

153 FERC ¶ 61,038  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Algonquin Gas Transmission, LLC

Docket Nos. RP13-751-001  
RP13-751-000

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 15, 2015)

1. On March 29, 2013, Algonquin Gas Transmission, LLC (Algonquin) submitted revised tariff records<sup>1</sup> to revise its contracting for service and right of first refusal (ROFR) processes. On April 30, 2013, the Commission conditionally accepted the revised tariff records to be effective May 1, 2013.<sup>2</sup> Pursuant to section 5 of the Natural Gas Act (NGA), the Commission required that Algonquin either file revisions to its tariff concerning reservation charge credits and *force majeure* in order to conform to Commission policy or explain why it should not be required to do so. Algonquin filed a request for rehearing (Request for Rehearing) and a response to the April 2013 Order (Response). As discussed below, the Commission denies the Request for Rehearing, finds that Algonquin's current lack of reservation charge crediting provisions is unjust and unreasonable, and directs Algonquin to file revised tariff records consistent with the discussion below.

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<sup>1</sup> Algonquin Gas Transmission, LLC, FERC NGA Gas Tariff, Algonquin Database 1; [1., Definitions, 4.0.0](#); [2., Request for Transportation Service, 2.0.0](#); [3., Credit Evaluation, 1.0.0](#); [9., Pregranted Abandonment and Right of First Refusal, 2.0.0](#); [14., Capacity Release, 4.0.0](#).

<sup>2</sup> *Algonquin Gas Transmission, LLC*, 143 FERC ¶ 61,082 (2013) (April 2013 Order).

## I. Background

### A. The Reservation Charge Crediting Policy

2. In this proceeding, the Commission has sought to bring Algonquin's tariff into compliance with the Commission's well established 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.<sup>3</sup> 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.<sup>4</sup> Partial credits may be provided pursuant to: (1) the No-Profit method under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1; or (2) the Safe Harbor method under which the pipeline provides full credits after a short grace period when no credit is due (i.e., 10 days or less).<sup>5</sup> In *North Baja Pipeline, LLC v. FERC*,<sup>6</sup> the United States Court of Appeals for the District of Columbia Circuit (the D.C. 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

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

<sup>4</sup> The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. Opinion No. 406, 76 FERC ¶ 61,022 at 61,088.

<sup>5</sup> The Commission has also stated that pipelines may use some other method that achieves equitable sharing reasonably equivalent to the two specified methods.

<sup>6</sup> 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*).

*Natural Gas Supply Association, et al.*,<sup>7</sup> 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 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.<sup>8</sup>

4. Since 2011, a number of pipelines have voluntarily filed to bring their tariffs into compliance with the Commission's reservation charge crediting policies.<sup>9</sup> Other

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

<sup>8</sup> 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.

<sup>9</sup> 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); *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 compliance*, 145 FERC ¶ 61,100 (2013) (*Texas Gas*); *National Fuel Gas Supply Corp.*, 143 FERC ¶ 61,103 (2013) (*National Fuel*); *TransColorado Gas Transmission Co.*, 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*, 139 FERC ¶ 61,275 (2012), 142 FERC ¶ 61,075, *order on reh'g*, 144 FERC ¶ 61,216 (2013) (*Rockies Express II*); *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); *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); *Millennium Pipeline*

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pipelines have complied with Commission orders requiring them to modify their tariffs consistent with Commission policy.<sup>10</sup> However, Algonquin continues to assert that it should be permitted to retain its tariff provisions without reservation charge crediting provisions which were the product of a 1994 rate case settlement (Settlement),<sup>11</sup> despite the fact that the Commission subsequently modified its reservation charge crediting policy in Opinion No. 406 and subsequent cases.<sup>12</sup>

**B. Algonquin's Lack of Reservation Charge Crediting Provisions and the April 2013 Order**

5. Algonquin's tariff contains no provisions requiring it to provide partial reservation charge credits during *force majeure* outages or full reservation charge credits during non-*force majeure* outages. Section 16.1 of the General Terms and Conditions of Algonquin's tariff (GT&C), entitled "Relief from Liability," defines *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."

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*Co., L.L.C.*, 149 FERC ¶ 61,290 (2014); *American Midstream (Midla), LLC*, 150 FERC ¶ 61,058 (2015); *East Tennessee Natural Gas, LLC*, 150 FERC ¶ 61,239 (2015); *Alliance Pipeline L.P.*, 151 FERC ¶ 61,271 (2015).

<sup>10</sup> 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., LP*, 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*); *Texas Eastern Transmission Corp.*, 140 FERC ¶ 61,216 (2012), *order on reh'g and compliance*, 149 FERC ¶ 61,143 (2014), *appeal withdrawn sub nom. Texas Eastern Transmission, L.P. v. FERC*, Docket No. 12-60892 (5th Cir. Apr. 20, 2015) (*Texas Eastern*); *Enable Gas Transmission, LLC*, 152 FERC ¶ 61,052 (2015) (*Enable*); *Empire Pipeline Inc.*, 150 FERC ¶ 61,181, at PP 77-80 (2015), *order accepting compliance filing*, unpublished delegated letter order in Docket No. RP15-873-000 issued May 7, 2015.

<sup>11</sup> Algonquin Request for Rehearing at 26 (citing *Algonquin Gas Transmission Corp.*, 68 FERC ¶ 61,039 (1994) (*Algonquin I*)).

<sup>12</sup> See, e.g., *Natural Gas Pipeline Co. of America*, 102 FERC ¶ 61,326 (2003), *order granting clarification*, 106 FERC ¶ 61,310, at PP 13-15, *order on reh'g*, 108 FERC ¶ 61,170 (2004) (*Natural*).

6. In addition, section 16.4, Scheduling of Construction and Maintenance, of Algonquin's GT&C provides that:

Algonquin 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 repair, maintenance or improvements on Algonquin's system as necessary to maintain the operational capability of the system, or to comply with applicable regulatory requirements, or to perform construction pursuant to valid FERC authorization. Algonquin shall exercise due diligence to schedule repair, construction and maintenance so as to minimize disruptions of service to Customer and shall provide reasonable notice of the same to Customer.

7. On March 29, 2013, Algonquin filed tariff records to revise its GT&C to reflect its current business practices related to contracting for service and right of first refusal processes. No party opposed Algonquin's proposed revisions to its GT&C. However, Indicated Shippers<sup>13</sup> filed a protest, contending that Algonquin's existing tariff did not contain the reservation charge crediting provisions required by Commission policy. Indicated Shippers also contended that GT&C section 16.1 violated Commission policy by including in the definition of *force majeure* "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means." Indicated Shippers requested that the Commission require Algonquin to file revised tariff records which are consistent with the Commission's policy.<sup>14</sup>

8. In the April 2013 Order, the Commission accepted the revised tariff records. In addition, the Commission found that the lack of any reservation charge crediting provisions in Algonquin's tariff conflicted with binding Commission precedent in prior adjudications and was sufficient to establish a *prima facie* case that the tariff is unjust and unreasonable.<sup>15</sup> The Commission explained that its reservation charge crediting policy

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<sup>13</sup> Indicated Shippers consisted of BP Energy Company (BP) and Hess Corporation (Hess).

<sup>14</sup> Indicated Shippers also argued that Algonquin should be required to make certain changes to sections 16.4 and 16.5 that are no longer at issue in this proceeding.

<sup>15</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 20 (citing *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050 (2011), *order on reh'g*, 139 FERC ¶ 61044 (2012) (*Kern River II*); *Northern*, 135 FERC ¶ 61,250, *order on reh'g*, 137 FERC ¶ 61,202; *Midwestern*, 137 FERC ¶ 61,257; *Gulf South*, 141 FERC ¶ 61,224; *Tennessee Gas Pipeline Co., LLC*, 133 FERC ¶ 61,208, 135 FERC ¶ 61,208 (2011), *order on reh'g*,

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requires full reservation charge credits for outages of primary firm service due to non-*force majeure* events and partial reservation charge credits for outages due to *force majeure* events.<sup>16</sup> The Commission further explained that the major elements of the Commission's reservation charge crediting policies were affirmed in *North Baja v. FERC*.<sup>17</sup>

9. The April 2013 Order stated that the Commission's reservation charge crediting policies have the force of law, because they have been developed in individual adjudications.<sup>18</sup> The Commission explained that, while the court held in *PG&E v. FPC*<sup>19</sup> that policy statements do not establish a "binding norm," the court also stated that, in contrast to a policy statement:

An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedent.

10. Thus, the Commission found that, consistent with *PG&E v. FPC*, the Commission's orders in its adjudications concerning pipeline reservation charge crediting provisions constitute "binding precedents" which establish "binding policy" that has "the force of law." The Commission accordingly concluded that the omission of any reservation charge crediting provisions from Algonquin's tariff conflicts with binding Commission precedent and is sufficient to establish a *prima facie* case that the tariff is unjust and unreasonable.<sup>20</sup> Therefore, pursuant to NGA sections 5, 10, and 14, the

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139 FERC ¶ 61,050 (2012) (*Tennessee*).

<sup>16</sup> *Id.* (citing Opinion No. 406, 76 FERC ¶ 61,022, Opinion No. 406-A, 80 FERC ¶ 61,070, as clarified by, *Rockies Express I*, 116 FERC ¶ 61,272 at P 63; *Ingleside Energy Center, LLC, et al.*, 112 FERC ¶ 61,101, at P 58 (2005); *Midwestern*, 137 FERC ¶ 61,257 at PP 19-22).

<sup>17</sup> 483 F.3d at 823.

<sup>18</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 21 (citing *Texas Eastern*, 140 FERC ¶ 61,216 at P 24).

<sup>19</sup> *Pacific Gas and Electric Company v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974) (*PG&E v. FPC*) (footnote and citations omitted).

<sup>20</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 22 (citing *Texas Eastern*, 140 FERC ¶ 61,216 at P 26).

Commission required Algonquin “either to produce evidence justifying the absence of any reservation charge crediting provisions from its tariff or file revised tariff language providing reservation charge credits consistent with Commission policy, as set forth in the precedents discussed above.”<sup>21</sup>

11. In addition, the Commission found that GT&C section 16.1 conflicts with the Commission’s reservation charge crediting policy by defining as *force majeure* “the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means.” The Commission recognized 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. However, the Commission found that, to the extent GT&C section 16 of Algonquin’s tariff is intended to treat service interruptions for routine, scheduled testing, repair and maintenance in compliance with government orders as *force majeure* events, this provision is contrary to Commission policy.<sup>22</sup> Accordingly, the Commission required Algonquin “to either (1) modify section 16.1 of its GT&C to exclude outages resulting from regulatory requirements which are within the pipeline’s control or expected or revise the definition of *force majeure* outages so that it only includes outages to comply with government requirements which are both outside the pipeline’s control and unexpected, or (2) explain why it should not be required to do so.”<sup>23</sup>

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<sup>21</sup> *Id.* (citing *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 938 (D.C. Cir. 1988) (*East Tennessee*), finding that the Commission may, consistent with its burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a tariff provision, a minimum bill, once a *prima facie* showing is made that the tariff provision is unjust and unreasonable).

<sup>22</sup> *Id.* P 25 (citing *Texas Eastern*, 140 FERC ¶ 61,216 at P 88).

<sup>23</sup> *Id.* The Commission also stated (at n.21) that, if Algonquin filed revised tariff language in compliance with that order, it could include in that filing a provision permitting partial reservation charge crediting for a transitional period of two years for outages resulting from orders issued by the Pipeline and Hazardous Safety Administration (PHMSA) of the United States Department of Transportation pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code added by section 23 of the Pipeline Safety, Regulatory and Job Creation Act of 2011. The Commission has found that such outages are comparable to those for which partial crediting is allowed for *force majeure* events. *Gulf South*, 141 FERC ¶ 61,224 at P 40; *Gulf Crossing*, 141 FERC ¶ 61,222 at P 40; and *Texas Gas*, 141 FERC ¶ 61,223 at P 39. In addition, the Commission noted that holdings in that order were without

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12. Finally, the Commission found, consistent with the *Texas Eastern* proceeding,<sup>24</sup> that existing section 16.4 contained a provision regarding Algonquin's curtailment of service which does not comply with Commission policy and therefore, was unjust and unreasonable. Section 16.4 provides, in part that Algonquin 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 repair, maintenance or improvements [emphasis added]." The Commission stated that it has found that pipelines may only "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.<sup>25</sup> The Commission explained that pipelines should plan routine repair, maintenance, and improvements through the scheduling process and should not curtail confirmed scheduling nominations in order to perform routine repair, maintenance, and improvements. Algonquin was directed, pursuant to NGA section 5, to modify section 16.4 to remove the authorization to "curtail" service to perform any repair, maintenance, and improvements consistent with Commission policy, or explain why it should not be required to do so.

13. Importantly, the April 2013 Order expressly recognized that while the Commission was imposing on Algonquin the burden of producing evidence:

it continues to have *the burden of persuasion* to demonstrate both that those existing tariff provisions are unjust and unreasonable and that any required replacement tariff provisions are just and reasonable. [emphasis added]<sup>26</sup>

The Commission further explained that:

By giving Algonquin the option to either revise its tariff or explain why it should not be required to do so, the Commission is *not making any final*

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prejudice to Algonquin's filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable, citing *Panhandle*, 143 FERC ¶ 61,041 at P 69.

<sup>24</sup> *Texas Eastern*, 140 FERC ¶ 61,216 at P 96, 149 FERC ¶ 61,143 at PP 210-213.

<sup>25</sup> See, e.g., *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123, at 61,663 (1996) (*Portland*); *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at P 68 (2011) (*Ryckman Creek*).

<sup>26</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 23 (citing *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993)).

*merits decision* under NGA section 5 in this order on either of those issues. The Commission is *only commencing the NGA section 5 proceeding* to decide those issues. [emphasis added]<sup>27</sup>

## II. Algonquin's Request for Rehearing and Response to the April 2013 Order

14. On May 30, 2013, Algonquin filed both a request rehearing of the April 2013 Order and a response to that order, contending that its existing tariff provisions are just and reasonable and should not be modified under NGA section 5. Algonquin does not contest the April 2013 Order's findings that its lack of reservation charge crediting tariff provisions conflicts with the precedents cited in that order. However, Algonquin contends that the Commission's reliance on those precedents is insufficient to satisfy its burden under NGA section 5 to show that Algonquin's existing tariff is unjust and unreasonable. Algonquin contends 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. Algonquin argues that, contrary to NGA section 5, the Commission placed the burden of producing evidence on Algonquin. Algonquin further argues that the Commission has previously approved the relevant tariff provisions as part of the negotiated Settlement in its general rate case in Docket No. RP93-14,<sup>28</sup> and no participant in this proceeding has presented any evidence, or even alleged, that the relevant circumstances have changed in a way that would warrant modification of these provisions. Algonquin contends that the Commission failed to recognize that more than one just and reasonable alternative is permitted for any given rate or tariff provision. Algonquin argues that the April 2013 Order improperly required it to modify the existing tariff based on a finding that the Commission's reservation charge crediting policy is just and reasonable without ever supporting a finding that Algonquin's tariff provisions are unjust and unreasonable.

