141 FERC ¶ 61,222
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.

Gulf Crossing Pipeline Company LLC Docket No. RP12-814-000

ORDER ACCEPTING TARIFF RECORDS SUBJECT TO CONDITIONS

(Issued December 20, 2012)

1. On June 20, 2012, Gulf Crossing Pipeline Company LLC (Gulf Crossing) filed tariff records[1] to revise its tariff provisions pertaining to reservation charge credits to be consistent with Commission policy. On July 31, 2012, the Commission accepted and suspended the tariff records, subject to refund and further Commission action, effective January 1, 2013, or some earlier date set forth in a subsequent order.[2] For the reasons discussed below, the Commission accepts the revised tariff records effective January 1, 2013, subject to conditions. Gulf Crossing is directed to file revised tariff records or provide further information and, pursuant to section 5 of the Natural Gas Act (NGA), either to modify certain tariff provisions concerning reservation charge credits or show cause why it should not be required to do so, as discussed below.

I. Background

2. In *Natural Gas Supply Association, et al.*,[3] the Commission encouraged interstate pipelines to review their tariffs to determine whether their individual tariff is in

[1] Gulf Crossing Pipeline Company LLC, FERC NGA Gas Tariff, Tariffs; Section 1, Table of Contents, 6.0.0; Section 6.7, GT&C - Operating Conditions, 3.0.0; Section 6.21.5, GT&C - Misc. Provisions - Force Majeure, 2.0.0; Section 6.25, GT&C - Demand Charge Credits, 5.0.0; Section 6.26, GT&C - List of Non-Conforming Service Agreements, 0.0.0.

[2] *Gulf Crossing Pipeline Co.*, 140 FERC ¶ 61,082 (2012) (July 2012 Order).

[3] 135 FERC ¶ 61,055, at P 2 (2011) (*NGSA*).

compliance with the Commission's policy concerning reservation charge credits, and, if not, make an appropriate filing to come into compliance. In general, the Commission requires all interstate pipelines to provide reservation charge credits to their firm shippers during both *force majeure* and non-*force majeure* outages. The Commission requires pipelines to provide full reservation charge credits for outages of primary firm service caused by non-*force majeure* events. The Commission also requires the pipeline to provide partial reservation charge credits during *force majeure* outages, so as to share the risk of an event for which neither party is responsible. Partial credits may be provided pursuant to: (1) the No-Profit method under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1, or (2) the Safe Harbor method under which the pipeline provides full credits after a short grace period when no credit is due (i.e., 10 days or less).[4]

3. The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. The Commission has held that routine, scheduled maintenance is not a *force majeure* event, even on "pipelines with little excess capacity"[5] where such maintenance may require interruptions of primary firm service. That is because, even if such outages are considered to be uncontrollable, they are expected. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed this policy in *North Baja Pipeline, LLC v. FERC*,[6] stating:

> Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipelines rates should incorporate the costs associated with a pipeline operating its system so that it can meet its contractual obligations.

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[4] *See, e.g.*, *Tennessee Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*). The Commission has also stated that pipelines may use some other method which achieves equitable sharing in the same ball park as the first two methods.

[5] *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at 61,350 (2003).

[6] 483 F.3d 819, 823 (D.C. Cir. 2007), *aff'g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005) (*North Baja*).

4. As the Commission requested in *NGSA*, Gulf Crossing reviewed the reservation charge crediting provisions in its tariff. That tariff contains only limited provisions concerning reservation charge crediting. Section 6.7(7) of Gulf Crossing's General Terms and Conditions of Service (GT&C) provides that, if Gulf Crossing is unable to transport gas "as a result of any non-*Force Majeure* event, then Gulf Crossing shall," provide reservation charge credits "for the appropriate portion of the reservation charge …affected by the interruption." Gulf Crossing's tariff does not provide for reservation charge credits in any other circumstance, including outages due to a *force majeure* situation. Gulf Crossing, accordingly, determined that its tariff does not fully comply with Commission policy.

5. Accordingly, on June 20, 2012, Gulf Crossing proposed to modify its tariff to bring both its *force majeure* and non-*force majeure* reservation charge crediting provisions into compliance with Commission policy. The filing included: (i) a proposed section 6.23[7] dedicated to reservation charge credits;[8] (ii) a proposed modification to the definition of *force majeure* concerning new pipeline safety and integrity management obligations; and (iii) minor conforming changes to the Table of Contents and the GT&C.

6. Gulf Crossing proposed to provide reservation charge credits for *force majeure* events utilizing the Safe Harbor Method. Following the ten-day grace period during which no credits are provided, Gulf Crossing would provide reservation charge credits for the "Force Majeure Average Usage Quantity" that Gulf Crossing failed to deliver to the customer's primary delivery point(s) due to the *force majeure* event provided that the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf Crossing would determine the Force Majeure Average Usage Quantity based upon nominations over the seven gas days prior to the first gas day of the *force majeure* event.

7. Gulf Crossing also proposed to provide full reservation charge credits for non-*force majeure* events, including maintenance events not included in the revised definition of *force majeure* described below. Gulf Crossing would provide reservation charge credits for any "Maintenance Average Usage Quantity" that it failed to deliver during a non-*force majeure* event provided the customer was not utilizing such quantity for delivery on a non-primary basis. Gulf Crossing would determine the Maintenance

[7] This section was formerly dedicated to the "List of Non-Conforming Agreements" which has been relocated to section 6.24 of the Tariff.

[8] Gulf Crossing employs the term "demand charge credits" for reservation charge credits.

Average Usage Quantity based upon nominations over the seven gas days prior to the first gas day of the maintenance and non-*force majeure* event.

8. Gulf Crossing also proposed to change its definition of *force majeure* in section 6.21(5)(1) to address new pipeline safety and integrity management obligations resulting from the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act). Specifically, Gulf Crossing proposed to include in the definition of *force majeure* "any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, to comply with the [2011 Act] requirements issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) [of the United States Department of Transportation (DOT)] pursuant [sic] to the 2011 Act, [and] requirements resulting from PHMSA's ongoing gas pipeline rulemaking proceedings." Gulf Crossing contended that these initiatives are expected to result in an increase in operations and maintenance costs and greater pressure on pipelines to perform upgrades and replacements. Gulf Crossing further contended that, while the exact nature of any additional pipeline safety requirements is undetermined, disruptions in service and pipeline infrastructure modernization costs are likely to be substantial.

9. Gulf Crossing stated that the Commission's current *force majeure* policy on reservation charge crediting stems from the D.C. Circuit's order in *North Baja* affirming the Commission's holding that scheduled maintenance is not a *force majeure* event. However, Gulf Crossing contended that recent pipeline incidents, new legislation, and ongoing rulemakings have resulted in increased scrutiny of pipeline operations, and this scrutiny is evident in several DOT and PHMSA initiatives and actions by the Executive Branch.[9] Gulf Crossing argued that any resulting outages are not the routine scheduled maintenance considered in *North Baja*. Gulf Crossing asserted that such service disruptions are due to broad government-initiated actions that are not reasonably in control of pipelines and which represent a sea change for the natural gas industry. Gulf Crossing contended that, in *North Baja*, the court's rationale for upholding the Commission's general exclusion of routine maintenance and testing outages from the definition of *force majeure* was that a pipeline's rates "incorporate [the] costs associated with a pipeline operating its system so that it meet its contractual obligations."[10] Gulf Crossing argues that this rationale does not apply to these outages since pipelines' existing rates do not and cannot incorporate the costs associated with complying with the new requirements.

