141 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company | Docket Nos. RP11-2061-002
RP11-2061-003

ORDER DENYING REHEARING AND ON COMPLIANCE FILING

(Issued December 20, 2012)

1. On December 15, 2011, the Commission issued an order requiring Northern Natural Gas Company (Northern) to revise its reservation charge crediting tariff provisions to be consistent with Commission policy.[1] In the December 2011 Order, the Commission held on rehearing of its June 2011 Order in this proceeding[2] that Northern's existing reservation charge crediting provisions failed to provide for sufficient sharing of the risk of *force majeure* outages.[3] The December 2011 Order also held that Northern had not justified retention of its existing reservation charge crediting provisions which fail to provide for full credits during non-*force majeure* outages. Accordingly, the December 2011 Order required Northern to file revised reservation charge crediting provisions consistent with the Commission policy concerning the credits to be given during both *force majeure* and non-*force majeure* outages. On January 17, 2012, Northern filed a request for rehearing of the December 2011 Order, and filed revised *pro forma* tariff sheets to comply with that order (the Compliance Filing).[4] This order

[1] *Northern Natural Gas Co.*, 137 FERC ¶ 61,202 (2011) (December 2011 Order) (or Rehearing Order).

[2] *Northern Natural Gas Co.*, 135 FERC ¶ 61,250 (2011) (June 2011 Order).

[3] *Id.* P 18.

[4] Northern filed the following Pro Forma Sheets to F.E.R.C. Gas Tariff Revised Volume No. 1: SIXTH REVISED VOLUME NO. 1, Pro Forma Sheet No. 200, Pro Forma Sheet No. 215, Pro Forma Sheet No. 233, Pro Forma Sheet No. 234, Pro Forma Sheet No. 235, Pro Forma Sheet No. 236, Pro Forma Sheet No. 237, Pro Forma Sheet No. 237A, and Pro Forma Sheet No. 310.

denies Northern's rehearing request and accepts the compliance filing to be effective January 1, 2013, subject to conditions.

I. Background

2. In general, Commission policy requires that the pipeline provide full reservation charge credits during periods when it cannot provide primary firm service because of non-*force majeure* events,[5] where the outage occurred due to circumstances within a pipeline's control, including scheduled maintenance. The Commission 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. Partial credits may be provided pursuant to: (1) the No-Profit method, under which the pipeline provides partial credits starting on the first day of the interruption in service, equal to the portion of the pipeline's reservation charge that represents the pipeline's return on equity (ROE) and associated income taxes, (2) the Safe Harbor method under which reservation charges must be credited in full to the shippers after a short grace period when no credit is due the shipper (i.e., 10 days or less), or (3) some other method which achieves equitable sharing in the same ball park as the first two methods.[6] In *North Baja Pipeline, LLC v. FERC*,[7] the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

3. On April 19, 2011, Northern filed to revise its new Market Area Winter fuel percentages to be effective November 1, 2011. On May 11, 2011, Indicated Shippers filed comments, requesting that the Commission require Northern to comply with the Commission's findings in *Northern Gas Supply Association, et al*[8] relating to the Commission's policy on reservation charge crediting. Section 7 of Northern's General Terms and Conditions (GT&C) requires Northern to provide reservation charge credits

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[5] *Force majeure* events are "events that are not only uncontrollable, but also unexpected." *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,088 (1996).

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

[7] 483 F.3d 819 (D.C. Cir. 2007), *affg, North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

[8] 135 FERC ¶ 61,055 (2011) (*NGSA*).

only when "the failure to deliver or receive gas is caused by negligence on the part of Northern . . . ."

4. The June 2011 Order accepted Northern's proposed Market Area Winter fuel percentages. However, the Commission rejected Northern's contention that the reservation charge crediting issue should not be addressed in this limited section 4 proceeding in which Northern did not propose any tariff changes related to reservation charge credits. The Commission also rejected Northern's argument that section 7 should not be modified, because it was negotiated by Northern and its customers in Northern's Global Settlement in Docket No. RS92-8, *et al.*, and was accepted by the Commission on July 16, 1993.[9] Northern argued that this provision was an essential element of the Global Settlement and constituted part of the bargain struck in the settlement of Northern's rates and should not be changed except in a section 4 rate proceeding wherein all aspects of Northern's rates and terms and conditions of service can be reviewed. However, the Commission found that settlement was no longer in effect and no other settlement prohibited Indicated Shippers from raising this issue at this time.

5. The June 2011 Order determined that GT&C section 7 was not consistent with Commission policy requiring full reservation charge credits in non-*force majeure* situations. The order directed Northern to modify its tariff consistent with Commission policy unless Northern could show why it should not be required to do so. However, the Commission accepted Northern's contention that because the settlement of its last rate case allocated $16 million in fixed costs to Northern's usage charge, it already shares the risk of *force majeure* outages by not collecting the fixed costs included in the usage charge. Accordingly, the order determined that when there is a *force majeure* situation Northern is not required to grant partial reservation charge credits.

6. On July 18, 2011, Indicated Shippers requested rehearing of the June 2011 Order's holding that Northern need not provide any reservation charge credits during *force majeure* events, and Northern filed an explanation why Commission policy with respect to non-*force majeure* situations should not be applied to Northern in this proceeding. Northern did not seek rehearing of the June 2011 Order.

II. December 2011 Order

A. *Force Majeure* Outages

7. In its request for rehearing, Indicated Shippers asserted that even if Northern allocated some fixed costs to its currently effective usage rates, the Commission should

[9] *Northern Natural Gas Co.*, 64 FERC ¶ 61,073 (1993).

still require Northern to implement partial reservation charge crediting for curtailments during *force majeure* situations. Indicated Shippers contended that the $16 million that Northern allegedly allocated to the usage charge represents only 3 percent of the cost of service set forth in the settlement of Northern's last rate case. Indicated Shippers argued that this amount of costs included in the usage rates does not equitably apportion the risk of curtailments during a *force majeure* situation.

8. The December 2011 Order found that Northern's inclusion of only about 3 percent of its fixed costs in its usage charge is too small an amount to accomplish an equitable sharing of the risks of *force majeure* outages, without any provision for reservation charge credits. The order explained that, absent crediting, Northern's shippers bear 97 percent of the risk of a *force majeure* curtailment through their continued payment of reservation charges containing that level of Northern's fixed costs, while the pipeline bears only 3 percent of the risk. This is virtually indistinguishable from the situation on a pipeline with straight fixed variable (SFV) rates, where the Commission has found it unjust and unreasonable for shippers to bear 100 percent of the risk of a *force majeure* outage, and accordingly requires such pipelines to provide partial reservation charge credits. The Commission agreed with Indicated Shippers that Northern's allocation of 3 percent of fixed costs to its usage charge does not achieve an equitable sharing of the risks of *force majeure* outages. The Commission recognized that in Opinion No. 406-A,[10] the Commission exempted Tennessee Gas Pipeline Co. (Tennessee) from providing reservation charge credits during *force majeure* outages because that pipeline included approximately twelve percent of its fixed costs in its usage charge. However, the Commission distinguished Opinion No. 406-A from the present case on the ground that Northern's inclusion of only 3 percent of its fixed costs in its usage charge hardly exposes Northern to the same level of risks as Tennessee's inclusion of twelve percent of its fixed costs in its usage charge. Therefore, the December 2011 Order granted rehearing.

9. Accordingly, the order required Northern to revise its tariff to grant partial reservation charge credits for *force majeure* events. The order recognized that Northern could modify the Safe Harbor or No-Profit methods, to reflect that its usage charge includes 3 percent of its fixed costs. The order stated that the modification might be an increase in the number of days at the outset of the Safe Harbor method when no credit is due or adjust the amount of credit under the No-Profit method. The order further stated the Commission was not approving any modification at this time but would consider any modification that Northern proposed when it made its compliance filing.

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[10] Opinion No. 406-A, 80 FERC ¶ 61,070 at 61,200 (1997).

B. *Non-Force Majeure* Outages

10. Northern's existing tariff provides reservation charge credits for non-*force majeure* outages only when Northern's negligence causes the failure to deliver or receive gas. The June 2011 Order determined that this provision was not consistent with Commission policy requiring full reservation charge credits in all non-*force majeure* situations, without regard to whether there was any negligence by the pipeline. The order directed Northern to modify its tariff consistent with Commission policy unless Northern could show why it should not be required to do so.

