152 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enable Gas Transmission, LLC
Formerly
CenterPoint Energy Gas Transmission
Company, LLC

Docket Nos. RP12-498-003
and RP12-498-004

ORDER ON REHEARING AND COMPLIANCE

(Issued July 16, 2015)

Table of Contents

Paragraph Numbers

1. On September 11, 2013, the Commission issued an Order on Rehearing and Compliance in the above-referenced proceeding.[1] As here relevant, that order required Enable Gas Transmission, LLC, (Enable)[2] to modify its tariff pursuant to section 5 of the Natural Gas Act. Specifically, the Commission found unjust and unreasonable: (1) Enable's reservation charge crediting tariff provisions; and (2) its liability and damage tariff provisions. The September 2013 Order accordingly required Enable to revise those parts of its tariff consistent with Commission policy. On October 11, 2013, Enable requested rehearing of the September 2013 Order. Enable also filed *pro forma* tariff records to comply with the September 2013 Order (October 2013 Compliance Filing).[3] Enable requests an effective date 60 days after the Commission accepts the revised records. Indicated Shippers filed a protest to the 2013 Compliance Filing limited to the reservation charge credit provisions. For the reasons discussed below, the Commission denies Enable's rehearing request and approves the *pro forma* tariff records subject to Enable submitting a compliance filing containing matching tariff records consistent with the discussion and conditions set forth in this order.

I. Reservation Charge Crediting

A. Background

2. In this proceeding, the Commission has sought to bring Enable's tariff into compliance with the Commission's reservation charge crediting policy. In general, the Commission requires all interstate pipelines to provide reservation charge credits to their firm shippers during both *force majeure* and non-*force majeure* outages. The Commission requires pipelines to provide full reservation charge credits for outages of

[1] *CenterPoint Energy Gas Transmission Co., LLC*, 144 FERC ¶ 61,195 (2013) (September 2013 Order).

[2] Effective July 30, 2013, CenterPoint Energy Gas Transmission Company, LLC (CenterPoint), changed its name to Enable Gas Transmission, LLC. Accordingly, while our earlier orders in this proceeding referred to the pipeline as CenterPoint, in this order the Commission will refer to the pipeline by its current name, Enable.

[3] The Commission rejected Enable's compliance filing because of a technical error, and on October 15, 2013, Enable refiled, as corrected, the 2013 Compliance Filing with no change in substance.

primary firm service caused by non-*force majeure* events, where the outage occurred due to circumstances within the pipeline's control, including planned or scheduled maintenance.[4] 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.[5] 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).[6] In *North Baja Pipeline, LLC v. FERC*, the United States Court of Appeals for the District of Columbia Circuit affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.[7]

3. In 2010, five trade associations representing producers, local distribution companies, and natural gas consumers filed a petition asserting that many pipelines were not in compliance with the Commission's reservation charge crediting policies and requesting that the Commission take action to bring the pipelines into compliance. In *Natural Gas Supply Association*,[8] the Commission responded by encouraging interstate pipelines to review their tariffs to determine whether they were in compliance with the Commission's policy concerning reservation charge credits, and, if not, make an appropriate filing to come into compliance. The Commission also stated that if any shipper on a particular pipeline believes that the pipeline's tariff does not comply with Commission policy and the pipeline is not taking appropriate action to bring its tariff into compliance, it could file a complaint alleging non-compliance and seek relief under section 5 of the Natural Gas Act (NGA), or raise the issue in any NGA section 4 filing by

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

[5] The Commission has defined *force majeure* outages as events that are both unexpected and uncontrollable. Opinion No. 406, 76 FERC ¶ 61,022 at 61,088.

[6] The Commission has also stated that pipelines may use some other method that achieves equitable sharing reasonably equivalent to the two specified methods.

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

[8] *Natural Gas Supply Ass'n*, 135 FERC ¶ 61,055, at P 2 (2011) (*NGSA*), *order on reh'g*, 137 FERC ¶ 61,051 (2011) (*NGSA Rehearing Order*).

the pipeline, including where the issue was not directly related to the pipeline's tariff proposal.[9]

4. Since 2011, a number of pipelines have voluntarily filed to bring their tariffs into compliance with the Commission's reservation charge crediting polices.[10] Other pipelines have complied with Commission orders requiring them to modify their tariffs consistent with Commission policy.[11] Enable, however, continues to assert that it should

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[9] *Id.* P 13 n.13 (citing *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,262, at P 22 (2009), *order on reh'g*, 132 FERC ¶ 61,111 (2010) (*Kern River I*), as an example of a limited section 4 filing where the Commission had permitted this issue to be raised, despite the fact the issue was not directly related to the pipeline's tariff proposal).

