits for routine maintenance outages is not dependent on the specific operating conditions on each pipeline, "no pipeline will ever be able to present individual facts or circumstances that would persuade the Commission to depart from" that policy.[164]

99. Texas Eastern argues that the prior adjudications relied on by the September 2012 Order to find that a sufficient *prima facie* showing had been made that Texas Eastern's reservation charge crediting provisions are unjust and unreasonable to justify initiating this section 5 proceeding did not themselves include a substantiation of the application of the rule through the development of specific facts, as required by *Shell Oil* and *Florida Gas v. FERC*. Texas Eastern asserts that the Commission relied on Opinion No. 406 where the Commission established its policy related to non-*force majeure* events based on general propositions that: (i) it is inequitable for customers to bear the risk associated with the pipeline's mismanagement of its system, such as maintenance outages within its control; and (ii) providing reservation charge credits incentivizes a pipeline "to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system."[165] Texas Eastern contends that Opinion No. 406 did not support either of these general propositions with findings of fact based on record evidence.

100. Texas Eastern argues that the other orders relied upon by the September 2012 Order also did not make the necessary findings of fact but simply relied on the policy

---

[163] *El Paso*, 105 FERC ¶ 61,262 at P 15.

[164] Texas Eastern Request for Rehearing at 24.

[165] *Id.* 15 (citing Opinion No. 406, 76 FERC at 61,086).

from Opinion No. 406.[166] For example, Texas Eastern contends that in *Natural*,[167] in which the Commission rejected a pipeline's proposal to adopt the same Routine Maintenance Exemption as in Texas Eastern's tariff, the Commission failed to make any findings of fact but simply relied on Opinion No. 406 as having changed Commission policy after the approval of Texas Eastern's provision. Texas Eastern contends the same is true of the Commission's orders in *Southern*[168] and *Portland*,[169] and that in *Southern*[170] the Commission even quoted its statement in *El Paso*[171] that "[t]he Commission's policy on this issue . . . is not dependent upon the specific operating conditions of the pipeline." Texas Eastern further contends that the orders relied on by the Commission did not involve facts similar to those in the present case. For example, unlike the pipelines in those cases, Texas Eastern has had its existing tariff provisions for nearly two decades and there is no indication that it mismanaged its system or unnecessarily interrupted service, nor have there been any complaints of unnecessary service interruptions or mismanagement.

101. Texas Eastern contends that the Commission may not establish a rule in individual adjudications which is not dependent upon the specific operating conditions on the pipeline or whether there is any evidence that the pipeline has failed to exercise due diligence to minimize routine maintenance outages. Texas Eastern asserts that, because the Commission is proceeding by adjudication rather than rulemaking, it must in each case compare the subject pipeline's history of scheduled maintenance and how much primary firm service was interrupted during those maintenance events with the similar facts concerning the pipelines in the prior adjudications. Texas Eastern asserts that in order to properly substantiate application of its reservation charge crediting policy to Texas Eastern, the Commission must come "forth with facts and apply such facts to prove that Texas Eastern has engaged in mismanagement of its system and is requiring its customers to bear the risk associated with such mismanagement or that Texas Eastern is

---

[166] *Id.* 14-17.

[167] *Id.* 15 (citing *Natural*, 106 FERC ¶ 61,310 at PP 13, 15).

[168] 135 FERC ¶ 61,056 at PP 24-27.

[169] 76 FERC at 61,663.

[170] 135 FERC ¶ 61,056 at P 25.

[171] 105 FERC ¶ 61,262 at P 15.

not managing its system in a manner to avoid interruption and therefore needs an incentive to prevent service interruptions."[172]

102. The Commission finds that it may, consistent with the APA, develop and apply in individual adjudications a policy requiring full reservation charge credits for routine maintenance outages that applies to all pipelines regardless of their specific operating conditions or evidence of "mismanagement" by individual pipelines leading to unnecessary outages. Texas Eastern argues, in essence, that not only do *Shell Oil* and *Florida Gas v. FERC* require the Commission to provide each pipeline a procedural right to challenge the application to it of any rule adopted in an adjudication, but the substance of the rule must be such that at least some pipelines will be successful in their challenges. Put another way, the arguments of Texas Eastern and INGAA amount to a contention that any rule adopted in an adjudication must have some limit to its application so that, for example, the rule applies only to pipelines with certain operating conditions or applies only to pipelines who have engaged in some form of mismanagement of their system.

103. Nothing in *Shell Oil* and *Florida Gas v. FERC* suggests such a limit on the substantive nature of rules adopted in adjudications. As discussed previously, those decisions address only the due process the Commission must provide affected parties in each adjudication where the rule is applied, not the substantive nature of the rule in question. Indeed, in *Shell Oil*, the court stated that the Commission "may establish *rules of general application* in a statutory rulemaking *or an individual adjudication*."[173] And in *Florida Gas v. FERC*, the court stated that the Commission "is not required to decide every case on individualized facts. It may invoke rules of general application in individual cases."[174]

104. Texas Eastern's contentions that the Commission cannot require pipelines to provide full reservation charge credits for routine maintenance in adjudications without considering each pipeline's specific operating conditions and diligence in avoiding outages is directly contrary to the decision of the D.C. Circuit in *North Baja v. FERC*. In that case, as here, the Commission relied on precedents developed in prior adjudications to require a pipeline to revise its tariff to provide full reservation charge credits during routine maintenance outages, rejecting contentions similar to those Texas Eastern makes here. As described in our rehearing order in that case, North Baja's rehearing request contended that the Commission's earlier order in the case improperly failed:

---

[172] Texas Eastern Request for Rehearing at 19.

[173] *Shell Oil*, 707 F.2d at 235 (emphasis added).

[174] *Florida Gas v. FERC*, 876 F.2d at 44.

> to distinguish between a pipeline that has a history of operational problems resulting in severe curtailment and which has set aside capacity for the purpose of system maintenance [citing the *El Paso* case, requiring full reservation charge credits for routine maintenance outages] and North Baja, which does not have the same history or capacity set aside. North Baja states that when taken into account, these factors render the Commission's general planned maintenance interruptions precedent inapplicable to North Baja. Therefore, North Baja recommends that the Commission should consider the specific circumstances on the pipeline and extent of control the pipeline had in preventing an interruption of service during planned maintenance."[175]

105. The Commission rejected this contention, stating, "Although the pipeline in *El Paso* may have had a history of operational problems resulting in curtailments, the Commission has consistently held, at times under circumstances without such a history of operational problems, that interruptions from planned or scheduled maintenance is a non-*force majeure* event that requires the pipeline to provide full credits," and the Commission cited *Natural* as an example of such a case.[176]

106. In *North Baja v. FERC*, the D.C. Circuit affirmed our *North Baja* orders, finding that the Commission reasonably relied on precedent developed in prior adjudications that was not dependent upon the specific operating conditions of the pipeline in question. The court stated that the Commission had analyzed the issue of reservation charge credits for routine maintenance outages at length in Opinion No. 406, ruling that scheduled maintenance is not a *force majeure* event, and therefore the pipeline must provide full reservation charge credits. The court explained that in subsequent cases the Commission has consistently applied the Opinion No. 406 precedent, without regard to the specific operating conditions on the pipeline:

> [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,

[175] *North Baja*, 111 FERC ¶ 61,101 at P 16 (footnotes omitted).

[176] *Id*. P 17.

> 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.[177]

107. The court further noted that "North Baja argues that FERC was obligated to consider the specific factual circumstances of North Baja—in particular, that it was operating at full capacity and scheduled maintenance outages were therefore uncontrollable."[178] The court rejected this contention, stating:

> In Opinion No. 406, however, the Commission defined *force majeure* events as events that are not only uncontrollable, but also unexpected. As the Commission wrote, "neither Tennessee nor its shippers are at fault for *force majeure* interruptions, because these are unexpected and uncontrollable events," 76 FERC ¶ 61,022, at 61,088. Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipelines' rates should incorporate the costs associated with a pipeline "operating its system so that it can meet its contractual obligations," and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service. The Commission here reasonably determined that North Baja's circumstances did not exempt it from the Commission's longstanding policy regarding scheduled maintenance [emphasis added].[179]

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

109. In this case, we have relied on the same precedents to require Texas Eastern to remove its Routine Maintenance Exemption as the D.C. Circuit found the Commission

[177] 483 F.3d 819 at 823.

[178] *Id*.

[179] *Id*.

reasonably relied on *North Baja v. FERC*. While Texas Eastern contends that Opinion No. 406 failed to support the policy requiring full credits for routine maintenance outages with findings of fact based on record evidence, the D.C. Circuit found that Opinion No. 406 "analyzed this issue at length" and "there is nothing unreasonable about FERC's policy" adopted by that opinion. Moreover, in describing the Commission's application of that policy in subsequent cases, the court highlighted our statement in *El Paso* that the Commission's "policy on this issue . . . is not dependent upon the specific operating conditions on the pipeline." Thus, while Texas Eastern cites that statement in *El Paso* as demonstrating that the Commission's prior adjudications erroneously applied a generic policy without considering the individual facts about each subject pipeline, the D.C. Circuit held exactly the reverse – that the Commission has reasonably adopted and applied in individual adjudications a policy requiring full reservation charge credits for routine maintenance outages that is not dependent on the "specific operating conditions on the pipeline."[180]

110. Texas Eastern attempts to distinguish the court's opinion in *North Baja v. FERC* by claiming the court "simply" affirmed the major elements of the Commission's policy without affirming the factual predicate underlying that policy.[181] However, as described above, the court in *North Baja v. FERC* explicitly considered and rejected North Baja's contention that the Commission had improperly failed to consider North Baja's "specific factual circumstances." The court concluded that the Commission had reasonably determined that North Baja's circumstances did not exempt it from the Commission's longstanding policy requiring full reservation charge credits for routine maintenance, pointing out that policy is not dependent upon the specific operating conditions of the pipeline.

111. Texas Eastern also contends that the Commission's decision in *Natural*,[182] in which the Commission rejected a pipeline's proposal to adopt the same Routine Maintenance Exemption as in Texas Eastern's tariff, is invalid precedent, because the Commission simply relied on Opinion No. 406 and did not make findings of fact specific to the pipeline. While the court in *North Baja v. FERC* did not expressly mention *Natural* in affirming the Commission's rejection of North Baja's contention that its specific factual circumstances justified an exemption from the full crediting requirement, the Commission's underlying rehearing order in *North Baja* expressly supported its holding with a citation to *Natural* as an example of a case in which it had required a

---

[180] *Id.*

[181] Texas Eastern Request for Rehearing at 15 n.40.

[182] *Id.* 15 (citing *Natural*, 106 FERC ¶ 61,310 at PP 13, 15).

pipeline without "a history of operational problems" to provide full reservation charge credits for routine maintenance outages.[183]

112. Finally, Texas Eastern argues that there has been no complaint or protest filed with the Commission or any court concerning the application of its reservation charge crediting provisions. However, in the *Florida Gas* decision[184] cited by the court in *North Baja v. FERC* as holding that the Commission's policy on this issue is not dependent upon specific operating conditions on the pipeline,[185] there had also been no complaints that the pipeline had inappropriately managed its scheduling of maintenance work. In any event, the pleadings in this proceeding contain numerous requests that Texas Eastern's tariff be modified to comply with the Commission's current reservation charge crediting policy.[186]

113. The Commission concludes that it has reasonably relied on its past precedent to require Texas Eastern to eliminate its Routine Maintenance Exemption without considering evidence of Texas Eastern's history of outages or how diligently it has managed its system. We have no quarrel with Texas Eastern's assertion in its Request for Rehearing that the "basic premise of precedent is that it establishes a rule to be followed when the facts and circumstances of cases are aligned, but if they are not aligned then that begs a departure from or modification to the precedent with respect to the different facts and circumstances of the matter."[187] However, contrary to Texas Eastern's arguments on rehearing, the relevant facts and circumstances of this case are "aligned" with the relevant facts and circumstances in the prior adjudications establishing the rule requiring full reservation charge credits for routine maintenance outages. As discussed above, that rule is not dependent on the "specific operating conditions on the pipeline," nor does it require a showing of a "history of operational problems resulting in curtailments." Indeed, Texas Eastern itself recognizes in its Request for Rehearing that the Commission has applied that rule to pipelines in prior adjudications without any

[183] *North Baja*, 111 FERC ¶ 61,101 at P 13 n. 13.