11. Northern's response was that a change to its agreed-upon reservation charge crediting provision should be made only after evaluation of a full and complete record in a general section 4 rate case proceeding. Northern stated that the crediting of reservation charges creates risk for a pipeline's revenues and is a rate matter that should be addressed in a general rate proceeding.[11] Northern again argued that its existing reservation charge crediting provision was negotiated by Northern and its shippers in Northern's Global Settlement in 1993 and accepted by the Commission, *Northern Natural Gas Co*., 64 FERC ¶ 61,073 (1993). Northern asserts this provision should be changed only in a general section 4 rate proceeding where all aspects of Northern's rates and terms and conditions of service can be reviewed. Northern reiterated that its customers had the opportunity to modify Northern's existing tariff language in a number of section 4 and section 5 proceedings after the 1993 settlement, but failed to do so.

12. The December 2011 Order held that Northern had not justified retention of its existing reservation charge crediting provisions which fail to provide for full credits during non-*force majeure* outages. The Commission again rejected Northern's contentions why it should be permitted to retain its existing reservation charge credit provisions. The order stated that good reason exists why the Commission has permitted the reservation charge crediting issue to be addressed in a limited section 4 filing outside the context of a general section 4 rate case because if the Commission had to wait for a pipeline to file a general section 4 rate case before that pipeline's compliance with the Commission's clear policy concerning reservation charge crediting could be addressed, compliance with Commission policy would be significantly delayed.

13. With respect to Northern's argument that its reservation charge crediting provision is part of a currently effective settlement and therefore should not be changed, the order cited the discussion in the June 2011 Order that Northern's last section 4 rate settlement,

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[11] Northern cited to *Golden Triangle Storage, Inc.*, 134 FERC ¶ 61,036, at P 8 (2011) and *Texas Eastern Transmission Corp.*, 63 FERC ¶ 61,100, at 61,434 (1993), *affirming*, 62 FERC ¶ 61,015, at 61,090 (1993).

approved in 2005, had a rate moratorium which terminated on November 1, 2007.[12] The Commission stated that Northern had not cited any provision of either the 2005 settlement or any earlier settlement which prohibits a shipper from seeking a change in Northern's reservation charge crediting provisions pursuant to NGA section 5 at this time, four years after expiration of the rate moratorium. Accordingly, the December 2011 Order required Northern to file revised reservation charge crediting provisions consistent with the Commission policy concerning the credits to be given during both *force majeure* and non-*force majeure* outages.

14. On January 17, 2012, Northern filed a request for rehearing of the December 2011 Order, and filed revised tariff sheets to comply with that order (the Compliance Filing).

III. Rehearing Request

A. *Force Majeure*

15. Northern contends that the December 2011 Order erred in holding that Northern's inclusion of only 3 percent of its fixed costs in its usage charge provided insufficient sharing of the risk of *force majeure* outages. Northern notes that, after Order No. 636, which mandated use of the SFV rate design wherein all the pipeline's fixed costs are recovered in the reservation charge, the Commission determined that pipelines using the SFV rate design must provide partial reservation charge credits during periods of *force majeure* outages in order to share the risk from service interruptions since under SFV there was no recovery by the pipeline of fixed costs through the usage charge. However, in Opinion No. 406-A,[13] the Commission did not require Tennessee to give partial credits in *force majeure* circumstances because Tennessee no longer was utilizing the SFV rate design and allocated 12 percent of its fixed costs to the usage rate.[14]

16. Northern contends that it is arbitrary and capricious for the Commission to declare, based solely on a comparison with Opinion No. 406-A, that Northern's non-SFV rate design that allocates 3 percent of fixed costs in the usage charge, which the Commission found to be reasonable based on the facts and circumstances on Northern's system, has suddenly become unjust and unreasonable for purposes of partial reservation crediting during *force majeure* outages. Northern argues that because the Commission found that no crediting was required in *Tennessee* where the pipeline allocated 12 percent

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[12] *Northern Natural Gas Co.*, 111 FERC ¶ 61,444 (2009).

[13] Opinion No. 406-A, 80 FERC ¶ 61,070.

[14] *Id.* at 61,200.

of fixed costs in the usage charge is not a reason why the Commission could not also find that Northern's allocation of 3 percent of fixed costs is sufficient for Northern not to be required to grant partial credits for *force majeure* outages.

17. Northern asserts that the only explanation given for the reversal in the Rehearing Order was that 3 percent "hardly exposes" Northern to the same type of risks the pipeline faced in *Tennessee*.[15] Northern contends that the Commission failed to explain what percentage of allocation of fixed costs would be reasonable based on the facts and circumstances on Northern's system. Moreover, Northern disputes the Commission's statement in the December 2011 Order, at P 21, that Opinion No. 406-A held that "a non-SFV rate design may achieve an equitable sharing of the costs of a *force majeure* outage in the same ballpark as the No Profit and Safe Harbor methods," contending that there is no such statement in Opinion No. 406-A.

18. Northern adds that while the Commission recognized in the December 2011 Order that it has held that "since 'a non-SFV rate design places some portion of the pipeline's fixed costs in the usage charge' that pipeline need not grant partial reservation charge credits," the Commission arbitrarily held that "[w]e certainly did not intend for this to apply when only a minimal amount of fixed costs is recovered in the usage charge."[16]

19. In short, Northern argues that the Commission has provided no explanation, except the conclusory statement that Northern's $16 million allocation of costs to the usage charge does not adequately share the risk, and the Commission's decision to abandon its prior finding that Northern's non-SFV rate design provided an equitable sharing of the risk of a *force majeure* event, without any consideration of the facts and circumstances on Northern's system, is arbitrary and capricious.

Commission Determination

20. We deny rehearing. The Commission requires the pipeline to provide partial reservation charge credits during *force majeure* outages in order to share the risk of an event for which neither the pipeline nor its shippers are at fault. The Commission has approved two methods for pipelines with an SFV rate design to share the risk, the No Profit and Safe Harbor methods. In addition, as the court stated in *North Baja*, the Commission permits pipelines to use other cost-sharing formulas, so long as they achieve

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[15] December 2011 Order, 137 FERC ¶ 61,202 at P 22.

[16] *Id.* P 23.

"an equitable sharing in the same ballpark"[17] as the No Profit and Safe Harbor methods. Therefore, the analysis of whether Northern's existing tariff provides for an equitable sharing of the risk of *force majeure* outages must focus on whether Northern's tariff provides for risk sharing in the "same ballpark" as the No Profit and Safe Harbor methods do for pipelines using the SFV rate design.

21. Northern contends that since its usage charge includes $16 million of fixed costs Northern could be considered as sharing the risk "in the same ballpark" as the Commission-approved methods. We disagree. As described above, *supra*, P 3, the No Profit method requires the pipeline to grant partial credits equal to the pipeline's ROE and associated income taxes portion of the reservation charge, thereby requiring the pipeline to forego its profit during the *force majeure* outage. This replicates the sharing of the risk that occurred automatically under the Modified Fixed Variable (MFV) rate design before Order No. 636 required pipelines to include all fixed costs in the reservation charge pursuant to the SFV rate design. Under MFV, the pipeline's ROE and associated taxes were included in the pipeline's usage charge, and thus when no volumes flowed during *force majeure* outages the pipeline did not recover its profit.

22. While the uncontested settlement of Northern's last rate case included 3 percent of its fixed costs in its usage charge and thus Northern would not recover that amount during a *force majeure* outage, that amount is not remotely close to its ROE and associated taxes. Appendix C to the 2005 Settlement indicates that Northern's current rates are based on a total annual cost of service of $481 million. That cost of service includes a return on equity of $131,955,871 and Federal and state income taxes of $56,975,258. Thus, the total return and associated income taxes is $188,931,129, which constitutes almost 40 percent of Northern's total cost of service. However, Northern's usage charge, which includes $16 million fixed costs, only recovers about 3 percent of its total fixed costs. Even attributing this amount entirely to ROE and associated income taxes, it constitutes only about 8.5 percent of Northern's ROE and associated income taxes. Thus, the absence from Northern's tariff of any requirement that it provide reservation charge credits during *force majeure* outages means that during such outages Northern will forgo at most 8.5 percent of its profit, while continuing to recover 91.5 percent of its profit through its reservation charge. Forgoing 8.5 percent of its profit does not constitute a sharing of the risk of *force majeure* outages remotely close to the same ballpark as the 100 percent of its profit which Northern would have to forgo under the No Profit method.

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[17] 483 F.3d 819 at 822-23 (D.C. Cir. 2007). *See also Kern River Gas Transmission Co.*, 139 FERC ¶ 61,044, at PP 36-40 (2012) (*Kern River*) (rejecting alternative cost sharing formula because it did not provide for sharing in the same ballpark as the No Profit or Safe Harbor methods).