[10] *See, e.g.*, *Paiute Pipeline Co.*, 137 FERC ¶ 61,164 (2011), *order on technical conference*, 139 FERC ¶ 61,089 (2012), *order on reh'g and compliance*, 142 FERC ¶ 61,021 (2013) (*Paiute*); *Midwestern Gas Transmission Co.*, 137 FERC ¶ 61,257 (2011) (*Midwestern*); *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224 (2012), *order on reh'g and compliance*, 144 FERC ¶ 61,215 (2013) (*Gulf South*); *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222 (2012), *order on reh'g and compliance*, 145 FERC ¶ 61,021 (2013) (*Gulf Crossing*); *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223 (2012), *order on reh'g and compliance*, 145 FERC ¶ 61,100 (2013) (*Texas Gas*); *National Fuel Gas Supply Corp.*, 143 FERC ¶ 61,103 (2013) (*National Fuel*); *TransColorado Gas Transmission Co. LLC.*, 139 FERC ¶ 61,229 (2012), *order on reh'g and compliance*, 144 FERC ¶ 61,175 (2013) (*TransColorado*); *Gas Transmission Northwest LLC*, 141 FERC ¶ 61,101 (2012); *Rockies Express Pipeline LLC*, 142 FERC ¶ 61,075 (2013), *order on reh'g*, 144 FERC ¶ 61,216 (2013); *Viking Gas Transmission Co.*, 142 FERC ¶ 61,054 (2013); *Dominion Transmission, Inc.*, 142 FERC ¶ 61,154 (2013), *order on reh'g and compliance*, 146 FERC ¶ 61,101 (2014) (*Dominion*); *ANR Pipeline Co.*, 145 FERC ¶ 61,182 (2013) (*ANR*); *Iroquois Gas Transmission Sys., L.P.*, 145 FERC ¶ 61,233 (2013) (*Iroquois*); *Vector Pipeline L.P.*, accepted by unpublished delegated letter order dated August 25, 2014 in Docket Nos. RP14-1111-000 and RP14-1111-001; *Equitrans, L.P.*, 148 FERC ¶ 61,250 (2014); *National Grid LNG, LLC*, 149 FERC ¶ 61,117 (2014); *Millennium Pipeline Co., L.L.C.*, 149 FERC ¶ 61,290 (2014); *American Midstream (MidLa), LLC*, 150 FERC ¶ 61,058 (2015); *East Tennessee Natural Gas, LLC*, 150 FERC ¶ 61,239 (2015).

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

(continued…)

be permitted to retain its existing reservation charge crediting provisions approved during its Order No. 636 restructuring proceeding,[12] despite the fact that the Commission subsequently modified its reservation charge crediting policy.

1. <u>Enable's Reservation Charge Crediting Provisions and the September 2013 Order</u>

5. Enable's firm rate schedule provides for reservation charge credits pursuant to section 5.2(a), which states the following:

> Failure to Deliver Contract Demand: If during one or more Days in the Service Month Transporter is unable to deliver to a Shipper which is paying the maximum rate, including a Reservation Charge, Gas scheduled and received by Transporter for the account of Shipper, up to the Contract Demand, consistent with other Contract Limitations, established for the Service Month, then, for Shippers paying the maximum rate, the total applicable Reservation Charge shall be reduced by subtracting the product of the quantity of such Gas in Dth which Transporter did not deliver and the applicable currently effective Reservation Charge Adjustment Rate. For Shippers paying less than the maximum rate, the amount of the adjustment, if any, shall be consistent with the discount agreement between Shipper and Transporter.[13]

6. In addition, section 8.2 of the Enable's GT&C states:

> Repair and Maintenance. Transporter shall have the right to curtail, interrupt or discontinue service in whole or in part on

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148 FERC ¶ 61,025 (2014) (*Panhandle*); *Texas Eastern Transmission, LP*, 138 FERC ¶ 61,126 (2012), *order on reh'g and compliance* 140 FERC ¶ 61,216 (2012), *order on reh'g and compliance*, 149 FERC ¶ 61,143 (2014), *appeal withdrawn sub nom. Texas Eastern Transmission, L.P. v. FERC*, Docket No. 12-60892 (5th Cir. Apr. 20, 2015) (*Texas Eastern*).

[12] *Arkla Energy Res.*, 62 FERC ¶ 61,076 (1993), *order on reh'g and compliance*, 64 FERC ¶ 61,166, at 62,491-62,493 (1993), *order on reh'g and compliance*, 65 FERC ¶ 61,343 (1993) (*Restructuring Orders*).

[13] Enable Gas Transmission, LLC, FERC Gas Tariff, Rate Schedule FT, § 5.2(a), Original Sheet Nos. 56-57.

> all or part of its system from time to time in order to perform repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable governmental regulations and shall not be liable to Shippers therefor. Transporter shall exercise due diligence to schedule such activities so as to minimize interruptions or disruption of services and shall provide reasonable advance notice of same.

