111 FERC ¶ 61,101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

North Baja Pipeline, LLC Docket Nos. RP05-25-001
RP05-25-002

ORDER ON REHEARING, CLARIFICATION, AND COMPLIANCE

(Issued April 19, 2005)

1. On December 13, 2004, North Baja Pipeline, LLC (North Baja) requested rehearing and clarification of the Commission's November 12, 2004 Order.[1] Among other things, the November 12 Order addressed North Baja's proposed modifications to its General Terms and Conditions (GT&C) regarding reservation charge credits and capacity assignment rights. The November 12 Order accepted and suspended North Baja's tariff sheets, subject to refund and conditions, to be effective November 15, 2004. In addition, on December 13, 2005, North Baja filed to comply with the November 12 Order. For the reason set forth below, the Commission denies rehearing, grants clarification, and accepts, subject to further revision, North Baja's tariff sheets[2] filed to comply with the November 12 Order. This order benefits the public by ensuring that North Baja's terms and conditions of service will be just and reasonable.

I. Background

2. On October 14, 2004, North Baja filed tariff sheets providing that if, due to a *force majeure* event, North Baja cannot provide any portion of a firm shipper's service for a period greater than ten consecutive days, then affected firm shippers would be entitled to a reservation charge credit. The amount credited would be equal to that portion of a shipper's Maximum Daily Quantity that North Baja is unable to deliver multiplied by the return on equity and related income tax component of North Baja's firm reservation charges.

---

[1] *North Baja Pipeline, LLC,* 109 FERC ¶ 61,159 (2004) (November 12 Order).

[2] Third Revised Sheet No. 116, First Revised Sheet No. 116.a, First Revised Sheet No. 203, and First Revised Sheet No. 204 to FERC Gas Tariff, Original Volume No. 1.

3. Further, North Baja proposed tariff language which would allow shippers to reverse the direction of their receipts and deliveries in connection with a one-time capacity release to (1) reverse their contract path from the present north-to-south direction to a south-to-north direction, and (2) assign their service agreement to a third party without going through North Baja's existing capacity release procedures.

4. On November 12, 2004, the Commission accepted and suspended North Baja's tariff sheets, subject to refund and conditions, to be effective November 15, 2004. Specifically, the Commission directed North Baja to modify its proposal to provide for full reservation charge credits whenever there is a service interruption in a non-*force majeure* event.

5. Regarding service interruptions during a *force majeure* event, the Commission stated that it has two concurrent policies which allow either full reservation credits after ten days or partial crediting starting at day one of a *force majeure* event. North Baja proposed a hybrid of the two policies, providing partial reservation charge credits for the period after ten days. Therefore, the Commission directed North Baja: (1) either to modify its proposal to conform to Commission precedent regarding full and partial credits; or (2) provide further justification and support of its reservation charge credit proposal in order to satisfy the sharing of risk requirements pronounced in Opinion No. 406.[3]

6. Finally, the Commission found that North Baja had not adequately supported its proposal to permanently assign negotiated rate agreements without undergoing a competitive bidding process. Therefore, the Commission directed North Baja to revise its tariff to conform to Commission precedent regarding competitive bidding procedures.

II. <u>Instant Filings</u>

7. On December 13, 2005, North Baja filed to comply with the November 12 Order. North Baja provided further support for its proposal to provide partial reservation charge credits in the event of a service interruption caused by a *force majeure* event after the tenth day of such interruption. Moreover, North Baja submitted tariff sheets that provide full reservation charge credits for non-*force majeure* interruptions. Finally, North Baja removed language regarding capacity assignment rights to conform its tariff to Commission precedent regarding competitive bidding procedures.

---

[3] *Tennessee Gas Pipeline Co.*, 76 FERC & 61,022 (1996) (Opinion No. 406), *order on reh'g*, 80 FERC & 61,070 (1997) (Opinion No. 406-A).

8. Contemporaneous with the compliance filing, North Baja filed a request for rehearing and clarification of the requirement to provide full reservation charge credits in all non-*force majeure* events, including planned maintenance. Specifically, North Baja argues that the Commission erred when it held that unavoidable interruptions resulting from planned maintenance were not *force majeure* events, and should consider North Baja's unique physical and operational characteristics. Moreover, North Baja requests clarification of whether the Commission's "two concurrent policies" regarding reservation charge credits for *force majeure* interruptions are the only permissible *force majeure* interruption credit mechanisms or whether the Commission would consider other approaches.