23. Similarly, Northern's inclusion of 3 percent of its fixed costs in its usage charge does not result in risk sharing in the "same ballpark" as under the Safe Harbor method. The Safe Harbor method requires the pipeline to provide full reservation charge credits after a grace period of ten days or less, during which no credit is provided. The shippers bear the full risk of the *force majeure* outage for the limited time of the grace period, but then the risk shifts entirely to the pipeline. It is true that Northern's inclusion of 3 percent of its fixed costs in the usage charge does result in Northern bearing a very small percentage of the risk of a *force majeure* outage during the first ten days of the outage, whereas under the Safe Harbor method, it would not have to bear any of that risk. However, the Safe Harbor method then requires Northern to provide full reservation charge credits for every subsequent day of the outage, thus requiring it to forgo 100 percent of its fixed costs for the remainder of the outage. By contrast, under Northern's current tariff, it only forgoes the 3 percent of its fixed costs included in its usage charges during all subsequent days of the *force majeure* outage.

24. This sharing of the risk is not remotely in the same ball park as the sharing of the risk under the Safe Harbor method. As the Commission explained in *Kern River*,[18] the Safe Harbor method allocates to the pipeline a progressively greater share of the risk of a *force majeure* outage the longer the outage lasts through the requirement to provide full credits after Day 10. For example, if the outage lasts 90 days, the Safe Harbor method would require a pipeline with SFV rates to credit to its firm shippers about 88 percent of the total reservation charges that it would otherwise recover during that period, thus requiring the pipeline to forgo 88 percent of its fixed costs. However, Northern's current tariff under which it does not grant any reservation charge credits during a *force majeure* outage, only requires it to forgo 3 percent of its fixed costs during a *force majeure* outage, no matter how long it lasts.

25. Northern relies on Opinion No. 406-A to contend that the Commission has a policy of exempting any pipeline with a non-SFV rate design from the requirement to provide reservation charge credits, no matter how small a proportion of fixed costs are included in the usage charge.[19] In that opinion, the Commission addressed a situation in

[18] 139 FERC ¶ 61,044 at P 38.

[19] Northern asserts that, having found Northern's rate design allocating 3 percent of its fixed costs to be just and reasonable based on the facts and circumstances of Northern's system, the Commission cannot now find that rate design has become unjust and unreasonable for purposes of the partial reservation charge crediting policy. However, the Commission's order approving the uncontested settlement of Northern's last rate case simply approved the settlement as fair, reasonable, and in the public interest, and the Commission stated its approval of the settlement did not constitute precedent regarding any issue in those proceedings. *Northern Natural Gas Co.*, 111

(continued…)

which it had approved a settlement of Tennessee's pending section 4 rate case which allocated 12 percent of the pipeline's fixed costs to its usage charge. The Commission held that "Tennessee's new rate design accomplishes, in effect, our goal of ensuring that the risk associated with a *force majeure* outage is shared, and that Tennessee not be guaranteed a profit when unable to provide service, without having to require Tennessee to provide partial credits."[20] The December 2011 Order distinguished Opinion No. 406-A on the ground that Northern's allocation of 3 percent of its fixed costs to its usage charge hardly exposes Northern to the same type of risk that Tennessee was exposed to with an allocation of 12 percent of its fixed costs to its usage charge. The December 2011 Order further held that the fact Northern's tariff requires its shippers to bear 97 percent of the risk of a *force majeure* outage, while the pipeline bears only 3 percent of this risk is virtually indistinguishable from a pipeline with SFV rates, where the Commission has found that it is unjust and unreasonable for shippers to bear 100 percent of the risk.

26. On rehearing, Northern contends that the Commission has failed to explain how Tennessee's non-SFV rate design, under which shippers bear 88 percent of the risk of *force majeure* outages, is "in the same ballpark" as the Commission-approved No Profit and Safe Harbor Methods. The Commission recognizes that Opinion No. 406-A did not discuss what percentage of Tennessee's fixed costs was attributable to ROE and associated taxes, and thus that opinion did not expressly analyze whether Tennessee's risk under its new rate design was in the same ballpark as its risk under the No Profit Method or Safe Harbor Methods. However, it does not follow from this fact that the Commission should exempt all pipelines using a non-SFV rate design from providing reservation charge credits no matter how small a percentage of their fixed costs they allocate to their usage charges, as Northern asserts.

27. As illustrated by our orders in *North Baja* and *Kern River*, when pipelines with SFV rates have proposed mechanisms to share the risk of *force majeure* outages which differ from the approved methods, we have carefully analyzed whether those proposals provided for risk sharing in the same ballpark as the approved methods, and we rejected the alternative proposals in those cases upon finding they were not in the same ballpark.

FERC ¶ 61,444. No issue was presented to the Commission, nor did the Commission decide any issue, concerning the justness and reasonableness of Northern's reservation charge crediting provisions. For the reasons discussed below, it does not follow from the Commission's approval of rates using a non-SFV rate design that such rates necessarily provide for an equitable sharing of the risks of *force majeure* outages without the need for any form of partial reservation charge crediting.

[20] Opinion No. 406-A, 80 FERC at 61,200.

A similar approach should be applied to all pipelines, regardless of their rate design, so that all pipelines are subject to similar risk sharing requirements with respect to *force majeure* outages. Therefore, to the extent that Opinion No. 406-A may be read as precedent that a pipeline's allocation of 12 percent of its fixed costs (or any other percentage) to its usage charge will exempt it from any requirement to provide partial reservation charge credits during a *force majeure* outage, the Commission will no longer follow such precedent.[21] Rather, consistent with *North Baja*, this issue must be resolved based upon a determination of whether the pipeline's tariff provides for a sharing of risk in the same ballpark as the two approved methods provide for pipelines with an SFV rate design, similar to the analysis we have conducted in this case.

28. Under these circumstances, the Commission properly rejected Northern's claim that it should not be required to grant any credit in the *force majeure* event because it was already sharing the risk when there is an interruption of service in the loss of the throughput because the $16 million did not represent the profit element in the lost volumes.

B. <u>Northern's Other Rehearing Contentions</u>

29. Northern contends that the Commission erred in requiring Northern to change the existing reservation charge crediting provisions in section 7 of its GT&C, arguing that the Commission violated its policy of not disturbing reservation charge crediting provisions agreed to in settlements. GT&C section 7 provides that Northern will only give reservation charge credits when its negligence causes its failure to deliver or receive gas. Northern states that provision was originally agreed to in the 1993 Global Settlement between Northern and its customers as part of the resolution of highly complex and strongly-contested issues involving Northern's rates and terms and conditions of service, and has not been modified in the settlements of its subsequent four rate cases.[22] Northern

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[21] We note that Tennessee's current tariff, as modified in its most recent rate case in Docket No. RP11-1566-000, provides for it to provide partial reservation charge credits during *force majeure* outages pursuant to the Safe Harbor method, even though it allocates some fixed costs to the usage charge. *See* Sheet No. 364 in Tennessee's current tariff.

[22] The Commission subsequently approved settlements of Northern's rate cases in Docket Nos. RP95-185-000 and RP98-203-000 in *Northern Natural Gas Co.*, 76 FERC ¶ 61,109 (1996), and *Northern Natural Gas Co.*, 87 FERC ¶ 61,321 (1999), respectively. The Commission approved a settlement of Northern's consolidated rate cases in Docket Nos. RP03-398-000 and RP04-155-000 in *Northern Natural Gas Co.*, 111 FERC ¶ 61,444.

argues that without an evaluation of all cost, revenue, risk, allocation, rate design and operational issues in a general section 4 rate case proceeding the Commission cannot make a reasoned decision concerning any changes in its reservation charge crediting provisions, with respect to either *force majeure* or non-*force majeure* outages. Northern asserts the agreed-upon crediting provision should not be changed absent a section 4 rate proceeding wherein all aspects of Northern's rates and terms and conditions of service can be reviewed.

30. Northern reiterates that Northern's customers have been fully aware of the Commission's policy regarding reservation charge credits, and yet they never sought to change them in subsequent rate proceedings. Northern asserts that customers repeatedly agreed to the current provision contained in Northern's tariff in each of its general section 4 cases since 1993, despite opportunities to attempt to implement the Commission's reservation charge crediting policy or negotiate a revision to the existing provisions. Northern argues that reservation charge credits impact a pipeline's revenues, and thus is a rate matter that should be addressed in a general rate proceeding (citing *Golden Triangle Storage, Inc.*, 134 FERC ¶ 61,036 at P 8).