7. In a protest to Enable's March 19, 2012 filing to revise its fuel use and lost and unaccounted-for gas (LUFG) percentages and electric power costs, BP America Production Company and BP Energy Company (BP) raised the issue of whether Enable's tariff complied with the Commission's reservation charge crediting policies. The Commission's order accepting and suspending Enable's filing found that Enable's reservation charge crediting provisions appeared to be inconsistent with the Commission's reservation charge crediting policies concerning both non-*force majeure* and *force majeure* outages.[14]

8. The Commission pointed out that section 5.2(a) of Enable's firm rate schedule provides reservation charge credits only for the amount of natural gas "scheduled and received by" Enable which it does not deliver. The Commission stated that language could be read as providing that Enable will not provide reservation charge credits in situations where, for example, it does not schedule primary firm service because it is conducting routine maintenance or because a *force majeure* outage has occurred. If so, the Commission found that the provision is contrary to Commission policy requiring that credits be measured by the amount of natural gas *nominated* by the shipper which the pipeline did not schedule.[15] On the other hand, the Commission recognized that the amount a shipper nominates to be scheduled by the pipeline is sometimes referred to as the amount the shipper "scheduled," despite the fact that technically only the pipeline "schedules" service.[16] Therefore, the Commission stated that it was not certain if Enable intended to limit reservation credits solely to situations where it actually scheduled the service nominated by the shipper, received the natural gas, and then was unable to deliver the scheduled amount.[17] Accordingly, the Commission required Enable to explain whether it interprets its reservation charge crediting provision as consistent with

[14] *CenterPoint Energy Gas Transmission Co., LLC*, 139 FERC ¶ 61,064, at PP 26-27 (2012) (April 2012 Order).

[15] *Id*.

[16] *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 74 (2011) (*Tennessee*).

[17] April 2012 Order, 139 FERC ¶ 61,064 at P 26.

Commission policy and, if not, to either revise its tariff provisions concerning reservation charge crediting to conform to Commission policy, or explain why it should not be directed to do so.[18]

9. Additionally, BP had raised a concern that Enable may deny discounted rate shippers any reservation charge credits pursuant to the provision in section 5.2 of the FT Rate Schedule that "[f]or Shippers paying less than the maximum rate, the amount of the adjustment, if any, shall be consistent with the discount agreement between Shipper and Transporter." In order to better understand the extent to which Enable individually negotiates reservation charge credits in discount rate agreements, the Commission required Enable to describe any reservation charge crediting provisions contained in its discount rate agreements that vary from the default provision for maximum rate shippers.[19]

2. <u>The September 2013 Order</u>

10. Enable requested rehearing of the April 2012 Order and filed a response contending that its existing reservation charge crediting provisions are just and reasonable and should not be modified under NGA section 5. Enable stated that its reservation charge crediting provisions provide credits only when Enable is unable to deliver natural gas that has been "scheduled and received by [Enable] for the account of Shipper[.]"[20] Enable further explained that it will not schedule natural gas that is affected by a *force majeure* event or by a scheduled service interruption, and therefore does not provide reservation charge credits in those situations.

11. Enable argued that the Commission previously found these reservation crediting charges to be just and reasonable in its *Restructuring Orders*, and that neither the Commission nor BP had submitted evidence showing that such provisions have become unjust and unreasonable. Enable contended that the Commission has the burden of proof under section 5 of the NGA and therefore must produce evidence necessary to support a *prima facie* case that Enable's tariff is unjust and unreasonable. Enable asserted that the April 2013 Order improperly shifted this burden to Enable by requiring Enable to produce evidence to defend its existing tariff based on nothing more than the conclusory statement that the tariff might be inconsistent with the Commission's reservation charge crediting policy as described in the *NGSA* policy statement. Enable further contended

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[18] *Id.* P 27.

[19] *Id.*

[20] Enable May 2012 Rehearing Request at 7 (quoting section 5.2(a) of Rate Schedule FT of Enable's tariff).

that the Commission cannot require the target of a section 5 investigation to file "evidence" before first seeing the evidence submitted by the proponent of the change.

12. Enable also pointed out that section 8.2 of its General Terms and Conditions (GT&C) permits it to interrupt service to make repairs necessary to maintain its operational capability and comply with government requirements without providing reservation charge credits. Enable stated that section was approved in its *Restructuring Orders* and requires it to use due diligence to schedule such activities in a way that minimizes such interruptions. Enable asserted that, before the Commission can require Enable to modify section 8.2, it must adduce evidence showing that Enable is violating the requirement that it exercise due diligence so as to minimize interruptions.

13. Enable next addressed the April 2013 Order's directives regarding the manner in which it negotiates reservation charge credits in discount rate agreements. Enable stated that its default position—reflected in section 4(d)(i) of its *pro forma* service agreement—is that discount rate shippers will not receive reservation charge credits unless Enable agrees otherwise. Enable stated that the Commission previously approved the inclusion of that provision in its *pro forma* service agreement and that the Commission has allowed other pipelines to negotiate the reservation charge crediting provisions to be included in a discount rate agreement. Enable contended that neither BP nor the Commission had offered any support to justify upsetting these contracts.

14. Finally, Enable argued that the Commission's reservation charge crediting policy cannot be implemented without a contemporaneous adjustment in the billing determinants used to design its rates, because it would now need to estimate the amount of capacity that will be subject to interruption each year, and factor that estimate into its rates.

15. The September 2013 Order first reviewed the initiation of the NGA section 5 investigation by the April 2012 Order and explained that the Commission had found that section 5.2(a) of Enable's Rate Schedule FT was unclear and could be read as being inconsistent with Commission policy with respect to the manner in which reservation charge credits are calculated. The Commission held that this finding sufficiently set forth a *prima facie* showing that Enable's existing reservation charge crediting provisions may be unjust and unreasonable to justify requiring Enable to explain whether it interprets its tariff to be consistent with Commission policy, and if not to revise it or show cause why it should not be required to do so.