[9] Transmittal Letter at 5-6.

[10] Citing *North Baja*, 483 F.3d 819, 823.

10. Protests were filed by Devon Gas Services, L.P. (Devon) and by Indicated Shippers.[11] The protests generally argued that Gulf Crossing's proposal conflicted with the Commission's policy and precedents regarding reservation charge crediting policy.

11. On July 10, 2012, Gulf Crossing filed an answer to the protests (Answer) and proposed several alternatives to its original proposal which are discussed below.

12. The July 2012 Order allowed the protestors an opportunity to respond to Gulf Crossing's Answer before a final disposition of the filing by the Commission. Responses to Gulf Crossing's Answer were filed by Indicated Shippers and Devon (Responses). The Responses generally argue that Gulf Crossing's proposal conflicts with the Commission's policy and precedents regarding reservation charge crediting policy. Gulf Crossing filed an answer to the responses (Answer to Responses).[12] The Responses and Answer to Responses are discussed below.

II. Discussion

13. The Commission accepts the revised tariff sections listed in footnote n.1 of this order to become effective January 1, 2013, subject to conditions. As discussed below, the Commission requires Gulf Crossing to file revised tariff records and, pursuant to NGA section 5, directs Gulf Crossing to make certain changes in the reservation charge crediting provisions in its tariff or explain why it should not be directed to do so.

A. Outages to Comply with the 2011 Act and PHMSA Rulemakings as *Force Majeure* Events

1. Gulf Crossing's Proposal

14. Gulf Crossing proposes to change its definition of *force majeure* in section 6.21(5)(1) to include outages necessary to comply with the 2011 Act and

[11] For the purposes of this proceeding, the Indicated Shippers are Apache Corporation; BP America Production Company and BP Energy Company; Chevron Natural Gas, a division of Chevron U.S.A. Inc.; ConocoPhillips Company; and Shell Energy North America (US), L.P.

[12] Rule 213(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)(2) (2012)) prohibits answers to protests or answers unless otherwise ordered by the decisional authority. In this case, the Commission will accept Gulf Crossing's Answer to Responses because it may assist the Commission in its decision-making process.

PHMSA's ongoing gas pipeline rulemakings. Specifically, Gulf Crossing proposes to include in the definition of *force majeure* "any testing, repair, replacement, refurbishment, or maintenance activity, including scheduled maintenance, to comply with the [2011 Act] requirements issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) [of the United States Department of Transportation (DOT)] pursuant [sic] to the 2011 Act, [and] requirements resulting from PHMSA's ongoing gas pipeline rulemaking proceedings."

2. Positions of the Parties

15. In its transmittal letter and its Answer, Gulf Crossing argued that its proposal to amend its definition of *force majeure* to include service interruptions associated with compliance with the 2011 Act is just and reasonable.[13] Gulf Crossing asserted that it is appropriate for it and its shippers to share the risk of such service interruptions pursuant to the well-established Safe Harbor Method applicable to other *force majeure* outages. Gulf Crossing argued that the 2011 Act and PHMSA's ongoing rulemaking proceedings will result in significant, new safety requirements, increasing the risk of service disruptions which cannot be considered "routine" and over which the pipeline will have little control.

16. Gulf Crossing stated that in August 2011 PHMSA issued an Advance Notice of Proposed Rulemaking (ANOPR),[14] requesting comment on various potential changes in PHMSA's gas pipeline safety regulations. Gulf Crossing stated that PHMSA requested comment on strengthening of PHMSA's existing integrity management (IM) regulations, expanding the application of those regulations beyond High Consequence Areas (HCA),[15] strengthening criteria for pipeline assessment tools, modifying repair criteria,

[13] Gulf Crossing contends that the Commission must accept Gulf Crossing's proposal, if the Commission determines that it is just and reasonable, regardless of whether other tariff or rate mechanisms are also just and reasonable or it has approved different provisions for other pipelines, (citing *Columbia Gas Transmission Corp.*, 124 FERC ¶ 61,122, at P 26 (2008) (citing *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993); and *Consolidated Edison Co. v. FERC*, 165 F.3d 992 (D.C. Cir. 1999) (*Consolidated Edison*), *reh'g denied*, 133 FERC ¶ 61,217 (2010))).

[14] Citing 76 FR 53086 (August 25, 2011).

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

and revising data collection requirements. PHMSA also requested comment on adding new requirements concerning corrosion control, weld seams, Maximum Allowable Operating Pressure (MAOP), and the use and location of certain mainline valves. Gulf Crossing stated that PHMSA is expected to issue multiple proposed rules on the issues covered by the ANOPR and these will likely require additional facility testing and upgrades, which will disrupt service.

17. Gulf Crossing also stated that the 2011 Act, which the President signed into law on January 3, 2012, will likely lead to significant service disruptions. Specifically, Gulf Crossing asserted that the provisions of section 23(a) of the 2011 Act, adding section 60139, Maximum Allowable Operating Pressure to Chapter 601 of Title 49 of the United States Code, will likely cause PHMSA to take actions that will disrupt pipeline service. Gulf Crossing stated that new section 60139(a) requires pipelines to verify the records of pipeline segments in Class 1 and Class 2 HCAs and Class 3 and Class 4 locations[16] to confirm their established MAOP. New section 60139(b) requires pipelines to report by July 3, 2012 those pipeline segments for which MAOP cannot be confirmed with records. Gulf Crossing pointed out that new section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline to reconfirm a MAOP. Gulf Crossing asserted that reconfirmation could require in-line inspection, or other alternative tests of Gulf Crossing's pipeline which could result in disruptions to pipeline service. Gulf Crossing also pointed out that new section 60139(c)(2) authorizes PHMSA to take interim measures until MAOP can be reconfirmed and such actions could involve pressure cuts reducing the pipeline's capacity.

18. Gulf Crossing stated that section 23 of the 2011 Act also requires PHMSA to issue regulations to require strength testing of previously-untested gas pipelines in HCAs operating at a pressure of greater than 30 percent of specified minimum yield strength. Gulf Crossing stated that such testing could include pressure testing, in-line inspections, and other alternative testing methods and could result in additional disruptions in pipeline service.

19. In addition to the 2011 Act's requirements concerning MAOP, Gulf Crossing maintained that PHMSA is required by the 2011 Act to conduct studies to help determine whether to expand the scope of integrity management requirements or to require the use of automatic or remote-controlled shut off valves. Gulf Crossing stated that PHMSA's existing integrity management program covers only about seven percent of all gas transmission pipelines, but portions of the 2011 Act have the potential to apply to all gas transmission pipelines. Gulf Crossing also maintained that, if PHMSA determines that

[16] Basically, these are areas with greater population density.

such changes are appropriate, PHMSA has the discretion to initiate a rulemaking to implement them.