31. Northern also contends that the Commission's reliance on *Southern*, 135 FERC ¶ 61,056 (2011), to support its position that a settlement does not bar review of the pipeline's reservation charge crediting provisions is flawed because *Southern's* rate case settlement explicitly provided that "the terms of the settlement would not survive beyond the Rate Moratorium," but here Northern's currently effective settlement (Docket No. RP04-155) has no comparable provision.

32. Finally, Northern refers to the Commission's statement in the December 2011 Order, at P 36, that Northern could file either a full cost and revenue study or a general section 4 rate case if the implementation of the Commission's reservation charge crediting policy resulted in rates that were too low. Northern argues this suggestion has no merit since Northern, as well as others, should not be forced to expend the enormous time and resources required for a full-blown section 4 rate proceeding to address the single issue of reservation charge crediting. In fact, the Commission's reliance on *ANR Pipeline Co. v. FERC*, 863 F.2d 959 (D.C. Cir. 1988) (*ANR*) to support its position is misplaced because there the D.C. Circuit rejected the Commission's suggestion that a section 4 rate case is a "cure-all" for Commission error.

33. Accordingly, Northern asks that the Commission should not require it to change its reservation charge crediting provisions with respect to either *force majeure* or non-*force majeure* situations in light of Northern's rate case settlement which the Commission approved that included the existing reservation charge credit provisions.

Commission Determination

34. Northern does not contest that section 7 of its GT&C is inconsistent with the Commission's policy requiring pipelines to provide full reservation charge credits during *force majeure* outages of primary firm service. However, it relies on the 2005 settlement of its most recent general section 4 rate case, as well as earlier settlements, to contend that it should be allowed to retain GT&C section 7 and should not be required to provide any additional reservation charge credits beyond those provided for in section 7 in either *force majeure* or non-*force majeure* situations. Northern's reliance on its prior rate case settlements is misplaced.

35. As Northern states, section 7 of its GT&C originated in the 1993 Global Settlement between Northern and its customers resolving a number of then pending proceedings, including Northern's restructuring pursuant to Order No. 636. Northern does not cite any provision in the nearly twenty-year old 1993 Global Settlement, or the subsequent settlements in 1996 and 1999, *supra,* n.22, which restricts its shippers' statutory right under NGA section 5 to seek a modification in GT&C section 7 today. Rather, Northern focuses on the currently effective 2005 settlement, *Northern Natural Gas Co.,* 111 FERC ¶ 61,144 (2005).

36. Nothing in the 2005 Settlement prohibits Northern's shippers from seeking a change in its reservation charge crediting provisions pursuant to NGA section 5. As described below, the parties to the 2005 Settlement carefully considered the ability of the parties to seek changes to Northern's rates and tariff provisions after the Settlement took effect. Articles II, III, and VII of the 2005 Settlement provide that neither Northern nor the other settling parties could seek certain specified rate and tariff changes before November 1, 2007. Apart from the limits on seeking the specified changes before November 1, 2007, those articles permit Northern and the other settling parties to seek any other rate or tariff change. Articles II, III, and VII of the 2005 Settlement contain no limit on the ability of settling parties to seek changes to GT&C section 7 concerning reservation charge credits either before or after November 1, 2007. It follows that the Settlement permits Northern's shippers to seek changes in its reservation charge crediting provisions.

37. Article II (A) provides that Northern could not file a section 4 rate case that would implement new base rates before November 1, 2007. Articles II (C) and (D) provide that Northern would not implement rate design changes before November 1, 2007, but will propose a different Market Area/Field Area cost allocation methodology in its next section 4 rate case for prospective implementation only. Article II (D) provides that Northern would not file a proceeding that would implement a change to its Periodic Rate Adjustment (PRA) mechanism under which it recovers its fuel costs before November 1, 2007, except to the extent it has filed to abandon certain facilities affecting its fuel usage. Article II (F) provides that Northern retains the right to file to change its oxygen content gas quality standard to be effective no earlier than November 1, 2005.

38. Article III (A) and (B)(1) of the Settlement required Northern to withdraw six proposals it had made in the rate case and not refile those proposals to be effective before November 1, 2007, including, for example, proposals to modify its gas quality standard concerning carbon dioxide and eliminate the annual redetermination of certain contract quantities. Article III (B)(2) lists another nine proposals which Northern agreed to make only in a general section 4 rate case for prospective implementation only. These include, for example, certain changes in its PRA mechanism and a minimum MDQ requirement at each zone delivery point. Neither Article II nor III make any mention of Northern's reservation charge crediting provisions in GT&C section 7.

39. Article VII (C) of the 2005 Settlement provides that all parties:

> understand and agree that the provisions of this Settlement relate only to the specific matters referred to in this Settlement and no party or person waives any claim or right which it otherwise may have with respect to any matters not expressly provided for in this Settlement. Nothing in this Settlement shall preclude Northern from filing changes in its F.E.R.C. Gas Tariff which are not inconsistent with its specific obligations under this Settlement. In addition, prior to November 1, 2007, the other parties to the Settlement shall not initiate a proceeding before the Commission that seeks to change the provisions of this Settlement with respect to any issues that are designated as issues that shall be modified by Northern on a prospective basis only.

40. We interpret Article VII (C) as permitting Northern's shippers to seek changes in Northern's reservation charge crediting provisions in GT&C section 7. The settlement contains no reference to GT&C section 7 nor to Northern's reservation charge crediting provisions generally. Therefore, as provided in the first sentence of Article VII (C), the Settlement does not relate to the reservation charge crediting provisions in section GT&C section 7, because that section is not among "the specific matters referred to in this Settlement." In addition, as provided in the same sentence, the shippers did not waive any claim or right they may have with respect to GT&C section 7, since the reservation charge crediting provisions in that section were not included in the matters "expressly provided for in this Settlement."

41. Finally, the restriction in the last sentence of Article VII (C) on Northern shippers' seeking changes in the Settlement is inapplicable to reservation charge crediting changes the shippers are seeking in this proceeding. That sentence only limits changes the shippers can seek before November 1, 2007, and Northern's shippers did not challenge Northern's reservation charge crediting provisions until 2011. In any event, the changes Northern's shippers could not seek before November 1, 2007, were limited to changes "with respect to any issues that are designated as issues that shall be modified by Northern on a prospective basis only." As described above, Articles II and III of the

Settlement do not designate any issues with respect to reservation charge crediting as issues that Northern could only modify on a prospective basis.

42. The Commission concludes that, regardless of the fact Northern's shippers did not raise any issue concerning reservation charge crediting in Northern's last general section 4 rate case, or preceding rate cases, the 2005 Settlement permits them to raise the issue now. Northern contends, in essence, that the Commission should interpret the 2005 Settlement as precluding its shippers from raising any section 5 issues with respect to any provisions in its tariff which they could have, but did not, raise in that rate case, at least until Northern files its next general section 4 rate case. However, as discussed above, the 2005 Settlement simply does not contain any such broad waiver by Northern's shippers of their right to raise section 5 issues with respect to matters which could have been raised in that section 4 rate case. To the contrary, Article VII (C) the 2005 Settlement provides that all parties, including Northern, "understand and agree that . . . no party or person waives any claim or right which it otherwise may have with respect to any matters not expressly provided for in this Settlement." If Northern desired that the 2005 Settlement restrict its shippers' right to challenge its reservation charge crediting provision until Northern's next general section rate case, it should have sought to include such a restriction in the Settlement. Instead, it agreed to a settlement which contains no such restriction.

43. We also reject Northern's contention that our requirement that it modify its reservation charge crediting provisions is inconsistent with our statement in *NGSA*, that "Where the pipeline and its shippers have entered into currently effective agreements that include provisions that differ from the Commission's reserve charge crediting policy, and which the Commission has accepted, those agreements need not be changed."[23] In making that statement, we cited as an example an order in *Kern River Gas Transmission Co.*,[24] in which the Commission did not require the pipeline to modify service agreements with particular shippers which contain individually negotiated provisions regarding reservation charge credits which were still in effect. Here, however, as discussed above, Northern has not claimed that the 1993 Global Settlement, in which the parties agreed to GT&C section 7, remains in effect or contains any provision restricting its shippers' statutory rights under NGA section 5 to seek a change in that generally applicable tariff provision. The 2005 Settlement, which is still in effect, does not relate to Northern's reservation charge crediting provisions and does not restrict Northern's shippers' rights under NGA section 5 to seek a change in Northern's reservation charge crediting provisions.

[23] *NGSA*, 135 FERC ¶ 61,055 at n.12.

[24] 132 FERC ¶ 61,111, at P 16 (2010).