[184] *Florida Gas*, 107 FERC ¶ 61,074 at P 22.

[185] 483 F.3d at 822-823.

[186] *See* the numerous pleadings objecting to Texas Eastern's tariff subsequent to the September 2012 Order, the comments on the Response filed by MDG and ConocoPhillips, and Indicated Shippers' answer to Texas Eastern's answer to comments.

[187] Texas Eastern Request for Rehearing at 24.

evidence as to those pipelines' histories of outages or lack of due diligence.[188] While Texas Eastern contends that the Commission erred in those prior cases, the D.C. Circuit has ruled otherwise.

114. Therefore, we find nothing in the circumstances on Texas Eastern's system to justify exempting it from application of our prior precedent concerning full reservation charge credits for routine maintenance outages. As described in the preceding sections, Texas Eastern's firm shippers, like those on other pipelines, pay substantial reservation charges for primary firm service in order to have reliable access to natural gas to serve high priority needs, including needs affecting public safety. Thus, the Commission's concern that interruptions of primary firm service be kept to an absolute minimum and that firm shippers be provided relief from paying reservation charges for services not rendered applies equally to Texas Eastern as to the other pipelines we have required to comply with our reservation charge crediting policy.[189] In addition, while some service disruptions on Texas Eastern may be unavoidable, there is also evidence that Texas Eastern can control the timing of such interruptions, thus enabling it to minimize any necessary disruptions in response to the strong financial incentives created by the Commission's reservation charge crediting policy. Thus, all the facts we have relied on in previous adjudications to require pipelines to provide full reservation charge credits for routine maintenance outages also exist on Texas Eastern's system.

115. Texas Eastern was given ample opportunity to challenge the application of Commission policy in this case due to unique circumstances or other reasons. The only specific difference between its system and other systems which Texas Eastern has pointed to is the fact section 17.3 of its GT&C requires it to provide reasonable advance notice of routine maintenance outages and exercise due diligence to minimize such outages. However, we have already explained above why that tariff provision does not justify exempting Texas Eastern from the rule requiring full reservation charge credits established in our prior adjudications. While Texas Eastern has asserted that its history of outages for maintenance purposes should be a relevant factor in any adjudication involving reservation charge crediting, it has not produced any evidence as to what that history is. Consistent with the fact that we are proceeding by case-by-case adjudication, we gave Texas Eastern the opportunity to produce evidence of the pattern of outages on its system and explain why that pattern indicated our reservation charge crediting policy should not be applied. Information regarding the pattern of outages on Texas Eastern's system is in its possession, as the operator of its system. However, Texas Eastern chose not to submit any evidence concerning outages on its system, either to indicate that such

---

[188] *Id*. 14-17.

[189] *See, e.g., Panhandle,* 148 FERC ¶ 61,025 at P 55.

outages are rare or non-existent or to indicate that such outages are significant and unavoidable. Nor has Texas Eastern provided any explanation of how whatever pattern of outages does exist on its system might be relevant to the issue of whether its existing reservation charge crediting provisions are unjust and unreasonable. We conclude that Texas Eastern has not produced any evidence of circumstances on its system that would warrant an exception from our longstanding reservation charge crediting policy.

116. For these reasons, the *Shell Oil* and *Florida Gas v. FERC* decisions cited by Texas Eastern are distinguishable from this case. In both of those cases, there were significant factual differences from the prior adjudications the Commission had relied on in reaching its decision, rendering the prior precedent inapplicable to those cases. In *Shell Oil*, the producer'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, whereas the key fact relied on in the prior adjudication denying a request for a new vintage price was that the producer's wells were onshore wells that were able to utilize existing well footage to a great degree. In *Florida Gas v. FERC*, the pipeline had not yet applied for a blanket certificate to perform open access transportation, whereas the key fact the Commission had relied on in the prior adjudication limiting the term of an individual certificate to one year was that the pipeline had already sought a blanket certificate and was in the midst of converting to open access transportation.

117. We now turn to a discussion of Texas Eastern's other reservation charge crediting provisions found unjust and unreasonable in the September 2012 Order: the Regulatory Requirements Exemption, the OFO Exemption, and the 95 Percent Requirement. In attacking the September 2012 Order's holding that Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable and must be revised, Texas Eastern and INGAA generally do not distinguish between the four specific reservation charge crediting provisions the Commission found unjust and unreasonable. Rather, they generally make broad brush arguments that we have improperly proceeded by adjudication with respect to all our holdings. In our discussion above of the Routine Maintenance Exemption, we have addressed all such contentions. In the next three sections, we address Texas Eastern and INGAA's contentions which are specific to the other provisions of Texas Eastern's tariff found unjust and unreasonable in the September 2012 order.

2. The Regulatory Requirements Exemption and the Definition of *Force Majeure*

118. The Regulatory Requirements exemption exempts Texas Eastern from providing reservation charge credits if its failure to deliver is the result of its "performing at any time repair and maintenance of its facilities to comply with regulatory requirements." Thus, unlike the Routine Maintenance Exemption discussed above, the Regulatory Requirements Exemption applies across-the-board to service interruptions which occur at any time of the year.

119. The September 2012 Order held that this provision is unjust and unreasonable because it imposes on Texas Eastern's shippers the entire risk of any service interruption to comply with regulatory requirements, contrary to Commission policy requiring pipelines to provide firm shippers with either full or partial reservation charge credits depending on whether the outage is due to a *force majeure* event. The Commission explained that outages due to scheduled or routine maintenance necessary to comply with regulatory requirements are not *force majeure* events, and thus the pipeline must provide full reservation charge credits for any such outages. However, the Commission also recognized that it had held that, in some circumstances, an outage required to comply with governmental requirements may be treated as resulting from a *force majeure* event for which partial reservation charge credits are required.[190] The September 2012 Order concluded that the Regulatory Requirements Exemption violates Commission precedent requiring pipelines to share the risk of *force majeure* outages, as well as Commission precedent requiring full reservation credits for non-*force majeure* outages.[191] For the same reasons, the Commission found unjust and unreasonable section 17.1 of Texas Eastern's GT&C defining *force majeure* events to include "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means." The Commission held that, to the extent that this provision is intended to treat all service interruptions for testing, repair and maintenance in compliance with government orders as *force majeure* events, this provision is contrary to Commission policy.

a. **Rehearing Requests**

120. In their rehearing requests, both Texas Eastern and INGAA assert the September 2012 Order's requirement that Texas Eastern modify the Regulatory Requirements Exemption and modify the section 17.1 definition of *force majeure* suffers from the same flaws as the requirement to eliminate the Routine Maintenance Exemption. They contend that the September 2012 Order improperly applied policies developed in individual adjudications to Texas Eastern as if they were a rule, without considering the specific factual circumstances of Texas Eastern's system. Texas Eastern also asserts that, in two of the prior adjudications the Commission relied on in finding that Texas Eastern

[190] *See Florida Gas*, 107 FERC ¶ 61,074 at P 32.

[191] September 2012 Order, 140 FERC ¶ 61,216 at PP 82-88 and P 91 (citing, *e.g.*, *Natural*, 106 FERC ¶ 61,310 at PP 13, 15; *Florida Gas*, 107 FERC ¶ 61,074 at P 32; *North Baja*, 111 FERC ¶ 61,101 at P 18, *aff'd*, *North Baja v. FERC*, 483 F.3d at 823; *Tennessee II*, 139 FERC ¶ 61,050 at PP 80-82; and *Rockies Express II*, 139 FERC ¶ 61,275 at P 19).

must provide full reservation charge credits for maintenance required to comply with regulatory requirements (*Orbit*[192]and *Florida Gas*[193]), the Commission failed to substantiate its holdings with any specific facts in the record. Texas Eastern and INGAA also contend that the September 2012 Order's finding that the Regulatory Requirements Exemption is unjust and unreasonable is inconsistent with the Commission's approval of that provision in the *Restructuring Orders.*

b. <u>Discussion</u>

121. The Commission continues to find that Texas Eastern's Regulatory Requirements Exemption is unjust and unreasonable. That provision unreasonably imposes on Texas Eastern's shippers the entire risk of any service interruption to comply with regulatory requirements, contrary to Commission policy. As the Commission explained in the September 2012 order, the Commission requires pipelines to provide some level of reservation charge credits whenever the pipeline is unable to schedule reserved primary firm service because of a government action.[194] If the particular government action is considered a non-*force majeure* event, the pipeline must provide full reservation charge credits. If the particular government action is considered a *force majeure* event, the pipeline must provide partial reservation charge credits in order to share the costs of a no-fault event outside the control of either the pipeline or its shippers. Thus, the level of credits to be provided turns on whether the government action is considered a *force majeure* event.

122. The Commission has defined *force majeure* outages as events that are both "unexpected and uncontrollable."[195] In adjudications after the September 2012 Order in this case, the Commission has clarified the distinction between (1) government actions that do not qualify as *force majeure* events under these criteria so that full reservation charges must be provided for any resulting outages and (2) government actions that do qualify as *force majeure* events so that only partial reservation charge credits need be provided for any resulting outage. In *TransColorado*[196] and *Gulf South,*[197] the

---

[192] Texas Eastern Request for Rehearing at 17 (citing *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009) (*Orbit*)).

[193] *Id.* (citing *Florida Gas*, 107 FERC ¶ 61,074 at PP 28-29).

[194] September 2012 Order, 140 FERC ¶ 61,216 at PP 83-86 and cases cited therein.

[195] Opinion No. 406, 76 FERC at 61,088; *North Baja v. FERC*, 483 F.3d at 823.

[196] 144 FERC ¶ 61,175 at PP 35-44.

Commission stated that the basic distinction is between: (1) outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including PHMSA's integrity management regulations; and (2) outages resulting from one-time, non-recurring government requirements, including a special, one-time testing requirement after a pipeline failure.

123. In *Gulf South*, the Commission explained that this distinction is reasonable for two reasons. First, the pipeline is likely to have greater discretion as to when it performs regular, periodic maintenance on particular pipeline segments, than when the government orders special one-time testing. In fact, the PHMSA integrity management regulations generally provide for a basic seven-year schedule for reassessing the integrity of pipeline segments in HCAs.[198] Thus, regular, periodic maintenance required by government regulation may be considered reasonably within the control of the pipeline and expected, in contrast to one-time, non-recurring government requirements. Second, the recurring costs of regular, periodic maintenance performed in the ordinary course of business may be included in a pipeline's rates in a general NGA section 4 rate case, whereas one-time, non-recurring costs are generally not eligible for inclusion in a pipeline's rates in a section 4 rate case. In *North Baja*, the court affirmed our policy requiring full credits for "scheduled" maintenance, finding that "there 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.'"[199] Consistent with this policy, the Commission has held that pipelines may reflect the costs of providing full reservation charge credits for non-*force majeure* outages in their rates.[200] Given that the full crediting policy is premised on the ability of the pipeline to recover the costs associated with that policy through its rates, it follows that eligibility for such cost recovery is an important factor in distinguishing between the types of government testing and maintenance requirements which trigger the full crediting requirement and those which only trigger a partial crediting requirement.[201]

---

[197] 144 FERC ¶ 61,215 at PP 31-34.

[198] *See* 49 C.F.R. § 192.939 (2014).

[199] *North Baja v. FERC*, 483 F.3d at 823.

[200] *See, e.g., Northern*, 141 FERC ¶ 61,221 at PP 46-50.

[201] Consistent with this clarification of the type of government requirements which may be treated as *force majeure* events, the Commission has permitted pipelines to include in their tariffs a provision permitting partial reservation charge crediting for a

(continued...)