15. Algonquin attacks the April 2013 Order's treatment of the reservation charge crediting policies developed in the cited adjudications as "having the force of law,"<sup>29</sup> and

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<sup>27</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 23.

<sup>28</sup> *Algonquin I*, 68 FERC ¶ 61,039 (approving the Settlement in Docket No. RP93-14). In Algonquin's Order No. 636 compliance proceedings, parties were permitted to raise the issue of reservation charge credits in the general rate case in Docket No. RP93-14 which resulted in the 1994 Settlement. *Algonquin Gas Transmission Corp.*, 62 FERC ¶ 61,132, at 61,865 (1993), *order on reh'g and compliance*, 63 FERC ¶ 61,188 (1993), *order on reh'g and compliance*, 65 FERC ¶ 61,019 (1993) (*Algonquin II*).

<sup>29</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 21.

asserts that the Commission found Algonquin's tariff unjust and unreasonable based solely on a finding that Algonquin's tariff was inconsistent with those policies, without considering any specific facts concerning circumstances on Algonquin's system. Algonquin argues that this amounts to imposing a rule without conducting the notice and comment required by the Administrative Procedures Act (APA).

16. Algonquin states that the United States Court of Appeals for the Fifth Circuit (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."<sup>30</sup> Algonquin interprets 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. Algonquin contends that, by adopting a policy that is not dependent on the operating conditions of each pipeline, the Commission has denied Algonquin and other pipelines the opportunity to challenge the basis of the rule. In addition, Algonquin argues that the Commission has failed to substantiate its application of that policy to Algonquin based on findings of fact concerning specific operating conditions of Algonquin's system. Moreover, Algonquin contends that the Commission committed the same errors in the prior cases on which it relied in this case, such as *Florida Gas*,<sup>31</sup> because in none of those cases did the Commission make any findings of fact based on the specific facts in the record, such as the operating conditions on the pipeline.<sup>32</sup>

17. Algonquin has responded to the April 2013 Order with similar arguments to those contained in its Request for Rehearing. Public notice of Algonquin's Response was issued on July 17, 2013, allowing parties to file comments on or before July 29, 2013. Indicated Shippers filed an answer to the Response (Answer to Response) and Algonquin filed an answer to that answer (Answer).<sup>33</sup>

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<sup>30</sup> Algonquin Request for Rehearing at 13 (quoting *Florida Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5<sup>th</sup> Cir. 1989) (*Florida Gas v. FERC*)). Algonquin also cites *Shell Oil Co. v. FERC*, 707 F.2d 230 (5<sup>th</sup> Cir. 1983) (*Shell Oil*).

<sup>31</sup> *Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, order on reh'g, 107 FERC ¶ 61,074, at P 32 (2004) (*Florida Gas*).

<sup>32</sup> Algonquin Request for Rehearing at 16-17.

<sup>33</sup> The Commission's Rules of Practice and Procedure do not permit answers to answers unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2)

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

18. For the reasons discussed below, the Commission denies rehearing of the April 2013 Order and finds that the absence of any reservation charge crediting provision in Algonquin's tariff is unjust and unreasonable. Below, we first find that the April 2013 Order properly initiated an investigation under NGA section 5 as to whether Algonquin's omission of reservation charge crediting provisions and its tariff definition of *force majeure* are unjust and unreasonable and established procedures that provided Algonquin a full opportunity to challenge the validity of our reservation charge crediting policies and their application to Algonquin, as required by the *Shell Oil* and *Florida Gas v. FERC* decisions of the Fifth Circuit. We then turn to the merits of Algonquin's contentions that in this proceeding we have failed to substantiate our reservation charge crediting policy, and its application to Algonquin, with substantial evidence and a reasoned explanation. We find that we have substantiated the validity and application of our reservation charge crediting policy to Algonquin with respect to both partial reservation charge credits for *force majeure* outages and full reservation charge credits for non-*force majeure* outages. Finally, we address the remaining contentions by Algonquin concerning the Commission's compliance with NGA section 5.

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

20. In the discussion below, the Commission addresses the Request for Rehearing and the Response concurrently, because Algonquin's contentions in the two pleadings substantially overlap.

### **IV. Whether Procedures Adopted in April 2013 Order Violated NGA Section 5**

21. Algonquin contends that the April 2013 Order improperly shifted the burden of producing evidence in this NGA section 5 proceeding to it, without the Commission first

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(2015). However, to the extent that Indicated Shippers' Answer to Response and Algonquin's Answer are such answers, the Commission finds good cause to accept them since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record.

presenting evidence on which to base a *prima facie* showing that Algonquin's existing tariff is unjust and unreasonable. Algonquin asserts that the Commission has the burden of proof in a section 5 proceeding and therefore has the initial burden of going forward with the evidence to show that Algonquin's Commission-approved tariff is unjust and unreasonable.

22. Algonquin asserts that the April 2013 Order's finding that Algonquin's tariff conflicted with binding Commission precedent failed to establish a *prima facie* case that Algonquin's tariff was unjust and unreasonable. Therefore, Algonquin argues, the April 2013 Order failed to justify shifting the burden of going forward with the evidence to Algonquin. Algonquin also contends that, by treating our reservation charge crediting decisions in prior adjudications as binding precedent having the force of law, the April 2013 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."<sup>34</sup> Algonquin contends that the Commission disallowed any opportunity for it to argue that the Commission should modify its policy. Algonquin also contends 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 April [2013] Order to apply the policy statement as having 'the force of law' is that a pipeline will not have an opportunity to present individual facts or circumstances that would persuade the Commission to depart from its policy statement."<sup>35</sup>

23. Algonquin contends that this violates the holdings of the United States Court of Appeals for the Fifth Circuit in *Shell Oil and Florida Gas v. FERC* 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 for the rule. Algonquin further argues it contravenes constitutional due process and is fundamentally unfair to require it to provide evidence to rebut claims not supported by record evidence. Other than the Commission's affirmance of its current reservation charge crediting policy, Algonquin states there is no substantial record evidence that its existing tariff provisions are no longer just and reasonable.

### **Commission Determination**

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<sup>34</sup> Algonquin Request for Rehearing at 18 (quoting the *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26 n.20).

<sup>35</sup> Algonquin Request for Rehearing at 22.

24. The Commission finds that the procedures established in the April 2013 Order for determining whether Algonquin's lack of reservation charge crediting tariff provisions is unjust and unreasonable are consistent with NGA section 5. In response to a protest by Indicated Shippers, the Commission reviewed Algonquin's tariff, and confirmed the absence of reservation charge crediting provisions in that tariff. The April 2013 Order found that the omission of any reservation charge crediting provisions in Algonquin's tariff and its tariff definition of *force majeure* conflicted with "binding Commission precedent"<sup>36</sup> established in adjudications concerning the reservation charge crediting provisions of individual pipelines.

25. Specifically, the Commission relied on precedent from adjudications in *Southern*, *Kern River*, *Northern*, *Midwestern*, *Gulf South*, and *Tennessee* for the proposition that pipelines are required to provide firm shippers with full reservation charge credits for outages of primary firm service due to non-*force majeure* events, and pipelines must provide firm shippers to partial reservation charge credits during *force majeure* outages in order to share the risk of outages for which neither party is responsible.<sup>37</sup> The Commission also stated that routine, scheduled maintenance is not a *force majeure* event, and that this policy is not dependent on the specific operational conditions of the pipeline, citing *El Paso Natural Gas Co.*<sup>38</sup> The Commission explained that it has defined *force majeure* outages as events that are "unexpected and uncontrollable," citing Opinion No. 406,<sup>39</sup> and outages for routine maintenance are expected, even if reasonably within the pipeline's control. The Commission also pointed out that, in *North Baja v. FERC*,<sup>40</sup> the D.C. Circuit affirmed the major elements of the Commission's reservation charge crediting policies in another adjudication.

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<sup>36</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 22. As the Commission explained in the preceding paragraph of the April 2013 Order, the D.C. Circuit held in *PG&E v. FPC*, 506 F. 2d at 38, that the Commission may "establish binding policy . . . through adjudications which constitute binding precedent."

<sup>37</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 20 (citing *Southern*, 135 FERC ¶ 61,056, 137 FERC ¶ 61,050; *Kern River II*, 135 FERC ¶ 61,050, 139 FERC ¶ 61,044; *Northern*, 135 FERC ¶ 61,250, 137 FERC ¶ 61,202; *Midwestern*, 137 FERC ¶ 61,257; *Gulf South*, 141 FERC ¶ 61,224, *Tennessee*, 133 FERC ¶ 61,208, 139 FERC ¶ 61,050.

<sup>38</sup> 105 FERC ¶ 61,262, at 61,350 (2003) (*El Paso*).

<sup>39</sup> Opinion No. 406, 76 FERC at 61,088.

<sup>40</sup> 483 F.3d at 823.

26. The April 2013 Order also found that Algonquin's definition of *force majeure* in section 16.1 of its GT&C as including "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means" appears to extend to routine maintenance contrary to Commission precedent. The Commission recognized 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.<sup>41</sup> However, such outages may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and are unexpected. The Commission stated that in several other adjudications, the Commission has required pipelines to clarify identical tariff language to ensure that outages for routine testing and maintenance required to comply with governmental action are not treated as *force majeure* events.<sup>42</sup>

27. Having determined that Algonquin's absence of reservation charge crediting provisions and tariff definition of *force majeure* conflict with binding precedent, the Commission reasonably required Algonquin to file revised tariff records to conform to the Commission's reservation charge crediting policy or explain why it should not be required to do so. In *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), the court addressed a similar issue concerning the Commission's ability to require a pipeline to provide information in a section 5 proceeding investigating compliance with Commission policies having the force of law. *INGAA* involved a Commission regulation, adopted in Order No. 637, requiring pipelines to permit shippers to segment their capacity to the extent operationally feasible.<sup>43</sup> Order No. 637 directed each pipeline to file *pro forma* tariff sheets showing how it intended to comply with that regulation or to explain why its system's configuration justified curtailing segmentation rights. The pipelines contended that the Commission had shifted to them the burden of proof that segmentation was infeasible on their systems, which was

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<sup>41</sup> The April 2013 Order cited *Florida Gas*, 105 FERC ¶ 61,171, 107 FERC ¶ 61,074 at P 32; and *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*).

<sup>42</sup> *Texas Eastern*, 140 FERC ¶ 61,216 at P 88; *Tennessee*, 139 FERC ¶ 61,050 at P 82. See also *Rockies Express II*, 139 FERC ¶ 61,275 at P 19.

<sup>43</sup> 18 C.F.R. § 284.7(d) (2015). *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. and Regs. ¶ 31,091, order on reh'g, Order No. 637-A, FERC Stats. and Regs. ¶ 31,099 (2000).

the Commission's burden under NGA section 5. The court rejected this argument, finding that the Commission had stated that it "will indeed shoulder the burden under § 5 of the NGA." *INGAA*, 285 F.3d at 38. As pertinent here, the court expressly stated that:

As to the Commission's determination to extract information from pipelines relevant to the practical issues, we see no violation of the NGA. The Commission has authority under § 5 to order hearings to determine whether a given pipeline is in compliance with FERC's rules, 15 U.S.C. § 717d(a), and under § 10 and § 14 to require pipelines to submit needed information for making its § 5 decisions, 15 U.S.C. §§ 717i & 717m(c). [*Id.*]

28. In this case, the Commission is also investigating whether a pipeline is in compliance with a binding policy having the force of law, although here the rules for implementing that policy have been established through adjudications constituting binding precedent, rather than through a rulemaking. The April 2013 Order required Algonquin to make precisely the same type of filing concerning its reservation charge crediting provisions and *force majeure* definition as Order No. 637 required pipelines to make concerning segmentation: either revise its tariff consistent with Commission policy or explain why it should not be required to do so. Accordingly, the Commission was well within its authority under NGA section 5 "to order hearings to determine whether a given pipeline is in compliance with FERC's rules and under [NGA section] 10 and [section] 14 to require pipelines to submit needed information for making its section 5 decisions."<sup>44</sup>

29. Algonquin contends that, by treating our reservation charge crediting decisions in prior adjudications as "binding precedent," the April 2013 Order (1) violated the holdings of *Shell Oil* and *Florida Gas v. FERC* that the Commission must allow affected parties to challenge the factual basis of rules developed in adjudications and (2) improperly departed, without explanation, from the Commission's statements in the *NGSA Rehearing Order* that the *NGSA Order's* "summary of the Commission's existing reservation charge crediting policy is . . . is a policy statement"<sup>45</sup> and that parties would be free to argue in a particular proceeding that the Commission should modify the reservation charge crediting policies established in prior adjudications.<sup>46</sup> The Commission rejects these contentions.

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<sup>44</sup> *INGAA*, 285 F.3d at 38. See also *Texas Eastern*, 140 FERC ¶ 61,216 at P 27.

<sup>45</sup> Algonquin Rehearing Request at 18 (citing *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26).

<sup>46</sup> *Id.*

30. As Algonquin points out in its request for rehearing,<sup>47</sup> the Fifth Circuit has held 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. For example, in *Florida Gas v. FERC*, the court stated:

Due process, however, guarantees that parties who will be affected by the general rule be given an opportunity to challenge the agency's action. When the rule is established through formal rulemaking, public notice and hearing provide the necessary protection. But where, as here, the 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.<sup>48</sup>

31. Consistent with this requirement, the April 2013 Order provided Algonquin 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 it. The Commission's April 2013 Order in this case required Algonquin "*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.*"<sup>49</sup> Moreover, the April 2013 Order emphasized that, "[b]y giving Algonquin *the option to either revise its tariff or explain why it should not be required to do so, the Commission is not making any final merits decision* under NGA section 5" as to whether Algonquin's lack of reservation charge crediting provisions should be found unjust and unreasonable or what replacement tariff provisions would be just and reasonable.<sup>50</sup> Rather, the April 2013 Order stated, "The Commission is *only commencing the NGA section 5 proceeding* to decide those issues."<sup>51</sup> Therefore, in its response to the April 2013 Order, Algonquin was free to submit whatever evidence and argument it desired in order to challenge both the validity of the Commission's reservation charge crediting policies and their application to Algonquin.