44. Northern also attacks the Commission's reliance on *Southern*, 135 FERC ¶ 61,056, to support its decision in this case to require Northern to modify its reservation charge crediting provisions despite the existence of Northern's 2005 Settlement. Northern points out that the rate case settlement in *Southern* explicitly provided that "the terms of the settlement would not survive beyond the Rate Moratorium," but here Northern's currently effective 2005 Settlement has no comparable provision. We recognize that Northern's 2005 Settlement remains in effect. However, the important point is that, as discussed above, that settlement contains no provision restricting Northern's shippers' rights under NGA section 5 to seek a change in Northern's reservation charge crediting provisions. Thus, there is no currently effective settlement which requires a continuation of Northern's existing reservation charge crediting provisions. Nor does modifying Northern's reservation charge crediting provisions require the modification of individually negotiated service agreements, as would have been the case with respect to the contracts at issue in *Kern River*.

45. Finally, Northern reiterates its contentions that its reservation charge crediting provisions should only be modified in a general NGA section 4 rate case, because those provisions may affect its ability to recover its costs. In the December 2011 Order,[25] the Commission explained why a limited section 4 proceeding is appropriate to address the reservation charge crediting issue. With regard to the cost recovery issue, the Commission stated that compliance with the Commission's reservation charge crediting policy need not have any significant impact on the pipeline's costs and revenues. The Commission pointed out that pipelines design their systems to be able to provide the primary firm service they have contracted to provide their firm shippers at all times, and the Commission only requires the pipeline to provide reservation charge credits when it fails to provide nominated service at a firm shipper's primary points. Thus the Commission has rejected requests to extend the crediting requirement to failure to provide nominated service at a firm shipper's secondary points, thereby limiting the pipeline's cost of compliance with the reservation charge crediting policy. The December 2011 Order also referred to Northern's own statement that it operated its system to ensure continued service, and the Commission stated that it would thus appear that requiring Northern to comply with the Commission reservation charge crediting policy should not have a significant impact on Northern's cost and revenues.

46. However, the Commission added that if in fact this was not the case, and that applying that policy would have a significant impact on Northern's cost and revenues

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[25] 137 FERC ¶ 61,202 at PP 30-36.

Northern could file to show the consequences of its compliance. Specifically, the Commission stated:[26]

> The Commission recognizes, however, that it has held that a pipeline may incorporate in its rates the costs associated with operating its system so that it can meet its contractual obligations. Therefore, 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 that would be the consequence of that action. To enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the pipeline would have to provide evidence of the number of non-*force majeure* outages it experienced during a past representative period, and the dollar amount of the 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. 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.

47. On rehearing, Northern contends that the Commission improperly assumed that modifying its reservation charge crediting provisions would not significantly affect its costs and revenues. However, in stating that such a modification would not appear to have a significant impact on Northern's costs and revenues, the Commission relied on Northern's own statements that it prides itself on the continued reliability of its system and plans maintenance at times that are the least disruptive to its customers and that it routinely employs methods to ensure continued service during maintenance. These include investments in line looping, temporary line bypasses, temporary regulation, stopple fittings, natural gas bottle trucks or liquefied natural gas tankers.[27] The Commission pointed out that Northern stated that it "now routinely employs [measures] to ensure continued service in the event of non-*force majeure* outages."[28]

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[26] *Id.* P 36 (footnotes omitted).

[27] Northern's July 18, 2011 Response at 5.

[28] *Id.* at 6.

48. In its rehearing request, Northern does not assert that it possesses any information that would indicate that modifying its reservation charge crediting provisions would significantly affect its costs and revenues. For example, the December 2011 Order stated that, to enable the Commission to estimate the pipeline's cost of complying with the Commission's reservation charge crediting policy, the pipeline could 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 its rehearing request, Northern makes no offer of evidence of such outages during a past representative period, nor does Northern assert that the Commission has improperly denied it the opportunity to present such evidence.[29]

49. Instead, Northern's rehearing request focuses on attacking the Commission's statement that, in order to show that its existing rates are insufficient to recover the costs of compliance with the Commission's reservation charge crediting policy, 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. The Commission stated that 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 or the pipeline could file a general section 4 rate case.[30] Northern asserts that it and its customers and other affected entities should not be forced to expend the time and resources required for a full blown rate proceeding to address the single issue of reservation charge crediting.

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[29] The Commission notes that this type of information is in the possession of the pipeline and therefore it is reasonable to expect the pipeline to produce such evidence.

[30] *See Ozark Gas Transmission, LLC*, 13 FERC ¶ 61,150 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 (2011) (*Ozark*); *Kinder Morgan Interstate Gas Transmission LLC*, 13 FERC ¶ 61,157 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*); *Natural Gas Pipeline Co. of America LLC*, 129 FERC ¶ 61,158 (2009), *reh'g denied*, 130 FERC ¶ 61,133 (2010) (*Natural Gas*); *Northern Natural Gas Co.*, 129 FERC ¶ 61,159 (2009), *reh'g denied*, 130 FERC ¶ 61,134 (2010) (*Northern Natural*); *Great Lakes Gas Transmission Limited Partnership*, 129 FERC ¶ 61,160 (2009), *reh'g denied*, 130 FERC ¶ 61,132 (2010) (*Great Lakes*). As the Commission explained in the *Natural Gas* rehearing order, "[s]ections 10(a) and 14(a) of the NGA authorize the Commission to require [the pipeline] to submit the information required by the [order instituting investigation] in order to carry out its responsibility under NGA section 5 to ensure that the pipeline's rates are just and reasonable." 130 FERC ¶ 61,133 at P 16.

50. If a pipeline produced evidence that requiring it to comply with the Commission's reservation charge crediting policy could cause it to incur significant additional costs which the pipeline might not be able to recover absent a significant increase in its rates, the Commission and other interested parties could consider whether to proceed with section 5 action to modify the pipeline's reservation charge crediting provisions in a limited section 4 proceeding. Here, however, Northern has not produced any such evidence, despite the fact it should not have been a significant burden for Northern to have reviewed its records to determine, for example, the number of outages of primary firm service it has experienced during a past representative period, and estimate the dollar amount of the additional credits it would have had to give.

51. Northern also contends that the December 2011 Order's suggestion that Northern could file a general section 4 rate case to recover any increased costs is contrary to the court's decision in *ANR*, which reversed a Commission order that required a pipeline to seek rate increases resulting from a section 5 action in a new section 4 rate filing, rather than allowing the pipeline to obtain such rate increases in its compliance filing in the section 5 proceeding. The December 2011 Order was consistent with *ANR*. Unlike the order reversed by the court in *ANR*, the December 2011 Order did not limit Northern to seek any rate increases resulting from our section 5 action in a new general section 4 rate case. Rather, the order expressly stated that Northern could raise the issue in this section 5 proceeding that the requirement to change its reservation charge crediting provisions would cause it to incur additional costs. For that reason, the order stated Northern could submit a cost and revenue study in this proceeding to show that its existing rates are insufficient to recover any additional costs resulting from compliance with our section 5 action. However, Northern has not taken us up on this offer and instead has continued to assert that the Commission must wait for it to file a general section 4 rate case before the Commission can change Northern's reservation charge crediting provision. As discussed in the December 2011 Order, that would indefinitely delay bringing Northern's tariff into compliance with Commission policy concerning reservation charge credits. Northern, not having provided any evidence that providing credits under the order would cause it to incur significant additional costs or underrecover its overall cost-of-service, we see no reason to further delay its compliance with Commission policy.

52. In its filing Northern again refers to *Golden Triangle Storage, Inc.*,[31] to support its position. The December order at P 39 explained that case is inapplicable to Northern because it involved a pipeline with market-based rate authority. There the pipeline argued that it did not have to grant reservation charge credits since reservation charge crediting was a matter of negotiation between it and its customers. The Commission's statement that Northern relies on, that reservation charge crediting is a rate matter, was

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[31] 134 FERC ¶ 61,036 (2011).

made in the context of agreeing with the pipeline's position that since the reservation charge crediting policy applied to pipelines with cost-based rates, it does not apply to pipelines with market-based rate authority, such as Golden Triangle, which can negotiate alternate forms of rate relief. Accordingly we deny Northern's request for rehearing.

IV. Northern's Compliance Filing and Protests

53. In its January 17, 2012 compliance filing Northern makes an entirely new reservation charge crediting proposal, including a number of elements not included in its existing tariff. Northern proposes to add a new section 22 titled "Reservation Charge Credits" to its existing firm transportation Rate Schedule and to make certain conforming changes to its General Terms and Conditions (GT&C). For the reasons discussed below, the Commission accepts the tariff records in Northern's January 17, 2012 compliance filing, to be effective upon issuance of this order, subject to Northern filing revised tariff records within 20 days of the date of this order consistent with the directives below.