III. Discussion

A. Compliance Filing

9. The Commission permits pipelines to implement different approaches to reservation charge crediting as long as the crediting mechanism is "a reasonable implementation of the risk sharing principle."[4]

10. In its compliance filing, North Baja states that under its proposal to provide partial reservation charge credits after an initial ten-day grace period, North Baja would forego the profit component of its reservation charge and retain only the portion of the charge equating to its fixed costs.[5] North Baja argues that in this way, the pipeline is sharing the risk of the *force majeure* interruption without being required to forego all of its costs. Although North Baja is correct that under its proposal it retains the portion of the charge equating to its fixed costs, this only applies after the ten-day grace period. Its proposal allows North Baja to retain charges equating to *both* the profit component and the fixed cost component of its reservation charge through the first ten days following a *force majeure* event. Since a *force majeure* event is a no-fault occurrence, we do not approve of North Baja's proposal, which overall places more risk on the shipper.

---

[4] *Tennessee Gas Pipeline Co.*, 76 FERC & 61,022, at 61,089 (1996) (Opinion No. 406), *order on reh'g*, 80 FERC & 61,070 (1997) (Opinion No. 406-A).

[5] Compliance Filing at 6 n.17 (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)); *Tennessee Gas Pipeline Co.*, 80 FERC ¶ 61,070 at 61,200 (1997) (supporting the proposition that a pipeline has a right to a reasonable opportunity to recover its fixed costs).

11. North Baja states that its proposal retains incentives to quickly resolve the *force majeure* event since it must partially refund reservation charges after the ten-day grace period.[6] Moreover, North Baja argues that its proposal fairly allocates the risk of a *force majeure* interruption between the pipeline and its shippers since providing full reservation charge credits after day ten would potentially impose more of the risk on the pipeline if, for example, the interruption lasts more than twenty days. Under North Baja's proposal, however, the shipper bears the full risk for the first ten days, and therefore, the risk is not balanced equitably. Furthermore, the generalized incentives mentioned by North Baja were similarly raised by the pipeline in *Tennessee*, 76 FERC ¶ 61,022, at p. 61,088 (1996), and the Commission nevertheless determined that the incentives of reservation charge credits were necessary for the pipeline to cure interruptions due to *force majeure* events.

12. Moreover, the Commission has stated that this shifting of the risk to the pipeline after ten days provides an incentive to the pipeline to regain control of its system as soon as possible, and assures customers that they will not bear the risk of an extended *force majeure* interruption.[7]

13. Finally, the Commission has rejected a proposal where the shipper was entitled to partial reservation charge credits (70 percent ratio) once the ten-day period ended, and directed the pipeline to grant the shipper full reservation charge credits after the ten-day period ended.[8]

14. Despite North Baja's further explanation, we find that its reservation charge credit proposal does not satisfy the Commission's risk requirements pronounced in Opinion No. 406. Accordingly, North Baja is directed to comply with the November 12 Order by modifying its proposal to conform to Commission policy.

[6] North Baja notes that it also has incentives to avoid service interruptions since it is at risk for recovery of the costs allocated to interruptible services that would be curtailed prior to firm service during such interruptions. Moreover North Baja argues that it has an overarching incentive to provide reliable service in order to prevent its customers from seeking other transportation alternatives.

[7] *Tennessee Gas Pipeline Co.*, 76 FERC & 61,022, at 61,089 (1996) (Opinion No. 406), *order on reh'g*, 80 FERC & 61,070 (1997) (Opinion No. 406-A).

[8] *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, at P 24 (2004).

B. Request for Rehearing

15. North Baja argues that the foundation of the Commission's policy regarding reservation charge credits has always been control – when the pipeline is not at fault for the interruption and has not mismanaged its pipeline, the Commission has required only partial credits. North Baja states that the November 12 Order presumes that all planned maintenance interruptions are not *force majeure* events. However, North Baja argues that certain planned maintenance is, by its nature, unavoidable; maintenance that must be performed to ensure that the pipeline can operate efficiently and safely and cannot be scheduled so as to avoid service interruption falls into this category.[9]

16. According to North Baja, the November 12 Order fails to distinguish between a pipeline that has a history of operational problems resulting in severe curtailments and which has set aside capacity for the purpose of system maintenance,[10] 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 the extent of control the pipeline has in preventing an interruption in service during planned maintenance.[11] North Baja maintains that in its case these considerations merit acceptance of its partial crediting proposal during unavoidable service interruptions resulting from planned maintenance.