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<sup>47</sup> Algonquin Rehearing Request at 13.

<sup>48</sup> *Florida Gas v. FERC*, 876 F.2d at 44.

<sup>49</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 31 (emphasis added).

<sup>50</sup> *Id.* P 23 (emphasis added).

<sup>51</sup> *Id.* (emphasis added).

32. Moreover, the April 2013 Order's treatment of our reservation charge crediting decisions in prior adjudications as "binding precedent" was neither a departure from the *NGSA Rehearing Order*, nor has it deprived Algonquin of the opportunity to challenge the validity of the reservation charge crediting policies adopted in those prior adjudications. After stating that pipelines could raise any issue they desired in future reservation charge crediting proceedings, the *NGSA Rehearing Order* stated that, while the *NGSA Order* was itself a policy statement, "the Commission may in future cases treat its decisions in the adjudications described in the [*NGSA Order*] as binding precedent." The *NGSA Rehearing Order* then explained:

In *PG&E v. FPC*, 506 F.2d at 38, the court recognized that an "agency may establish binding policy... through adjudications which constitute binding precedents." The Commission precedents described in [*NGSA*] were established in adjudications concerning the justness and reasonableness of the reservation charge crediting tariff provisions of specific pipelines. In addition, the most significant policies established in those adjudications were examined and affirmed by the United States Court of Appeals in *North Baja*. *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 Commission may not depart from established policies without providing an explanation of the reasons for doing so.*<sup>52</sup>

33. Contrary to Algonquin's contentions that the April 2013 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 April 2013 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 that it would in the *NGSA Rehearing Order*, the April 2013 Order gave Algonquin an opportunity to argue that the Commission should modify the policies established in those prior adjudications, as explained above.

34. Our characterization of the precedent established in prior reservation charge crediting adjudication proceedings as binding policy having the force of law does not

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<sup>52</sup> *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26 n.20 (emphasis added) (citing *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (*Wisconsin Valley*)).

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. As described above, the April 2013 Order gave Algonquin the opportunity to seek such a change in our reservation charge crediting policy in this proceeding.

35. However, as Algonquin itself recognizes in its rehearing request,<sup>53</sup> in order to change policies established in prior adjudications, the Commission must provide a “reasoned explanation for its departure from established case law.”<sup>54</sup> Therefore, to the extent Algonquin argues the Commission should modify the reservation charge crediting policies established in its prior adjudications, as opposed to arguing that those policies do not apply to its factual circumstances, Algonquin must describe the reasoned explanation it believes would justify the Commission’s departure from its “established case law.”

36. For the same reasons, the Commission rejects Algonquin’s suggestion that precedent established in individual adjudications must be treated in much the same manner as a policy statement. For example, Algonquin 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 is not binding precedent . . . , 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.*”<sup>55</sup> Algonquin also contends that the April 2013 Order represented a fundamental shift from our *NGSA* orders because it applies “the policy statement as having the ‘force of law.’”<sup>56</sup>

37. These contentions improperly conflate precedent established in an adjudication with a policy statement. To the extent Algonquin is arguing that policies developed through adjudications have no greater weight than policies set forth in a policy statement, it is incorrect. 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.”<sup>57</sup> As a result, in future cases the Commission must support a policy set forth in a

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<sup>53</sup> Algonquin Rehearing Request at 20 (citing *Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1458 (D.C. Cir. 1996); *Cross-Sound Ferry Services v. Interstate Commerce Commission*, 873 F.2d 395, 398 (D.C. Cir. 1989); *Southwestern Elec. Power Co. v. FERC*, 810 F.2d 289, 291 (D.C. Cir. 1987); and *West Virginia Pub. Serv. Comm’n v. U.S. Dep’t of Energy*, 681 F. 2d 847, 863 (D.C. Cir. 1982)).

<sup>54</sup> *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 298 (5<sup>th</sup> Cir. 2007) (*Jupiter Energy*) (quoting *EP Operating Co. v. FERC*, 876 F.2d 46, 48 (5<sup>th</sup> Cir. 1989) (*EP Operating*)). See also *Wisconsin Valley*, 236 F.3d at 748.

<sup>55</sup> Algonquin Request for Rehearing at 21 (emphasis added).

<sup>56</sup> *Id.* at 22.

<sup>57</sup> *PG&E v. FERC*, 506 F.2d at 38.

policy statement “as if the policy statement had never been issued.”<sup>58</sup> That is not true of policies established in adjudications. Unlike policy statements, orders in adjudications, including those involving the reservation charge crediting tariff provisions of individual pipelines, are finally determinative of the rights and obligations of the parties to the adjudication. As a result, orders in adjudications “constitute binding precedents.”<sup>59</sup> Therefore, in subsequent adjudications, the Commission cannot proceed as if the orders in prior adjudications had never been issued. Rather, the Commission must determine whether the prior precedent is applicable to the facts in the subsequent adjudication<sup>60</sup> and, if so, either apply the prior precedent in the subsequent adjudication or, in the Fifth Circuit’s words, provide a “reasoned explanation for its departure from established case law.”

38. Having rejected Algonquin’s contentions that the April 2013 Order did not give it an opportunity to present evidence and argument challenging the validity of our reservation charge crediting policies and their application to Algonquin, we now turn to the merits of Algonquin’s contentions that the record established in this proceeding fails to substantiate our reservation charge crediting policy, or its application to Algonquin, 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 to Algonquin with respect to both partial reservation charge credits for *force majeure* outages and full reservation charge credits for non-*force majeure* outages.

**V. Substantiation of Reservation Charge Crediting Policies and their Application to Algonquin**

39. Algonquin contends that, in order to implement its reservation charge crediting policies through adjudication, the Commission must compare the individual facts and circumstances of the subject pipeline with those of the pipelines in the prior adjudications. Algonquin asserts that this requires comparing “the pipelines’ histories of scheduled maintenance and how much primary firm service was actually interrupted during those maintenance events.”<sup>61</sup> Algonquin contends that, as in *Shell Oil and Florida Gas v. FERC*, the Commission has adduced no evidence to substantiate the basis for its rule requiring reservation charge credits either in this proceeding or in the prior

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<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.*

<sup>61</sup> Algonquin Request for Rehearing at 23.

adjudications which established that rule. As a result, Algonquin argues, the Commission has presented no evidence on the need to apply its general rule on reservation charge crediting to Algonquin specifically, but instead has rested its decision on its policy alone.

40. Algonquin argues that the prior adjudications relied on by the Commission did not themselves include a substantiation of the application of the rule through the development of specific facts. Algonquin 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."<sup>62</sup> Algonquin contends that Opinion No. 406 did not support either of these general propositions with findings of fact based on record evidence. Algonquin also argues that the other orders relied upon by the Commission also did not make necessary findings of fact but simply relied on the established policy.

**A. Force Majeure Partial Crediting Policy**

41. As described above, Algonquin's tariff does not require it provide any reservation charge credits during *force majeure* outages. The April 2013 Order found that the omission of any tariff provision requiring Algonquin to provide partial reservation charge credits during force majeure outages was inconsistent with the Commission's policy adopted in Opinion No. 406 that pipelines must share the risk of *force majeure* events.

42. In its response to the April 2013 Order, Algonquin contends that the Commission has presented no evidence in either this proceeding or prior adjudications to substantiate its policy requiring pipelines to provide partial reservation charge credits during *force majeure* outages. Algonquin also contends that the Commission has not provided any evidence concerning the particular factual circumstances on its system that would justify applying the partial reservation charge crediting policy to it. Algonquin also points out that, during its Order No. 636 restructuring proceeding, parties raised the issue whether Algonquin should be required to provide reservation charge credits, but the Commission declined to address the issue, stating that parties could raise the issue in Algonquin's then pending rate case in Docket No. RP93-14-000.<sup>63</sup> However, Algonquin states, the parties settled that rate case without any requirement that Algonquin provide reservation charge

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<sup>62</sup> *Id.* at 14 (citing Opinion No. 406, 76 FERC ¶ 61,022 at 61,086).

<sup>63</sup> *Algonquin II*, 62 FERC ¶ 61,132 at 61,865.

credits.<sup>64</sup> Algonquin contends that the Commission has not presented evidence of changed circumstances since that time that would justify now requiring Algonquin to provide partial reservation charge credits. The Commission rejects these contentions.

43. In 1996, several years after the Commission had processed all the interstate pipelines' filings to comply with Order No. 636 and after the approval of Algonquin's 1994 rate case settlement, the Commission reviewed its reservation charge crediting policies in Opinion No. 406.<sup>65</sup> In Opinion No. 406, the Commission recognized that Order No. 636's requirement that pipelines shift from a modified fixed variable (MFV) rate design to a straight fixed variable (SFV) rate design had the effect of shifting the risk of *force majeure* outages entirely to the shippers. Under an MFV rate design, return on equity and associated income taxes were included in the usage charge. As a result, during a *force majeure* outage, "there was a built-in sharing of the risk because the pipeline's recovery of its return on equity and taxes was dependent on its throughput."<sup>66</sup> However, under an SFV rate design, all of the pipeline's fixed costs are included in the pipeline's reservation charge. Accordingly, during a *force majeure* outage, the pipeline with SFV rates continues to recover its entire cost of service, including its return on equity, while its shippers fail to receive access to the capacity assured them by their payment of reservation charges. Opinion No. 406 stated that requiring shippers to bear the entire risk of *force majeure* outages is inconsistent with the Commission's prior recognition that "a *force majeure* interruption is a no-fault occurrence" and therefore "all parties should bear the risk of *force majeure* events."<sup>67</sup> Therefore, Opinion No. 406 found that Tennessee Gas Pipeline Company's (Tennessee) existing tariff provision excusing it from providing any reservation charge credits during *force majeure* outages was unjust and unreasonable, because it placed all the risk of *force majeure* outages on its shippers. Opinion No. 406 found that this requirement "returns the balance of risk back to the *status quo* before the Commission mandated the use of the SFV rate design."<sup>68</sup>

44. Algonquin, like Tennessee at the time of Opinion No. 406, uses an SFV rate design. Therefore, Algonquin's existing tariff, like Tennessee's existing tariff provision found unjust and unreasonable in Opinion No. 406, places all the risk of *force majeure*

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<sup>64</sup> *Algonquin I*, 68 FERC ¶ 61,039.

<sup>65</sup> Opinion No. 406, 76 FERC ¶ 61,022 at 61,088-89.

<sup>66</sup> *Id.* at 61,089.

<sup>67</sup> *Id.* at 61,088.

<sup>68</sup> *Id.* at 61,089.

outages on its shippers. For this reason, Algonquin's failure to provide partial reservation charge credits during *force majeure* outages is unjust and unreasonable for the same reasons Opinion No. 406 held that Tennessee's similar provision was unjust and unreasonable.

45. Algonquin suggests that the Commission cannot rely on Opinion No. 406 to find that its failure to provide partial reservation charges during *force majeure* outages is unjust and unreasonable, because the Commission failed to substantiate its reservation charge crediting policies in Opinion No. 406 with appropriate factual findings. This contention is directly contrary to the D.C. Circuit's decision in *North Baja v. FERC*. In that case, the court affirmed the Commission's requirement that North Baja provide partial credits for *force majeure* outages consistent with the policy adopted in Opinion No. 406, 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. The Commission has simply instructed North Baja to choose the *Texas Eastern* or *Tennessee* formulas or to propose a formula that achieves an equitable cost-sharing in the same ballpark as the *Texas Eastern* and *Tennessee* policies. . . In short, FERC's decision on the cost-sharing issue was entirely reasonable<sup>69</sup>

In this case, we are relying on our past precedent to require Algonquin to modify its tariff in precisely the same manner as we did in the orders affirmed by the D.C. Circuit in *North Baja v. FERC*.

46. Moreover, Algonquin has made no argument that would cause us to reconsider the precedent established in Opinion No. 406 requiring partial reservation charge credits in order to share the risk of *force majeure* outages, nor has Algonquin provided any reason why that policy should not be applied to it. Algonquin does not contest the underlying premise of the Opinion No. 406 *force majeure* risk sharing policy that "a *force majeure* interruption is a no-fault occurrence" for which neither the pipeline nor its shippers are to blame. Nor does Algonquin offer any explanation why a policy requiring pipelines and shippers to share the risk of such no-fault interruptions, in the same manner as they did before Order No. 636, is unreasonable.

47. Algonquin also suggests that, before the Commission can take action under NGA section 5 to require it to provide partial reservation charge credits during *force majeure*

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<sup>69</sup> *North Baja v. FERC*, 483 F.3d at 822.

outages, the Commission must present record evidence that Algonquin's failure to do so is unjust and unreasonable. However, the Commission has done just that by showing that Algonquin's SFV rate design imposes the entire risk of *force majeure* outages on Algonquin's shippers, contrary to the Commission's reasonable policy of requiring a sharing of that risk. No other factual evidence is necessary, or relevant, to the issue whether Algonquin's failure to provide significant partial reservation charge credits during *force majeure* outages is unjust and unreasonable. For example, whether Algonquin's system has had many, some, or no *force majeure* outages in the past has no bearing on the issue of whether it is unjust and unreasonable for its tariff to continue to impose the full cost of all such future *force majeure* outages on its shippers. Regardless of the pipeline's past history of *force majeure* outages, it is inequitable to require Algonquin's shippers to bear the full cost of any such future outage, rather than have the pipeline and its shippers share equitably the risk of an event for which neither party is responsible. Despite having been given the opportunity by the April 2013 order, Algonquin has not provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the risk sharing policy we have applied consistently and uniformly to other pipelines.

48. For these reasons, the Commission finds that Algonquin's failure to provide partial reservation charge credits during *force majeure* outages is unjust and unreasonable.

**B. Non-Force Majeure Full Crediting Policy**

49. As described above, Algonquin's tariff does not require it to provide any reservation charge credits for outages of primary firm service during non-*force majeure* outages. The April 2013 Order found that the omission of such a tariff provision was inconsistent with the Commission's policy, first adopted in Opinion No. 406 and applied in numerous subsequent cases, that pipelines must provide full reservation charge credits for non-*force majeure* outages of primary firm service.

50. In its request for rehearing of, and response to, the April 2013 Order, Algonquin contends generally that the Commission has not substantiated its policy requiring full reservation charge credits for non-*force majeure* outages. Algonquin argues that the prior adjudications relied on by the April 2013 Order did not themselves include a substantiation of the application of the rule through the development of specific facts. Algonquin asserts that the April 2013 Order 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.”<sup>70</sup> Algonquin contends that Opinion No. 406 did not support either of these general propositions with findings of fact based on record evidence.