20. Gulf Crossing asserted that the risk of outages under the new pipeline safety requirements is sufficiently detailed to provide certainty as to the range of impacts and is not speculative. Gulf Crossing further contended that any such outages should be considered outside the control of the pipeline and thus qualify as *force majeure* events for which cost sharing is appropriate, contending that the costs of such outages are not currently included in their rates. Gulf Crossing further asserted that its proposed risk sharing mechanism will not provide an incentive to prolong outages because it will have an incentive to keep outages to the shortest possible duration to reduce the amount of reservation charge credits after the 10-day safe harbor grace period.

21. Gulf Crossing contended that the service disruptions anticipated to result from the 2011 Act and pending PHMSA rulemakings were not contemplated prior to the 2011 Act and are not accounted for in Gulf Crossing's existing rates or the Commission's existing *force majeure* policy. Gulf Crossing argued that any rate changes through a general section 4 rate case or adjustment of billing determinants and return on equity would only take place on a prospective basis. Gulf Crossing maintained that until it has operated under any increased regulatory requirements for a transitional period, including those costs in its rates would be difficult because the outages would not be reflected in test period data. Gulf Crossing asserted that the exact level of service interruptions resulting from the new requirements is unknown, and a proposal to include their costs in its rates could potentially be rejected on the ground that such interruptions are speculative and non-recurring events, i.e., such as interim pressure reductions. Gulf Crossing asserts that resolution through a general section 4 rate case ignores the realities of the current natural gas market, and it likely would be unable to recover any increased rate because of competitive circumstances.

22. In the alternative, Gulf Crossing offered to limit its equitable sharing proposals to a transitional period outside its *force majeure* provisions. Gulf Crossing proposes a transitional period when the costs of outages caused by increased regulatory requirements are not reflected in its rates. Gulf Crossing contended that treating outages due to the 2011 Act as *force majeure* events for at least a transitional period is necessary to address their cost recovery concerns.

23. In their Responses, the respondents generally argue that the proposal to modify the definition of *force majeure* conflicts with Commission and judicial precedents, including *North Baja*, that classify outages for scheduled maintenance as non-*force majeure* events. They also point out that PHMSA has not yet determined what requirements will be necessary for pipelines to comply with the 2011 Act and that the Act does not require PHMSA to issue any regulations until July 3, 2013. Therefore, the respondents contend that Gulf Crossing has not presented any evidence that it will be unable to provide

primary firm service as a result of the possibility of future regulations which have not yet been enacted.

24. The respondents argue that Commission policy requires that *force majeure* events must be both uncontrollable and unexpected. They contend that outages for compliance with the 2011 Act are not unexpected, as evidenced by Gulf Crossing's instant request. The respondents also assert that the details of how Gulf Crossing manages compliance with any new requirements resulting from the 2011 Act, including when and where outages occur is likely to be in the control of the pipeline. The respondents further assert that testing and maintenance required by government regulation are part of a pipeline's duties under a certificate of service and are not appropriately considered a *force majeure* event. Some respondents argue that *North Baja* only stated that a pipeline's rates should incorporate the costs associated with meeting its contractual obligations but did not require including such costs as a requirement for crediting. The respondents also argue that, if Gulf Crossing's rates are insufficient to recover those costs it may file pursuant to section 4 for a rate increase.

25. The respondents also contend that, if Gulf Crossing is unable to verify its records and confirm the MAOP of certain pipeline segments, as required by section 23(a) of the 2011 Act, that could be the result of its own negligence in failing, for example, to keep proper records or conduct appropriate tests in the past. The respondents assert that, in such circumstances, any outages required to reconfirm MAOP could not qualify as no-fault, *force majeure* events for which only partial credits are required.

26. In its Answer to Responses, Gulf Crossing argues that its new obligations are not speculative since PHMSA is actively developing regulations to implement the 2011 Act. Gulf Crossing asserts that a significant expansion of PMSHA regulation is reasonably foreseeable and could result in service interruptions. Gulf Crossing further asserts that, in any case, shippers will not be harmed if there are no disruptions. Gulf Crossing argues that interruptions are not, and could not have been, included in its rates and, therefore, its proposal is not inconsistent with the outages considered in *North Baja* since these outages are not provided for in its existing rates.

27. Gulf Crossing also states that it could be required to reconfirm MAOP on certain portions of its system despite having followed all applicable regulatory requirements, and thus outages required for such reconfirmation would not be attributable to any negligence on its part. It points out that neither the pipeline safety laws nor PHMSA regulations required Gulf Crossing to retain record of the original design, installation, construction, initial inspection and initial testing specifications of pipeline facilities built before

August 19, 1970.[17] Gulf Crossing also states that it has set the MAOP of some of its pre-1970 pipeline at historical high operating pressures, as permitted by PHMSA regulations.[18]

3. Commission Determination

28. The Commission finds that Gulf Crossing's proposal to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings is overbroad. With one exception, the nature and timing of any new safety requirements PHMSA may adopt pursuant to the 2011 Act or ongoing PHMSA rulemakings is too speculative at this time to justify modifying Commission policy to treat any outages resulting from such new requirements as *force majeure*. However, for the reasons discussed below, we will allow partial reservation charge crediting for a transitional two-year period for outages due to orders PHMSA may issue pursuant to section 60139(c) of Chapter 601 of Title 49, as added by section 23 of the 2011 Act. This determination is without prejudice to Gulf Crossing filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable.

Safety Requirements Other Than Those Related to MAOP

29. Aside from the 2011 Act's provisions concerning MAOP, Gulf Crossing focuses primarily on potential new regulations concerning integrity management programs and remote or automatic shut-off valves in order to support its proposal to revise its definition of *force majeure*. However, as discussed below, it is unclear at the present time what changes, if any, PHMSA may make with respect to its existing regulations concerning integrity management and shut-off valves. Nor do any such changes appear likely to take effect before 2014, at the earliest. In these circumstances, Gulf Crossing cannot show that its proposal to provide only partial reservation charges for outages that may result from whatever regulations PHMSA may adopt on these subjects is just and reasonable.

30. PHMSA adopted its first integrity management regulations pursuant to the Pipeline Safety Improvement Act of 2002 (2002 Act), which provided for PHMSA to issue regulations requiring pipelines to implement integrity management programs for

[17] Citing 49 U.S.C. § 60104(b).

[18] Citing 49 C.F.R. § 192.619(c) (2012).

pipeline segments in HCAs. Those regulations took effect on January 14, 2004,[19] and specify how pipeline operators must identify, prioritize, assess, evaluate, repair, and validate the integrity of gas transmission pipelines in HCAs as part of their routine, periodic maintenance activities. Shortly after those regulations took effect, the Commission rejected a pipeline's proposal to treat outages resulting from PHMSA's integrity management regulations as *force majeure* events.[20] The Commission held that an outage due to periodic maintenance required by government regulations for the safe operation of the pipeline "is a necessary non-*force majeure* event within the control of the pipeline."[21] In subsequent orders, the Commission has explained that testing and maintenance required by government regulation are a part of the service provider's duties under a certificate of public convenience and necessity and thus are not appropriately considered a *force majeure* event or otherwise exempted from the requirement for full reservation charge crediting.[22]

31. In the ANOPR, PHMSA sought comments on whether the existing integrity management regulations should be strengthened. For example, PHMSA requested comment on whether the definition of a HCA should be modified to include more miles of pipeline; whether some integrity management requirements should be imposed on pipelines outside of HCAs; whether repair criteria for both HCA and non-HCA areas should be strengthened; whether in-line inspection methods, including pigging, should be required whenever possible; revising the requirements for collecting, validating, and integrating pipeline data; requiring the use of automatic and remote controlled shut off valves; and valve spacing. However, PHMSA did not propose any specific changes in its integrity management regulations in the ANOPR. Before making any changes to its

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[19] *See Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines),* 68 FR 69778 (December 15, 2003).