124. Texas Eastern and INGAA contend that the Commission erred in requiring Texas Eastern to eliminate its Regulatory Requirements Exemption and modify its definition of *force majeure* consistent with the above policies for the same reasons they contend we erred in requiring Texas Eastern to eliminate its Routine Maintenance Exemption. In making these arguments, Texas Eastern and INGAA generally do not distinguish between the Routine Maintenance and Regulatory Requirements Exemptions. Therefore, in the discussion above concerning the Routine Maintenance Exemption, we have already addressed Texas Eastern and INGAA's contentions as they relate to the September 2012 Order's requirement that Texas Eastern provide full reservation charge credits for regular, periodic maintenance required by government regulations. Such maintenance is simply one type of routine maintenance. Thus, the same facts which substantiate application to Texas Eastern of our prior precedent requiring full reservation charge credits for routine maintenance outages generally also substantiate application to Texas Eastern of our precedent requiring full reservation charge credits for outages due to regular, periodic maintenance necessary to comply with government requirements.[202] In addition, the due diligence and advance notice requirements in GT&C section 17.3 do not provide an adequate incentive to minimize such outages for the same reasons discussed above with respect to the Routine Maintenance Exemption.[203] Indeed, the fact the Regulatory Requirements Exemption applies to outages throughout the year, and not just outages occurring during the peak period, renders all the more necessary the strong financial incentive to minimize such outages supplied by the full reservation charge crediting requirement.

125. Texas Eastern[204] points out that, in the part of the September 2012 Order denying rehearing of the February 2012 Order's initiation of this section 5 proceeding, the Commission stated that the February 2012 Order "relied on binding precedent in individual adjudications in *Orbit*[205]and *Florida Gas*,[206] in finding that the Regulatory

---

transitional period of two years for outages resulting from orders issued by the PHMSA pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code added by section 23 of the 2011 Act requiring pipelines to reconfirm their Maximum Allowable Operating Pressure (MAOP). As discussed in the compliance section of this order, the Commission is permitting Texas Eastern to include such a tariff provision in its revised reservation charge crediting provisions.

[202] *See supra* at PP 50-58, PP 66-67.

[203] *See supra* at PP 51-57.

[204] Texas Eastern Request for Rehearing at 17.

[205] *Orbit*, 126 FERC ¶ 61,095 at P 68.

Requirements Exemption violated the requirement that pipelines provide full reservation charge credits for outages due to maintenance necessary to comply with regulatory requirements."[207] Texas Eastern contends that the Commission improperly relied on those two precedents because the stated policy in those adjudications was not substantiated by any specific facts in the record.

126. This contention is directly contrary to the decision of the D.C. Circuit in *North Baja v. FERC*, affirming the Commission's reliance on *Florida Gas* and other precedents to require North Baja to provide full reservation charge credits for outages due to maintenance. In that opinion, the court stated that the Commission "has repeatedly reiterated that scheduled maintenance is not a *force majeure* event," citing the very same part of our *Florida Gas* decision which Texas Eastern now contends cannot be relied upon to find its Regulatory Requirements Exemption unjust and reasonable.[208] The court then noted that the Commission explained in a later order 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.'"[209] The court concluded that the Commission's *North Baja* orders "had expressly relied on these precedents and applied its well-established and reasonable definition of a *force majeure* event to the case before it," thereby reasonably explaining its decision for purpose of the court's review under the APA.

127. In the portion of *Orbit* cited by Texas Eastern, the Commission relied on *Tarpon Whitetail*,[210] which cites *Florida Gas*, to find that the inclusion in the definition of *force majeure* of "testing (as required by governmental authority . . . for the safe operation of the facility . . .)" was inconsistent with Commission policy. *Orbit* stated that *Tarpon* found that testing and maintenance are part of the service provider's duties under a certificate of public convenience and necessity and, therefore, not appropriately considered a *force majeure* event. Thus, *Orbit* is another example of reliance on the same precedent which the court in *North Baja v. FERC* found to be reasonable.

128. As discussed above, and consistent with our recognition in *NGSA* that binding precedents established in prior adjudications may be modified in subsequent

---

[206] *Florida Gas*, 107 FERC ¶ 61,074 at PP 28-29.

[207] September 2012 Order, 140 FERC ¶ 61,095 at P 22.

[208] *North Baja v. FERC*, 483 F.3d at 822-823.

[209] *Id*., (quoting *El Paso*, 105 FERC ¶ 61,262 at P 15).

[210] *Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 5.

adjudications, the Commission in *TransColorado* and *Gulf South* clarified and somewhat expanded the types of government actions that qualify as *force majeure* events for which only partial credits are required to include all one-time non-recurring government requirements that are not part of the pipeline's routine, periodic maintenance programs. Thus, a special one-time testing requirement by the government, for example after a pipeline failure, may be treated as a *force majeure* event for which only partial reservation charge credits are required, despite the fact *Tarpon Whitetail* may be read as requiring all testing required by the government to be treated as non-*force majeure* events. The tariff revisions we are requiring Texas Eastern to adopt in this proceeding may reflect this clarification of our policy concerning reservation charge credits for outages attributable to government action.

129. Texas Eastern's Regulatory Requirements Exemption is unjust and unreasonable not only because it exempts Texas Eastern from providing reservation charge credits for non-*force majeure* outages due to government-required non-*force majeure* routine period maintenance, but also because it fully exempts *force majeure* outages due to special one-time government requirements from crediting. Such an exemption is contrary to the Commission's longstanding policy that pipelines and their shippers should share equitably the risk of such no-fault events. None of Texas Eastern and INGAA's contentions on rehearing justifies Texas Eastern's retention of such an unjust and unreasonable exemption from the Commission's cost-sharing requirements with respect to *force majeure* outages.

130. While Texas Eastern relies on the approval of its reservation charge crediting provisions in the *Restructuring Orders*, the Commission has provided a reasoned explanation of its requirement that Texas Eastern modify its reservation charge crediting provisions that violate our current policy concerning the sharing of the risk of *force majeure* outages, despite their approval in the *Restructuring Orders*. The Commission failed in the *Restructuring Orders*, as well as orders on the Order No. 636 restructuring compliance filings of other pipelines,[211] to fully consider how Order No. 636's requirement that pipelines shift from the Modified Fixed-Variable Rate Design (MFV) to an SFV rate design should affect its reservation charge crediting policy. Under the MFV rate design in effect before Order No. 636, the pipeline's return on equity and associated income taxes were included in the usage charge. Therefore, pipelines automatically shared the risk of all *force majeure* outages, including those resulting government actions, because they could not recover their return on equity and taxes during the outage. Texas Eastern's Regulatory Requirements Exemption, combined with its shift to an SFV rate design, eliminated its automatic sharing of the risk of *force majeure* outages

[211] *Panhandle*, 143 FERC ¶ 61,041 at PP 39-42.

attributable to government actions. In 1996, Opinion No. 406[212] 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, and accordingly the Commission established a policy of requiring pipelines to include in their tariffs a mechanism for the sharing of the risk of *force majeure* outages. The Commission observed that this requirement "returns the balance of risk back to the *status quo* before the Commission mandated the use of the SFV rate design."[213]

131. While Opinion No. 406 stated that the Safe Harbor method used by Texas Eastern was a reasonable method of providing for such sharing, Texas Eastern's Regulatory Requirements Exemption unreasonably excludes *force majeure* outages caused by government requirements from that mechanism. In *Natural*, the Commission rejected Natural's proposal to adopt the same exemption.[214] The Commission held that such a total exemption from reservation credits for maintenance to comply with regulatory requirements was no longer permitted by Commission policy. In *North Baja v. FERC*, the D.C. Circuit cited both Opinion No. 406 and *Natural* as orders setting forth and applying our policy requiring partial reservation charge credits for all *force majeure* outages, and then affirmed our rejection of North Baja's partial reservation charge crediting proposal, stating:

> [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.[215]

132. While Texas Eastern has asserted that its history of outages for maintenance purposes should be a relevant factor in any adjudication involving reservation charge crediting, the pattern of outages on Texas Eastern's system is not relevant to the issue of whether its failure to comply with our reservation charge crediting policy affirmed in *North Baja v. FERC*, is unjust and unreasonable. Whether Texas Eastern'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 *force majeure* outages attributable to government actions on its shippers. Regardless of the pipeline's

---

[212] Opinion No. 406, 76 FERC at 61,088-89.

[213] *Id*. 61,089.

[214] *Natural*, 106 FERC ¶ 61,310 at P 15.

[215] *North Baja v. FERC*, 483 F.3d at 822.

past history of *force majeure* outages, it is inequitable to require Texas Eastern's shippers to be required to bear the full cost of any such future outage.

133. For the reasons discussed above, the Commission denies rehearing of the September 2012 Order holdings with respect to the Regulatory Requirements Exemption and the *Force Majeure* definition. Contrary to the assertions of Texas Eastern and INGAA, the Commission has substantiated application to Texas Eastern of its reservation charge crediting policy concerning outages to comply with governmental requirements with a reasonable explanation supported by the record evidence not only in this case but in numerous prior decisions.

3. The OFO Exemption

134. Texas Eastern's OFO Exemption provides that Texas Eastern can withhold a reservation charge credit if the failure to deliver "is the result of Pipeline having operational flow orders [OFO] in effect on such Day."

135. The September 2012 Order held that Commission policy requires pipelines to provide some level of reservation charge credits whenever the pipeline is unable to schedule primary firm service. Therefore, the issuance of an OFO cannot justify a complete exemption from reservation charge crediting. The only issue is whether the issuance of the OFO is the result of a *force majeure* situation outside the pipeline's control, in which case only partial credits are required. The September 2012 Order also stated that the Commission had rejected a similar OFO exemption in *Natural*[216] as contrary to Commission policy. Accordingly, the September 2012 Order required Texas Eastern to remove the OFO Exemption from its tariff.

136. Texas Eastern and INGAA contend that the Commission erred in requiring Texas Eastern to eliminate its OFO Exemption for the same reasons they contend we erred in requiring Texas Eastern to eliminate its other crediting exemptions, without making any contentions specific to the OFO Exemption. Accordingly, our discussion above rejecting Texas Eastern and INGAA's contention with respect to the Routine Maintenance and Regulatory Requirements Exemptions applies equally to the OFO Exemption. In particular, our discussion in the preceding section reaffirming our holding that the Regulatory Requirements Exemption violates our policy requiring that pipelines equitably share the costs of no-fault *force majeure* outages applies equally to the September 2012 Order's similar finding concerning the OFO Exemption. As discussed above, in *North Baja v. FERC*, the court affirmed our reliance on the same *Natural*

[216] *Natural*, 106 FERC ¶ 61,310 at PP 13, 15.

precedent to reject North Baja's partial crediting proposal as the September 2012 Order relied on in finding Texas Eastern's OFO Exemption unjust and unreasonable.

4. The 95 Percent Requirement

137. The 95 Percent Requirement allows Texas Eastern a 5 percent tolerance before it must provide reservation charge credits. Thus, Texas Eastern is required to provide reservation charge crediting only if it delivers less than 95 percent of the shipper's nominated volumes.

138. The September 2012 Order found that the 95 Percent Requirement is contrary to Commission policy and thus unjust and unreasonable. The Commission explained that, in a 2006 order in *Rockies Express I*, it had held that such a tolerance before reservation charge credits are provided for non-*force majeure* outages is contrary to the Commission's policy that pipelines must bear the full risk of non-*force majeure* outages of primary firm service.[217] The Commission also stated that in subsequent cases, the Commission has consistently followed the holding in *Rockies Express I*,[218] citing as examples the Commission's recent orders in both *Southern*[219] and *Tennessee II*[220] In those orders, the Commission required those pipelines to remove tariff provisions exempting them from providing credits where they delivered at least 98 percent of nominated amounts, thus providing a two percent tolerance level before credits were required. The Commission accordingly required Texas Eastern to revise its tariff to require full reservation charge credits when it does not provide 100 percent of nominated reserved firm service.