51. Algonquin 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, Algonquin contends that in *Southern*<sup>71</sup> the Commission failed to take into account the operating conditions that the pipeline presented and stated that its crediting policy with respect to routine maintenance outages is not dependent on the specific operating conditions of the pipeline. Algonquin contends the other orders cited by the April 2013 Order all made the same error in applying generic policy without making any findings of fact based on record evidence.<sup>72</sup>

52. Algonquin contends that, as in past proceedings, the Commission has introduced no evidence to support the application of its full reservation charge crediting policy for non-*force majeure* outages to Algonquin. It asserts that the Commission has made no findings whether Algonquin’s service disruptions have been longer than necessary or have been scheduled at times that failed to minimize service disruptions, or even whether such disruptions have occurred. Therefore, Algonquin argues, the Commission has presented no evidence sufficient to support the application of its general rule on reservation charge crediting to Algonquin specifically.

53. Algonquin also contends that, if the April 2013 Order had engaged in the correct application of precedent, the Commission would have compared the individual facts and circumstances of the pipelines in the prior adjudications with those of Algonquin. For example, Algonquin asserts, the Commission could have compared “the pipelines’ histories of scheduled maintenance and how much primary firm service was actually interrupted during those maintenance events.”<sup>73</sup> However, the April 2013 Order did not engage in any such fact comparison.

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<sup>70</sup> Algonquin Request for Rehearing at 14 (citing Opinion No. 406, 76 FERC ¶ 61,022 at 61,086).

<sup>71</sup> 137 FERC ¶ 61,050 at PP 30-32.

<sup>72</sup> Algonquin Request for Rehearing at 16-17 (citing *Portland*, 76 FERC ¶61,123 at 61,663, *Ryckman Creek*, 136 FERC ¶ 61,061 at P 68, *Florida Gas*, 107 FERC ¶ 61,074 at PP 28-29, *Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 5, *Texas Eastern*, 140 FERC ¶ 61,216 at P 88, *Tennessee*, 139 FERC ¶ 61,050 at P 82, and *Rockies Express II*, 139 FERC ¶ 61,275 at P 19).

<sup>73</sup> Algonquin Request for Rehearing at 23.

54. In its prior adjudications, the Commission has 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 associated with routine and regulatory maintenance necessary for a pipeline's safe and proper functioning.<sup>74</sup> In this order, we reaffirm that policy and hold that substantial evidence supports its application to Algonquin.

55. As we have previously determined, 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 Algonquin, 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 Algonquin's tariff in providing such a financial incentive. We explain that our policy of requiring full reservation charges as an incentive for pipelines to minimize outages of primary firm service applies without regard to the pipeline's past history of outages or evidence of lack of due diligence to minimize outages. We then discuss the reasonableness of requiring Algonquin 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 find that Algonquin has not produced evidence that any of its negotiated rate agreements contain provisions exempting it from providing reservation charge credits to its negotiated rate customers consistent with the generally applicable provisions of its tariff.

### **1. Reliance on Primary Firm Service**

56. Primary firm transportation service is the highest priority service provided by natural gas pipelines.<sup>75</sup> 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

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<sup>74</sup> See *Texas Eastern*, 140 FERC ¶ 61,216 at P 58, 149 FERC ¶ 61,143 at P 66; *Panhandle*, 143 FERC ¶ 61,041 at P 58, 148 FERC ¶ 61,025 at PP 11, 56.

<sup>75</sup> 18 C.F.R. § 284.7(a)(3) (2015). *Tennessee*, 139 FERC ¶ 61,050 at PP 14-18.

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.”<sup>76</sup> For this right, shippers on pipelines with straight fixed variable rates, including Algonquin, 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.

57. Algonquin’s firm shippers include major LDCs serving residential consumers, electric generators, and other high priority uses, such as hospitals, in its natural gas pipeline system which extends from points near Lambertville and Hanover, New Jersey, through the states of New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, to points near the Boston area.<sup>77</sup> Other firm shippers on the Algonquin system include municipal gas companies,<sup>78</sup> electric generators,<sup>79</sup> and producers and marketers of natural gas whose gas sales include sales of natural gas to be used for high

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<sup>76</sup> *Tennessee*, 139 FERC ¶ 61,050 at P 18.

<sup>77</sup> *E.g.*, National Grid Gas Delivery Companies, Consolidated Edison Co. of New York, Inc., Orange and Rockland Utilities, Inc., New Jersey Natural Gas Co., and New York State Electric & Gas Corporation.

<sup>78</sup> *E.g.*, Norwich Public Utilities, Taunton Municipal Lighting Plant and Middleborough Gas and Electric Department.

<sup>79</sup> Exelon Generation Company, LLC; PSEG Power, LLC.

priority purposes.<sup>80</sup> Algonquin'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.

58. Algonquin stated in its application for certificate authorization for the Algonquin Incremental Market Project in Docket No. CP14-96-000 (AIM) for which it executed precedent agreements with eight LDCs and two municipal utilities:

With more homes and commercial buildings in [the Northeast] now converting heating units and appliances to natural gas, and the utilization of natural gas for industrial purposes also increasing, demand for natural gas in the region is expected to increase.<sup>81</sup>

59. 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 to Algonquin as it has to the other pipelines we have required to comply with our reservation charge crediting policy.<sup>82</sup>

60. With the increased use of natural gas for gas-fired electric generation,<sup>83</sup> this concern is even more compelling today than when we first established our reservation charge crediting policy. Algonquin serves gas-fired electric generators in New England. Algonquin states in its Informational Postings that:

To increase Algonquin's supply base, we have developed the HubLine and Maritimes & Northeast pipeline extensions providing high-pressure deliverability to ease New England's *increasing demand for electric generation* [emphasis added].

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<sup>80</sup> *E.g.*, BP, Direct Energy Business Marketing, LLC, Emera Energy Services, Inc., Nextera Energy Power Marketing, LLC, and Reposal Energy North America Corporation.

<sup>81</sup> Algonquin's February 28, 2014 application in Docket No. CP14-96-000 at 5.

<sup>82</sup> *See, e.g., Panhandle*, 148 FERC ¶ 61,025 at P 55, and *Texas Eastern*, 149 ¶ 61,143 at P 70.

<sup>83</sup> *See Coordination of Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, FERC Stats. & Regs. ¶ 32,700, at P 5 and n.7, n.8 (2014) (Gas-Electric NOPR); Order No. 809, 80 Fed. Reg. 23,197 (Apr. 24, 2015), FERC Stats. & Regs. ¶ 31,368 at P 9 (2015) (Order No. 809).

Reliance on natural gas as a fuel for electric generation is expected to continue increasing resulting in greater interdependence between the natural gas and electric industries.<sup>84</sup> Reliance on gas-fired electric generation in New England increased from five percent in 1990 to 51 percent in 2011.<sup>85</sup>

61. 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,<sup>86</sup> and/or they may be unable to deliver natural gas to their regular sales customers, thus disrupting their commercial relationships. In addition, 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.<sup>87</sup>

62. 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

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<sup>84</sup> Order No. 809, FERC Stats. & Regs. ¶ 31,368 at P 9 and n.11 (citing, *e.g.*, U.S. Energy Information Administration, *Annual Energy Outlook 2014 with projections to 2040* (April 2014) (Natural gas-fired generation is projected to overtake coal-fired generation for U.S. electricity generation by 2040. Natural gas' share of U.S. electricity generation is projected to increase from 30 percent in 2012 to 35 percent in 2040.); ICF Assessment of New England's Natural Gas Pipeline Capacity to Satisfy Short and Near-Term Electric Generation Needs: Phase II Final Report (November 20, 2014); North American Electric Reliability Corporation, *2014 Long-Term Reliability Assessment* (November 2014) at 13).

<sup>85</sup> Gas-Electric NOPR, FERC Stats. & Regs, ¶ 32,700 at P 5 n.7.

<sup>86</sup> 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.

<sup>87</sup> See *Texas Eastern*, 149 FERC ¶ 61,143 at P 71.

primary firm transportation service in order to minimize harm to the public and financial injury caused by outages of that service.<sup>88</sup>

## 2. Financial Incentives

63. 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 services. 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.

64. Algonquin contends that the Commission has not provided any evidence to support its finding that the full crediting requirement provides an incentive for pipelines to minimize service interruptions, either in Opinion No. 406 or in subsequent cases. However, the fact that exposing the pipeline to financial loss whenever routine maintenance interrupts primary firm service will provide pipelines an incentive to exercise the greatest possible care to minimize outages and thus 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.<sup>89</sup>

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<sup>88</sup> *CenterPoint Energy Gas Transmission Co.*, 144 FERC ¶ 61,195, at P 62 (2013) (*CenterPoint*); *Texas Eastern*, 149 FERC ¶ 61,143 at PP 68-72.

<sup>89</sup> *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 Distrib. 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.”). *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (“[I]t is within the scope of the agency’s expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.”). *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 260-61 (D.C. Cir. 2007) (The Commission’s prediction that a given formula for allowing electricity suppliers to recover fixed costs in setting prices would “provide an efficient incentive to invest” was a “reasonable predictive judgment.”). *Central Hudson Gas & Elec. Corp. v.*

(continued ...)

65. The Commission recognizes that section 16.4 of Algonquin's GT&C requires it to exercise due diligence to schedule repair, construction, and maintenance so as to minimize service disruptions and to provide reasonable notice of such maintenance to shippers. However, as the Commission found in *Texas Eastern*,<sup>90</sup> such a tariff requirement is a less effective means of accomplishing the Commission's objective of ensuring that primary firm service is as reliable as possible, than a full reservation charge crediting requirement. Such a tariff provision simply directs the pipeline to exercise due diligence, without imposing any significant risk that the pipeline will incur a financial cost for outages or providing shippers any financial relief from their costs as a result of such outages. Such a tariff provision contains no mechanism requiring any form of payment by the pipeline to its shippers for service outages. At most, such a tariff provision 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 the pipeline had failed to comply with its tariff'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, the pipeline would face little risk that it would ever incur any cost when it fails to provide primary firm service because of routine maintenance. Such a purely regulatory approach of relying on a tariff provision mandating the exercise of "due diligence" to ensure reliable primary firm service, unsupported by the strong financial incentives provided by the automatic reservation charge crediting requirement, is insufficient to ensure that the pipeline exercises the highest possible standard of care to maximize the reliability of primary firm service.

66. By contrast, an express provision in Algonquin's tariff requiring it to provide full reservation charge credits during any routine maintenance outage will provide a strong financial incentive for a pipeline to minimize such outages to the maximum extent possible. For example, with such a requirement, Algonquin 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 on Algonquin the risk of such an immediate financial cost if it fails to provide primary firm service will inspire it to exercise the highest possible standard of care to

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*FERC*, 783 F.3d 92, 109 (2nd Cir., 2015) (analyzing, with approval, the D.C. Circuit's extensive case law permitting the Commission to make "findings based on 'generic factual predictions' derived from economic research and theory.").

<sup>90</sup> 149 FERC ¶ 61,143 at PP 77-80.

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.

67. Algonquin contends that, in order to require pipelines to provide full reservation charge credits during non-*force majeure* outages as an incentive to minimize such outages, the Commission must show that there is currently a problem with pipelines failing to minimize such outages. Algonquin states that Opinion No. 406, which established the full crediting policy, stated only that it is inequitable for pipeline shippers to bear the risk of the pipeline’s mismanagement of its system and providing reservation charge credits would incentivize a pipeline “to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system.”<sup>91</sup> Algonquin states that Opinion No. 406 did not support these propositions with findings of fact.<sup>92</sup> Algonquin also contends that the Commission has made no findings whether Algonquin’s service disruptions have been longer than necessary or have been scheduled at times that failed to minimize service disruptions, or even whether such disruptions have occurred. Therefore, Algonquin argues, the Commission has presented no evidence sufficient to show that the current level of service interruptions on Algonquin is too high so as to justify the need for a new incentive for Algonquin to reduce its service interruptions.

68. Our reservation charge crediting policy and our application of that policy to Algonquin are not based on any finding that pipelines generally, or Algonquin in particular, are currently mismanaging their systems or failing to manage their systems in a prudent manner. Rather, as described above, the Commission has based its reservation charge crediting policy on the strong public interest in ensuring that the primary firm service provided by pipelines, including Algonquin, is as reliable as possible in order to minimize the harm to the public and financial injury caused by outages of that service. In the exercise of our authority under the NGA to determine just and reasonable rates, terms, and conditions of service, the Commission has found that the goal of ensuring the maximum reliability of primary firm service is best accomplished by providing pipelines

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<sup>91</sup> Algonquin Response to April 2013 Order at 17 (quoting Opinion No. 406, 76 FERC ¶ 61,022 at 61,086).

<sup>92</sup> See *Enable*, 152 FERC ¶ 61,052 at P 80 n.102 (citing *CenterPoint*, 144 FERC ¶ 61,195 at PP 58-56; *Panhandle*, 143 FERC ¶ 61,041 at P 57; *Texas Eastern*, 140 FERC ¶ 61,216 at P 54).

an economic incentive, through the reservation charge crediting requirement, to exercise the highest possible standard of care to provide reliable primary firm transportation service.

69. Algonquin's contentions that, in order to substantiate its policy requiring pipelines to provide full reservation charge credits for routine maintenance as an incentive for pipelines to minimize such outages, the Commission must find that there is a problem with excessive service interruptions, is directly contrary to the decision of the D.C. Circuit in *North Baja v. FERC*. The court's opinion in that case affirmed our requirement that North Baja provide full reservation charge credits during non-*force majeure* outages, despite the absence of any evidence that the current level of service interruptions on North Baja was too high or that it was mismanaging its pipeline, and the court held that the Commission had reasonably relied on its past precedent on this issue, including Opinion No. 406.

70. 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:

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.<sup>93</sup>

71. The Commission rejected this contention, stating, "[a]lthough 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."<sup>94</sup>

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<sup>93</sup> *North Baja*, 111 FERC ¶ 61,101 at P 16 (footnotes omitted).

<sup>94</sup> *Id.* P 17 (footnotes omitted).

72. 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 *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at 61,245 PP 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 P 7, 62,352 P 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.<sup>95</sup>

73. 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.”<sup>96</sup> 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

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<sup>95</sup> *North Baja v. FERC*, 483 F.3d at 822-823. In the *Florida Gas* decision, referred to by the court above, the pipeline maintained that no purpose would be served by requiring it to provide reservation charge credits, because it “has a history of working with its customers to schedule outages so as to minimize disruptions” and “no party has identified a specific instance when it inappropriately managed the scheduling of maintenance work.” *Florida Gas*, 107 FERC ¶ 61,074 at P 22.