16. The September 2013 Order pointed out that, rather than merely relying on the policy statement in *NGSA*, as Enable contended, the April 2012 Order cited to the Commission's reservation charge crediting policy developed in a series of individual

adjudications,[21] and the D.C. Circuit affirmed the major elements of that policy in *North Baja v. FERC*. The September 2013 Order explained that those adjudications constitute "binding precedent" that has the "force of law." Moreover, the Commission pointed out that, while the *NGSA Rehearing Order* stated that the summary of its reservation charge crediting policy in *NGSA* was a policy statement, the *NGSA Rehearing Order* also stated that "the Commission may in future cases treat its decisions in the adjudications described in [*NGSA*] as binding precedent."[22] Therefore, the April 2012 Order concluded that the Commission had reasonably relied on the binding precedent in the prior adjudications to initiate a section 5 investigation of Enable's reservation charge crediting provisions.

17. The September 2013 Order also recognized that, even though the April 2012 Order reasonably initiated a section 5 investigation of Enable's tariff and imposed a burden of producing evidence on Enable, the Commission continued to have the burden of persuasion under NGA section 5 to demonstrate both that: (1) the existing reservation charge crediting provisions in Enable's tariff are unjust and unreasonable; and (2) any replacement tariff provisions the Commission imposes are just and reasonable.[23] Therefore, the September 2013 Order next considered the issue of whether it could satisfy the burden of persuasion with respect to the relevant provisions of Enable's tariff.

18. The September 2013 Order held that Enable's own explanation of how it implements section 5.2(a) demonstrates that its tariff violates the Commission's policies requiring the pipeline to provide partial reservation charge credits during *force majeure* outages and full reservation charge credits during non-*force majeure* outages.[24]

19. With regard to *force majeure* outages, the Commission stated that, as part of clarifying that section 5.2(a) only requires it to provide credits when it fails to deliver natural gas that it has scheduled, Enable stated that it does not schedule natural gas if a *force majeure* event prevents it from providing service. Thus, under Enable's existing

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[21] September 2013 Order, 144 FERC ¶ 61,195 at P 40.

[22] *NGSA Rehearing Order*, 137 FERC ¶ 61,051 at P 26 n.20 (citing *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (*PG&E v. FPC*)).

[23] *See East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 938 (D.C. Cir. 1988) (stating that FERC nonetheless retained the ultimate burden of persuasion); *Western Res. Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (*Western Resources*).

[24] *See Kern River Gas Transmission Co.*, 140 FERC ¶ 61,146, at PP 23-24 (2012) (referencing *Southern Natural Gas Co.*, 137 FERC ¶ 61,050 at P 19 (2011), *clarifying* 135 FERC ¶ 61,056 (2011) (*Southern*)).

tariff, it does not provide any reservation charge credits during *force majeure* outages, except possibly on the first day of a *force majeure* outage if the outage occurs after Enable has scheduled service for that day. If the *force majeure* event extends beyond the first day, Enable would not provide any credits during subsequent days of a *force majeure* outage, because it would not schedule service on such subsequent days. Enable sought to justify its failure to provide significant reservation charge credits during *force majeure* outages on the ground that the Commission approved this aspect of section 5.2(a) of its tariff during its Order No. 636 restructuring proceeding. The September 2013 Order rejected this contention, finding that subsequently the Commission recognized in Opinion No. 406 that Order No. 636's requirement that pipelines shift to a straight fixed variable (SFV) rate design, under which all fixed costs are included in the reservation charge, had the effect of shifting the risk of *force majeure* outages entirely to the shippers. As a result, because Enable uses an SFV rate design, Enable's existing tariff provision in GT&C section 5.2(a) operates to excuse it almost entirely from providing reservation charge credits during *force majeure* outages, contrary to Commission policy established in Opinion No. 406. Accordingly, the Commission directed Enable to modify its tariff to provide partial reservation charge credits during *force majeure* outages consistent with Commission policy.

20. Similarly, the September 2013 Order found that Enable's clarification of section 5.2(a) of Rate Schedule FT demonstrates that its existing tariff is also contrary to the Commission's policy requiring full reservation charge credits during non-*force majeure* outages. Enable stated that section 8.2 of its GT&C authorizes it to interrupt service in order to perform "repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable governmental regulations." Enable stated that it does not schedule natural gas deliveries that are affected by a service interruption authorized by GT&C section 8.2. Therefore, Enable stated, because section 5.2(a) only requires it to provide reservation charge credits when it fails to deliver scheduled natural gas, it does not provide reservation charge credits for any such scheduled repairs or maintenance. Moreover, Enable pointed out that GT&C section 8.2 requires it to exercise due diligence to schedule maintenance so as to minimize service interruptions and to provide reasonable advance notice of such activities. Given these requirements, Enable contended that it is reasonable for it not to provide reservation charge credits when it determines that service must be interrupted to maintain operational capability or comply with applicable government regulations.