139. In its Request for Rehearing, Texas Eastern contends that, in the *Southern* case cited by the September 2012 Order, the Commission erroneously applied generic policy without regard to the individual facts of Southern's system, and therefore the Commission cannot rely on that precedent in this case. Texas Eastern asserts that in *Southern*, the Commission refused to take into account the specific operating conditions

---

[217] *Rockies Express I,* 116 FERC ¶ 61,272 at P 63.

[218] *See, e.g., Petal Gas Storage, L.L.C.*, 126 FERC ¶ 61,199, at PP 25-26 (2009); *Orbit*, 126 FERC ¶ 61,095 at P 69; *SG Resources Mississippi, L.L.C.*, 122 FERC ¶ 61,180, at P 6 (2008).

[219] 135 FERC ¶ 61,056 at PP 20-21, *reh'g denied*, 137 FERC ¶ 61,050 at PP 30-33.

[220] 135 FERC ¶ 61,208 at PP 64-66.

presented by the pipeline to justify its two percent tolerance before providing credits, including its OFO penalty allowances and operational impossibility.[221]

140. Contrary to Texas Eastern's contentions, the Commission carefully considered Southern's contentions as to why its two percent tolerance level was justified by conditions on its system, and the Commission found those contentions unpersuasive. Southern contended that its two percent tolerance level was consistent with a prior tariff provision providing a two percent tolerance level for meter errors in the measurement of deliveries (which it had reduced to one percent). It also argued that its two percent tolerance level before providing reservation charge credits was consistent with its tariff provision permitting a two percent tolerance level before imposing daily balancing penalties for violations of OFOs. Southern contended that this tolerance level recognizes the fact that it is operationally impossible to manage imbalances to a zero percentage each day. Southern also sought to distinguish *Rockies Express I*, on the basis that the pipeline in *Rockies Express I* provided no tolerance before imposing penalties on imbalances violating an OFO.

141. In *Southern*,[222] the Commission responded to these contentions by stating it had rejected similar contentions based on meter error and penalty tolerances in *Tennessee II*,[223] where the Commission stated:

> [T]he determination of whether a pipeline should provide reservation charge credits in connection with service provided during a particular period is part of determining what amount the pipeline should bill shippers for the service provided during that period. Reservation charge credits do not entail penalties for shipper conduct adversely affecting the system. When a pipeline bills for service provided, it bills for an exact amount of service provided, regardless of what meter error may be inherent in the measurement of the service provided. If the amount of service measured by the meters for billing purposes is less than the scheduled deliveries, then it is appropriate for the pipeline to be required to provide reservation

[221] Texas Eastern Request for Rehearing at 16 (citing *Southern*, 137 FERC ¶ 61,050 at PP 30-32).

[222] *Southern*, 137 FERC ¶ 61,050 at PP 30-32.

[223] 135 FERC ¶ 61,208 at PP 64-66.

> charge credits for the under-delivered amount.[224]

In short, the Commission concluded that the inevitable errors in measuring natural gas deliveries relied on by Southern should provide no greater basis for excusing it from providing reservation charge credits than it does for excusing Southern's shippers from paying the full amount of their bills.

142. In this case, despite being given the opportunity to do so, Texas Eastern has produced no evidence of operating conditions on its system that would support its five percent tolerance level before providing full reservation charge credits for nominated primary firm service which it failed to provide due to a non-*force majeure* outage. Texas Eastern has thus provided no basis for finding that our existing precedent on this issue is inapplicable to its system. Accordingly, the Commission reaffirms its holding that Texas Eastern's existing five percent tolerance level requires customers to bear the risks associated with the interruption of primary firm service within the pipeline's control, in direct conflict with the Commission's policy requiring full reservation charge credits for non-*force majeure* events.

D. NGA Section 5 and the Burden of Proof

143. Texas Eastern and INGAA argue that the Commission has improperly blurred the distinction between NGA sections 4 and 5 in this proceeding. They contend that the Commission improperly shifted to Texas Eastern the burden of producing evidence of unique circumstances on its system to justify retention of its existing reservation charge crediting provisions, contrary to section 5's requirement that the Commission bear the burden of showing that Texas Eastern's tariff is unjust and unreasonable. Moreover, Texas Eastern argues that the Commission failed to recognize that more than one just and reasonable alternative is permitted for any given rate or tariff provision.[225] It argues that the September 2012 Order improperly required Texas Eastern to modify its existing tariff based on a finding that the Commission's reservation charge crediting policy is just and reasonable, without ever supporting a finding that Texas Eastern's tariff provisions are unjust and unreasonable.

144. The Commission finds that its actions in this proceeding are consistent with NGA section 5 and have not blurred the distinction between that section and section 4. We

---

[224] *Tennessee II*, 135 FERC ¶ 61,208 at P 65.

[225] Texas Eastern Request for Rehearing at 28 n.82 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968), and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)).

have recognized throughout this proceeding that, in order to require Texas Eastern to modify its reservation charge crediting provisions, we have the burden of persuasion to show that Texas Eastern's existing reservation charge crediting provisions are unjust and unreasonable. However, as we explained in the September 2012 Order, once a *prima facie* showing is made that a pipeline's tariff provision is unjust and unreasonable, the Commission may, consistent with its burden of persuasion under section 5, impose on a pipeline the burden of producing evidence justifying that tariff provision.[226]

145. As we found in the September 2012 Order[227] and have reaffirmed in this order, the record in this proceeding amply supports a *prima facie* showing that Texas Eastern's Routine Maintenance Exemption, Regulatory Requirements Exemption and related *force majeure* definition, OFO Exemption, and 95 Percent Requirement are unjust and unreasonable, because they are contrary to the Commission's longstanding reservation charge crediting policies, as affirmed by the court in *North Baja v. FERC*.[228] We require pipelines to provide full reservation charge credits for routine maintenance outages in order to ensure that primary firm service is as reliable as possible, because interruptions of that service can cause serious harm to the public and financial injury to firm shippers.

---

[226] *See East Tennessee*, 863 F.2d at 938, 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) (*Transwestern v. FERC*). *See also Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002), which, as described in the September 2012 Order, 140 FERC ¶ 61,216 at PP 26-27, upheld the Commission's ability in an NGA section 5 proceeding to require a pipeline either to revise its tariff consistent with Commission policies having the force of law or explain why its system's configuration justified a different approach.

[227] September 2012 Order, 140 FERC ¶ 61,216 at PP 22-23.

[228] 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 ¶ 61,159 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.

As discussed above, the full crediting requirement acts as an incentive mechanism to ensure pipelines exercise the highest possible standard of care to minimize any interruptions of primary firm transportation service. It also provides shippers relief from the payment of reservation charges when the service reserved by those payments is not available.

146. Texas Eastern's Routine Maintenance Exemption, Regulatory Requirements Exemption and related *force majeure* definition, OFO Exemption, and 95 Percent Requirement are all contrary to this policy to the extent that they exempt Texas Eastern from providing full reservation charges for routine maintenance outages. As described above, the record in this proceeding supports a *prima facie* showing that the full reservation charge crediting policy is applicable to Texas Eastern. Interruptions of primary firm service on Texas Eastern's system entail the same risk of harm to the public and financial harm to firm shippers, as do outages of primary firm service on other pipelines. The record also shows that Texas Eastern has a degree of control over when it performs routine maintenance, thus enabling it to respond to the incentives created by the full reservation charge crediting requirement. In addition, the finding that full reservation credits will provide an incentive for Texas Eastern to minimize outages of primary firm service is a reasonable economic proposition of the type that courts have found constitutes substantial evidence. The record also contains evidence of the potential for such injury.

147. Our reservation charge crediting policies also require pipelines to share the risk of *force majeure* outages over which they have no control by providing partial reservation charge credits. As discussed above, contrary to that policy, Texas Eastern's Regulatory Requirements Exemption and particularly its OFO Exemption place the entire risk of some *force majeure* outages on Texas Eastern's shippers.

148. Having made these findings based on the written pleadings submitted by the parties in the non-formal hearing established by the February 2012 Order, we have "then looked to see whether . . . [Texas Eastern] had demonstrated justifications for" its challenged reservation charge crediting provisions.[229] As the Fifth Circuit held in similar circumstances in *Transwestern v. FERC*,[230] the burden we have placed on Texas Eastern is not a burden of persuasion. We have not required it to prove by a preponderance of the evidence that its reservation charge crediting provisions are justified. Rather, the burden we have placed on Texas Eastern is a burden of production under which Texas Eastern

[229] *Transwestern v. FERC*, 820 F.2d at 746.

[230] *Id.* 745-746.

has been obligated merely to proffer justifications for its reservation charge crediting provisions.

149. After thoroughly considering the proffered justifications in the preceding sections, we have concluded that Texas Eastern's tariff provisions are unjust and unreasonable based on the substantial record evidence and must be replaced with tariff provisions consistent with our reservation crediting charge policy. For example, Texas Eastern asserts its existing tariff requirement to exercise "due diligence" to minimize service disruptions due to routine maintenance provides a sufficient incentive minimize outages. However, the Commission has found that this purely regulatory approach of mandating due diligence, unsupported by the financial incentives provided by the automatic reservation charge crediting requirement, fails to ensure that the pipeline exercises the highest possible standard of case to ensure the reliability of primary firm service and is thus unjust and unreasonable. This approach is also unjust and unreasonable for the further reason that it fails to provide shippers financial relief when the service reserved by their payment of reservation charges is not available. Moreover, Texas Eastern has not produced any evidence to justify exempting it from our policy that pipelines should share the risk of all *force majeure* outages.

150. Texas Eastern recognizes that the September 2012 Order explained that the February 2012 Order had only initiated a section 5 investigation and "established procedures to develop a record" upon which the Commission could decide the issues.[231] However, Texas Eastern asserts that other statements by the Commission in the September 2012 order indicate that the Commission impermissibly shifted the burden of going forward to Texas Eastern by requiring it to provide evidence of a unique circumstance that would support exempting Texas Eastern from the policy. The Commission did state that:

> For the reasons discussed above, *Texas Eastern has not persuaded us to modify our existing policy* requiring full reservation charge credits for routine maintenance outages of primary firm service, which the D.C. Circuit affirmed in *North Baja v. FERC.* [footnote omitted] *Nor has Texas Eastern provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the policy* we have applied consistently to other pipelines. [Language quoted by Texas Eastern emphasized.][232]

[231] September 2012 Order, 140 FERC ¶ 61,216 at P 19. *See also id*. PP 18-33.

[232] *Id*. P 76.

151. However, these statements do not conflict with NGA section 5's requirement that we bear the burden of persuasion to find Texas Eastern's existing tariff unjust and unreasonable. Rather, the Commission simply stated its conclusion, based on earlier discussion in the September 2012 Order, that Texas Eastern had not satisfied the burden reasonably placed on it of producing evidence that unique circumstances regarding its system or other reasons render the precedents established in prior adjudications concerning full reservation charge credits for routine maintenance inapplicable to Texas Eastern's system.[233] Having determined that our prior precedent applied to Texas Eastern's situation, the Commission could only allow Texas Eastern to retain its Routine Maintenance Exemption if we departed from our established precedent requiring full reservation charge credits for such maintenance. In order to do that, the Commission must provide a "reasoned explanation for its departure from established case law."[234] The intent of the language cited by Texas Eastern was to state that Texas Eastern has not provided us a rationale that would satisfy our burden to justify departing from our prior precedent, which had been affirmed by the D.C. Circuit in *North Baja v. FERC*. Therefore, the Commission did not improperly shift the burden of persuasion to Texas Eastern.

152. Finally, the Commission rejects Texas Eastern's contention that we have required Texas Eastern to modify its existing tariff based solely on a finding that the Commission's reservation charge crediting policy is just and reasonable, without ever supporting a finding that Texas Eastern's tariff provisions are unjust and unreasonable as required by NGA section 5. It is within the Commission's authority under the NGA to (1) find that the public interest requires that pipelines exercise the highest possible standard of care to ensure the reliability of primary firm transportation service in order to avoid that the harm to the public and financial injury caused by outages of that service, (2) require pipelines to provide full relief from the payment of reservation charges during any non-*force majeure* outage of primary firm service, and (3) share the risk of *force majeure* outages by providing partial reservation charge credits. Texas Eastern's tariff does none of these things and is therefore unjust and unreasonable.