[20] *See Florida Gas Transmission Co.*, 107 FERC ¶ 61,074, at PP 19, 28-29 (2004) (*Florida Gas*).

[21] *Id.* P 29.

[22] *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009); *See also Natural Gas Pipeline Co. of America,* 106 FERC ¶ 61,310, at P 15 (2004) (*Natural*); *Tarpon Whitetail Gas Storage, LLC*, 125 FERC ¶ 61,050, at P 5 (2008) (*Tarpon Whitetail*); *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011), *order on reh'g,* 139 FERC ¶ 61,050, at PP 80-82 (2012) (*Tennessee*); *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126 at P 12, *order on reh'g,* 140 FERC ¶ 61,216, at P 88 (*Texas Eastern*); and *Rockies Express Pipeline Co.*, 139 FERC ¶ 61,275, at P 19 (2012) (*Rockies Express*).

integrity management regulations in response to the comments received in response to the ANOPR, PHMSA must issue a notice of proposed regulations (NOPR), proposing specific changes to those regulations and requesting comment. PHMSA must then analyze those comments and issue a final rule adopting revised regulations. Thus, at the present time, there is no certainty as to whether and how PHMSA may modify its integrity management regulations in the rulemaking proceeding initiated by the ANOPR. Moreover, because PHMSA has not yet issued a NOPR on this subject, it will likely be at least a year before any final rule can be issued in that proceeding.

32. In addition to the integrity management issues raised by the ANOPR, sections 5(a) and (b) of the 2011 Act require PHMSA to evaluate, by July 3, 2013, whether some or all of its integrity management requirements should be expanded beyond HCAs, taking into account various factors including "the need to perform integrity management assessments and repairs in a manner that is achievable and sustainable, and that does not disrupt pipeline service," and "the options for phasing in the extension of integrity management requirements beyond [HCAs], including the most effective and efficient options for decreasing risks to an increasing number of people living or working in proximity to pipeline facilities." Section 5(c) of the Act requires PHMSA to submit a report to Congress by January 3, 2014 on the results of its evaluation of expanding integrity management requirements. In order to give Congress time to review the report, section 5(f) of the Act prohibits PHMSA from issuing any final rule expanding IM requirements beyond HCAs until the earlier of one year after completion of the report to Congress or January 3, 2015, unless PHMSA determines such a regulation is necessary to address a risk to public safety, property, or the environment or an imminent hazard exists.

33. Thus, the 2011 Act does not require PHMSA to take any specific actions with respect to its integrity management regulations, apart from evaluating the need for expanding the existing requirements in its regulations and submitting a report to Congress by January 3, 2014. Moreover, the 2011 Act requires PHMSA to wait until the earlier of one year after submitting the report or January 3, 2015, to issue any final rule expanding integrity management requirements beyond HCAs, unless such a regulation is necessary to address a risk to public safety, property, or the environment. It thus appears unlikely that any such final rule could take effect before 2015.

34. Until there is some certainty as to what new integrity management requirements PHMSA may adopt for pipelines and when they will take effect, it is premature for the Commission to consider modifying its well established current policy that pipelines must provide full reservation charge credits for outages of primary firm service due to scheduled maintenance and repairs performed as part of an integrity management program. Because of the uncertainty as to what integrity management requirements may be adopted, it is uncertain how any such new requirements will affect pipelines' ability to minimize outages due to their integrity management activities. For example, it is unclear whether, even if PHMSA adopts strengthened integrity management regulations, those

regulations will significantly exceed the integrity management activities pipelines are already voluntarily conducting and would conduct in any case. The Interstate Natural Gas Association of America (INGAA) has reported to PHMSA that, while only about 4.5 percent of all member pipeline miles are included in HCAs, interstate pipelines have assessed and mitigated 53 percent of their pipeline miles pursuant to IM programs.[23]

35. Also, section 5 of the 2011 Act requires PHMSA to take into account "the need to perform integrity management assessments and repairs in a manner that . . . does not disrupt pipeline service" and to consider options for phased implementation of any new requirements. When PHMSA adopted the first integrity management regulations pursuant to the 2002 Act, it gave pipelines no later than one year after enactment to develop written integrity management plans and gave pipeline operators no later than five years after enactment to assess 50 percent of their covered pipelines and another five years to assess the remainder. There could be a similar phased implementation of any new requirements, which would give pipelines considerable control over when any necessary outages on particular pipeline segments occur. In light of the uncertainty concerning the nature and timing of any new integrity management requirements, the Commission lacks the information necessary to evaluate whether it would be just and reasonable to grant any relief from the present requirement that pipelines provide full reservation charge credits for any outages of primary firm service due to integrity management activities required to comply with PHMSA regulations.

36. With regard to Gulf Crossing's concern about shut-off valves, section 4 of the 2011 Act requires PHMSA, "if appropriate," to issue regulations not later than January 3, 2014, requiring automatic shut-off valves on pipelines constructed or entirely replaced after adoption of the regulation where economically, technically and operationally feasible. PHMSA has not yet issued any Notice of Proposed Rulemaking pursuant to section 4 of the Act. Therefore, PHMSA has not yet provided even a preliminary statement of its views concerning the appropriateness of requiring such shut-off valves. Moreover, even if PHMSA does determine such regulations are appropriate, any regulations it adopts would only apply to new construction occurring after adoption of the regulations and would not appear to be directly related to existing pipeline facilities. Accordingly, as with integrity management, it is premature to consider whether to permit partial reservation charge crediting for outages of primary firm service related to the installation of shut-off valves.

37. The 2011 Act contains numerous other provisions requiring studies of various kinds, apart from the MAOP provisions discussed in the next section. For example,

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[23] *See* INGAA submission responding to *The State of the National Pipeline Infrastructure – A Preliminary Report*, June 22, 2011, Docket No. PHMSA-2011-0127.

section 7 of the Act requires PHMSA by December 31, 2012, and every two years thereafter, to conduct surveys to measure progress in plans for safe management and replacement of cast iron (CI) pipelines. PHMSA must also submit a report to Congress not later than December 31, 2013, identifying all CI pipelines and evaluating the pipeline's safety programs. However, Gulf Crossing does not expressly rely on these other provisions to support their partial crediting proposal.