<sup>96</sup> *North Baja v. FERC*, 483 F.3d at 823.

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].<sup>97</sup>

74. The court thus concluded that the Commission had reasonably applied its policy requiring full reservation charge credits for non-*force majeure* interruptions of primary firm service to North Baja, despite the absence of any evidence that operational problems within its control were causing outages on its system.

75. In this case, we are relying on the same precedents to find that Algonquin’s failure to provide full reservation charge credits for non-*force majeure* outages as the D.C. Circuit found the Commission reasonably relied on *North Baja v. FERC*. While Algonquin 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 as set forth in the *Florida Gas* decision is not dependent upon the specific operating conditions on the pipeline.”<sup>98</sup> Thus, while Algonquin contends that the Commission must demonstrate that the current level of service interruptions on a pipeline’s system is too high in order to require the pipeline to provide full reservation charge credits, 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

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<sup>97</sup> *Id.*

<sup>98</sup> In its rehearing request, Algonquin states that, until now, no customer has filed a complaint or protest with the Commission objecting to Algonquin’s reservation charge crediting policy. Algonquin Request for Rehearing at 8. However, in the *Florida Gas* case, referred to in the passage from the court’s decision quoted above, the pipeline also stated that there had been no complaints that it had inappropriately managed its scheduling of maintenance work. *Florida Gas*, 107 FERC ¶ 61,074 at P 22.

routine maintenance outages that is not dependent on the “specific operating conditions on the pipeline.”<sup>99</sup>

76. Algonquin 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.<sup>100</sup> However, as discussed 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.

77. Thus, the facts concerning Algonquin’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 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.

78. Finally, while Algonquin has asserted that the current level of primary firm service outages on its system is relevant to a determination of whether it should be required to provide reservation charge credits, it has not produced any evidence as to how many outages of primary firm service occur on its system. Consistent with the fact that we are proceeding by case-by-case adjudication, we have given Algonquin the opportunity to produce evidence of the pattern of outages on its system and explain why that pattern indicates our reservation charge crediting policy should not be applied. Information regarding the pattern of outages on Algonquin’s system is in its possession, as the operator of its system. However, Algonquin chose not to submit any evidence concerning outages on its system, either to indicate that such outages are rare or non-existent or to indicate that such outages are significant but unavoidable.

79. The Commission concludes that it has reasonably relied on its past precedent to require Algonquin to provide full reservation charge credits during non-*force majeure*

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<sup>99</sup> 483 F.3d at 823.

<sup>100</sup> Algonquin Request for Rehearing at 15.

outages as an incentive to ensure that it exercises the highest standard of care possible to minimize outages of primary firm service. As discussed above, our requirement that pipelines provide full reservation charge credits during non-*force majeure* outages 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, Algonquin itself recognizes in its Rehearing Request that the Commission has applied that policy to pipelines in prior adjudications without any evidence as to those pipelines’ histories of outages or lack of due diligence.<sup>101</sup> While Algonquin contends that the Commission erred in those prior cases, the D.C. Circuit has ruled otherwise.

### **3. Compensation for Unavailability of Primary Firm Service**

80. 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.

81. 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. Thus, when a pipeline, such as Algonquin, is prevented, i.e., by performing routine maintenance, from providing primary firm service to a shipper within the contractual entitlement set forth in its contract, it is unreasonable to not require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided.

82. Algonquin contends that its existing tariff provisions are part of a Commission approved rate structure which contemplates that Algonquin will not provide reservation

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<sup>101</sup> Algonquin Rehearing Request at 16.

credits during service outages. Algonquin asserts that the Commission has recognized that reservation charge credits are essentially a rate matter.<sup>102</sup> Algonquin states that, consistent with this recognition, the Commission held in its Order No. 636 restructuring proceeding that the issue of reservation charge credits should be addressed in Algonquin's general rate case in Docket No. RP93-14.<sup>103</sup> Algonquin states that, although a party in that rate case presented testimony seeking reservation charge credits, the parties ultimately settled that case without requiring Algonquin to provide any reservation charge credits in either *force majeure* or non-*force majeure* situations.<sup>104</sup> Accordingly, Algonquin argues its lack of reservation charge crediting provisions is the product of a negotiated rate settlement, which subsequent rate case settlements did not change,<sup>105</sup> and thus represents nearly two decades of settled practice.

83. Algonquin also states that the Commission should not require it to implement reservation charge crediting outside of a general NGA section 4 or 5 rate case where adjustments can also be made to the rates themselves. Algonquin suggests that its lack of reservation charge crediting provisions allows its rates to be lower than they otherwise would be. It states that, when customers expect to receive reservation charge credits for service not provided due to maintenance or *force majeure* outages, they are willing to pay a higher reservation charge rate knowing they will recoup some of those reservation charges during outages. However, when there is no expectation of reservation charge credits, as on Algonquin, a lower rate is justified because no later credits will be forthcoming. Algonquin concludes that the Commission should not disrupt the expectations of the parties that no reservation charge credits will be provided to compensate shippers for their inability to receive primary firm service during *force majeure* and non-*force majeure* outages of primary firm service.

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<sup>102</sup> Algonquin Response at 23 (citing *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,090, *reh'g*, 63 FERC ¶ 61,100, at 61,434 (1993), and *Golden Triangle Storage Inc.*, 134 FERC ¶ 61,036, at P 8 (2011) (*Golden Triangle*)).

<sup>103</sup> *Algonquin II*, 62 FERC ¶ 61,132 at 61,865, 63 FERC ¶ 61,188, 65 FERC ¶ 61,019.

<sup>104</sup> *Algonquin I*, 68 FERC ¶ 61,039 (approving the Settlement in Docket No. RP93-14). *Algonquin II*, 62 FERC ¶ 61,132 at 61,865, 63 FERC ¶ 61,188, 65 FERC ¶ 61,019.

<sup>105</sup> Algonquin Response at 23 (citing *Algonquin Gas Transmission Co.*, 87 FERC ¶ 61,008 (1999)).

84. The Commission rejects Algonquin's contentions that the settlements of its 1994 and 1999 rate cases justify exempting it from our reservation charge crediting policies, including the policy that credits are necessary to provide firm shippers rate relief and compensation for costs incurred as a result of the pipeline's failure to provide primary firm service. Neither of those settlements contains any provision either restricting the shippers' rights under NGA section 5 to seek a change in Algonquin's tariff regarding reservation charge crediting today or suggesting that the settlement rates were in any way premised upon a continuation of the existing omission of any reservation charge crediting provisions. While Algonquin suggests that the 1994 Settlement represented a negotiated agreement that its tariff should not be modified in the future to include reservation charge crediting provisions, Article VII(3) of the 1994 Settlement provided that "[no] party shall be deemed, by virtue of its assent to this [settlement] to have accepted any principle or determination with regard to Algonquin's rates." That settlement also contained express provisions defining what types of section 5 relief parties were prohibited from seeking, without including any restriction on section 5 complaints concerning reservation charge crediting. For example, Article VII(4) expressly restricted any party from seeking, pursuant to NGA section 5, a change in Algonquin's modified incremental rate design before May 1, 1999. If Algonquin intended that the 1994 Settlement also restrict the parties' rights to seek reservation charge crediting provisions pursuant to NGA section 5, it could have sought to include such a restriction in the settlement. Instead, Algonquin agreed to a settlement which contains no such restriction.<sup>106</sup> In any event, the 1994 Settlement expired by its terms upon the effective date of the rates agreed to in the 1999 Settlement.

85. Similar to the 1994 Settlement, Article 6.01 of the 1999 Settlement provided that "[no] party shall be deemed, by virtue of its assent to this [settlement] to have accepted any principle or determination with regard to Algonquin's rates." Article 4.01 of the 1999 Settlement did impose a four year rate moratorium, until May 1, 2003, during which "Algonquin's Base Tariff Rates . . . and other tariff provisions for transportation services offered pursuant to Parts 284 and 157 of the Commission's regulations . . . shall not be changed other than as expressly provided by this Offer of Settlement." The 1999 Settlement also contained provisions preventing parties from instituting section 5 proceedings seeking changes in Algonquin's rates "directly or indirectly" during the rate moratorium. Even assuming that those provisions of the 1999 Settlement prevented parties from seeking reservation charge crediting provisions during the four year rate moratorium, that moratorium expired on May 1, 2003, and Algonquin has not cited any other settlement with its shippers which might restrict its shippers' right to seek reservation charge crediting provisions pursuant to NGA section 5 today. Therefore,

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<sup>106</sup> *Northern*, 141 FERC ¶ 61,221 at P 42.

contrary to Algonquin's arguments, neither the 1994 or 1999 Settlements require a continuation of Algonquin's current lack of reservation charge crediting provisions today, over twelve years after the expiration of the 1999 Settlement rate moratorium.<sup>107</sup>

86. We do not disagree with Algonquin's contention that providing reservation charge credits may affect the level of the pipeline's rates. In fact, as the court recognized in *North Baja*, we permit a pipeline to incorporate in its rates "the costs associated with a pipeline 'operating its system so that it can meet its contractual obligations.'"<sup>108</sup> For this reason, we have consistently held in reservation charge crediting cases that "if a pipeline thinks that Commission action under NGA section 5 requiring it to revise its tariff to be consistent with Commission policy would result in its rates being too low to recover its overall cost of service, it could file to show why it believes such would be the consequence of that action."<sup>109</sup> We have also stated that, if a pipeline produces evidence

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<sup>107</sup> This case is thus similar to *Southern*, 135 FERC ¶ 61,056 at PP 14-15, *Northern*, 141 FERC ¶ 61,221 at PP 36-42, and *Panhandle*, 143 FERC ¶ 61,041 at P 78, in all of which the Commission interpreted rate case settlements as not precluding subsequent complaints under NGA section 5 seeking reservation charge credits.

<sup>108</sup> 483 F.3d at 823. For example, a pipeline could include in its cost of service the recurring cost of reservation charge credits or reduce its rate design volumes to reflect recurring outages requiring credits.

<sup>109</sup> *Northern*, 141 FERC ¶ 61,221 at P 46. *Panhandle*, 143 FERC ¶ 61,041 at P 81. *Texas Eastern*, 149 FERC ¶ 61,143 at P 74, *CenterPoint*, 144 FERC ¶ 61,195 at P 67. The Commission has described the information to be included in such a filing as follows:

To enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the pipeline would have to provide evidence of the number of non-*force majeure* outages it experienced during a past representative period, and the dollar amount of the additional credits it would have had to give. In addition, the pipeline would have to provide the Commission with the information necessary to determine whether the pipeline's existing rates are insufficient to recover any additional costs resulting from compliance. For example, the pipeline could file a full cost and revenue study consistent with what we have required in recent section 5 investigations of the justness and reasonableness of a pipeline's overall rates.

(continued ...)

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.<sup>110</sup>

87. In its response to the April 2013 Order, Algonquin recognizes that the Commission has permitted pipelines to file evidence that a section 5 requirement to provide reservation charge credits would require a rate increase to permit the pipeline to recover its cost of service and that the Commission has stated it would consider not taking section 5 action if such evidence were presented.<sup>111</sup> Nevertheless, Algonquin did not produce any evidence that providing reservation charge credits would cause it to underrecover its cost of service so as to require an increase in its rates, despite the fact the information the Commission has stated is necessary for it to estimate the pipeline's cost of compliance with the Commission's reservation charge crediting policy is in the pipeline's possession.

88. As a result, there is no record evidence in this proceeding that would require us to consider the issue of whether reservation charge crediting on Algonquin's system would require a rate increase that would offset the benefits of reservation charge crediting in providing an increased incentive for Algonquin to minimize outages of primary firm service and compensating firm shippers for unavoidable outages. Algonquin having failed to produce evidence otherwise, we must presume that its current rates are sufficiently high to recover the costs of any reservation charge credits it could reasonably project our NGA section 5 action would cause it to incur. Therefore, while the Commission is willing to consider exceptions to its reservation charge crediting policies where adverse rate effects would offset the benefits of reservation charge crediting, that issue is not raised on the present record.

89. The Commission concludes that, in the circumstances of this case, a tariff provision requiring Algonquin to provide full reservation charge credits during non-*force majeure* outages of primary firm service is necessary to provide firm shippers rate relief

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Alternatively, the pipeline could also file a general section 4 rate case to increase its rates to recover the increased costs from compliance with that policy. *Northern*, 141 FERC ¶ 61,221 at P 46.

<sup>110</sup> *Northern*, 141 FERC ¶ 61,221 at P 50. *Panhandle*, 143 FERC ¶ 61,041 at P 81.

<sup>111</sup> Algonquin Response at 24-25.

and compensation for costs incurred as a result of Algonquin's failure to provide the service for which the shipper is paying its reservation charge. For the reasons discussed above, the fact Algonquin's last two general section 4 rate cases settled over 20 and 15 years ago, respectively, without providing for reservation charge credits does not justify exempting it from our reservation charge crediting policies, including the policy that credits are necessary to provide firm shippers rate relief and compensation for costs incurred as a result of the pipeline's failure to provide primary firm service.<sup>112</sup>

#### 4. Negotiated Rate Agreements

90. In its response to the April 2013 Order, Algonquin states that it has entered into long-term negotiated rate agreements with some of its shippers. Algonquin asserts that the maximum recourse rates approved in the 1994 and 1999 Settlements discussed in the preceding section have served as "the baseline rates" for those negotiated rate agreements,<sup>113</sup> and that the negotiated rate agreements reflect the decision of the pipeline and its shippers in the 1994 Settlement not to have reservation charge crediting. Algonquin further argues that both it and its negotiated rate customers made commercial decisions to enter into long-term negotiated rate agreements with the expectation that it did not provide reservation charge credits. Algonquin contends that ordering it to provide reservation charge credits now would disrupt those expectations in violation of

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<sup>112</sup> While Algonquin cites *Golden Triangle*, 134 FERC ¶ 61,036 at P 8, for the proposition that rates and reservation charge credits are interdependent, we note that that case is distinguishable from the instant case, because that case involved a storage company for which the Commission had approved market-based rates because it lacked market power. The Commission does not require pipelines which lack market power to include any reservation charge crediting provisions in their tariffs, because shippers on such pipelines can negotiate alternate forms of rate relief. *Panhandle*, 143 FERC ¶ 61,041 at P 82. However, we have not found that Algonquin lacks market power. In the absence of a tariff provision offering reservation charge credits at least to shippers agreeing to pay the maximum recourse rate, the Commission cannot find that shippers on a pipeline with market power, such as Algonquin, can negotiate alternate forms of rate relief. However, the Commission recognizes that a shipper may be willing to trade limits on reservation credits for a lower rate. Therefore, the Commission has permitted pipelines to include in tariff provisions offering reservation charge credits a provision exempting shippers with discounted or negotiated rates from such credits unless the pipeline agrees to include a reservation charge crediting provision in the discounted or negotiated rate agreement. *CenterPoint*, 144 FERC ¶ 61,195 at P 76-78. Algonquin may propose such a tariff provision in its filing to comply with this order.