E. <u>Other Rehearing Issues</u>

153. INGAA argues that the Commission has erroneously departed from its longstanding policy initiated in the Order No. 636 restructuring proceeding of resolving

---

[233] *See NGSA Rehearing Order,* 137 FERC ¶ 61,051 at P 26 and n.20.

[234] *Jupiter Energy Corp. v. FERC*, 482 F.3d at 298, *quoting EP Operating Co. v. FERC*, 876 F.2d at 48. *See also Wisconsin Valley v. FERC*, 236 F.3d at 748.

reservation charge crediting issues on a pipeline-by-pipeline basis.[235] INGAA asserts that this approach which allowed individual pipelines to tailor reservation charge crediting provisions to their unique circumstances was continued well after the Order No. 636 restructuring, citing *Kern River I*,[236] and the Commission has failed to explain its departure from this approach.

154. The Commission has followed the same approach to deciding the reservation charge crediting issues in this case as we have consistently followed in deciding reservation charge crediting issues since we established our current policies in Opinion No. 406. In every contested case since Opinion No. 406, we have, as here, required the subject pipeline to comply with the basic policy of providing full reservation charge credits for non-*force majeure* outages of primary firm service and partial credits for *force majeure* outages. Our use of individual adjudications to implement our reservation charge crediting policies does allow the pipeline some flexibility to tailor its specific reservation charge crediting provisions to its unique circumstances,[237] but the pipeline must comply with the basic policy. The only exception to the requirement that pipelines comply with the basic policy is when the pipeline has mutually agreed with its shippers on reservation charge crediting provisions that vary from Commission policy. The Commission recognized this exception in *NGSA*, when we stated that, where the pipeline and its shippers have entered into currently effective rate agreements that include provisions that differ from the Commission's reservation charge crediting policy and

---

[235] INGAA's Request for Rehearing at 11-12.

[236] *Kern River I*, 129 FERC ¶ 61,262 (2009), *order on reh'g*, 132 FERC ¶ 61,111.

[237] For example, the Commission has permitted pipelines to use differing methods of calculating the full reservation charges to be provided when they give advance notice of outages for routine maintenance. *See, e.g., Southern*, 137 FERC ¶ 61,050 at P 21 (use of usage during immediately preceding seven days); *Texas Gas*, 141 FERC ¶ 61,223 at P 79 (use of average usage during several previous years), *ANR*, 145 FERC ¶ 61,182 at PP 15-16 (allowing ANR to use shipper nominations to calculate credits in advance notice situation), and *Dominion*, 146 FERC ¶ 61,101 at PP 27-30 (use of historical usage during immediately preceding seven days in some circumstances and preceding year in other circumstances). *See also Dominion*, 146 FERC ¶ 61,101 at PP 44-45 (approving special crediting provisions for storage services) and *Texas Gas*, 141 FERC ¶ 61,223 at PP 57-67 (allowing a pipeline with non-SFV rates to take that fact into account in its *force majeure* partial crediting provisions).

which the Commission has accepted, those agreements need not be changed.[238] Texas Eastern has no such currently effective agreements with its shippers.

155. The *Kern River I* order cited by INGAA is fully consistent with our approach of requiring pipelines to comply with its reservation charge crediting policy, except where it has mutually agreed with shippers to reservation charge crediting provisions that vary from Commission policy. In that case, the Commission required the pipeline to revise its generally applicable tariff to comply with the Commission's reservation crediting policy, while permitting it to continue in effect certain specially negotiated contracts in which the shippers had agreed to different reservation charge crediting provisions. However, with that narrow exception, the requirements of the Commission's policy were applied to the pipeline's other tariff provisions, consistent with the determination in *Kern River I and Kern River II* that the pipeline's generally applicable tariff must otherwise comply with the reservation charge crediting policy.[239]

156. As the Commission stated in rejecting Kern River's argument in its compliance filing that its reservation charge proposal be adopted based on the particular circumstances on its system:

> While as discussed below the Commission permits individual shippers to negotiate reservation charge crediting provisions in their particular service agreements which vary from Commission policy and the pipeline's generally applicable tariff, such individually negotiated agreements do not justify Kern River's failure to modify its generally applicable Rate Schedule KRF-1 consistent with Commission policy.[240]

[238] *See NGSA*, 135 FERC ¶ 61,055 at n.12, comparing *Kern River I*, 132 FERC ¶ 61,111 at P 16; to *Southern*, 135 FERC ¶ 61,056. The Commission has also permitted pipelines to include in their tariffs provisions that negotiated rate agreements will not be eligible for reservation charge credits, unless the pipeline agrees. *See, e.g.*, *Iroquois*, 145 FERC ¶ 61,233 at PP 67-72.

[239] *See Kern River I*, 132 FERC ¶ 61,111 at P 16; *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050, at P18 (2011), *order on reh'g*, 139 FERC ¶ 61,004 (2012) (*Kern River II*); *See also NGSA*, 135 FERC ¶ 61,050 at P 12.

[240] *Kern River II*, 135 FERC ¶ 61,050 at P 18.

157. Texas Eastern erroneously asserts that the Commission in this case did not allow it an opportunity to present facts and circumstances to persuade the Commission to depart from its policy. However, the February 2012 Order expressly allowed Texas Eastern the opportunity to explain why it should not be required to revise its existing tariff to be consistent with the Commission's reservation crediting policy. Therefore, Texas Eastern was permitted to present facts, including a comparison of its scheduled maintenance and outages, to support finding that the Commission's reservation crediting policy is not applicable to Texas Eastern's circumstances. Despite being provided the opportunity to do so, Texas Eastern failed to provide evidence to support exempting it from the well-established reservation charge crediting policy which has been applied consistently and uniformly to other pipelines.

158. The Commission thus reaffirms its finding in the September 2012 Order that Texas Eastern's Routine Maintenance Exemption, Regulatory Requirements Exemption and related *force majeure* definition, OFO Exemption, and 95 Percent Requirement are unjust and unreasonable. We now turn to the issue of whether the replacement reservation charge crediting provisions Texas Eastern has proposed in its filings to comply with the September 2012 Order are just and reasonable.

III. <u>October and November 2012 Compliance Filings</u>

159. On October 22, 2012, Texas Eastern filed *pro forma* tariff records to revise its reservation charge crediting provisions consistent with the directives of the September 2012 Order.[241] In that filing, Texas Eastern proposed to remove the reservation charge crediting provisions which are currently included in its various firm rate schedules.[242] Texas Eastern proposed to add a new section 31 to its GT&C section 31 governing the reservation charge credits to be provided for *force majeure* and non-*force majeure* outages of primary firm service under all its firm rate schedules.

160. Section 31.1 provides that Texas Eastern will adjust the customer's reservation charge for each day of an outage or other non-*force majeure* event that results in Texas Eastern failing to deliver on such day a quantity of gas that it is obligated to deliver on a firm basis. Section 31.2 includes the reservation charge crediting provisions applicable to *force majeure* events. That section provides for a 10-day Safe Harbor and, in the event of an outage or other *force majeure* event, after the tenth day, credits calculated pursuant to

[241] Sections 3.3, 3.4, 3.5, or 3.6 of Rate Schedules CDS, FT-1, SCT, LLFT, VKFT, MLS-1, SS-1, FSS-1, FTS, FTS-2, FTS-4, FTS-5, FTS-7, FTS-8, and SS.

[242] These are Rate Schedules CDS, FT-1, SCT, LLFT, VKFT, MLS-1, SS-1, FSS-1, FTS, FTS-2, FTS-4, FTS-5, FTS-7, FTS-8, and SS.

section 31.1. Section 31.3 sets forth the circumstances in which a shipper would not receive reservation charge credits.

161. On November 26, 2012, Texas Eastern submitted revised *pro forma* tariff records to supersede and replace the *pro forma* tariff records it had submitted in the October 2012 Compliance filing.[243] Texas Eastern stated that the November 2012 Compliance filing revises GT&C section 31 in response to issues and requests for clarification raised in the protests to the October 2012 Compliance Filing.

A. **Public Notice**

162. Public notice of Texas Eastern's October 2012 Compliance Filing was issued on October 23, 2012. Protests were due as provided in section 154.211 of the Commission's regulations.[244] Indicated Shippers;[245] Noble Energy, Inc. (Noble Energy);[246] MDG;[247] PGC; Con Ed, Orange and Rockland Utilities, Inc., Philadelphia Gas Works, and the National Grid Delivery Companies (collectively the Companies); Statoil; and PSEG ER&T filed protests to the October 2012 Compliance Filing. Texas Eastern filed an answer to the protests to the October 2012 Compliance Filing addressing issues related to the tariff provisions that it did not modify or clarify in its November 2012 Compliance Filing.[248]

---

[243] Sections 3.4, 3.5, 3.6, or 3.7 of Rate Schedules CDS, FT-1, SCT, LLFT, VKFT, MLS-1, SS-1, FSS-1, FTS, FTS-2, FTS-4, FTS-5, FTS-7, FTS-8, and SS.

[244] 18 C.F.R. § 154.211 (2014).

[245] For purposes of this protest, Indicated Shippers also included ConocoPhillips ; Shell Energy North America (U.S.), L.P.; and ExxonMobil Gas and Power Company, a division of ExxonMobil Corporation.

[246] Noble Energy's motion to join the protest of Indicated Shippers is granted.

[247] MDG consists of Borough of Chambersburg, Pennsylvania; Batesville, Indiana; Cairo Public Utility Company; Gloster, Mississippi; Harrisburg, Arkansas; Horton Highway Utility District, Tennessee; Lawrenceburg, Tennessee; Loretto, Tennessee; Middleborough, Massachusetts, Municipal Gas and Electric Department; Norwich, Connecticut, Department of Public Utilities; Smyrna, Tennessee; and Utica, Mississippi.

[248] The Commission's Rules of Practice and Procedure do not permit answers to protests or answers unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2) (2014). However, the Commission finds good cause to accept Texas

(continued...)

163. Public Notice of the November 2012 Compliance Filing was issued on November 27, 2012. The Companies filed a limited protest to the November 2012 Compliance Filing.

164. Untimely motions to intervene in this proceeding were filed by Exelon Corporation; Statoil;[249] PGC; Natural Gas Supply Association; Independent Petroleum Association of America; American Forrest & Paper Association; ExxonMobil Gas & Power Marketing Company, a division of ExxonMobil Corporation; Shell Energy North America (U.S.), L.P.; Noble Energy; the Associations; and PSEG ER&T.[250] The Commission finds that granting the late motions to intervene will not cause any undue prejudice to other parties as Rule 385.214(d)(3)(ii) of the Commission's Rules of Practice and Procedure provides that a late intervenor must accept the record as developed prior to its late intervention. Therefore, we will grant the late motions to intervene.

165. In the discussion below, the Commission addresses the revised *pro forma* tariff records included in the November 2012 Compliance Filing. The Commission finds that the reservation charge crediting provisions included in those pro forma tariff records are just and reasonable, subject to certain modifications, and the Commission directs Texas Eastern to file, on or before November 28, 2014, actual tariff records consistent with the discussion below, to be effective December 1, 2014.

B. Calculation of Reservation Charge Credits for Non-*Force Majeure* Outages - Section 31.1

1. Texas Eastern's Proposal

166. In section 31.1(i) through (iv), Texas Eastern proposes to calculate the reservation charge credits to be provided during non-*force majeure* outages based on "the lesser of" of the following quantities:

> (i) the quantity of gas that Texas Eastern failed to deliver which

---

Eastern's Answer since it will not delay the proceeding, assisted the Commission in understanding the issues raised, and will ensure a complete record.

[249] Statoil requested a hearing or technical conference to explore alternative provisions. Based on the determinations in this order, Statoil's request is denied as unnecessary.