21. The September 2013 Order found that Enable had conceded that section 5.2(a) of its FT Rate Schedule is contrary to the Commission's policy requiring pipelines to provide full reservation charge credits during non-*force majeure* outages for routine scheduled maintenance. In contending that it should not be required to provide such credits, Enable relied on the fact that the Commission approved both Rate Schedule FT section 5.2(a) and GT&C section 8.2 in the *1993 Restructuring Order*. Enable also

contended that, as it relates to service interruptions of the type authorized by GT&C section 8.2 to maintain operational capability or comply with governmental regulations, the Commission's policy requiring full reservation charge credits is arbitrary and capricious. Enable suggested this approach equates pipeline safety compliance work with mismanagement and that this is unreasonable at a time when Federal safety requirements are expanding.[25]

22. The September 2013 Order rejected these contentions. The Commission found that the fact section 5.2(a) was approved in Enable's Order No. 636 restructuring proceeding does not justify Enable's retention of a tariff provision contrary to current Commission policy. The September 2013 Order explained that, after the Commission processed the pipelines' filings to restructure their services in compliance with Order No. 636, the Commission adopted a policy of requiring pipelines to provide full reservation charge credits for non-*force majeure* interruptions of a shipper's primary firm service in Opinion No. 406.[26] The September 2013 Order also explained that, in cases after Opinion No. 406, the Commission had expressly held that the policy requiring full credits for routine maintenance outages set forth in that opinion applies to situations where some interruptions of primary firm service may be necessary and unavoidable to preserve the safety and integrity of the pipeline facilities and thus do not arise from mismanagement.[27] The September 2013 Order explained that, in those prior adjudications, the Commission had found that, regardless of operating conditions on a particular pipeline, full reservation charge credits for routine maintenance outages: (1) provide a financial incentive for the pipeline to perform maintenance with minimal service disruption; and (2) compensate shippers for any interruptions of their contracted for primary firm service.

23. The September 2013 Order stated that the D.C. Circuit had approved this policy when it reviewed the Commission's *North Baja* orders, rejecting North Baja's contention that Opinion No. 406 emphasized "control" and therefore the opinion was inapplicable to a pipeline where outages for planned maintenance are uncontrollable because it operates

[25] May 2012 Rehearing Request at 14-15 and n.30 (citing a March 29, 2012 letter to the Commission filed by the Interstate Natural Gas Association of America).

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

[27] September 2013 Order, 144 FERC ¶ 61,195 at PP 59-62 (citing cases finding full credits must be provided for routine maintenance outages even when those outages are unavoidable, including *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at PP 14-15 (2003) (*El Paso*); *Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, at P 34 (2003), *order on reh'g and compliance*, 107 FERC ¶ 61,074, at PP 27-33 (2004); *North Baja*, 109 FERC ¶ 61,159 at P 12.

at full capacity. The court recognized that the Commission's reservation charge crediting policy extended to scheduled maintenance interruptions that are not controllable, holding as follows:

> Although some scheduled maintenance interruptions may be uncontrollable, they are certainly not unexpected.[28]

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

24. The Commission also rejected Enable's contention that our existing reservation charge crediting policy is unreasonable. Enable argued that, while the purpose of the policy is to give pipelines the financial incentive to avoid or shorten service disruptions, there is no record evidence that pipelines are failing to keep service disruptions to a minimum. Enable also stated that there was no evidence that pipelines without reservation charge crediting provisions interrupt service any more frequently than pipelines with such tariff provisions. However, the September 2013 Order stated that the Commission has held that, regardless of whether the pipelines have a past history of service disruptions for routine maintenance or complaints about such disruptions, the requirement to provide credits will provide the pipeline an important additional financial incentive to minimize outages of primary firm service for maintenance outages and to complete regulatory requirements in an expeditious manner.[29]

25. In reaffirming the Commission's policy of requiring full reservation charge credits for non-*force majeure* outages, the September 2013 Order stated that shippers contract for primary firm service to guarantee their ability to obtain natural gas during periods of peak demand for natural gas. For example, LDCs contract for primary firm service in order to be able to serve residential consumers and other high priority users during the winter heating season. Natural gas is also increasingly used for gas-fired electric generation. A pipeline's failure to provide reliable primary firm service when needed by its firm shippers thus entails a serious risk of harm to the public. In these circumstances, the Commission found that it is entirely reasonable to provide pipelines a financial incentive to keep interruptions of primary firm service to the absolute minimum. When a pipeline fails to provide the primary firm service on which its shippers rely to serve their

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

[29] September 2013 Order, 144 FERC ¶ 61,195 at P 64.

high priority needs, it is reasonable to relieve those shippers their obligation to make payments to reserve the capacity which the pipeline now cannot provide.[30]

26. The September 2013 Order stated that the Commission has recognized that pipelines may face increased regulatory requirements as a result of the Pipeline Safety, Regulatory and Job Creation Act of 2011 (2011 Act) and other initiatives of the Pipeline and Hazardous Safety Administration (PHMSA). In particular, the Commission has held that pipelines may include in their tariffs a provision permitting partial reservation charge crediting for a transitional period of two years for outages resulting from orders issued by PHMSA pursuant to section 60139(c) of Chapter 601 of Title 49 of the United States Code added by section 23 of the Pipeline Safety, Regulatory and Job Creation Act of 2011.[31] As explained in those orders, such outages are distinguishable 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 credits must be given. Accordingly, the September 2013 Order stated that, when Enable filed to comply with that order, it could include in that filing provisions permitting partial reservation charge credits for such outages.[32]