<sup>113</sup> Algonquin Response at 27.

Commission policy and the *Mobile-Sierra* doctrine.<sup>114</sup> Algonquin also argues that requiring it to provide reservation charge credits would impose an undue burden on Algonquin's non-negotiated rate customers, because Algonquin would have to allocate the costs of those credits solely to the non-negotiated rate shippers.

91. If a pipeline and a shipper have entered into a currently effective negotiated rate agreement which is reasonably interpreted as providing for no or different reservation charge credits than required by Commission policy, the Commission has stated that it will not change the negotiated rate agreement pursuant to NGA section 5.<sup>115</sup> However, when a pipeline's service agreements and/or tariff contain a *Memphis* clause<sup>116</sup> incorporating into the service agreement the pipeline's general terms and conditions of service as they may change from time to time, the Commission has held that the *Memphis* clause automatically gives negotiated rate shippers the benefit of any reservation charge crediting provisions required pursuant to NGA section 5, absent a provision in the negotiated rate agreement providing otherwise.<sup>117</sup> This approach is consistent with longstanding Commission precedent that service agreements with a *Memphis* clause "automatically give shippers any increased rights which may be provided by changes in the terms and conditions of service in a pipeline's tariff."<sup>118</sup>

92. In this case, Algonquin has not produced copies of any of the negotiated rate agreements which it claims exempt it from providing reservation charge credits. Nor does Algonquin allege that any of those negotiated rate agreements contain specific provisions exempting it from providing reservation charge credits or providing for a different type of reservation charge crediting, comparable to the negotiated rate agreements which the Commission exempted from NGA section 5 action in *Kern River*.

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<sup>114</sup> *United Gas PipeLine Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>115</sup> *NGSA*, 135 FERC ¶ 61,055 at P 12 n.12. *Kern River I*, 132 FERC ¶ 61,111 at P 16.

<sup>116</sup> *United Gas PipeLine Co. v. Memphis Light, Gas, and Water Division*, 358 U.S. 103 (1958).

<sup>117</sup> *Iroquois*, 145 FERC ¶ 61,233 at P 68-71.

<sup>118</sup> *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 46 (2002), *reh'g denied*, 106 FERC ¶ 61,088, at PP 64-65 (2004), *aff'd*, *American Gas Association v. FERC*, 428 F.3d 255, 263 (D.C. Cir. 2005) (*AGA v. FERC*).

Instead, Algonquin appears to rely solely on the fact that its tariff as agreed to in the 1994 and 1999 Settlements did not provide reservation charge credits when it entered into the existing negotiated rate agreements. On that ground, it argues that the economic basis on which it agreed to its existing negotiated rates was that it would not be subject to reservation charge crediting. The Commission rejected similar contentions in *Iroquois*.

93. As in *Iroquois*, Algonquin's service agreements contain *Memphis* clauses, applying any changes in Algonquin's terms and conditions of service to all its firm shippers, without distinction as to the type of rate they pay. Algonquin's *pro forma* service agreement for each of its firm services incorporates into the service agreement the applicable firm rate schedule and the general terms and conditions of Algonquin's tariff.<sup>119</sup> Moreover, as discussed in the previous section, the 1994 and 1999 Settlements contain no restriction on the shippers' right to seek tariff changes pursuant to NGA section 5, except for the rate moratorium in the 1999 Settlement, which expired on May 1, 2003.

94. If Algonquin intended that its negotiated rate agreements be insulated from any future changes in the reservation charge crediting provisions included in its tariff, it could have included a provision to that effect in the negotiated rate agreements and sought Commission approval of such a deviation from the *pro forma* service agreement then in effect.<sup>120</sup> However, Algonquin has not produced evidence that it included such a provision in any of its negotiated rate agreements. In these circumstances, under well-established Commission precedent, Algonquin's negotiated rate shippers are entitled to the benefit of any reservation charge crediting provisions required by the Commission pursuant to NGA section 5, in the same manner as Algonquin's firm shippers paying a maximum or discounted recourse rate.

95. When discounted rate shippers have contended that the *Memphis* clause in their contracts should not operate to incorporate into their contracts a new surcharge, the Commission has refused to exempt them from the new surcharge if the discounted rate

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<sup>119</sup> For example, section 1 of the form of service agreement applicable to Rate Schedule AFT-1 provides, "Algonquin shall deliver and Customer shall take and pay for service pursuant to the terms of this Agreement and subject to Algonquin's Rate Scheduled AFT-1 and the General Terms and Conditions of Algonquin's tariff, which are incorporated herein by reference and made a part hereof."

<sup>120</sup> See *Kern River II*, 135 FERC ¶ 61,050 at PP 32-33, permitting individually negotiated reservation charge crediting provisions to remain in place despite a change in the pipeline's generally applicable reservation charge crediting provisions in its GT&C.

agreement contained no provision limiting the operation of the *Memphis* clause.<sup>121</sup> As the Commission explained in *Natural Gas Pipeline Co. of America*:<sup>122</sup>

The Commission does not involve itself in the drafting of discount agreements, and the parties to such agreements must be mindful that rates are subject to change. Accordingly, we find no basis on which to offer relief to parties now finding themselves disadvantaged by the terms they negotiated.<sup>123</sup>

96. Accordingly, just as a shipper should be mindful when it enters into a service agreement that changes the pipeline makes to its GT&C pursuant to NGA section 4 will be incorporated into the service agreement, so also should the pipeline understand that changes to its GT&C required by the Commission pursuant to NGA section 5 will also be incorporated into all existing service agreements, absent an express provision otherwise.<sup>124</sup>

97. In drafting its negotiated rate agreements, Algonquin failed to recognize the clear possible result of the *Memphis* clause in its service agreements and include language to limit or preclude application to those contracts of a revision to its tariff to conform its reservation charge crediting provisions to Commission policy. Algonquin is a sophisticated party. As the Commission stated in *Iroquois*:

if continued application of [the pipeline's] then existing reservation charge crediting provisions regardless of future changes was an essential part of the economic bargain reflected in its existing negotiated rate agreements, it is reasonable for the Commission to expect that [they] would have included language in the negotiated rate agreements so stating.<sup>125</sup>

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<sup>121</sup> See *Sea Robin Pipeline Co., LLC*, Opinion No. 516-A, 143 FERC ¶ 61,129, at PP 146-151 (2013); *High Island Offshore System, L.L.C.*, 145 FERC ¶ 61,155, at PP 16-20 (2013).

<sup>122</sup> *Natural Gas Pipeline Co. of America*, 70 FERC ¶ 61,317, at 61,967-8 (1995).

<sup>123</sup> *Id.* at 61,968.

<sup>124</sup> See *Union Pacific Fuels, Inc., et al., v. FERC, et al.*, 129 F.3d 157 (D.C. Cir. 1997).

<sup>125</sup> *Iroquois*, 145 FERC ¶ 61,233 at P 70 (citing *Ohio Power Co. v. FERC*, 744 F.2d 162, 167 n.5 (D.C. Cir. 1984) (major public utility experienced in making rate

(continued ...)

Algonquin has not produced any evidence indicating that any of its negotiated rate agreements include language restricting its *Memphis* clause from providing its negotiated rate shippers with the benefit of any reservation charge crediting provisions required pursuant to NGA section 5. In the absence of evidence of such a provision, we interpret the negotiated rate agreements as providing for negotiated rate firm shippers to receive reservation charge credits in the same manner as any other firm shipper on Algonquin's system.

98. Consistent with this holding, we reject Algonquin's contention that we must satisfy the *Mobile-Sierra* standard in order to require Algonquin to provide reservation charge credits to its negotiated rate shippers. Because we are not modifying Algonquin's negotiated rate agreements, we need not make the findings required to modify a contract to which the *Mobile-Sierra* "public interest" presumption is applicable, even assuming these negotiated rate agreements could fall into that category.<sup>126</sup>

99. Finally, we reject Algonquin's contention that, if it is required to provide reservation charge credits to its negotiated rate shippers, that would impose an undue burden on Algonquin's non-negotiated rate customers. Algonquin contends that, in that event, it would have to allocate the costs of all such credits solely to its non-negotiated rate shippers. However, Commission policy on negotiated rates does not allow the cost shifting to the recourse customers which Algonquin foresees. As the Commission stated in *Texas Gas Transmission LLC*, it:

has consistently reiterated its intent, set forth in the *Alternative Rate Policy Statement*, that "customers electing the recourse rates will be no worse off as a result of the use of negotiated rates."<sup>127</sup>

100. The Commission concludes that its policy requiring pipelines to provide full reservation charge credits during non-*force majeure* outages is applicable to Algonquin

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filings can properly be held to the letter of the language it drafted, *i.e.*, is fairly chargeable with ability to state what it means); *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914, 929 (D.C. Cir. 1979) (major public utility is fairly chargeable with ability to state what it means))).

<sup>126</sup> *AGA v. FERC*, 428 F.3d at 263.

<sup>127</sup> *Texas Gas Transmission, LLC*, 138 FERC ¶ 61,175, at P 31 (2012) (citing *Alternatives to Traditional Cost-of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,242, *order granting clarification*, 74 FERC ¶ 61,194, *reh'g denied*, 75 FERC ¶ 61,024 (1996)).

and (1) provides an important additional financial incentive for pipelines to minimize interruptions of primary firm service and (2) provides appropriate rate relief to firm shippers if an interruption does prevent them from using the primary firm service for which they are paying reservation charges.

**C. Definition of Force Majeure**

101. Section 16.1 of the General Terms and Conditions of Algonquin's tariff, entitled "Relief from Liability," defines *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." In the April 2013 Order, the Commission recognized 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, citing *Tarpon Whitetail*,<sup>128</sup> and *Florida Gas*.<sup>129</sup> However, the Commission stated that such outages may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and are unexpected. Therefore, the Commission found that, to the extent GT&C section 16.1 is intended to treat service interruptions for routine, scheduled testing, repair and maintenance in compliance with government orders as *force majeure* events, this provision is contrary to Commission policy, and the Commission required Algonquin to clarify section 16.1 consistent with Commission policy or explain why it should not be required to do so.<sup>130</sup>

102. Algonquin asserts that the April 2013 Order mistakenly relied on *Florida Gas* and *Tarpon Whitetail* in holding that "an outage required to comply with governmental requirements ... may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control and are unexpected." Algonquin asserts that the stated policy in those adjudications is not substantiated by any specific facts in the record.<sup>131</sup>

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<sup>128</sup> *Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 5.

<sup>129</sup> *Florida Gas*, 107 FERC ¶ 61,074 at P 32.

<sup>130</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 25 (citing *Texas Eastern*, 140 FERC ¶ 61,126 at P 88).

<sup>131</sup> Algonquin asserts that the Commission noted that it had required other pipelines to clarify identical tariff language citing *Texas Eastern*, *Tennessee*, and *Rockies Express II* which also did not make specific findings of fact. Algonquin Request for Rehearing at 17 n.58.

103. The Commission has defined *force majeure* outages as events that are both “unexpected and uncontrollable.”<sup>132</sup> In adjudications after the April 2013 Order in this case,<sup>133</sup> the Commission has clarified the basic distinction as to whether outages resulting from governmental actions are *force majeure* or non-*force majeure* events. The Commission found that 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, are non-*force majeure* events requiring full reservation credits. Outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are *force majeure* events requiring only partial crediting.

104. 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, for example after a pipeline failure. 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, which the pipeline may have to implement within a short timeframe. 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. The Commission explained that because 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 that trigger the full crediting requirement and those that only trigger a partial crediting requirement.<sup>134</sup> Thus, under *TransColorado* and *Gulf South*, outages resulting from one-time non-recurring government requirements that (1) are not part of the pipeline's routine, periodic maintenance programs and (2) provide the pipeline little discretion as to when the outage occurs, qualify as *force majeure* events.

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<sup>132</sup> Opinion No. 406, 76 FERC at 61,088; *North Baja v. FERC*, 483 F.3d at 823.

<sup>133</sup> *TransColorado*, 144 FERC ¶ 61,175 at PP 35-43, and *Gulf South*, 144 FERC ¶ 61,215 at PP 31-34.

<sup>134</sup> See *Texas Eastern*, 149 FERC ¶ 61,143 at P 123.

105. Algonquin's definition of *force majeure* as including "the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means" is unjust and unreasonable, because it appears to define all outages resulting from government action as *force majeure* events, contrary to the policy described above. Accordingly, the Commission requires Algonquin to modify the section 16.1 definition of *force majeure* so that it will not include 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.

106. Algonquin contends that the April 2013 Order improperly relied on the Commission's orders in *Florida Gas*<sup>135</sup> and *Tarpon Whitetail*,<sup>136</sup> in finding that Algonquin's definition of *force majeure* was contrary to Commission policy. Algonquin argues that the Commission did not substantiate the policy set forth in those adjudications by any specific facts in the record. 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 scheduled maintenance, rather than treating such outages as *force majeure* events. 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 Algonquin now contends cannot be relied upon to find its existing *force majeure* definition to be unjust and reasonable.<sup>137</sup> 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."<sup>138</sup> 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.

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<sup>135</sup> *Florida Gas*, 107 FERC ¶ 61,074 at PP 28-29.

<sup>136</sup> *Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 5.

<sup>137</sup> *North Baja v. FERC*, 483 F.3d at 822-823.

<sup>138</sup> *Id.*, (quoting *El Paso*, 105 FERC ¶ 61,262 at P 15). *Tarpon Whitetail* cited *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. Thus, *Tarpon Whitetail* is another example of reliance on the same precedent which the court in *North Baja v. FERC* found to be reasonable.

107. As discussed above, and consistent with our recognition in *NGSA* that binding precedents established in prior adjudications may be modified in subsequent 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 Algonquin to adopt in this proceeding may reflect this clarification of our policy concerning reservation charge credits for outages attributable to government action.