[250] INGAA's late motion to intervene is discussed above.

qualified for scheduling at the highest scheduling priority in its tariff;[251]

(ii) when Texas Eastern gives seven days' or less advance notice of the outage before the Timely Nomination Cycle for the applicable day, the shipper's average usage of primary firm service during the seven day period immediately before the outage;

(iii) when Texas Eastern gives more than seven days' advance notice of the outage, the shipper's average usage during the same calendar days of the preceding year as the outage, with an adjustment based on any increase or decrease in the shipper's firm contractual entitlements during that year; or

(iv) the shipper's firm contractual entitlement under Customer's service agreement minus the quantity of gas actually delivered.

2. Positions of the Parties

167. Statoil and PGC object to the "lesser of" language in section 31.1 as unsupported. Statoil argues that the "lesser of" language is unnecessarily restrictive. Statoil asserts that, for example, Texas Eastern could apply the credit to the lesser of the seven day average preceding the interruption or the average daily quantity scheduled the same day in the previous year. Statoil further asserts that, if the shipper has increased its throughput over the past year, application of this provision ignores the shipper's changed circumstances and misrepresents the economic impact of the outage on the shipper. Texas Eastern contends that this language specifically addresses the potential for customers to game or unfairly manipulate the amount of credits. Texas Eastern further contends that the "lesser of" language is necessary to exclude artificially inflated nominations consistent with Commission policy.

168. Indicated Shippers, PGC, and Statoil object to section 31.1(iii) arguing that there is no Commission precedent for considering the previous calendar year's quantities and because a customer's volumes may vary greatly from year to year. Texas Eastern asserts that both sections 31.1(ii) and 31.1(iii) are critical to counteract potential gaming because it has a history of providing significant advance notice of outages, sometimes several months in advance. Texas Eastern further asserts that section 31.1(ii) alone would allow customers the opportunity for gaming. Texas Eastern contends that sections 31.1(ii) and (iii) serve as necessary dual approaches to minimize the potential for gaming, where customers may submit inflated nominations knowing that the nomination will be rejected.

---

[251] That scheduling priority is set forth in section 4.1(I)(1) of Texas Eastern's GT&C, and is the equivalent of a primary firm scheduling priority.

169. PSEG ER&T argues that Texas Eastern's focus on prior usage at the same primary delivery points is unfairly limiting and prior usage at secondary points should also be considered. Texas Eastern contends that it bases its calculation on usage at primary points of delivery because the Commission has recognized that a customer's use of alternative points does not qualify for reservation charge credits.

3. **Commission Determination**

170. The Commission finds that Texas Eastern's proposed calculation methodology is just and reasonable, subject to clarification of the "lesser of" provision. Consistent with our decision in *Dominion,* [252] Texas Eastern must clarify that the first three calculation methods in sections 31.1(i) through (iii) apply to mutually exclusive circumstances, with the credits to be applied under each of those methods capped at the shipper's firm contractual entitlements as provided in section 31.1(iv). Thus, when Texas Eastern has not given advance notice of an outage before the Timely Nomination Cycle, the shipper's reservation charges would be based on the lesser of the quantities it nominated for that day which qualified for scheduling, as provided in section 31.1(i), or its firm contractual entitlements. When Texas Eastern gives seven days or less advance notice of an outage, the shipper's reservation charge credits must be based on the lesser of the shipper's average usage during the seven days immediately preceding the outage, as provided under section 31.1(ii), or its firm contractual entitlements. When Texas Eastern gives more than seven days advance notice of an outage, the shipper's reservation charge credits must be based on the lesser of its usage during the same calendar days of the preceding year, with an adjustment for changes in contractual entitlements during the year, as provided in section 31.1(iii), or its firm contractual entitlements.

171. With this clarification, Texas Eastern's proposed method for calculating the amount of reservation charge credits to be provided during an outage is just and reasonable. We deny the protests concerning the use of the average of the seven-day usage immediately preceding the outages when seven days' or less advance notice is given and usage on the same day in the previous year when more than seven days' notice is given. Texas Eastern states that it often gives several months or more advance notice of maintenance outages, and that its proposal to base credits on usage during a corresponding period of the prior calendar year when it has given more than seven days advance notice of an outage is necessary to minimize the potential that shippers could take advantage of the advance notice to maximize their credits. The Commission has recognized that advance notice of maintenance outages benefits shippers and the market by enabling affected entities time to plan for each outage and make alternative arrangements to obtain needed gas supplies during the period of the outage. Therefore, in

[252] *Dominion*, 142 FERC ¶ 61,154 at P 41.

order to avoid discouraging pipelines from providing detailed advance notice of such outages because of a concern about shipper gaming, the Commission has permitted pipelines to base any reservation charge credits on usage during some representative past period before the advance notice is provided.[253] Accordingly, the September 2012 Order stated that Texas Eastern could propose that, when it gives advance notice of a maintenance outages, credits be calculated credits based on usage during a historical period that is reasonably representative of the usage shippers would have made of the facilities during the period of the outage, and the Commission stated it may be reasonable for Texas Eastern to base credits on usage during a comparable period in a prior calendar year or years.[254]

172. The protestors oppose use of the previous years' quantities in section 31.1(iii), arguing that a customer's volumes may vary greatly from year to year. The Commission has recognized that there is no perfect method of estimating the amount of service a shipper would have used during an outage, if the pipeline had not given advance notice of the outage.[255] The Commission has accordingly accepted proposals to base credits on usage during the seven days immediately preceding notice of the outage,[256] proposals to base credits on usage during a representative period in a prior calendar year,[257] and proposals to use an average of usage during several prior years.[258] Texas Eastern has chosen the option of basing credits on shipper usage during the previous year when it gives more than seven days advance notice of the outage. Moreover, while a customer's usage may vary from year to year, i.e., due to changes in demand and weather patterns, Texas Eastern's November 2012 Compliance Filing has modified proposed section 31.1(iii) to address concerns about variances in throughput by adjusting the previous year's quantities up or down *pro rata* based on any increase or decrease to the customer's contract entitlement at the applicable point(s) of delivery during the prior

---

[253] *TransColorado*, 139 FERC ¶ 61,229 at PP 34-41; *Dominion*, 142 FERC ¶ 61,154 at PP 35-41.

[254] September 2012 Order, 140 FERC ¶ 61,216 at P 69 n.85 (citing, *e.g.*, *Kern River II*, 139 FERC ¶ 61,044 at P 49).

[255] *Texas Gas*, 141 FERC ¶ 61,223 at P 79.

[256] *Southern*, 137 FERC ¶ 61,050 at P 21; *TransColorado*, 139 FERC ¶ 61,229 at PP 36-41.

[257] *Dominion*, 142 FERC ¶ 61,154 at PP 35-41.

[258] *Texas Gas*, 141 FERC ¶ 61,223 at P 79.

twelve months and to not apply if there was no contract entitlement. The Commission finds that this method of taking into account changes in a shipper's maximum contract entitlement in the prior year adequately addresses issues raised concerning new or increased service in the preceding year.[259]

173. Finally, PSEG ER&T's argument that prior usage at secondary points should also be considered is mistaken. Texas Eastern has utilized primary points of delivery because the Commission has determined that the use of alternative points does not qualify for reservation charge credits.[260]

C. Mutually Coordinated Outages - Section 31.3(v)

1. Texas Eastern's Proposal

174. Under proposed section 31.3(v), a customer cannot receive reservation charge credits if Texas Eastern and the customer have mutually coordinated the timing of the scheduled work and the work is performed in accordance with that schedule.

2. Positions of the Parties

175. The Companies, Indicated Shippers, and PGC argue that scheduled work, whether or not mutually coordinated, must be eligible for reservation charge credits. Texas Eastern contends that its longstanding practice of notifying customers of upcoming work that may require an outage affords customers an opportunity to conduct necessary work at their own facility at the same time. Texas Eastern asserts that section 31.3(v) promotes Commission policy by minimizing service disruptions and incentivizing Texas Eastern to coordinate timing of necessary outages with maintenance or repair activities that customers themselves may need to undertake on their own systems. Texas Eastern further asserts that this provision also promotes the Commission's gas electric reliability goals and more open dialogue and communication between the gas pipeline industry and electric transmission system operators and generators. Texas Eastern contends that section 31.3(v) is also required to eliminate the potential for gaming that exists when a customer must undertake maintenance or repair work on its own facilities capable of being scheduled at a time that coincides with the work Texas Eastern is conducting on its system.

---

[259] *See Dominion*, 142 FERC ¶ 61,154 at P 38-39.

[260] *See, e.g.*, *TransColorado*, 139 FERC ¶ 61,229 at P 44; *Tennessee II*, 139 FERC ¶ 61,050 at PP 93-96; and *Kern River II*, 139 FERC ¶ 61,044 at PP 12-15.

3. Commission Determination

176. The Commission has found that an exemption from crediting when the pipeline mutually coordinates routine maintenance, as proposed by Texas Eastern, is reasonable. As the Commission stated, in *National Fuel,*[261] such mutual coordination

> reasonably provides shippers an opportunity to agree with National Fuel as to the timing of maintenance activities, so that such maintenance can be conducted at a time that is least disruptive to the shipper. Moreover, such an agreement can give the shipper an opportunity to make alternative arrangements to obtain needed gas supplies.[262] The language proposed by National Fuel clearly states any agreement between National Fuel and a shipper will be mutual and the timing coordinated. In these instances, it is not an unreasonable expectation that a shipper mutually agreeing to coordinate activities with National Fuel would not be eligible for reservation charge credits. Furthermore, as with any pipeline providing service under a FERC gas tariff, if a shipper believes National Fuel acted in bad faith, it may always seek further recourse at the Commission.

177. Therefore, Texas Eastern's proposed recognition that reservation charge credits are not required when an outage is mutually coordinated as embodied in section 31.3(v) is consistent with Commission policy.

D. The Conduct of Customers or Other Parties – Sections 31.3(i)-(iii)

1. Texas Eastern's Proposal

178. Under section 31.3(i), a customer cannot receive reservation charge credits if Texas Eastern's failure to deliver is due to the conduct of the customer, including, "without limitation," the customer's refusal to accept delivery or violation of an operational flow order that is in effect during "the outage or other event" resulting in Texas Eastern's failure to deliver. In its November 2012 Compliance Filing, Texas Eastern added a provision to section 31.3(i), permitting reservation charge credits if a customer refused deliveries pursuant to GT&C section 5.4 "each and any time" the customer had the right to do so during the seven days leading up to the outage. Section 5.4 permits a shipper, "at its option," to refuse to accept deliveries if the gas

[261] *National Fuel*, 143 FERC 61,103 at P 45.

[262] *TransColorado*, 139 FERC ¶ 61,229 at PP 36, 39.

tendered by the pipeline fails to conform to the gas quality requirements set forth in GT&C section 5.

179. Under sections 31.3(ii) and 31.3(iii), a customer cannot receive reservation charge credits if Texas Eastern's failure to deliver is due to the conduct of the upstream or downstream operator, respectively. These sections also provide that the relevant conduct includes "without limitation, the refusal to" deliver or receive gas Texas Eastern was available to receive or made available for delivery.

2. Positions of the Parties

180. The Companies contend that section 31.1(i) unreasonably restricts their ability to receive reservation charge credits when they exercise their option to refuse deliveries that fail to conform to Texas Eastern's gas quality standards. Specifically, they oppose the requirement that, in order to be eligible for credits in this circumstance, the customer must have refused non-conforming deliveries each and every time they had the right to do so during the seven days leading up to an outage. The Companies state that they may have the ability to accept delivery of a limited amount of non-conforming gas on one day but not the following day. For example, a customer's liquefied natural gas peak shaving facility may be able to tolerate a limited amount of gas with excess nitrogen tendered one day, but not be able to tolerate gas with excess carbon dioxide content tendered the following day.