27. The Commission also stated that, if Enable was concerned that Commission action under NGA section 5 requiring it to revise its tariff to be consistent with Commission policy will result in the pipeline's rates being too low to recover its overall cost of service, Enable could present evidence in its filing to comply with the September 2013 Order to show why the pipeline believes that would be the consequence of that action, and the Commission described the information to be included in such a filing.[33]

28. The September 2013 Order also found the definition of *force majeure* in section 8.1 of Enable's GT&C to be unjust and unreasonable. Specifically, the Commission found the inclusion in that definition of "tests, maintenance, or repairs to machinery, equipment, lines of pipe or other facilities" to be overbroad, because it treats as *force majeure* events situations that are part of routine and scheduled maintenance of the pipeline. The Commission stated that it has defined *force majeure* events as events that are not only uncontrollable but also unexpected and therefore has held that outages for

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[30] *Id*. P 65.

[31] *Gulf South*, 141 FERC ¶ 61,224 at P 40; *Gulf Crossing*, 141 FERC ¶ 61,222 at P 40; *Panhandle*, 143 FERC ¶ 61,041 at P 68; and *Texas Gas*, 141 FERC ¶ 61,223 at P 39.

[32] September 2013 Order, 144 FERC ¶ 61,195 at P 66.

[33] *Id.* P 67 quoted the description in *Northern Natural*, 137 FERC ¶ 61,202 at P 36.

routine or scheduled maintenance do not constitute *force majeure* events, even though they may be "uncontrollable,"[34] and the D.C. Circuit affirmed this policy in *North Baja v. FERC*.[35] Accordingly, pursuant to section 5 of the NGA, the Commission directed Enable to file revised tariff records clarifying that planned and scheduled tests, maintenance and repairs of pipelines are excluded from its definition of *force majeure*.

29. While the September 2013 Order required Enable to modify section 5.2(a) of Rate Schedule FT and section 8.1 of its GT&C as described above, the Commission found that section 8.2 of Enable's GT&C does not violate the Commission's reservation charge crediting policies. The Commission explained that section is limited to: (1) authorizing Enable to interrupt or curtail service in order to perform repairs and maintenance to maintain the operational capability of the system or to comply with applicable regulations; (2) providing Enable will not be liable to its shippers for such interruptions; and (3) requiring Enable to exercise due diligence to schedule such repair, construction, and maintenance so as to minimize disruptions of service and provide reasonable notice to shippers. The authorization to interrupt service to perform maintenance is a standard provision in pipeline tariffs that does not address how such interruptions will affect shippers' obligations to pay for their service. Similarly, the Commission found the provision concerning liability only concerns Enable's liability to pay damages to shippers or others because of failure to make deliveries because of compliance with governmental directives and does not address the issue of limiting Enable's ability to collect reservation charges from shippers during service interruptions. Finally, the Commission found the provision requiring Enable to exercise due diligence to minimize service disruptions is reasonable and consistent with Commission policy.

30. However, the Commission required Enable to remove from section 8.2 the authorization to "curtail" service to perform any repair, maintenance, and improvements consistent with Commission policy. The Commission explained that pipelines may only "curtail" service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled. The pipeline should take outages required for routine repair, maintenance, and improvements into account when it is scheduling service, rather than curtailing service after it is scheduled. If an interruption of service is required for routine repair, maintenance or improvements, 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, maintenance, and improvements through the scheduling process and

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[34] *See, e.g., Southern*, 135 FERC ¶ 61,056 at PP 24-27; *see also* similar cases cited *supra*.

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

should not curtail confirmed scheduling nominations in order to perform routine repair, maintenance, and improvements.

31. Finally, the September 2013 Order found that no changes were necessary to Enable's tariff regarding the manner in which reservation charge credits are addressed in discount rate agreements. The Commission found it reasonable for reservation charge credits to be a subject of negotiation in discount agreements, because those credits relate to the rate paid for the service, rather than the quality of the service. Enable may be more willing to provide a discount if the shipper agrees to forgo or limit reservation charge credits during outages. A shipper can decide whether it is willing to trade limits on reservation charge credits for a lower rate. If not, the shipper has the right to take service at the maximum rate and receive reservation charge credits in a manner that is consistent with Commission policy.

B. Rehearing of the September 2013 Order

32. On rehearing, Enable does not contest the September 2013 Order's findings that its existing reservation charge crediting provisions are contrary to the precedents cited in that order requiring full reservation charge credits for non-*force majeure* outrages and partial reservation charge credits for *force majeure* outages. However, it contends that the Commission's reliance on those precedents is insufficient to satisfy its burden under NGA section 5 to show that Enable's existing tariff is unjust and unreasonable.