108. In addition, Algonquin may include in its filing to comply with this order, 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 PHMSA pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code added by section 23 of the Pipeline Safety, Regulatory and Job Creation Act of 2011. As the Commission explained in *Gulf South*,<sup>139</sup> section 60139(a) provides that PHMSA must require the pipeline owner or operator to reconfirm the MAOP of each pipeline segment for which it currently has insufficient records to confirm that 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 outages resulting from such PHMSA orders would be one-time non-recurring events distinguishable from the routine, periodic maintenance which the Commission has held 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.

109. Further, the Commission recently issued a policy statement to provide greater certainty regarding the ability of interstate natural gas pipelines to recover the costs of modernizing their facilities and infrastructure to enhance the efficient and safe operation

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<sup>139</sup> *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.

of their systems.<sup>140</sup> The *Policy Statement* stated that recent governmental safety and environmental initiatives, including PHMSA rulemaking proceedings pursuant to the 2011 Pipeline Safety Act, have raised the probability that interstate natural gas pipelines will soon face increased costs to enhance the safety and reliability of their systems. The *Policy Statement* therefore established a process to allow interstate natural gas pipelines to seek to recover certain capital expenditures made to modernize system infrastructure through a surcharge/tracker mechanism, subject to conditions intended to ensure that the resulting rates are just and reasonable and protect natural gas consumers from excessive costs.

110. The *Policy Statement* recognized that the projects whose costs would be eligible for recovery in a modernization cost tracker do not lend themselves easily to the governmental action *force majeure*/non-*force majeure* distinction described above.<sup>141</sup> On the one hand, such projects do not constitute routine periodic maintenance of the type for which the Commission requires full reservation charge credits. Moreover, because each project constitutes a one-time, non-recurring event, any reservation charge credits provided by the pipeline would not be a recurring cost eligible for recovery in a pipeline's NGA section 4 general rate case. On the other hand, pipelines will likely have considerable discretion as to the timing of when they perform each project, with projects likely to be scheduled and performed over a multi-year period. Therefore, the projects are not unexpected in the sense ordinarily required for treatment as a *force majeure* event. In these circumstances, the Commission stated it would address the issue of reservation charge credits for projects included in a modernization cost tracker, at least initially, on a case-by-case basis in each proceeding in which a pipeline proposes such a tracker.

111. If Algonquin proposes a modernization cost tracker pursuant to the *Policy Statement*, it may include a reservation charge crediting proposal for projects included in the tracker. Consistent with the standards set forth in the *Policy Statement*, if Algonquin proposes to provide shippers full reservation charge credits in its tracker filing, the Commission would consider a proposal by Algonquin to recover such costs through the tracker, consistent with the Commission's policy that pipelines may recover the costs of full reservation charge credits in rates. Alternatively, the Commission would consider partial reservation charge crediting methods tailored to the circumstances of the projects included in Algonquin's proposed tracker.

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<sup>140</sup> *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, 151 FERC ¶ 61,047 (*Policy Statement*), *reh'g denied*, 152 FERC ¶ 61,046 (2015).

<sup>141</sup> *Policy Statement*, 151 FERC ¶ 61,047 at PP 105-109.

**D. GT&C Section 16.4**

112. Section 16.4 provides, in part that Algonquin 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 repair, maintenance or improvements [emphasis added].” The April 2013 Order found that the reference to curtailment in this provision is unjust and unreasonable. The Commission explained that it only permits pipelines 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, citing *Portland*<sup>142</sup> and *Ryckman Creek*<sup>143</sup>. However, the term “repair, maintenance or improvements” in GT&C section 16.4 is not limited to an emergency situation or an unexpected loss of capacity, but also includes outages required for routine repair, maintenance, and improvements. The Commission stated that the pipeline should take such routine outages into account when it is scheduling service and not confirm shipper nominations to schedule service that it will not be able to provide for the period of the outage, rather than curtailing service after it is scheduled. Therefore, the April 2013 Order directed Algonquin pursuant to NGA section 5, to modify section 16.4 to remove the authorization to “curtail” service to perform routine repair, maintenance, and improvements consistent with Commission policy, or explain why it should not be required to do so.

113. Algonquin asserts that the April 2013 Order mistakenly relied on *Portland* and *Ryckman Creek* to support its finding that “pipelines may only ‘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.” Algonquin contends that those orders simply relied on previous Commission decisions, which found that routine repair and maintenance is not a *force majeure* event and then applied the Commission’s stated policy without making any findings of fact on the record.

114. The April 2013 Order’s finding concerning the use of the word “curtail” in section 16.4 did not relate to the definition of *force majeure*. In fact, the April 2013 Order found that section 16.4 “was not a definition of *force majeure* and did not treat routine scheduled repair and maintenance as a *force majeure* event for which only partial reservation charge credits would be required or otherwise address the issue of reservation charge credits.”<sup>144</sup> Rather, section 16.4 is limited to (1) authorizing

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<sup>142</sup> 76 FERC ¶ 61,123 at 61,663.

<sup>143</sup> 136 FERC ¶ 61,061 at P 68.

<sup>144</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 29.

Algonquin to interrupt or curtail service in order to perform repairs and maintenance “as necessary to maintain the operational capability of [Algonquin’s] system or to comply with applicable regulatory requirements, or to perform construction pursuant to valid FERC authorization” and (2) requiring Algonquin to exercise due diligence to schedule such repair, construction, and maintenance so as to minimize disruptions of service and provide reasonable notice to shippers.

115. The Commission’s concern with the use of the word “curtail” in section 16.4 relates only to the timing of Algonquin’s interruptions of primary firm service in order to perform routine repairs and maintenance. The Commission uses the word “curtail” to refer to pipeline orders terminating already scheduled service outside of the normal scheduling process because of an emergency situation or unexpected capacity loss. As the Commission held in a 1993 order addressing similar tariff language proposed by Algonquin’s wholly owned subsidiary,<sup>145</sup>

[T]he Commission has found that routine repair and maintenance is not an emergency situation or an unexpected loss of capacity. Therefore, it should be planned through scheduling and should not disrupt confirmed service. Algonquin LNG should modify its tariff accordingly.

116. The Commission accordingly finds GT&C section 16.4 unjust and unreasonable to the extent that it authorizes Algonquin to issue a curtailment order terminating service outside of the normal scheduling process in order to perform routine repair, maintenance or improvements. By definition, such routine activities can be planned sufficiently in advance that there should be no need to disrupt confirmed service in order to perform them. In fact, curtailing confirmed service outside of normal scheduling processes in order to perform routine maintenance would be contrary to the separate requirement in section 16.4 that Algonquin exercise due diligence to schedule such repair, construction, and maintenance so as to minimize disruptions of service and provide reasonable notice to shippers. Therefore, Algonquin must modify section 16.4 to clarify that it may not “curtail” service in order to perform routine repair and maintenance.

117. For the reasons discussed above, the Commission finds that it has substantiated the validity and application of its reservation charge crediting policies to Algonquin.

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<sup>145</sup> *Avoca Natural Gas Storage*, 68 FERC ¶ 61,045 at 61,155 n.38 (1994) (citing *Algonquin LNG, Inc.*, 64 FERC ¶ 61,173, at 62,528 (1993)).

## VI. NGA Section 5 and the Burden of Proof

118. Algonquin argues that the Commission has improperly blurred the distinction between NGA sections 4 and 5 in this proceeding.<sup>146</sup> Algonquin contends that the Commission improperly shifted to Algonquin 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 Algonquin's tariff is unjust and unreasonable. Moreover, Algonquin argues that the Commission failed to recognize that more than one just and reasonable alternative is permitted for any given rate or tariff provision.<sup>147</sup> Algonquin argues that the April 2013 Order improperly required it 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 Algonquin's tariff provisions are unjust and unreasonable.

119. 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 have recognized that, in order to require Algonquin to modify its reservation charge crediting provisions, we have the burden of persuasion to show both (1) that the omission of reservation charge crediting provisions from Algonquin's existing tariff provisions is unjust and unreasonable and (2) that the replacement tariff provisions the Commission imposes are just and reasonable. This order addresses only the first prong of this burden, with the issue of a just and reasonable replacement tariff provision to be addressed when Algonquin files to comply with this order. However, as we found in the April 2013 Order, citing *East Tennessee v. FERC*,<sup>148</sup> 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.

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<sup>146</sup> Algonquin Request for Rehearing at 7.

<sup>147</sup> *Id.*

<sup>148</sup> April 2013 Order, 143 FERC ¶ 61,082 at P 22 n.16 (citing *East Tennessee v. FERC*, 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 (5<sup>th</sup> Cir. 1987) (*Transwestern v. FERC*)).

120. Algonquin contends that, unlike the record in *East Tennessee v. FERC*, there is no evidence of any kind in the record here that Algonquin's existing tariff provisions are unjust or unreasonable. Algonquin accordingly contends that the Commission improperly shifted to Algonquin the burden of producing evidence to justify retention of its existing reservation charge crediting provisions, without the Commission having first submitting record evidence sufficient to establish a *prima facie* case that Algonquin's reservation charge crediting provisions are unjust and unreasonable.

121. The Commission finds that its actions in this proceeding are consistent with NGA section 5 and *East Tennessee v. FERC*. The nature and type of evidence necessary to make a *prima facie* case that a tariff provision is unjust and unreasonable depends upon the tariff provision at issue and the extent to which there may be material issues of fact relevant to the establishment of a *prima facie* case.<sup>149</sup>

122. In this case, Algonquin's failure to provide partial reservation charge credits during *force majeure* outages and full credits during non-*force majeure* outages is inconsistent with binding Commission policy developed in past adjudications. As discussed in the preceding sections of this order, our policies requiring pipelines to provide partial reservation charge credits during *force majeure* outages and full reservation charge credits during non-*force majeure* outages have been established in adjudications concerning the reservation charge crediting provisions of individual pipelines. In *North Baja v. FERC*, the D.C. Circuit Court of Appeals affirmed our holdings in one of those adjudications. In *PG&E v. FPC*,<sup>150</sup> the court stated an "agency may establish binding policy . . . through adjudications which constitute binding precedent."<sup>151</sup> Accordingly, the Commission's reservation charge crediting policies established in its adjudications, including in *North Baja v. FERC*, are "binding precedent" which establish "binding policy," unless and until changed in a future adjudication.

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<sup>149</sup> *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

<sup>150</sup> 506 F.2d at 38 (footnote and citations omitted). *See also, e.g., Consolidated Edison Co. of New York, Inc. et al. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency may "change the established law and apply newly created rules . . . in the course of an adjudication").

<sup>151</sup> *See also Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 61 (D.C. Cir. 1999) (holding that to the extent "arguments . . . reflected efforts to skirt or modify, rather than comply" with current Commission policy, the Commission may reject them).

123. In addition, the primary facts material to establishing a *prima facie* case that the Commission's current "binding precedent" on reservation charge credits is applicable to Algonquin are uncontested. The Commission requires pipelines to provide partial reservation charge credits during *force majeure* outages in order to equitably share the risk of outages for which neither the pipeline nor its shippers are at fault. The fact that Algonquin's tariff, together with its SFV rate design, places the entire risk of *force majeure* outages on its shippers demonstrates that Algonquin does not equitably share the risk of *force majeure* outages under its existing tariff.

124. The Commission requires 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. As explained 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.

125. Algonquin's firm shippers include: (1) major LDCs serving residential and other natural gas consumers; (2) gas-fired electric generators; (3) municipal gas companies; and (4) producers and marketers of natural gas. These shippers, like firm shippers 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. Therefore, as discussed above, 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 and financial harm to firm shippers applies equally to Algonquin as to the other pipelines we have required to comply with our reservation charge crediting policy.<sup>152</sup> In addition, the finding that full reservation credits will provide an incentive for Algonquin to minimize outages of primary firm service is a reasonable economic proposition of the type that courts have found constitutes substantial evidence. Moreover, as the D.C. Circuit recognized in *North Baja v. FERC*, the Commission's policy requiring full reservation charge credits during non-*force majeure* outages "is not dependent upon specific operating conditions on the pipeline,"<sup>153</sup> and therefore factual issues concerning the operating conditions on Algonquin are not

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<sup>152</sup> See, e.g., *Panhandle*, 148 FERC ¶ 61,025 at P 55; *Texas Eastern*, 149 FERC ¶ 61,143 at 69-70.

<sup>153</sup> *North Baja v. FERC*, 483 F.3d at 823 (quoting *El Paso*, 105 FERC ¶ 61,262 at P 15). See also *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

material to finding that the Commission's policy requiring full reservation charge credits during non-*force majeure* outages is applicable to Algonquin.

126. In these circumstances, the Commission has reasonably determined that the fact Algonquin's reservation charge crediting provisions and tariff definition of *force majeure* conflict with the Commission's "binding policy" on reservation charge crediting, including precedent affirmed by the D.C. Circuit, is sufficient to establish a *prima facie* case that those reservation charge crediting provisions are unjust and unreasonable, thereby shifting the burden of producing evidence to justify those provisions to Algonquin.<sup>154</sup> Algonquin seeks to distinguish *East Tennessee* on the ground that, in that case, the Commission established a hearing before an Administrative Law Judge, and the *prima facie* case that the pipeline's minimum bill was anticompetitive, and thus unjust and unreasonable, was based on testimony by a shipper that the minimum bill had prevented it from taking advantage of other options to purchase natural gas. However, the Commission may decide issues based on written pleadings in a non-formal hearing, where there are no contested material factual issues requiring witness testimony.<sup>155</sup> Here, the facts outlined above are sufficient to establish a *prima facie* case that Algonquin's

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<sup>154</sup> As Algonquin points out on rehearing, when the Commission requires a pipeline to file a cost and revenue study as part of initiating a section 5 rate investigation, the Commission does not require the pipeline to submit testimony as part of the cost and revenue study, explaining that the pipeline has no burden to show that its existing rates are just and reasonable in such an investigation. *See, e.g., Ozark Gas Transmission, L.L.C.*, 133 FERC ¶ 61,158, at P 10 (2010), *reh'g*, 134 FERC ¶ 61,062, *reh'g*, 134 FERC ¶ 61,193, at P 30-32 (2011). However, in those cases, unlike here, the Commission had not established a *prima facie* case that the pipeline's tariff was contrary to binding Commission precedent. Moreover, as discussed above, in section 5 proceedings concerning reservation charge crediting, the Commission has stated that, if the pipeline believes that providing reservation charge credits would cause it to underrecover its cost of service, "it could file a full cost and revenue study consistent with what we have required in recent section 5 investigations of the justness and reasonableness of a pipeline's overall rates." *Northern*, 141 FERC ¶ 61,221 at P 49. As in section 5 rate investigations, there would be no need for the pipeline to include testimony as part of such a cost and revenue study.