181. Indicated Shippers argues that the phrases "or other event" and "without limitation" in section 31.1provide Texas Eastern too much discretion to withhold reservation charge credits when delivery is refused for reasons that are not the shipper's fault. Texas Eastern contends that the phrase "or other event," is only intended to describe the "outage or other event" that results in Texas Eastern failing to deliver gas to the customer, similar to the use of the phrase "outage or other event" throughout the new reservation charge crediting provisions, including sections 31.1, 31.1(ii), 31.1(iii), and 31.2. Texas Eastern further contends that the phrase "without limitation" is intended to avoid limiting the "conduct of customer" to the examples in section 31.1(i). Texas Eastern asserts that it seeks to exclude from reservation charge credits all circumstances where the pipeline's failure to deliver is due to the customer's conduct. Texas Eastern argues that, if "without limitation" is not included customers could act in a way that would cause it to fail to deliver gas and entitle the customer to reservation charge credits contrary to the purpose of the reservation charge crediting provisions.

182. Indicated Shippers and PGC also argue that sections 31.3(ii) and 31.3(iii) should be modified to state that the failure to deliver must be due "solely" to the conduct of the upstream or downstream operator, respectively, to avoid a circumstance where Texas Eastern can avoid reservation charge credits because it happens to be doing scheduled maintenance at the same time. Texas Eastern answers that sections 31.3(ii) and 31.3(iii) already exclude Texas Eastern's conduct by stating that such exceptions apply only if

Texas Eastern was "available to receive" or make "available for delivery" the applicable quantity. Texas Eastern asserts that, if it is doing scheduled maintenance at the same time as the operator, then Texas Eastern would not be "available to receive" or make "available for delivery" the quantity. Texas Eastern further asserts that adding the word "solely" would eliminate the possibility that the failure to deliver could be due both partially to the conduct of the upstream or downstream operator and partially to the conduct of a third party other than the pipeline, such as the customer.

3. <u>Commission Determination</u>

183. The Commission finds unreasonable Texas Eastern's proposal to apply the shipper conduct exemption from crediting in section 31.3(i) to shipper refusals to accept delivery of non-conforming gas pursuant to GT&C section 5.4 unless the shipper refused delivery of such gas each and every time it was tendered during the preceding seven days. Section 5.4 provides that a shipper may refuse to accept gas that does not conform to Texas Eastern's gas quality standards "at its option." As the Companies explain, a shipper may reasonably accept such non-conforming gas on one day, but not the next. The Commission has held that it is unreasonable to exempt a shipper from reservation charge credits it would otherwise be entitled to, if it refuses to accept natural gas that does not conform to tariff standards.[263] Accordingly, Texas Eastern is directed to revise section 31.3(i) to permit shippers to receive reservation charge credits so that the shipper conduct exemption from crediting will not apply on any day a shipper refuses to accept non-conforming gas pursuant to section 5.4, regardless of whether on some other day the customer exercised its option to accept non-conforming gas.

184. The Commission also requires Texas Eastern to make one clarification in its proposed sections 31.3(ii) and 31.3(iii) exemptions for outages due to the conduct of upstream or downstream operators. As the Commission has explained, the exemption from the requirement to provide reservation charge credits due to the conduct of upstream or downstream entities is limited, in both *force majeure* and non-*force majeure* circumstances, to when an outage is due solely to the conduct of entities outside the control of the pipeline.[264] In response to protests that Texas Eastern's proposed exemptions for outages due to the conduct of upstream and downstream entities fail to limit the exemptions to outages due "solely" to the conduct of those entities, Texas Eastern argues that the addition of the word "solely" is unnecessary, because sections 31.3(ii) and (iii) already limit those crediting exemptions to situations when

---

[263] *See, e.g.*, *National Fuel*, 143 FERC ¶ 61,103 at P 38.

[264] *Gulf South*, 144 FERC ¶ 61,215 at P 68.

Texas Eastern is available to receive or deliver the gas. Texas Eastern also asserts that revising sections 31.3(ii) and (iii) so that the subject crediting exemptions only apply when the outage is due "solely" to the conduct of the upstream or downstream operator would mean that the exemptions would not apply when the outage is partially due to the conduct of the operator and partially due to the conduct of another third party.

185. The Commission agrees that it is unnecessary for Texas Eastern to add the word "solely" to sections 31.3(i), (ii), and (iii) because the language in those sections limiting the crediting exemption to situations when Texas Eastern is available to receive or deliver gas accomplishes the same purpose. That language also makes clear that Texas Eastern would be required to provide partial reservation credits when a *force majeure* event affects both its system and the system of an upstream or downstream pipeline, consistent with the Commission's *Paiute* decision.[265] However, sections 31.3(ii) and (iii) fail to make clear that the exemptions for outages due to the conduct of upstream and downstream operators only apply when those operators are outside the control of Texas Eastern. Therefore, Texas Eastern must revise those sections to include express language limiting the exemptions to conduct of operators outside the control of Texas Eastern.[266]

186. Finally, the Commission denies the protest concerning the use of the phrases "without limitation" and "outage or other event." As Texas Eastern explains, it is reasonable to use the phrase "without limitation" so as not to limit the conduct of the customer to the specific example related to OFO violations included in the provision. Further, the phrase "outage or other event" is limited to the conduct of the customer which violates an OFO and results in the failure of the pipeline to deliver the gas and, therefore, is reasonable.

187. Therefore, in its filing to comply with this order, Texas Eastern must revise sections 31.3(i), (ii), and (iii), consistent with the above discussion.

E. Customer's Inability to Accept Gas - Section 31.3(vi)

1. Texas Eastern's Proposal

188. Under section 31.3(vi), a customer cannot receive reservation charge credits if the outage occurs at a time when the customer is unable to take scheduled quantities for any reason, including an outage on the customer's facilities whether planned or unplanned.

---

[265] *Paiute*, 139 FERC ¶ 61,089 at P 31.

[266] *Dominion*, 142 FERC ¶ 61,154 at P 52.

2. Positions of the Parties

189. Indicated Shippers argues that section 31.3(vi) is duplicative of section 31.3(i), which excludes reservation charge credits due to the customer's conduct, because if a customer is unable to take delivery of gas then it would have refused delivery. Texas Eastern contends that section 31.3(i), concerns situations where the pipeline's failure to deliver is due to the customer's affirmative conduct, such as refusing delivery or violating an OFO, while section 31.3(vi), concerns situations where the customer is physically unable to take delivery, such as due to an outage on the customer's system or customer's *force majeure*. Texas Eastern asserts that, the latter circumstances should not result in reservation charge credits because the customer would not have been able to take delivery of the gas even if Texas Eastern were able to deliver it. Texas Eastern contends that section 31.3(vi) is required to eliminate the potential for gaming that exists when a customer has been provided significant advanced notice of an outage and decides to schedule work on its system at the same time, but still nominates deliveries even though it would be unable to physically take delivery.

3. Commission Determination

190. As explained by Texas Eastern, section 31.3(vi) concerns circumstances where the customer is physically unable to take delivery, while proposed section 33.3(i) only concerns outages due to the affirmative conduct of the customer. Therefore, Indicated Shippers' objection is rejected.

F. Secondary or Alternative Delivery Point - Sections 31.3(vii) and 31.3(viii)

1. Texas Eastern's Proposal

191. Texas Eastern proposes that a customer cannot receive reservation charge credits if: (1) the gas is allocated or scheduled during a subsequent nomination cycle to or from a secondary location pursuant to section 31.3(vii) or (2) the customer accepts the gas at an alternative point of delivery pursuant to section 31.3(viii).

2. Positions of the Parties

192. Indicated Shippers argue that sections 31.3(vii) and 31.3(viii) are duplicative because both are instances where gas is delivered to an alternative point of delivery. Texas Eastern asserts that section 31.3(vii) applies in situations where, after the timely nomination cycle, the customer's gas is scheduled to or from a secondary location, including secondary receipt or delivery points and section 31.3(viii) applies when the customer specifically utilizes an alternative point of delivery during any nomination cycle, including the timely nomination cycle.

3. Commission Determination

193. As explained by Texas Eastern, section 31.3 (vii) applies when gas is scheduled after the timely nomination cycle, and section 31.3 (viii) applies when gas is scheduled during any nomination cycle including the timely nomination cycle. Therefore, Indicated Shippers' objection is rejected.

G. The 2011 Act – Section 31.3(x)

1. Texas Eastern's Proposal

194. Under section 31.3(x), Texas Eastern will not provide reservation charge credits if Texas Eastern's failure to deliver is due to repair and maintenance activities to comply with the 2011 Act, the requirements and orders issued by the Department of Transportation's Pipeline Hazardous Materials Safety Administration (PHMSA) pursuant to the 2011 Act, and pursuant to its ongoing rulemaking proceedings, and orders issued by PHMSA specifically to Texas Eastern.

2. Positions of the Parties

195. The protestors generally argue that section 31.3(x) is contrary to Commission precedent under which such activities are non-*force majeure* events that require full reservation charge credits. In the alternative, the Companies suggest that such activities be classified as *force majeure* events, and PSEG ER&T suggests that section 31.3(x) be rejected without prejudice and revisited once the full scope of PHMSA's new regulations are known.

196. Texas Eastern answers that it has included the crediting exemption for repair and maintenance activities related to the 2011 Act and future PHMSA orders because such regulations and orders are expected to result in new obligations that have not previously been required for interstate natural gas pipelines. Texas Eastern asserts that the service interruptions that may occur due to these new statutory and regulatory obligations represent a significant change in the industry and are not the same kind of scheduled maintenance activities that the Commission has otherwise been concerned with in the context of reservation charge adjustments. Texas Eastern further asserts that the 2011 Act and the new PHMSA initiatives are expected to result in broader, more stringent safety requirements that will increase pipelines' repair and maintenance obligations,

including costs associated with required facility testing, upgrades, replacements, records reviews, and other repair and maintenance costs.[267]

3. Commission Determination

197. Texas Eastern's proposed section 31.3(x) is inconsistent with Commission policy as established in *Gulf South, et al*.[268] concerning outages related to the 2011 Act. In those orders, the Commission held that pipelines may include in their tariffs a provision permitting partial reservation charge crediting for a transitional period of two years for outages resulting from orders related to pipeline's maximum allowable operating pressure (MAOP) issued by the PHMSA pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code added by section 23 of the 2011 Act.[269] Section 60139(a) requires each owner or operator of a pipeline to conduct a verification of its records relating to pipeline segments so as to ensure that the records accurately reflect the physical and operational characteristics of the subject pipelines and to confirm their established MAOP. For each pipeline segment for which a pipeline's records are insufficient, PHMSA must require the pipeline owner or operator to reconfirm a MAOP as expeditiously as economically feasible, and PHMSA must determine what interim actions are appropriate to maintain safety until a MAOP may be reconfirmed. The Commission found that Section 60139(a) gave PHMSA immediate authority to issue orders requiring reconfirmation of MAOP and interim actions until reconfirmation and that such orders would be one-time non-recurring events. Therefore the Commission found that outages resulting from such PHMSA orders would be distinguishable from the routine, periodic maintenance which the Commission has held is within the control of the pipeline and therefore must be treated as non-*force majeure* events for which full reservation charge credits must be given. Accordingly, the Commission permitted pipelines to treat such outages for a transitional two-year period in the same manner as *force majeure* events for which only partial reservation charge credits are required.[270]

---

[267] Texas Eastern November 26, 2012 Answer at 17 (citing at n.34 "Pipeline Safety: Safety of Gas Transmission Pipelines," PHMSA, Advance Notice of Proposed Rulemaking, 76 Fed. Reg. 53,086 (Aug. 25, 2011)).

[268] *Gulf South*, 141 FERC ¶ 61,224 at PP 28-47, *order on reh'g*, 144 FERC ¶ 61,215; *Gulf Crossing*, 141 FERC ¶ 61,222, *order on reh'g*, 145 FERC ¶ 61,021; *Texas Gas*, 141 FERC ¶ 61,223, *order on reh'g*, 145 FERC ¶ 61,100 (collectively referred to as *Gulf South, et al.*).

[269] *Id*.