33. Enable states that the United States Court of Appeals for the Fifth Circuit has held that when the Commission establishes a rule in individual adjudications, "due process requires that the affected parties be allowed to challenge the basis of the rule. FERC must be able to substantiate the general rule."[36] Enable contends that the Commission's prior adjudications concerning reservation charge crediting failed to substantiate with record evidence the rationales underlying the Commission's reservation charge crediting policy. It therefore asserts those adjudications cannot justify imposing an industry-wide, "binding rule" creating an inflexible reservation charge crediting policy applicable to all pipelines.

34. Enable contends that the Commission failed to give it an opportunity to challenge the basis of the Commission's reservation charge policies adopted in its prior adjudications, as due process requires. Enable also argues that, in this proceeding, the Commission has not properly substantiated its reservation charge crediting policies or

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[36] Enable October 2013 Rehearing Request at 6-7 (quoting *Florida Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989) (*Florida Gas v. FERC*)). Enable also cites *Shell Oil Co. v. FERC*, 707 F.2d 230 (5th Cir. 1983) (*Shell Oil*).

their application to Enable. As a result, Enable argues, the Commission has violated both the Administrative Procedures Act (APA) and NGA section 5.

35. In arguing that the Commission has failed to justify its reservation charge crediting policies, Enable focuses primarily on the Commission's requirement that pipelines provide full reservation charge credits for non-*force majeure* outages, particularly those related to routine maintenance. Enable urges that the Commission has not shown that the crediting requirement is necessary to provide incentives to reduce the number of outages for maintenance or repairs either on an industry-wide basis, or as applied to Enable. Enable contends that the Commission has failed to show that there is an industry problem with excessive pipeline outages, as required by *Natural Fuel Gas Supply Co. v. FERC*, 468 F.3d 831 (D.C. Circuit 2006). Moreover, Enable challenges another ground for imposing the policy, namely that shippers are paying a rate that entitles them to service at all times without interruption, and thus when they do not receive that service, the shipper is entitled to a contractual credit. Enable asserts that if the pipeline's existing tariff does not provide for reservation charge crediting, then the shipper has no "contractual right" to such credits when service is interrupted.

36. For the reasons discussed below, we deny Enable's request for rehearing of the September 2013 Order's finding that its reservation charge crediting provisions are unjust and unreasonable. Below, we first find that we have provided Enable a full opportunity in this proceeding to challenge the validity of our reservation charge crediting policies and their application to Enable, as required by the *Shell Oil* and *Florida Gas v. FERC* decisions of the Fifth Circuit. We then turn to the merits of Enable's contentions that in this proceeding we have failed to substantiate our reservation charge crediting policy, and its application to Enable, with substantial evidence and a reasoned explanation. We find that we have substantiated the validity and application of our reservation charge crediting policy to Enable with respect to both partial reservation charge credits for *force majeure* outages and full reservation charge credits for non-*force majeure* outages. Finally, we address the remaining contentions by Enable concerning the Commission's compliance with NGA section 5.

1. <u>The Commission's Burden When It Proceeds by Adjudication</u>

37. In the September 2013 Order, we found that Enable's reservation charge crediting provisions are unjust and unreasonable, because they are contrary to the Commission's reservation charge crediting policies developed in a series of adjudications, including the *North Baja* proceeding in which the D.C. Circuit affirmed the major elements of our reservation charge crediting policies.[37] As Enable points out on rehearing,[38] the Fifth

[37] *North Baja v. FERC*, 483 F.3d 819.

[38] Enable October 2013 Rehearing Request at 6-7.

Circuit has held that, when the Commission adopts a rule in an adjudication, parties in subsequent adjudications where the rule is applied must have an opportunity to challenge the basis of the rule. For example, in *Florida Gas v. FERC*, the court stated:

> Due process, however, guarantees that parties who will be affected by the general rule be given an opportunity to challenge the agency's action. When the rule is established through formal rulemaking, public notice and hearing provide the necessary protection. But where, as here, the rule is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule. FERC must be able to substantiate the general rule.[39]

38. Consistent with this requirement, the Commission has provided Enable a full opportunity in this proceeding to present evidence and argument in order to challenge the validity of our reservation charge crediting policies and their application to it. The Commission's April 2012 Order in this case required Enable "to explain whether it interprets its reservation charge crediting provision as consistent with Commission policy and, if not to *either* revise its tariff provisions concerning reservation charge crediting to conform with Commission policy, *or* explain why it should not be directed to do so."[40] In its response to this requirement, Enable was free to submit whatever evidence and argument it desired in order to challenge both the validity of the Commission's reservation charge crediting policies and their application to Enable.

39. Enable contends that, by treating our reservation charge crediting decisions in prior adjudications as "binding precedent," the September 2013 Order improperly departed, without explanation, from the Commission's statement in the *NGSA Rehearing Order* that it would "provide each pipeline an opportunity to raise any issue it desires as to why its existing or proposed reservation charge crediting provisions are just and reasonable."[41] Enable also suggests that this violated the holdings of *Shell Oil* and *Florida Gas v. FERC* that the Commission must allow affected parties to challenge the factual basis of rules developed in adjudications.