---

[9] Request for Rehearing at 9 (arguing that certain repair and maintenance, such as periodic pigging, create unavoidable service interruptions through no fault of the pipeline).

[10] Request for Rehearing at 3 n.2, 9 n.19 (citing *El Paso Natural Gas Co.,* 105 FERC ¶ 61,262 at P 15 (2003)).

[11] North Baja admits that when a pipeline with unsubscribed capacity curtails service during planned maintenance and such curtailment could have been avoided through better planning, full reservation charge credits may be appropriate.

17. We find no merit in North Baja's request for rehearing. Although the pipeline in *El Paso* may have had a history of operational problems resulting in curtailments,[12] 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.[13]

18. Furthermore, we do not agree with North Baja that "planned" maintenance is "uncontrollable". While we agree that certain planned maintenance, such as "pigging," may be necessary and unavoidable to preserve the safety and integrity of the pipeline facilities, we do not agree that the pipeline has no "control" over how and when it performs such maintenance. Similarly, we do not agree that North Baja's expectation of transporting regasified liquid natural gas in the future, should exempt it from the Commission's *force majeure* policy. These are activities over which North Baja exercises a degree of control, unlike acts of God in typical *force majeure* situations. Accordingly, this control warrants that the pipeline provide full credits to shippers for all such scheduled gas not delivered. Furthermore, since such maintenance is planned, the pipeline should have provided for such maintenance interruptions in its rates. North Baja's lack of a history of operational problems resulting in curtailments should not exempt it from the Commission's *force majeure* policy.

19. As the Commission has discussed above, although control is an important principle, it is not the Commission's only consideration in such circumstances. The Commission also has an important goal of providing the pipeline, the entity in the best position to cure the non-*force majeure* interruption, in this case planned maintenance, with an incentive to resolve the interruption as quickly as possible.

C. **Request for Clarification**

20. North Baja requests clarification of whether *Texas Eastern* and *Tennessee* are the only permissible partial credit approaches for *force majeure* interruptions, or whether the Commission would consider other approaches. The Commission supports its statement in the November 12 Order that its precedent has established two concurrent policies

---

[12] *El Paso Natural Gas Co.,* 105 FERC ¶ 61,262 (2003).

[13] *See, e.g.*, *Natural Gas Pipeline Company of America*, 108 FERC ¶ 61,170, at P 7 (2004); *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at P 27-28 (2004) (stating that events such as planned outages "could be read as within its [the pipeline's] control" and disagreeing with the pipeline that "non-discretionary but planned events are appropriately included in its definition of force majeure"); *Alliance Pipeline, L.P.*, 84 FERC ¶ 61,239, at p. 62,214 (1998).

which allow either full reservation credits after ten days or partial crediting starting at day one of a *force majeure* event.[14] However, the November 12 Order did not state that these were the only two permissible partial credit approaches. The Commission is open to alternative approaches if fully justified and supported. This is why the November 12 Order directed North Baja either to modify its proposal to conform to one of its two established policies, or to provide further justification and support of its proposal.

The Commission orders:

(A) North Baja's tariff sheets referenced in footnote 2 are accepted, subject to further revision, as discussed in the body of this order. North Baja is directed to file, within 30 days of the date of this order, revised tariff sheets modifying its proposal regarding reservation charge credits, in accordance with Commission policy and the November 12 Order.

(B) North Baja's request for rehearing is denied.

(C) North Baja's request for clarification is granted.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

[14] *See, e.g., El Paso Natural Gas Co.,* 104 FERC ¶ 61,045 (2003), *clarif. order*, 108 FERC ¶ 61,056 (2004) (partial reservation charge credits from day one); *Natural Gas Pipeline Company of America,* 106 FERC ¶ 61,310 (2004) (full reservation charge credits once the ten-day period ends).