54. To comply with the December 2011 Order's requirement for crediting in *force majeure* situations, Northern proposes not to use either the Safe Harbor or No Profit Methods for providing partial credits. Rather, it proposes to provide no credits during the first 15 days of the *force majeure* outage, and then, during the next 15-day period, Northern would provide full credits for "Required Deliveries" which it failed to deliver. After the first 30 days of the *force majeure* outage, Northern proposes to provide a partial credit for any undelivered quantities of "Required Deliveries" equal to the pipeline's return on equity and associated income taxes. In section 22(c), Northern defines "Required Deliveries" as "the minimum quantities actually required by the shipper to serve or otherwise meet the firm market at its primary delivery points…."

55. For non-*force majeure* events, including scheduled and unscheduled maintenance, Northern proposes to provide full credits for undelivered quantities of "Required Deliveries", from the first day of the outage and continuing for each and every day that gas is not delivered to the shipper's primary delivery points.

56. Northern also proposes, for the first time, to establish a claim process that a shipper must follow in order to obtain a credit. Pursuant to section 22 (D) a shipper must file a claim within 10 days from the end of the event that includes information: (1) that the shipper had required deliveries that Northern failed to deliver; (2) that the shipper has taken all efforts to mitigate the amount of reservation charge credits it is claiming; and (3) that the shipper had actual gas supplies available for its required deliveries. Shippers making claims for reservation charge credits will be required to support the claim with an affidavit.

57. Northern also proposes in section 22 (F) that reservation credits applicable to a replacement shipper under a capacity release would be based on the lesser of the

releasing or replacement shipper's reservation charge and that there would be no credit if the replacement shipper is paying a volumetric rate. Northern proposes in section 22 (G) that, when a shipper has segmented its capacity, its reservation charge credits will be limited to the original contract demand in the service agreement, for which the shipper is paying a reservation charge.

58. Northern's Compliance Filing was protested by Northern States Power Company–Minnesota, Northern States Power Company–Wisconsin and Southwestern Public Service Company (Xcel Energy), Indicated Shippers, Northern Municipal Distributors Group and Midwest Region Gas Task Force Association (NMDG/MRGTF), CenterPoint Energy Resources Corp., DBA CenterPoint Energy, Minnesota Gas (CenterPoint Energy). Northern Illinois Gas Company, DBA Nicor Gas, filed a motion for leave to intervene and comments. On February 9, 2012, Northern filed an Answer to the comments and protests.

59. Process Gas Consumers Group (PGC) filed a motion for leave to intervene and protest. In its motion, PGC stated that it was a trade association whose members owned and operated manufacturing facilities that consumed natural gas transported on Northern's system, and would be affected by the outcome of this proceeding. On February 6, 2012, Northern filed requesting that PGC "identify by name [its] members that have a specific interest in the proceeding." (Answer at 1). On February 8, 2012, PGC filed a response urging the Commission to deny Northern's request. The Commission denies Northern's request, and PGC need not disclose the name of its members, consistent with the ruling in *Stingray Pipeline Co.*, LLC, 135 FERC ¶ 61,099 at P 20 (2011). In *Stingray*, we allowed PGC and another trade association to intervene, without requiring them to identify by name their members with a direct interest in the proceeding as requested by the pipeline in that case. We found that the associations had shown a sufficient interest in the proceeding by stating that they had members who are consumers of natural gas transported on the pipeline. PGC has made the same showing here, and therefore we grant its motion to intervene.

60. Protestors object to practically every aspect of Northern's filing. They object to Northern's three tier approach to the crediting for *force majeure* outage. First, they object to a Safe Harbor period of 15 days, stating Northern had not stated the basis for the 5 days more than the 10 day safe harbor period the Commission has permitted, and they object to using the No-Profit method of crediting after 30 days. They argue that Northern's proposal is another form of "cherry picking" of the most pipeline favorable aspects of the No Profit and Safe Harbor Methods. They note that the Commission rejected such cherry picking in *North Baja* and *Kern River*. They object to the use of the term "Required Deliveries" in section 22.C.9 because under that definition Northern would base credits solely on its determination that the amount a shipper nominated that was not delivered, was "required … to serve or otherwise meet its fair market at a Primary Delivery Point."

61. They also object to the new procedure in section 22.D.1 which imposes a variety of obligations on the shipper before it would be "eligible for an adjustment." Among the elements objected to are the requirement of submitting a detailed affidavit with "sufficient data", all of which must be submitted within 10 days. Further, they find fault with the requirement in section 22.D.2 that the shipper must take actions "to mitigate the amount of the claim" because there is no such requirement under Commission precedent. Finally, they object to the clause in section 22.H that if a shipper has contracted different rates the adjustment will be calculated "based on the lowest rates first."

A. *Force Majeure*

62. In order to comply with the December 2011 Order's requirement that it provide partial reservation charge credits during *force majeure* outages, Northern proposes to provide such credits pursuant to a hybrid of the Safe Harbor and No Profit Methods. Specifically, Northern proposes that for *force majeure* outages there will be a 15-day Safe Harbor period with no credit granted, followed by a 15-day period with full credit, and after 30 days, credits will be given using the No-Profit calculation, namely the portion of the pipeline's reservation charge that represents the pipeline's return on equity and associated income taxes. All protestors argue that the proposal is contrary to Commission policy which permits a Safe Harbor period up to 10 days, and thereafter shippers are entitled to a full reservation charge credit until the curtailment ends.

63. In this case Northern acknowledges that its proposal differs from the Commission-approved Safe Harbor method but contends that the change is justified because it allocates some fixed costs to the usage charge. As a result, it contends, it shares the risk since it does not recover the fixed costs in the usage when there is a *force majeure* outage. Northern notes that the Commission specifically referred to this factor in the December 2011 Order at P 22, wherein it stated that in light of this fact, Northern could "modify the usual provisions of the Safe Harbor or No-Profit methods to reflect that a certain portion of the fixed costs are included in the usage charge." Northern asserts that its proposal and changes "do exactly as the Commission suggested."[32]

Commission Determination

64. We believe there is some merit to Northern's position, but find it goes too far in shifting the risk to Northern's firm shippers under Northern's factual situation. As discussed above, in determining whether Northern's proposal for sharing the risk of *force majeure* outages is reasonable, we must analyze whether the proposal provides for risk sharing in the same ball park as the No Profit and Safe Harbor Methods would for a pipeline with an SFV rate design. Northern's proposed hybrid of the No Profit and Safe

[32] Answer at 3.

Harbor Methods is identical to the hybrid reservation charge crediting proposal rejected by the Commission in *Kern River, supra,* n.16, apart from the fact there were no fixed costs in Kern River's usage charge, but Northern's usage charge includes 3 percent of its fixed costs. The Commission found that Kern River's hybrid proposal unreasonably cherry picked the most pipeline favorable aspects of the No Profit and Safe Harbor Methods. Northern's inclusion of 3 percent of its fixed costs in its usage charge is insufficient to justify a different result in this case.

65. As the Commission explained in *Kern River*, while both the Safe Harbor and the No Profit Methods achieve an equitable sharing of the risks of *force majeure* outages, they allocate the risks of short- and long-term outages in a different manner. The Safe Harbor Method allocates the entire risk of *force majeure* outages of 10 days or less to the firm shippers. The requirement to provide full credits after Day 10 then allocates to the pipeline a progressively greater share of the risk of a *force majeure* outage the longer the outage lasts. For example, if the outage lasts 90 days, the Safe Harbor Method would require the pipeline to credit to its firm shippers about 88 percent of the total reservation charges that would otherwise be due during that period. By contrast, the No Profit Method allocates the same proportionate risk to the pipeline regardless of the length of the *force majeure* outage, because the pipeline must provide a credit equal to its return on equity and associated income taxes beginning on Day One and continuing until the outage ends. Thus, unlike the Safe Harbor Method, the No Profit Method requires the pipeline to bear some of the risk of short term *force majeure* outages. On the other hand, since a pipeline's return on equity and associated income taxes generally constitute somewhat less than 50 percent of its fixed costs, the No Profit Method allocates less of the risk of long-term *force majeure* outages to pipelines than the Safe Harbor Method.