<sup>155</sup> *Conoco Inc. v. FERC*, 90 F.3d 536, 543 n.15 (D.C. Cir. 1996) (quoting *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) ("The court has repeatedly held that the Commission 'is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions.'")).

reservation charge crediting policies are unjust and unreasonable, without the need for a formal hearing before an ALJ.

127. Having made these findings based on the written pleadings submitted by the parties in the non-formal hearing established by the April 2012 Order, we have “then looked to see whether . . . [Algonquin] had demonstrated justifications for” its challenged reservation charge crediting provisions.<sup>156</sup> As the Fifth Circuit held in similar circumstances in *Transwestern v. FERC*,<sup>157</sup> the burden we have placed on Algonquin 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 Algonquin is a burden of production under which Algonquin has been obligated merely to proffer justifications for its reservation charge crediting provisions.

128. After thoroughly considering Algonquin’s proffered justifications in the preceding sections, we have concluded that Algonquin’s tariff provisions are unjust and unreasonable based on substantial record evidence and must be replaced with tariff provisions consistent with our reservation charge crediting policy. The only justification proffered by Algonquin is that the lack of any reservation charge crediting provisions in its tariff is part of an agreed-upon rate structure originating in its 1994 rate case settlement. Algonquin contends that its lack of reservation charge crediting provisions allows it to charge lower rates to its firm shippers since it does not need to increase its rates to recover the cost of such credits, and the benefit of those lower rates outweighs any adverse effects from the lack of reservation charge crediting provisions. Algonquin further argues that Algonquin and its customers have relied on Algonquin’s existing tariff provisions and have made commercial decisions based on those provisions for years<sup>158</sup> and that there is no evidence in the record that relevant circumstances have changed so as to render existing tariff provisions relied upon by its customers unjust and unreasonable.

129. However, as discussed above, Algonquin’s 1994 Settlement and subsequent agreements with its shippers do not contain any provision providing for a continuation of its current lack of any reservation charge crediting provisions or restricting the shippers’ rights to seek such provisions pursuant to NGA section 5. There is thus nothing in those various agreements upon which the parties could reasonably rely as precluding a future requirement that Algonquin modify its tariff to include reservation charge crediting provisions consistent with Commission policy.

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<sup>156</sup> *Transwestern v. FERC*, 820 F.2d at 746.

<sup>157</sup> *Id.* at 745-746.

<sup>158</sup> *See* the discussion above concerning the Settlement.

130. In addition, Algonquin has failed to produce evidence that requiring it to provide reservation charge credits would cause its rates to increase. As discussed above, Algonquin recognizes that, in NGA section 5 proceedings addressing whether to require a pipeline to adopt reservation charge crediting provisions, the Commission permits the pipeline to produce evidence that such a requirement would cause it to underrecover its cost-of-service, and thereby require a rate increase. However, in its filing to comply with the April 2013 Order, Algonquin did not produce any evidence that an NGA section 5 requirement that it provide reservation charge credits would have that effect, despite the fact that the relevant information, such as the number of outages that would have required payment of reservation charge credits in a past representative period, is in its possession.

131. As a result, there is no record evidence in this proceeding that would require us to consider the issue of whether reservation charge crediting on Algonquin's system would require a rate increase that would offset the benefits of reservation charge crediting in providing an increased incentive for Algonquin to minimize outages of primary firm service and compensating firm shippers for unavoidable outages. Algonquin having failed to produce evidence otherwise, we must presume that its current rates are sufficiently high to recover the costs of any reservation charge credits it could reasonably project our section 5 action would cause it to incur. Therefore, while the Commission is willing to consider exceptions to its reservation charge crediting policies where adverse rate effects would offset the benefits of reservation charge crediting, that issue is not raised on the present record.

132. Algonquin contends that, in order to require it to provide reservation charge credits pursuant to NGA section 5, the Commission must show that circumstances on Algonquin's system have changed since the Commission's approval the 1994 Settlement without any provision for reservation charge credits. We disagree. As previously described, following the Commission's approval of Algonquin's 1994 Settlement, the Commission changed its policy to require partial reservation charge credits during *force majeure* outages of primary firm service and full reservation charge credits during non-*force majeure* outages starting with Opinion No. 406.<sup>159</sup> Given the absence of any provision in the 1994 Settlement or subsequent agreements between Algonquin and its shippers precluding a requirement that Algonquin provide reservation charge credits, it is

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<sup>159</sup> See, e.g., the discussions at *Panhandle*, 143 FERC 61,041 at PP 40-42, *Texas Eastern*, 149 FERC ¶ 61,143 at PP 83-85.

reasonable to require Algonquin to modify its tariff to be consistent with current Commission policy.<sup>160</sup>

133. The Commission also rejects Algonquin's contention that we have required it 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 Algonquin'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 a serious risk of 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. Algonquin's tariff does none of these things and is therefore unjust and unreasonable.

134. Finally, although we have relied on our existing reservation charge crediting policies, as affirmed by the D.C. Circuit in *North Baja v. FERC*, in establishing a *prima facie* case that Algonquin's current tariff is unjust and unreasonable, we have also provided Algonquin 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 it as required by the Fifth Circuit's *Florida Gas v. FERC* and *Shell Oil* decisions. However, unlike in those cases, Algonquin has not produced any evidence that the factual circumstances on its system render the precedents established in prior adjudications concerning reservation charge crediting inapplicable to its system, nor has Algonquin provided us a rationale that would satisfy the Commission's burden to provide a "reasoned explanation for its departure from established case law"<sup>161</sup> concerning reservation charge crediting.

135. *Shell Oil* 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

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<sup>160</sup> See *Natural*, 106 FERC ¶ 61,310 at PP 13-15, stating, "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* [emphasis added]."

<sup>161</sup> *Jupiter Energy*, 482 F.3d at 298 (quoting *EP Operating*, 876 F.2d at 48). See also *Wisconsin Valley*, 236 F.3d at 748.

to the existing well used in the sidetracking operation.<sup>162</sup> In a prior adjudication involving onshore wells, the Commission held that sidetracked wells were not eligible for a new vintage price, because producers undertaking sidetracking operations are able to utilize existing well footage to a great degree, and therefore, the Commission did not allow new vintage price treatment for these wells. In requesting a new vintage price for its sidetracked wells, Shell Oil contended that, while the onshore wells in the prior case had utilized existing well footage to a great degree, that fact was not true of its wells, which were drilled from offshore platforms and sidetracked from points only slightly below the surface without utilizing existing well footage to a great degree. Nevertheless, the Commission denied Shell Oil a new vintage price for its sidetracked wells.

136. 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.”<sup>163</sup> 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, however, held that Shell Oil had not had an opportunity in the earlier case to challenge the key factual assumption underlying the rule adopted in that case – that sidetracked wells utilize existing well footage to a great degree, and the court concluded that “due process requires that Shell be allowed to challenge that assumption here and now.”<sup>164</sup> The court concluded that the general rule applied in onshore situations would not be a basis for ruling on offshore wells, because “the Commission... failed to substantiate the single factor upon which the rule” was based – the factual finding that sidetracked wells utilize existing well footage to a great degree.<sup>165</sup>

137. In this case, unlike in *Shell Oil*, we have not claimed that Algonquin forfeited any opportunity to challenge our reservation charge crediting policy by failing to intervene in prior adjudications where the Commission established that policy. Rather, we have provided Algonquin a full opportunity to produce evidence that the reservation charge crediting policies established in our prior adjudications should not be applied to it, either because of factual differences between it and the pipelines in the prior cases or because the policy should be modified. However, as discussed *supra*, Algonquin has not

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<sup>162</sup> Sidetracked wells are created by drilling part of an existing well and then sideways to a new location.

<sup>163</sup> *Shell Oil*, 707 F.2d at 235.

<sup>164</sup> *Id.* at 236.

<sup>165</sup> *Id.* at 235-36.

produced any evidence of relevant factual differences between its situation and the situations of the pipelines in our prior reservation charge crediting adjudications similar to the distinction between onshore and offshore sidetracking operations raised in *Shell Oil*. Nor has Algonquin provided a basis for us to modify the policies established in those adjudications.

138. *Florida Gas v. FERC* 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 prior case, the Commission held that the term limit was necessary to 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*.<sup>166</sup> 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*.

139. 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."<sup>167</sup> However, the court stated, when a rule "is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule."<sup>168</sup> The court found that the Commission had not substantiated applying the one-year limit to Florida Gas, because the facts in this case were substantially different from the facts in the earlier *New Jersey Zinc* case.<sup>169</sup> While in *Florida Gas* the pipeline never sought a blanket certificate, the pipeline in *New Jersey Zinc* had already applied for a blanket certificate. As a result, in *New Jersey Zinc*, a long term individual certificate may have frustrated the pipeline's ongoing conversion to open

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<sup>166</sup> 843 F.2d 1497 (D.C. Cir. 1988) (*New Jersey Zinc*).

<sup>167</sup> *Florida Gas v. FERC*, 876 F.2d at 44.

<sup>168</sup> *Id.* (citing *Shell Oil*, 707 F.2d at 235-236).

<sup>169</sup> *Id.* at 45.

access transportation.<sup>170</sup> However, the court stated, the Commission had not explained in *Florida Gas* why, when a pipeline has 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.

140. In this case, unlike in *Florida Gas v. FERC*, the Commission has not simply applied its reservation charge crediting policy without giving Algonquin an opportunity to produce evidence on the need for, or effect of, our reservation charge crediting policies on Algonquin's system. Rather, we have provided Algonquin a full opportunity to produce such evidence, and we have addressed Algonquin's contentions on the merits. However, as discussed above, Algonquin has not produced any evidence of relevant factual differences between it and the pipelines in our prior reservation charge crediting adjudications that would render the precedent established in the earlier cases inapplicable to Algonquin. By contrast, 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. Moreover, for the reasons discussed above, Algonquin has not provided a basis for us to modify the policies established in those adjudications.

141. For these reasons, the *Shell Oil* and *Florida Gas v. FERC* decisions relied on by Algonquin are distinguishable from this case. In both of those cases, unlike here, 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.

142. For similar reasons, we reject Algonquin's reliance on the D.C. Circuit's decision in *Michigan Wis. Pipe Line Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975) (*Mich Wis*). In that case, the court stated:

There is no question that the Commission may attach precedential, even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a stare decisis manner. However, a rudimentary prerequisite to such an application is that the factual composition of the case to which the principle is being applied bear something more than a modicum of similarity to the case from which the principle derives. This is not to say that factual patterns must be virtually

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<sup>170</sup> *Id.* at 44.

identical for a principle to control, but rather that there is a point where the patterns are so diverse that a per se application of the principle, without at least recognition and accommodation of the factual distinctions, brings into question the rationality of the application. *See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974) (“The agency must articulate a ‘rational connection between the facts found and the choice made.’ ”)<sup>171</sup>

143. In *Mich Wis*, the court reversed a Commission order, which rejected one pipeline’s application to include in rate base advance payments for the development of gas supplies relying on a decision in an earlier adjudication rejecting another pipeline’s application for such rate base treatment. As Algonquin points out, the court found that the Commission’s “bare application” of principles developed in one proceeding to a second proceeding “without even so much as a passing comment upon” factual differences between the two cases was not reasoned decision-making.<sup>172</sup> The court listed a number of factual distinctions between the two cases which the Commission had failed to address. For example, the pipeline in the first case made its advance payments before the Commission issued a policy statement allowing such payments to be included in rate base subject to certain conditions, and therefore could not claim reliance on that policy statement. However, the pipeline in the second case made the payments after the policy statement and did claim that it had done so in reliance on the policy statement. Also, the pipeline in the first case made its advance payments to its wholly owned subsidiary, which benefitted from the payments. However, the pipeline in the second case made the advance payments to a non-affiliate and therefore the issue of benefitting an affiliate did not arise.

144. In contrast, here, Algonquin has failed to present any relevant factual distinctions between this case and the prior adjudications on which the Commission has relied in establishing a *prima facie* case that Algonquin’s failure to provide reservation charge credits is unjust and unreasonable, despite being given a full opportunity to do so. Therefore, this is a case in which the Commission, in the words of the court in *Mich Wis*, “may attach precedential, even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a stare decisis manner.”

145. The Commission concludes that it has reasonably relied on its past precedent to require Algonquin to provide reservation charge credits consistent with the policy

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<sup>171</sup> *Mich Wis*, 520 F.2d at 89.

<sup>172</sup> *Id.*

established in those adjudications. We agree with Algonquin 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.”<sup>173</sup> However, contrary to Algonquin’s arguments, the relevant facts and circumstances of this case are “aligned” with the relevant facts and circumstances in the prior adjudications establishing the rule requiring partial reservation charge credits during *force majeure* outages of primary firm service and full reservation charge credits for non-*force majeure* 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, Algonquin itself recognizes in its Request for Rehearing that the Commission has applied that rule to pipelines in prior adjudications without any evidence as to those pipelines’ histories of outages or mismanagement.<sup>174</sup> While Algonquin contends that the Commission erred in those prior cases, the D.C. Circuit has ruled otherwise. In this proceeding, all the facts we have relied on in previous adjudications to require pipelines to provide partial reservation charge credits during *force majeure* outages and full reservation charge credits during non-*force majeure* outages also exist on Algonquin’s system. Algonquin was given ample opportunity to challenge the application of Commission policy in this case due to unique circumstances or other reasons. Algonquin has not produced any evidence of circumstances on its system that would warrant an exception from our longstanding reservation charge crediting policy. Therefore, we find nothing in the circumstances on Algonquin’s system to justify exempting it from application of our prior precedent.

## **VII. Conclusion**

146. For the reasons discussed above, the Commission finds, pursuant to NGA section 5, that omission from Algonquin’s tariff of the required reservation charge crediting provisions consistent with Commission policy is unjust and unreasonable. Similarly, the Commission finds that the definition of *force majeure* in section 16.1 of Algonquin’s GT&C and the authorization to curtail service to perform routine maintenance in section 16.4 are unjust and unreasonable. Accordingly, Algonquin must revise its tariff to be consistent with current Commission policy. Therefore, the Commission requires Algonquin to file revised tariff language consistent with the discussion above.

### **The Commission orders:**

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<sup>173</sup> Algonquin Request for Rehearing at 21.

<sup>174</sup> *Id.* 14-17.

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

(B) Algonquin is directed, within 30 days of the date of this order, pursuant to NGA section 5, to file revised tariff records consistent with the Commission's reservation charge crediting policy, and the discussion in this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.