MAOP Requirements

38. We now turn to the new requirements concerning MAOP established by section 23 of the 2011 Act. As described above, section 23(a) of the 2011 Act added section 60139, Maximum Allowable Operating Pressure, to Chapter 601 of Title 49 of the United States Code. Section 60139(a) required each owner and operator of a pipeline to conduct a verification of its records of relating to pipelines in class 3 and class 4 locations and class 1 and class 2 HCAs by July 3, 2012. The purpose of the verification is to ensure that the records accurately reflect the physical and operational characteristics of the subject pipelines and to confirm their established MAOP. Section 60139(b) requires each owner or operator of a pipeline facility to identify and submit to PHMSA documentation relating to each pipeline segment for which its records are insufficient to confirm the established MAOP of the segment by July 3, 2013. Section 60139(c)(1) provides that, after receiving this information, PHMSA must require the pipeline owner or operator of a pipeline facility identified pursuant to section 60139(b) to reconfirm a MAOP "as expeditiously as economically feasible," and PHMSA must determine what interim actions "are appropriate for the pipeline owner or operator to take to maintain safety until a [MAOP] is confirmed." Section 60139(c)(2) requires that, in determining the interim actions for each pipeline owner or operator to take, PHMSA must take into account "potential consequences to the public safety and the environment, potential impacts on pipeline system reliability and deliverability, and other factors, as appropriate."

39. Section 60139(d)(1) also requires PHMSA to issue regulations by July 3, 2013, to require testing to confirm the material strength of previously-untested gas pipelines located in HCAs which are operating at a pressure greater than thirty percent of specified minimum yield strength (SMYS). This requirement includes both grandfathered pre-1970 pipelines and post-1970 pipelines. Section 60139(d)(2) requires PHMSA to consider safety testing methodologies, including at a minimum pressure testing and other alternative methods, including in-line inspections, determined by DOT to be of equal or greater effectiveness. Section 60139(d)(3) requires PHMSA, in consultation with the Chairman of FERC and State regulators, to establish time frames for completion of the testing which "take into account potential consequences to public safety and the environment and that minimize costs and service disruptions."

40. For the reasons discussed below, we find it is just and reasonable for Gulf Crossing to provide partial reservation charge credits consistent with the Safe Harbor

Method for outages of primary firm service required to comply with orders issued by PHMSA pursuant to section 60139(c) for a transitional two-year period starting on January 1, 2013. However, it is premature to consider any similar partial reservation crediting provision for outages that may be caused by any strength testing regulation PHMSA may adopt pursuant to section 60139(d).

41. Section 60139(c) provides that, if a pipeline is unable to confirm MAOP for a pipeline segment by July 3, 2013, PHMSA must require the pipeline to reconfirm the MAOP of the segment as expeditiously as economically feasible, and PHMSA may require the pipeline to take interim actions to maintain safety until MAOP can be confirmed. Unlike the other sections of the 2011 Act discussed above, all of which require PHMSA to conduct rulemaking proceedings before modifying current requirements, section 60139(c) does not require PHMSA to conduct any rulemaking proceeding before it orders particular pipelines to reconfirm MAOP and take interim actions to maintain safety until MAOP is confirmed. Rather, PHMSA may simply issue an order to a particular pipeline tailored to address the specific circumstances of its system. Therefore, unlike the non-MAOP provisions of the 2011 Act discussed in the preceding section, PHMSA actions pursuant to section 60139(c) of the Act are relatively imminent, and could take effect at any time without advance notice of the type that would ordinarily be provided in a rulemaking proceeding.

42. In addition, the Commission finds several other important factors which distinguish any outages resulting from actions PHMSA takes pursuant to section 60139(c) from the routine, periodic maintenance which the Commission has held are within the control of the pipeline and therefore must be treated as non-*force majeure* events for which full reservation charge credit must be given. First, whatever actions PHMSA takes pursuant to section 60139(c) of the 2011 Act would be one-time non-recurring events. Section 60139(c) does not create an ongoing requirement to reconfirm MAOP on a periodic basis comparable to ordinary integrity management programs. Section 60139 simply authorizes PHMSA to require a one-time reconfirmation of MAOP for the subject pipeline segments, pursuant to in-line inspection, hydrostatic testing, or other alternative tests.[24] Also, any interim safety measures, such as a requirement for the pipeline to operate at reduced pressure, would only be in effect until MAOP is reconfirmed. Moreover, the pipeline could have less discretion concerning the timing of

[24] In this regard, PHMSA orders requiring a one-time reconfirmation of MAOP and interim safety measures may be considered comparable to the one-time requirement that a pipeline be relocated for highway construction, which the Commission held could be treated as a *force majeure* event in *Florida Gas*, 107 FERC ¶ 61,074 at P 32. *See also Tarpon Whitetail*, 125 FERC ¶ 61,050 at P 6.

testing to reconfirm MAOP or any interim measures to maintain safety until MAOP can be reconfirmed, than it has concerning the timing and location of routine scheduled maintenance.

43. Second, costs of outages for such one-time testing or reduced operating pressure would generally not be recurring costs eligible for inclusion in a pipeline's rates in a general section 4 rate case.[25] By contrast, as the court in *North Baja* emphasized in affirming our policy concerning full reservation charge credits for scheduled maintenance, that policy is premised on the ability of the pipeline to include the expected costs that would be incurred under that policy in its rates.[26]

44. The Commission also finds that a blanket authorization of partial crediting for outages required to reconfirm MAOP pursuant to section 60139(c) for a transitional period is consistent with Congress's determination that MAOP should be confirmed "as expeditiously as economically feasible." The Commission recognizes that there could be circumstances in which a pipeline's inability to verify its records concerning the MAOP of a particular pipeline segment could arguably be attributable at least in part to the pipeline's failure to maintain adequate records, at least for pipeline segments constructed after 1970. However, the Commission finds that, on balance, it is preferable to permit pipelines to include in their tariffs a bright-line rule that the pipeline will provide partial reservation credits for all outages resulting from PHMSA orders issued pursuant section 60139(c). Such a bright-line rule should minimize the need for burdensome case-by-case consideration of whether a pipeline's mismanagement may have contributed to its inability to verify the records for a particular pipeline segment. This will expedite the resolution of what credits are due the shippers. Also, the requirement that the pipeline provide partial credits regardless of fault will ensure that pipelines share the risk of all outages of primary firm service resulting from compliance with PHMSA orders pursuant to section 60139(c).

45. The Commission will limit any authorization for partial crediting for outages resulting from section 60139(c) to a transitional period of two years. This two-year transitional period is consistent with the fact that actions by PHMSA pursuant to section 60139(c) are only temporary in nature to reconfirm MAOP and require interim safety measures until MAOP is reconfirmed. After MAOP is reconfirmed, there should no longer be a need for such a special partial crediting provision. At the end of the transitional period, the Commission will reexamine whether there is any need to extend

[25] *See* 18 C.F. R. § 154.303(a)(4) (2012).

[26] *North Baja*, 483 F.3d 819, 823.

this tariff provision. Accordingly, Gulf Crossing may include in its tariff a provision permitting partial reservation charge crediting, for a transitional period of two years commencing on January 1, 2013, for outages resulting from orders issued by PHMSA pursuant to section 60139(c) of the 2011 Act. That tariff provision should include a requirement that, when Gulf Crossing provides notice of an outage required to comply with an order issued by PHMSA pursuant to section 60139(c), that notice identify the specific PHMSA order with which it is complying.