66. Northern's hybrid proposal would give it the pipeline-favorable aspects of both the Safe Harbor and No Profit Methods. Because Northern's usage charge includes only 3 percent of its fixed costs, Northern's proposal would place 97 percent, or almost all, of the risk of short-term *force majeure* outages of 10 days or less on its shippers. That is very close to the Safe Harbor Method's imposition of 100 percent of the risk of short term-outages of 10 days or less on the pipeline's shippers. [33] However, thereafter

[33] In all cases where the Commission has approved a pipeline's use of the Safe Harbor Method, the no credit period has been limited to 10 days or less. *See, e.g., Midwestern*, 137 FERC ¶ 61,257 at P 20; *Tuscarora Gas Transmission Co.*, 123 FERC ¶ 61,109, at P 12 (2008); *Entrega Gas Pipeline LLC*, 114 FERC ¶ 61,326, at P 13 (2006); *Natural Gas Pipeline Co. of Am.*, 106 FERC ¶ 61,310, at P 24, *reh'g*, 108 FERC ¶ 61,170, at PP 8-11 (2004); *Tex. E. Transmission Co.*, 62 FERC ¶ 61,015, at 61,090 (1993). Northern has not cited any case where the Commission approved a grace period of more than 10 days.

Northern's proposal would place substantially more of the risk of the *force majeure* outage on its shippers than the Safe Harbor Method does. While the Safe Harbor Method requires a pipeline to start providing full reservation charge credits on Day 11 of the outage, Northern does not propose to provide any reservation charge credits until Day 16 of the *force majeure* outage. Thus, under Northern's proposal it would continue to bear only 3 percent of the risk of the *force majeure* outage through Day 15. By contrast, an SFV pipeline providing full reservation charge credits under the Safe Harbor Method starting on Day 11 would provide credits equal to 9.09 percent of the cumulative reservation charges for the first 11 days of the outage, rising to 33 percent of the cumulative reservation charges for the first 15 days of the outage.[34]

67. While Northern proposes to provide full reservation charge credits on Days 16 through Day 30 of a *force majeure* outage, it would still absorb considerably less of its fixed costs on a cumulative basis during *force majeure* outages with durations of 16 to 30 days, than an SFV pipeline providing credits under the Safe Harbor Method. As shown on Appendix A, Northern's total loss of fixed costs during a 16-day *force majeure* outage, taking into account both the 3 percent not collected through the usage charge during each of the first 15 days and the full reservation credit provided on Day 16 would be 9.06 percent of the cumulative fixed costs that would otherwise have been collected during that period. The loss of fixed costs would gradually rise to 51.5 percent of the cumulative fixed costs that would have otherwise been collected if the *force majeure* outage lasted for 30 days. By contrast, an SFV pipeline providing full reservation charge credits under the Safe Harbor Method after Day 10 would provide credits equal to 37.5 percent of the cumulative reservation charges for a 16 day *force majeure* outage, rising to 66 percent of the cumulative reservation charges for a 30 day outage.

68. After Day 30 of a *force majeure* outage, Northern proposes only to provide credits under the No Profit Method. As a result, Northern's total loss of fixed costs during *force majeure* outages lasting more than 30 days would gradually decline from the 51.5 percent loss for a 30 day outage. For example, during an outage of 90 days Northern would forego 43.8 percent of the cumulative fixed costs that would it otherwise would have collected. By contrast, an SFV pipeline using the Safe Harbor Method would provide reservation charge credits equal to a progressively higher percentage of the cumulative reservation charges for the *force majeure* outage the longer the outage lasted, with the credits equal to 88.9 percent of the reservation charges that would otherwise have been paid during an outage of 90 days.

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[34] *See* Appendix A comparing the pipeline's cumulative absorption of its fixed costs during outages of various lengths under the Safe Harbor Method, the No Profit Method, Northern's proposed hybrid method, and the Modified Safe Harbor and No Profit Methods permitted by this order.

69. Therefore, Northern's hybrid proposal gives it most of the pipeline favorable aspects of the Safe Harbor Method, by allocating almost the entire risk of *force majeure* outages of 10 days or less to its firm shippers. However, thereafter, Northern's proposal fails to give its shippers the Safe Harbor Method's full offsetting benefit of exempting them from bearing any additional risk for *force majeure* outages lasting more than 10 days. In fact, as shown on Appendix A, Northern's proposal requires its shippers to bear substantially more of the risk of any *force majeure* outage lasting more than 10 days, than does the Safe Harbor Method.

70. Northern's hybrid proposal is also substantially less favorable to its shippers than the No Profit Method. That method requires the pipeline to bear the same proportionate risk for short-term *force majeure* outages as for long-term outages, based upon the percentage of its fixed costs comprised of ROE and associated income taxes. For Northern that percentage is approximately 40 percent. Therefore, that method would allocate to Northern 40 percent of the risk of all *force majeure* outages, regardless of its length, including all outages of 15 days or less. By contrast, Northern's hybrid proposal only requires it to bear 3 percent of the risk of any *force majeure* outage of 15 days or less. While Northern's proposal requires it to bear somewhat more than 40 percent of the risk of *force majeure* outages lasting more than 24 days,[35] it appears likely that most *force majeure* outages on Northern's system would be less than 25 days. For example, Northern states in its transmittal letter, at p. 4, that the proposed initial Safe Harbor period of "15 days reflected the operational expectations for the timing of repairs on a major compression station in the event of a catastrophic outage on Northern."

71. The Commission concludes that Northern's hybrid proposal cherry picks the most pipeline-favorable aspects of each method by (1) requiring shippers to bear most of the risk of shorter term outages of 15 days or less, while (2) providing a percentage refund for the less likely longer-term outages of more than 24 days that is only marginally higher than that provided by the No Profit Method. As the court held in *North Baja*, such a blending of the two risk sharing methods does not "achieve[ ] an equitable cost-sharing in the same ballpark as" the Safe-Harbor and No-Profit Methods.[36]

72. While the Commission rejects Northern's hybrid proposal, the Commission finds that Northern may, consistent with the December 2011 Order, modify the No Profit or Safe Harbor Methods to reflect that its usage charge includes 3 percent of its fixed costs, as follows. In order to provide risk sharing equivalent to that provided under the No Profit Method by a pipeline with an SFV rate design, Northern could revise its tariff to

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[35] *See* Appendix A.

[36] *North Baja*, 483 F.3d 819, 822.

provide reservation credits equal to 37 percent of the fixed costs in its reservation charge for every day of a *force majeure* outage. Those credits, combined with the fact Northern would not be collecting the 3 percent of its fixed costs included in its usage charge, would result in Northern forgoing the 40 percent of its fixed costs comprised of ROE and associated income taxes during the *force majeure* outage, consistent with the No Profit Method.

73. Alternatively, if Northern desires to use the Safe Harbor Method, the addition of one day to the 10-day Safe Harbor period would result in Northern's risk sharing being in the same ball park as the risk sharing under the Safe Harbor Method for a pipeline with an SFV rate design which does not allocate any fixed costs to the usage charge. On a cumulative basis, Northern's loss of the 3 percent of its fixed costs included in its usage charge during each day of the first 10 days of a *force majeure* outage is the equivalent of providing the shippers a credit equal to 30 percent of the fixed costs included in the charges for a single day of service. This is only about one-third of the credit of 100 percent of its fixed costs that the Safe Harbor Method would otherwise require Northern to provide for Day 11 of a *force majeure* outage, and therefore does not justify adding any more than one day to usual 10-day Safe Harbor period. As shown on Appendix A, adding one day to the Safe Harbor period provides a sufficient adjustment to account for the fact that Northern bears a small amount of the risk of the first 10 days of a *force majeure* outage since it is not recovering the fixed costs in the usage charge. If the *force majeure* outage lasts more than 10 days, Northern would bear somewhat less of the risk of longer *force majeure* outages than would an SFV pipeline using the Safe Harbor Method. Northern's somewhat lower risk sharing during longer *force majeure* outages would offset its somewhat greater risk for shorter term *force majeure* outages. Therefore, no greater adjustment to the Safe Harbor Method beyond the addition of one day to the Safe Harbor period would be justified.

74. Accordingly, Northern must revise its proposal consistent with the above discussion.

B. Eligible Quantities

75. In Section 22(c) Northern defines what volumes that the shipper nominated but were not delivered are eligible for credits, which are called "Undelivered Quantities." First, "Required Deliveries" is defined as "the minimum quantities actually required by the shipper to serve or otherwise meet the firm market at its primary delivery points." Then, the section defines "Undelivered Quantities" as "the Required Deliveries that Northern was unable to deliver" during the outage.

76. Protestors object to these definitions, contending that there should be no requirement that the shipper shows that the undelivered amount was for the shipper's firm service since the credit is for compensating the shipper for the service it would have

received but for the curtailment. They argue that Northern's contractual obligation to its firm customers does not depend upon that shipper's downstream markets.