[270] *Gulf South*, 141 FERC ¶ 61,224 at n.25; *Gulf Crossing*, 141 FERC ¶ 61,222 at

(continued...)

198. However, the Commission held that the nature and timing of any other new safety requirements PHMSA may adopt pursuant to the 2011 Act are too speculative at this time to justify modifying Commission policy to treat any outages resulting from such new requirements similarly to *force majeure* events. The Commission explained that the 2011 Act requires PHMSA to conduct studies and rulemakings before imposing any other new requirements, including any changes to its integrity management regulations. Indeed, Texas Eastern, itself, recognizes that the exact scope of the additional repair and maintenance obligations resulting from the 2011 Act and new PHMSA initiatives and orders had not been determined when it made its proposal.[271] That continues to be true.

199. Accordingly, when Texas Eastern files to comply with this order, it must eliminate proposed section 31.3(x). However, Texas Eastern may include in that filing provisions permitting partial reservation charge credits for outages resulting from PHMSA orders issued pursuant to Section 60139(a) for a two-year period consistent with Commission policy as discussed above.[272] Any such proposed provision must be a separate transitional provision because the Commission has not found that such outages are *force majeure* events. Further, any proposed provision must provide that Texas Eastern's notice to its customers of such outages will identify the specific PHMSA order causing that outage.[273]

200. In addition, our holdings in this order are without prejudice to Texas Eastern filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.[274] The Commission is aware of the possible impact of the 2011 Act and PHMSA rulemakings and will closely monitor the implementation of the new requirements. The Commission understands the importance of these issues and will consider the need for further action as the impact of PHMSA's implementation process moves forward.

---

n.24; *Texas Gas*, 141 FERC ¶ 61,223 at n.26 (citing *Florida Gas*, 107 FERC ¶ 61,074 at P 32).

[271] Texas Eastern November 26, 2012 Answer at 17-18.

[272] *Panhandle*, 143 FERC ¶ 61,041 at P 68.

[273] *See*, *e.g.*, *Gulf South*, 141 FERC ¶ 61,224 at P 45.

[274] *Panhandle*, 143 FERC ¶ 61,041 at P 69.

H. The Definition of *Force Majeure* - Section 17.1

1. Texas Eastern's Proposal

201. Texas Eastern's definition of *force majeure* in GT&C section 17.1 includes "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable means." The September 2012 order found that to the extent the inclusion of that phrase in section 17.1 was intended to treat all service interruptions for testing, repair and maintenance in compliance with government orders as *force majeure* events, it was contrary to Commission policy.[275] The Commission accordingly required Texas Eastern to modify section 17.1 to exclude outages resulting from regulatory requirements which are within the pipeline's control or expected.[276] However, Texas Eastern was permitted to propose to include in the definition of *force majeure* outages to comply with government requirements which are both outside the pipeline's control and unexpected.

202. Texas Eastern proposes to modify section 17.1 by adding a sentence at the end of that section stating: "For the sole purpose of calculating Reservation Charge Crediting Adjustments pursuant to Section 31.2 of Pipeline's General Terms and Conditions, outages due to scheduled or routine maintenance shall not be considered *Force Majeure* events."

2. Positions of the Parties

203. MDG argues that section 17.1 as modified does not exclude from *force majeure* events all outages to comply with government orders that are within the pipeline's control or are expected. Texas Eastern answers that it has revised section 17.1 to exclude outages due to scheduled or routine maintenance from the definition of *force majeure* for reservation charge crediting purposes and treat them as non-*force majeure* events which necessarily includes outages to comply with government orders that are within its control or expected without altering the contractual definition of *force majeure*.

204. MDG, the Companies, and PSEG ER&T argue that the "for the sole purpose" clause is unnecessarily narrowing and contrary to the Commission precedent that scheduled maintenance is a non-*force majeure* event. Texas Eastern asserts that the "for the sole purpose" clause preserves its long-standing criteria for defining *force majeure*

---

[275] September 2012 Order, 140 FERC ¶ 61,216 at P 88.

[276] *Id.*

events for all purposes other than reservation charge crediting and at the same time complies with the Commission’s reservation charge crediting policy.

3. **Commission Determination**

205. The Commission finds that Texas Eastern’s proposed modification of section 17.1 of its GT&C complies with the September 2012 Order. Texas Eastern proposes to specifically exclude outages due to routine or scheduled maintenance from the definition of *force majeure.* In addition, the list of *force majeure* events in section 17.1 concludes with the following phrase:

> any other cause, *whether of the kind enumerated herein, or otherwise*, not within the control of the party claiming suspension, and which by due diligence such party is unable to prevent or overcome [emphasis added].

Therefore, GT&C section 17.1 limits all the listed events, including the governmental requirements exemption, to matters arising out of circumstances not within Texas Eastern’s control.

206. The Commission denies the protests to Texas Eastern’s proposed language stating that the exclusion of scheduled maintenance from the definition of *force majeure* is for the sole purpose of calculating reservation charge credits. As Texas Eastern states, in this proceeding, the Commission has focused on the *force majeure* definition issue solely in the context of whether partial versus full reservation charge credits must be provided for a particular outage. The September 2012 Order did not address the issue of whether routine or scheduled maintenance might be considered a *force majeure* event for other business purposes. Therefore, the Commission accepts Texas Eastern’s proposed revision to section 17.1 for purposes of compliance with the September 2012 Order. However, this acceptance is without prejudice to the parties raising this issue in another proceeding, such as by filing a separate complaint.

I. **Payment Obligation – Section 17.2**

1. **Texas Eastern’s Proposal**

207. Texas Eastern did not propose to modify section 17.2 of its tariff. Section 17.2 states that the *force majeure* events will not relieve either party from its obligations to make payments of amounts due with respect to delivered gas or as provided in the applicable rate schedule.

2. **Positions of the Parties**

208. The Companies argue that section 17.2 is inconsistent with proposed section 31.2, which allows for reservation charge credits after the 10-day safe harbor period that applies to *force majeure* events, and suggests clarifying language. Texas Eastern answers

that section 31.2 is not intended to relieve the payment obligation under section 17.2. Texas Eastern contends that, when there is a *force majeure* event, the section 17.2 payment obligation remains, and pursuant to section 31.2, after the 10-day safe harbor period, the customer's applicable reservation charges will be adjusted pursuant to section 31.1. Texas Eastern asserts that, therefore, the amount due may be reduced, but the customer's obligation to pay any amounts due to Texas Eastern remains. Texas Eastern further asserts that section 17.2 also applies in situations where the customer, not Texas Eastern, is experiencing a *force majeure*, and in that situation both parties' obligation to pay any amounts due also remains in place.

3. Commission Determination

209. Based on Texas Eastern's explanation, the Commission finds that section 17.2 is not inconsistent with section 31.1. Therefore, the Companies' request to modify the language proposed in section 17.2 is denied.

J. Curtailment – Section 17.3

210. The September 2012 Order found that section 17.3 of Texas Eastern's GT&C is inconsistent with the Commission's curtailment policy. That section provides, in part, that Texas Eastern has the "right to curtail, interrupt, or discontinue service in whole or in part on all or a portion of its system from time to time to perform routine repair and maintenance." The Commission found that the reference to "curtailment" in this provision is unjust and unreasonable. The Commission explained that pipelines are only permitted to "curtail" service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled.[277] The Commission stated that, because routine repair or maintenance is not an emergency situation or an unexpected loss of capacity, the pipeline should take outages required for routine repair and maintenance into account when it is scheduling service, rather than curtailing service after it is scheduled. For that reason, the Commission has held that pipelines should plan routine repair and maintenance through the scheduling process and should not curtail confirmed scheduling nominations in order to perform routine repair and maintenance.[278] Therefore, the September 2012 Order directed Texas Eastern to modify section 17.3 to remove the authorization to "curtail" service to perform routine repair and maintenance.

---

[277] *See, e.g., Portland,* 76 FERC at 61,663; *Ryckman Creek,* 136 FERC ¶ 61,061 at P 68.

[278] *Id.*

1. Texas Eastern's Proposal

211. Texas Eastern has revised section 17.3 as follows:

> 17.3 Scheduling of ~~Routine~~ Maintenance
>
> Pipeline shall have the right to curtail, interrupt, ~~or~~ discontinue, *or not schedule* service in whole or in part on all or a portion of its system from time to time to perform ~~routine~~ repair and maintenance on Pipeline's system as necessary to maintain the operational capability of Pipeline's system or to comply with applicable regulatory requirements, *except that Pipeline shall not have the right to curtail service that Customer has nominated and Pipeline has scheduled in order to perform routine repair or maintenance*. Pipeline shall exercise due diligence to schedule routine repair and maintenance so as to minimize disruptions of service to Customers and shall provide reasonable notice of the same to Customers. [Revisions are indicated by strikeout and emphasis.]

2. Positions of the Parties

212. PSEG ER&T argues that Texas Eastern should not avoid reservation charge credits by refusing to schedule properly nominated services. Texas Eastern responds that calculation of reservation charge credits in section 31.1 is based on the failure to deliver on a firm basis during a non-*force majeure* outage. Texas Eastern asserts that, if a shipper has properly nominated firm service and that nomination has been confirmed by upstream and downstream operators, the reservation charge crediting provisions of section 31.1 would be triggered if Texas Eastern does not deliver the gas, whether the non-delivery is due to Texas Eastern not scheduling the gas or for other reasons.

3. Commission Determination

213. The Commission finds that Texas Eastern's revision of section 17.3 complies with the September 2012 Order. As required by that order, Texas Eastern has clarified that it may not curtail service in order to perform routine repair or maintenance. Thus, curtailment of scheduled service will be limited to emergency situations and unexpected losses of capacity. The Commission denies PSEG ER&T's protest. As the Commission has previously found, section 17.3 contains nothing concerning the issue of providing reservation charge credits.[279] Therefore, section 17.3 does not limit in any way the reservation charge credits required by section 31.1. PSEG ER&T's argument that

[279] September 2012 Order, 140 FERC ¶ 61,216 at P 33.

reservation charge crediting is improperly affected by Texas Eastern's proposed revisions is rejected.

K. <u>Clarifications and Moot Issues</u>

214. In the November 2012 Compliance Filing, Texas Eastern clarified and modified various provisions in response to protests to its October 2012 Compliance Filing and it asserted that these revisions render the relevant issues raised in the protests moot. Except as discussed above, no party has contended that these modifications failed to address its concerns. The Commission has reviewed the various revisions not already discussed and finds them to be reasonable.

215. Accordingly, the Commission directs that, on or before November 28, 2014, Texas Eastern file actual tariff records, to be effective December 1, 2014, consistent with the *pro forma* tariff records included in its November 2012 Compliance Filing, with the modifications required above.

<u>The Commission orders</u>:

(A) The requests for rehearing of the September 2012 Order are denied, as discussed in the body of this order.

(B) Texas Eastern is directed to submit to the Commission a compliance filing, on or before November 28, 2014, containing actual tariff records, to be effective December 1, 2014, consistent with the discussion in this order, and subject to the conditions set forth in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Texas Eastern Transmission, LP
FERC NGA Gas Tariff
Texas Eastern Database 1

1., Rate Schedule CDS, 3.1.0
2., Rate Schedule FT-1, 5.1.0
3., Rate Schedule SCT, 2.1.0
5., Rate Schedule LLFT, 1.1.0
7., Rate Schedule VKFT, 2.1.0
9., Rate Schedule MLS-1, 1.1.0
14., Rate Schedule SS-1, 3.1.0
15., Rate Schedule FSS-1, 2.1.0
17., Rate Schedule FTS, 1.1.0
18., Rate Schedule FTS-2, 1.1.0
19., Rate Schedule FTS-4, 1.1.0
20., Rate Schedule FTS-5, 1.1.0
21., Rate Schedule FTS-7, 2.1.0
22., Rate Schedule FTS-8, 2.1.0
23., Rate Schedule SS, 1.1.0
17., Force Majeure, 1.1.0
31., Reservation Charge Adjustment, 0.1.0