46. This allowance of partial crediting is limited solely to outages resulting from section 60139(c). Unlike section 60139(c), section 60139(d) requires PHMSA to issue regulations by July 3, 2013, before requiring strength testing of previously-untested gas pipelines located in HCAs and operating at a pressure greater than thirty percent of specified minimum yield strength. Section 60139(d) also requires PHMSA, in consultation with the Chairman of FERC and State regulators, to establish time frames for completion of the testing which minimize outages. Therefore, it is possible that the pipelines will be permitted a longer period of time to conduct this testing, than any testing required to reconfirm MAOP or interim safety measures adopted under section 60139(c) of the 2011 Act discussed above. That would give the pipelines a greater ability to control outages due to the strength testing required by section 60139(d), than they are likely to have in complying with requirements issued under section 60139(c). Accordingly, the Commission finds that consistent with the discussion above, it is appropriate to await developments in the rulemaking proceeding required by section 60139(d) before permitting any special tariff provision with respect to outages resulting from strength testing under section 60139(d).

47. In summary, the Commission finds that Gulf Crossing has not shown that its proposal to revise its definition of *force majeure* to include all testing, repair, replacement, refurbishment, or maintenance activity required to comply with the 2011 Act and ongoing PHMSA rulemaking proceedings is just and reasonable. However, the Commission will permit Gulf Crossing to file revised tariff records which require the partial reservation charge credits for outages due to PHMSA orders pursuant to section 60139(c) of the 2011 Act for a transitional period of two years. We emphasize that our holdings in this order are without prejudice to Gulf Crossing filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable. The Commission is aware of the possible impact of the 2011 Act and PHMSA rulemakings and will closely monitor the implementation of the new requirements. The Commission is tracking the impacts of the 2011 Act and understands the importance of these issues and

will consider the need for further action as the impact of PHMSA's implementation process moves forward.[27]

B. Calculation of Reservation Charge Credits During non-*Force Majeure* Outages

1. Gulf Crossing's Proposal

48. Proposed section 6.23(2)(a) provides that Gulf Crossing will provide reservation charge credits "for any Maintenance Average Usage Quantity that Gulf Crossing failed to deliver to the primary delivery point(s), provided such quantity was not utilized on a non-primary basis." As proposed in Gulf Crossing's June 20, 2012 filing, section 6.23(2)(b) provides that the Maintenance Average Usage Quantity shall be:

> (i) the Customer's average nominated quantity of Primary Firm Service requiring nominations and (ii) Customer's average actual flows at primary delivery locations where nominations are not required. Such average shall be determined based upon the seven (7) Gas Days prior to the first Gas Day of the maintenance event; provided, however, during the first Gas Day of the Maintenance Event, the Customer's "Maintenance Average Usage Quantity" *shall be the quantity of Primary Firm Service scheduled or, if greater, the quantity of Primary Firm Service that would have been scheduled but for the Maintenance Event* if:
>
> (ii) Gulf Crossing did not post notice of the Maintenance Event before 7:00 a.m. CCT the Gas Day preceding the Maintenance Event; and
>
> (iii) the Customer did not change its nomination under its firm service agreement after Gulf Crossing posted notice of the Maintenance Event [emphasis added].

49. In its Answer, Gulf Crossing offered to clarify this proposed language in response to Indicated Shippers' contention that the seven day average should only be used to determine credits for subsequent days of a multi-day outage when Gulf Crossing gave

[27] See *Mississippi River Transmission, LLC*, 140 FERC ¶ 61,253, at P 65 (2012), where the Commission expressed similar concerns in denying a proposal to track costs related to the requirements of the 2011 Act.

advance notice that the outage would continue on that particular day before the Timely Nomination Cycle for that gas day. Specifically, Gulf Crossing proposed to add the following language to section 6.23(2)(b):

> The previous seven (7) days' average daily quantity usage will only be used in the determination of the Maintenance Average Usage Quantity when Gulf Crossing has posted notice prior to the Timely Cycle nomination deadline that the capacity will be unavailable for the day in question.

Gulf Crossing also proposed to amend section 6.23(2)(b)(ii), to change the 7:00 a.m. CCT deadline to conform to the deadline established above, which is tied to the Timely Cycle nomination deadline. Gulf Crossing asserted that such deadline for the posting notice is appropriate because it better synchronizes with the actual nominations process.

2. Positions of the Parties

50. In its initial protest to Gulf Crossing's filing, Indicated Shippers contended that the italicized language improperly limits the calculation of credits for the first day of the outage to the amount that is scheduled or would have been scheduled but omits the requirements that reservation charge credits be based upon the amount nominated that the pipeline was unable to schedule or deliver. Indicated Shippers argued that the Commission in *Tennessee* "required pipelines to provide shippers a full reservation charge credit for the amount of primary firm service they nominated to be scheduled but the pipeline was unable to schedule or deliver."[28] Indicated Shippers request that the Commission require Gulf Crossing to modify the italicized language so that the credits are based upon the amount of primary firm service nominated, as opposed the amount which was scheduled or would have been scheduled but for the outage.

51. In its answer, Gulf Crossing contends that the proposed language reasonably takes into consideration the circumstances both when notice is and is not provided prior to the Maintenance Event. Gulf Crossing also states that the Commission approved language similar to that objected to by Indicated Shippers in *Midwestern Gas Transmission Co.*[29]

52. Indicated Shippers responds that Gulf Crossing's proposed language not only does not properly differentiate between the amount nominated and the amount Gulf Crossing

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[28] Citing *Tennessee Gas Pipeline Co., L.L.C.*, 135 FERC ¶ 61,208 at P 74.

[29] Citing 137 FERC ¶ 61,257, at PP 15, 18 (2011) (*Midwestern*).

scheduled and was unable to deliver but also does not describe how Gulf Crossing would know what volumes "would have been scheduled but for the Maintenance Event."

3. Commission Determination

53. As Indicated Shippers states, when there is no advance notice of an outage, the amount of reservation charge credits a pipeline must give in the non-*force majeure* situation is measured by the amount of service which the shipper nominated to be scheduled by the pipeline but the pipeline was unable to schedule or deliver.[30] We believe that Gulf Crossing's proposal to provide credits for "the quantity of Primary Firm Service that would have been scheduled but for the Maintenance Event" may be read as consistent with that policy, because the quantity that would have been scheduled but for the maintenance event would appear to be the amount the shipper nominated to be scheduled. However, in order to avoid any ambiguity, the Commission directs Gulf Crossing to revise proposed section 6.25(2)(b)(i) to expressly provide that, when there is no advance notice of an outage, Gulf Crossing will provide credits based on the amount of primary firm service which the shipper nominated for scheduling, but the pipeline was unable to schedule or deliver because of a non-*force majeure* event.

54. The Commission also finds that Gulf Crossing's proposal in its Answer to revise section 6.23(2)(b) to clarify that the seven days average will only be used when Gulf Crossing has posted notice before the Timely Cycle Nomination deadline that the capacity will be unavailable is reasonable and consistent with Commission policy. Therefore, Gulf Crossing is directed to file revised tariff records to revise section 6.23(2)(b) consistent with that alternative proposal.