77. In *Kern River*,[37] the pipeline had a similar proposal but used the term "Required Market Deliveries." However, the definition was exactly the same as proposed by Northern, namely "the maximum quantities actually required by shipper to service otherwise meet its firm market at Primary Delivery Point."

78. The Commission rejected the use of that term, stating:

> By defining that term to mean the quantities required by the shipper to 'meet its firm market at Primary Delivery Points,' Kern River would limit the credits to quantities which the shipper has a firm contractual obligation to supply its downstream customers. However, the shipper's contractual arrangements with its downstream customers are not relevant to determining the reservation charge credits intended to compensate the shipper for Kern River's failure to satisfy its firm contractual obligation to the shipper. A shipper may use its primary firm transportation capacity on Kern River for a variety of purposes, including to take advantage of short-term interruptible business opportunities.[38]

79. The Commission concluded:

> Accordingly, Kern River's proposal to limit reservation charge credits to the shipper's 'Required Market Deliveries' would fail to accomplish the goal of compensating the shipper for the primary firm service Kern River would have provided, but for the outage.[39]

80. The Commission directed that Kern River must modify its tariff records in its compliance filing to remove all provisions related to its proposal to limit reservation charge credits to "Required Market Deliveries."[40] We direct Northern to take similar

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[37] *Kern River Gas Transmission Co.*, 139 FERC ¶ 61,044 (2012).

[38] *Id.* P 46.

[39] *Id.* P 49.

[40] *Id.* P 50.

action here and remove all provisions related to "Required Deliveries" and "Undelivered Quantities."

C. Procedure for Obtaining Credits

81. Northern proposes in section 22, for the first time, to require a shipper to file a claim for a reservation charge credit within 10 days of the end of the service outage, and support the claim, by submission of a detailed affidavit. The affidavit is to include, among other things, a detailed schedule of its Required Deliveries and the undelivered quantities for each day of the outage, an affirmation that the shipper had available gas supplies at the shipper's primary receipt points for the full amount of required deliveries, and detail regarding all actions to mitigate the amount of the claim. The provision further states that shippers have the burden to show claims are "*Bona Fide,*" and that shippers "took all actions to mitigate the potential adjustment."

82. Almost every protestor objected to the claim procedure, including the mitigation requirement as contrary to Commission precedent. They contend that the procedure is unduly burdensome, and gives Northern unlimited discretion in determining whether shippers have met all the requirements, especially since some terms such as "*Bona Fide*" are vague and undefined.

83. In *Kern River*, the Commission rejected a similar claim procedure proposed by the pipeline. The Commission stated that since the primary purpose of the claims procedure is to require shippers to provide evidence of their market deliveries and the Commission rejected use of that term, it followed that the claim procedure and the required mitigation by the shipper would also be rejected. Moreover, the order noted that the information the pipeline was seeking in the claim procedure was already in the pipeline's possession so there was no need for the claim procedure.[41] The same reasoning applies here since the provisions here are similar to the ones in *Kern River*. Accordingly, as we did in *Kern River* at P 58, we direct Northern to remove from section 22 all provisions related to its claim procedure.

D. Capacity Release

84. In section 22.F, Temporary Capacity Release, Northern proposes tariff language concerning the determination of reservation charge credits during periods when a shipper has released its capacity to a replacement shipper. In that situation, Northern provides that the reservation charge credit applicable to the replacement shipper will be the lower of the reservation rate of the releasing or the replacement shippers. Northern proposes that if there is a volumetric rate, there will be no reservation charge credits.

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[41] *Id*. P 58.

85. In *Kern River*, there was an identical provision in Section 7.6 of Kern River's tariff. The Commission addressed the proposal in PP 61-65. The Commission concluded that the proposal was reasonable, subject to certain conditions. The Commission stated that where the replacement shipper is paying a reservation charge which is lower than the releasing shipper's rate, it is reasonable for the reservation charge credit applicable to the replacement shipper to be based on its lower reservation charge, so long as the pipeline continues to reduce the releasing shipper's rate by the amount of the replacement shipper's reservation charge. Because the replacement shipper is not paying the higher reservation charge applicable to the releasing shipper, there is no reason for the pipeline to provide the replacement shipper a credit in excess of the replacement shipper's reservation charge. However, the Commission found that the pipeline should continue to credit the replacement shipper's reservation charge to the releasing shipper, without regard to the reservation charge credits given to the replacement shipper for the outage.[42] Otherwise, the releasing shipper would be required, in effect, to subsidize the reservation charge credits the Commission requires the pipeline to give to the replacement shipper for the pipeline's failure to provide that shipper its contracted-for service.

86. In the situation where the replacement shipper is paying a reservation charge which is higher than the releasing shipper's reservation charge, Northern proposes to limit the reservation charge credit applicable to the replacement shipper to the lower reservation charge paid by the releasing shipper. Since the Commission's capacity release regulations require the pipeline to credit the entire reservation charge paid by the replacement shipper to the releasing shipper, the releasing shipper is entitled to any profit from releasing its capacity at a rate higher than it is paying the pipeline. Northern's proposal to limit the credit to the replacement shipper to the releasing shipper's rate has the effect of requiring the replacement shipper to continue to fund the releasing shipper's profit on its release. The replacement shipper would continue to pay the pipeline the amount by which its reservation charge exceeds the releasing shipper's reservation charge. In *Kern River* the Commission found this reasonable, so long as the pipeline credits to the releasing shipper the entire amount of the replacement shipper's reservation charge – both the amount the replacement shipper continues to pay and the amount of any reservation charge credits provided to the replacement shipper. This would put the releasing shipper in the same position as if the outage had not occurred, and thus treats the releasing shipper in a reasonable manner. Although the replacement shipper would not be credited the entire amount of its reservation charge, the Commission found this reasonable. The Commission explained that the pipeline had no control over the release

[42] *Id*. P 62.

rate agreed to by the releasing shipper and the replacement shipper and never had any right to retain the excess amount paid by the replacement shipper.[43]

87. Accordingly, the Commission required Kern River to revise its proposed tariff language to clarify that the credits it provides to releasing shippers would be unaffected by any reservation charge credits it provides to the replacement shipper in either of the above two described situations.[44] We therefore require Northern to revise its proposed section 22.F to make a similar clarification.

88. The Commission finds reasonable Northern's proposal to provide no reservation charge credits when the replacement shipper pays a volumetric rate, as we previously found in *Kern River*.[45] Because the replacement shipper's rate is volumetric it will not make any payments to the pipeline during an outage, since it receives no service. Moreover, the releasing shipper, having released its capacity at a volumetric rate, takes the risk that it will receive no credits if the replacement shipper does not take any service. Therefore, in this situation, there is no need for Northern to provide any credits to the releasing shipper.

89. The Commission accepts Northern's proposal in section 22.F, subject to Northern clarifying that the credits provided to releasing shippers will be unaffected by any reservation charge credits provided to the replacement shipper during either a *force majeure* or non-*force majeure* outage.

The Commission orders:

(A) Northern is directed to file, within 30 days of the date of issuance of this order, revised actual compliance tariff records, effective the date of this order, to implement the *pro forma* proposal listed in footnote n.4, as clarified and modified by this order.

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[43] *Id.* P 63.

[44] The Commission also finds that proposed section 9.7 concerning segmented transportation agreements is reasonable.

[45] *Id.* P 64.

(B) Northern's request for rehearing is denied

(C) PGC's request for intervention is granted

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A
Northern Natural Gas Company
Docket Nos. RP11-2061-002 and RP11-2061-003

Pipeline % of Cost Absorption

Duration of Force Majeure Outage (Days)	No Profit Method (SFV)	Safe Harbor Method (SFV)	Northern Proposal	11 Day Safe Harbor (3% fixed costs in usage charge)
1	40[46]	0.0	3.0	3.0
10	40	0.0	3.0	3.0
11	40	9.1	3.0	3.0
12	40	16.7	3.0	11.1
13	40	23.1	3.0	17.9
14	40	28.6	3.0	23.7
15	40	33.3	3.0	28.9
16	40	37.5	9.1	33.3
17	40	41.2	14.4	37.2
18	40	44.4	19.2	40.7
19	40	47.4	23.4	43.8
20	40	50.0	27.2	46.7
25	40	60.0	41.8	57.3
30	40	66.7	51.5	64.4
35	40	71.4	49.9	69.5
40	40	75.0	48.6	73.3
50	40	80.0	46.9	78.6
90	40	88.9	43.8	88.1

[46] As set forth in P 23, Northern's ROE and associated income taxes represent 40 percent of the cost of service.