C. Secondary Points

1. Gulf Crossing's Proposal

55. Proposed section 6.23(5)(a) states that Gulf Crossing will reduce the amount of reservation charge credits owed by "the quantity of gas delivered by Gulf Crossing to non-primary delivery points during the FM [*force majeure*] or the Maintenance Event."

2. Positions of the Parties

56. Indicated Shippers argues that the proposed tariff language conflicts with Gulf Crossing's intent to reduce credit amounts by non-primary deliveries used by the shipper

[30] *See, e.g., Tennessee Gas Pipeline Co., L.L.C.*, 135 FERC ¶ 61,208, at P 74. *See also Southern Natural Gas Co.*, 135 FERC ¶ 61,056, at P 32, *order on reh'g*, 137 FERC ¶ 61,050 (2011).

because the proposed language does not require action on the shipper's part to effectuate a delivery by Gulf Crossing. Indicated Shippers asserts that, as a result, the proposed language could permit Gulf Crossing to act on its own accord to deliver gas to non-primary delivery points and thereby reduce a shipper's reservation charge credits accordingly. Therefore, it requests that the Commission direct Gulf Crossing to revise its tariff to expressly require that Gulf Crossing may only reduce reservation charge credits based on deliveries to secondary points when the shipper nominates such deliveries to the secondary point. Gulf Crossing answers that its proposed section 6.23(5)(a) must be read in the context of its entire tariff. Gulf Crossing states that, under its tariff, it must receive and deliver gas based on nominations submitted by customers pursuant to their service agreements. Therefore, it cannot deliver gas to a shipper's secondary points on its own accord for the purpose of reducing a shipper's reservation charge credits.

3. Commission Determination

57. The Commission agrees with Gulf Crossing that Indicated Shippers' requested change in section 6.23(5)(a) is unnecessary. As Gulf Crossing states, its tariff does not give it discretion to make deliveries to secondary points when such deliveries are not nominated, and therefore, Gulf Crossing could not engage in the gaming about which Indicated Shippers is concerned without violating its tariff.

D. Submission of Nominations

1. Positions of the Parties

58. Indicated Shippers argues that the Commission should require Gulf Crossing to revise its proposal to be consistent with the Commission policy set forth in *Wyoming Interstate Company, Ltd*.[31] Indicated Shippers asserts that, consistent with *WIC*, a shipper should not be required to submit a primary firm nomination in the Timely and Evening cycles to be eligible for reservation charge credits if the shipper has moved its now curtailed amounts to another pipeline.

59. Gulf Crossing asserts that it has not proposed a requirement to re-submit nominations. Gulf Crossing asserts re-submission is not an issue where a historical seven-day average is used and the nominations have already occurred. Gulf Crossing further asserts that the proposal obviously does not require re-submission of a nomination for credits during the first day of a curtailment when credits are based upon that day's nominations.

[31] 130 FERC ¶ 61,091, at P 17 (2010) (*WIC*).

60. Indicated Shippers requests that, as in *Rockies Express*,[32] Gulf Crossing's tariff be interpreted to require that a shipper only need nominate in the Timely and Evening nomination cycles to receive reservation charge credits, unless the shipper nominates a curtailed quantity on an alternate pipeline. Indicated Shippers contends that, to the extent that Gulf Crossing interprets its tariff otherwise, the Commission should require Gulf Crossing to file tariff sheets in compliance with *WIC*.

2. Commission Determination

61. While the Commission found in *WIC* that it is unreasonable to require a shipper that has been curtailed by WIC and then moved its supply to another pipeline to renominate in the Evening Cycle in order to claim a reservation charge credit, that decision was in response to WIC's proposal to require a shipper to resubmit a nomination in the Evening Cycle in order to receive the credit even if the shipper moved to an alternate pipeline. In contrast, Gulf Crossing states that, if a shipper does not receive nominated firm service, it will be entitled to a credit without having to resubmit a nomination in a later nomination cycle. Therefore, Indicated Shippers' request that the Commission direct Gulf Crossing to implement tariff language that provides a shipper only need to nominate in the Timely and Evening nomination cycles to receive reservation credits is denied, as unnecessary.[33]

E. Outages Due to Acts of Shippers or Third Parties

1. Gulf Crossing's Proposal

62. Proposed section 6.23(4) provides that a customer's "Average Usage Quantity shall be reduced to the extent any curtailments are the result of Customer's negligence or intentional wrongful acts. Customer shall not be entitled to [reservation] charge credits as a result of loss of any of the following: (a) gas supply, (b) markets, or (c) transportation upstream or downstream of Gulf Crossing's system."

63. Indicated Shippers argued that proposed section 6.23(4) conflicts with the Commission's policy which holds that a pipeline is exempted from providing reservation charge credits only where the outage is solely due to an upstream or downstream disruption or the conduct of a third party, including shippers, and not controlled by the pipeline.

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[32] Citing *Rockies Express*, 139 FERC ¶ 61,275 at P 6.

[33] *Tennessee*, 139 FERC ¶ 61,050 at PP 103-04.

64. In its Answer, Gulf Crossing contended that its proposed section 6.23(4) is consistent with Commission policy. However, Gulf Crossing stated that it is willing to modify the second sentence of its section 6.23(4) with the following emphasized language:

> *Unless Gulf Crossing has declared a force majeure, maintenance, or non-force majeure event,* Customer shall not be entitled to demand charge credits as a result of loss of any of the following: (a) gas supply, (b) markets, or (c) transportation upstream or downstream of Gulf Crossing's system.

65. Gulf Crossing asserts that this clarification makes it clear that Gulf Crossing will not be exempt from providing credits if it cannot provide service due to an interruption on its facilities. Gulf Crossing contends that its proposed revision is more appropriate than limiting the exemption to circumstances solely due to others' operating conditions or the conduct not controlled by the pipeline since use of the term "solely" could be interpreted to require reservation charge credits when not appropriate. Gulf Crossing gave the following example of a situation where it asserted that reservation credits would be inappropriate, even though a party might contend that the inability to make deliveries was not due solely to another pipeline. In this example, Gulf Crossing has historically delivered gas into Pipeline X at a certain pressure. Pipeline X declares a *force majeure* but claims that the reason it cannot accept Gulf Crossing's gas is due to pressures provided by Gulf Crossing. However, Gulf Crossing stands ready and able to delivery gas at historical pressures. Gulf Crossing asserts in such a situation it should not be obligated to provide reservation charge credits because the cause of the interruptions is outside of Gulf Crossing's control.

2. Positions of the Parties

66. Indicated Shippers asserts that there is no basis for Gulf Crossing's proposed exemption, because Gulf Crossing's proposal relates to the inability to deliver gas at the pipeline interconnect due to deviations in pressure from historical averages. Indicated Shippers further asserts that the pressure at an interconnection is solely an issue between the interconnecting parties and there are contractual remedies.

67. Gulf Crossing contends that this provision was not drafted to apply specifically to *force majeure* events and, rather, is a general provision that applies to "any" curtailment. Gulf Crossing further contends that it is appropriate that reservation charge credits be reduced to the extent curtailments were caused by a customer's negligent or intentional wrongful acts, i.e., if a customer negligently damages Gulf Crossing's pipe.

3. Commission Determination

68. We find that Gulf Crossing's proposed crediting exemption must be revised to be consistent with Commission policy. Commission policy is to require the pipeline to provide reservation charge credits for outages where the failure to deliver is due to events within the pipeline's control. On the other hand, when a pipeline cannot deliver the service because of events not within the pipeline's control, i.e., due to the conduct of the shipper or the operator of upstream or downstream facilities, the pipeline should not be required to grant credits.[34] Therefore, Gulf Crossing's proposed exemption must be limited to include only those circumstances where its failure to provide service is due to events or conduct of others outside of its control which result in an outage of reserved firm service.

69. In addition, when *force majeure* events occur on both Gulf Crossing's facilities and the facilities of others, Gulf Crossing could not have provided service in any case. Therefore, as the Commission found in *Paiute Pipeline Co.*, in a *force majeure* event when both the pipeline's and the facilities of others are affected, then the traditional *force majeure* rule applies and the pipeline is required to provide partial credits.[35] Therefore, Gulf Crossing's tariff also must expressly provide that it is exempted from issuing reservation charge credits only when Gulf Crossing's failure to schedule or deliver gas is solely due to conduct of others not controllable by Gulf Crossing.[36]

70. Gulf Crossing's alternative also does not conform to the Commission policy discussed above. The additional language requiring a declaration of an outage by the pipeline must be eliminated to make clear that it is the pipeline's failure to deliver the nominated firm service, not declarations by the pipeline related to the outage, that requires it to provide reservation charge credits. Therefore, the Commission directs Gulf Crossing instead to limit the scope of the proposed section 6.23(4) exemption to make clear that Gulf Crossing is exempted from issuing reservation charge credits only when Gulf Crossing's failure to deliver gas was due solely to the conduct of others or events

[34] *See, e.g.*, *Natural*, 106 FERC ¶ 61,310 at P 15, n.10; *Tennessee*, 139 FERC ¶ 61,050 at PP 100-101; *TransColorado Gas Transmission Company, LLC*, 139 FERC ¶ 61,229, at P 50 (2012) (*TransColorado*).

[35] *Paiute Pipeline Co.*, 139 FERC ¶ 61,089, at PP 30-32 (2012). *See also Rockies Express*, 139 FERC ¶ 61,275 at P 12; *TransColorado*, 139 FERC ¶ 61,229, at PP 51-52 (2012).

[36] *Rockies Express*, 139 FERC ¶ 61,275 at P 12; *TransColorado*, 139 FERC ¶ 61,229 at P 52.

not controllable by Gulf Crossing, i.e., operating conditions on upstream or downstream facilities or a shipper's inability to obtain gas supplies or find a purchaser to take delivery of the supplies.

F. Segmented Capacity, Capacity Release, and Partial Assignment

1. Positions of the Parties

71. Indicated Shippers argues that sections 6.23(1)(c) and 6.23(5)(d) both define the reservation charge credits owed for segmented capacity, capacity release, or partial assignment. Indicated Shippers contends that section 6.23(1)(c) should be eliminated as redundant to section 6.23(5)(d).

72. Gulf Crossing agrees to delete both proposed section 6.23(1)(c) and section 6.23(2)(c) because they are redundant to 6.23(5)(d), which would remain.

2. Commission Determination

73. We will accept Gulf Crossing's agreement to remove proposed sections 6.23(1)(c) and 6.23(2)(c). Therefore, we direct Gulf Crossing to file revised tariff records removing proposed sections 6.23(1)(c) and 6.23(2)(c), as proposed in its Answer.

G. Existing Curtailment Provision

74. The currently effective section 6.7(7) of Gulf Crossing's GT&C contains a provision regarding curtailment of service which does not comply with Commission policy. Prior to the present filing, section 6.7(7) provided, in part, that Gulf Crossing's service "may be interrupted or curtailed due to scheduled routine repair, and maintenance." As revised by the present filing, it states that Gulf Crossing's service "may be interrupted or curtailed due to maintenance or a non-Force Majeure event."

75. The Commission has found that pipeline service may be "curtailed" in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled.[37] Because routine repair or maintenance is not an emergency situation or an unexpected loss of capacity, the pipeline should take outages required for routine repair and maintenance into account when it is scheduling service, rather than curtailing service

[37] *See, e.g., Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126 at P 96; *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123 at 61,663; *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at P 68 (2011).

after it is scheduled. If an interruption of service is required for routine repair or maintenance, then the pipeline should not confirm shipper nominations to schedule service that it will not be able to provide for the period of the outage. For that reason, the Commission has held that pipelines should plan routine repair and maintenance through the scheduling process and should not curtail confirmed scheduling nominations in order to perform routine repair and maintenance.[38] Therefore, pursuant to section 5 of the NGA, Gulf Crossing is directed to modify section 6.7(7) of its GT&C to remove the authorization to curtail service to perform routine repair and maintenance or explain why it should not be required to do so.

H. *Force Majeure* Definition

1. Gulf Crossing's Existing Tariff Provision

76. Gulf Crossing's GT&C section 6.21(5)(1) includes "the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party)" as an instance of *force majeure*.

2. Positions of the Parties

77. Indicated Shippers argues that Gulf Crossing's current definition of *force majeure* described above violates Commission policy which limits *force majeure* to uncontrollable and unanticipated events and specifically excludes scheduled maintenance. Indicated Shippers contends that, accordingly, Gulf Crossing's currently effective definition of *force majeure* is unjust and unreasonable.

78. Gulf Crossing answers that this existing language, read as a whole with the proposed changes, makes clear that only non-routine maintenance and testing and not scheduled maintenance is included in the definition of *force majeure*. Gulf Crossing asserts that this provision applies only to outages necessary to comply with the previously unanticipated large-scale changes in PHMSA's pipeline safety regulations which are anything but routine and outside of the control of the pipeline.

3. Commission Determination

79. As discussed above, the Commission has held that outages for routine or scheduled maintenance do not constitute *force majeure* events which are both outside the pipeline's control and unexpected. In any case, contrary to Gulf Crossing's assertions,

[38] *Id.*

this provision is not limited to outages to comply with PHMSA regulations.[39] Therefore, this provision which defines all service interruptions for testing as *force majeure* events, is overbroad and thus contrary to Commission policy. Accordingly, pursuant to section 5 of the NGA, Gulf Crossing is directed to file revised tariff records to eliminating this provision from its definition of *force majeure* or explain why it should not be required to do so.

The Commission orders:

(A) The tariff records listed in footnote no. 1 of this order are accepted to become effective January 1, 2013, subject to conditions, as discussed in this order.

(B) Within thirty (30) days of the date of this order, Gulf Crossing is directed to file revised tariff records, to be effective January 1, 2013, modifying the tariff changes it filed pursuant to NGA section 4, concerning those proposals, consistent with the discussion in the body of this order.

(C) Within thirty (30) days of the date of this order, Gulf Crossing is directed, consistent with the discussion in the body of this order, pursuant to NGA section 5, either to modify certain existing provisions in its tariff or explain why it should not be required to do so.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[39] Any such provision would of course be subject to the Commission's determination of the related issues in this order.