40. Our treatment of our reservation charge crediting decisions in prior adjudications as binding precedent is neither a departure from the *NGSA Rehearing Order*, nor has it deprived Enable of the opportunity to challenge the validity of the reservation charge

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[39] *Florida Gas v. FERC*, 876 F.2d at 45.

[40] April 2012 Order, 129 FERC ¶ 61,064 at P 27 (emphasis added).

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

crediting policies adopted in those prior adjudications. After stating that pipelines could raise any issue they desired in future reservation charge crediting proceeding, the *NGSA Rehearing Order* stated that, while the *NGSA order* was itself a policy statement, "the Commission may in future cases treat its decisions in the adjudications described in the [*NGSA Order*] as binding precedent." The NGSA Rehearing Order then explained:

> In *PG&E v. FPC*, 506 F.2d at 38, the court recognized that an "agency may establish binding policy... through adjudications which constitute binding precedents." The Commission precedents described in the [*NGSA Rehearing Order*] were established in adjudications concerning the justness and reasonableness of the reservation charge crediting tariff provisions of specific pipelines. In addition, the most significant polices established in those adjudications were examined and affirmed by the United States Court of Appeals in *North Baja*. As with any such precedent, parties are free to argue in particular proceedings that the Commission should modify the policies established in such precedents because of changed circumstances or other reasons. However, as the courts have held many times, the Commission may not depart from established policies without providing an explanation of the reasons for doing so.[42]

41. Contrary to Enable's contentions that the September 2013 Order constituted a departure from the approach the Commission stated it would take in the *NGSA Rehearing Order*, the Commission's actions in this proceeding are entirely consistent with that order. As the Commission stated it would in the *NGSA Rehearing Order*, the September 2013 Order treated its decisions in prior adjudications concerning the reservation charge crediting provisions of individual pipelines as binding precedent. However, as the Commission also stated it would in the *NGSA Rehearing Order*, the Commission has given Enable an opportunity to argue that the Commission should modify the policies established in those prior adjudications.

42. Our characterization of the precedent established in prior reservation charge crediting adjudication proceedings as binding policy having the force of law does not mean that such precedent is not subject to change. Any "binding policy having the force of law," whether established in a rulemaking proceeding or an adjudication, is subject to future changes, and thus is only "binding" until changed. While the Commission must conduct a new rulemaking proceeding in order to modify a binding policy established in a

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[42] *Id.* (citing *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (*Wisconsin Valley*)).

rulemaking proceeding, the Commission can change a binding policy established in an adjudication in any subsequent adjudication. We have given Enable the opportunity to seek such a change in our reservation charge crediting policy in this proceeding.

43. However, as Enable itself recognizes in its rehearing request,[43] in order to change policies established in prior adjudications, the Commission must provide a "reasoned explanation for its departure from established case law."[44] Therefore, to the extent Enable argues the Commission should modify the reservation charge crediting policies established in its prior adjudications, as opposed to arguing that those policies do not apply to its factual circumstances, Enable must describe the reasoned explanation it believes would justify the Commission's departure from its "established case law."

44. For the same reasons, the Commission rejects Enable's suggestion that precedent established in individual adjudications must be treated in much the same manner as a policy statement. Enable asserts, "[p]olicies developed through prior adjudications, *just like a policy developed through the issuance of a policy statement*, must be fully supported at the time the policy is applied."[45] To the extent Enable is arguing that policies developed through adjudications have no greater weight than policies set forth in a policy statement, it is incorrect. A policy statement "is not finally determinative of the issue or rights to which it is addressed" and only "announces the agency's tentative intentions for the future."[46] As a result, in future cases the Commission must support a policy set forth in a policy statement "as if the policy statement had never been issued."[47] That is not true of policies established in adjudications. Unlike policy statements, orders in adjudications, including those involving the reservation charge crediting tariff provisions of individual pipelines, are finally determinative of the rights and obligations of the parties to the adjudication. As a result, orders in adjudications "constitute binding precedents."[48] Therefore, in subsequent adjudications, the Commission cannot proceed

[43] Enable October 2013 Rehearing Request at 16 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 48 (1983); *Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006)).

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

[45] Enable October 2013 Rehearing Request at 3-4 (emphasis added).

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

[47] *Id.*

[48] *Id.*

as if the orders in prior adjudications had never been issued. Rather, the Commission must determine whether the prior precedent is applicable to the facts in the subsequent adjudication[49] and, if so, either apply the prior precedent in the subsequent adjudication or, in the Fifth Circuit's words, provide a "reasoned explanation for its departure from established case law."

45. We now turn to the merits of Enable's contentions that in this proceeding we have failed to substantiate our reservation charge crediting policy, and its application to Enable, with substantial evidence and a reasoned explanation. For the reasons discussed below, we find that we have substantiated the validity and application of our reservation charge crediting policy to Enable with respect to both partial reservation charge credits for *force majeure* outages and full reservation charge credits for non-*force majeure* outages.

2. *Force Majeure* Partial Crediting Policy

46. Section 5.2(a) of Enable's Rate Schedule FT only requires it to provide reservation charge credits when it is unable to deliver to a firm shipper "Gas scheduled and received by Transporter for the account of Shipper." In response to the April 2012 Order, Enable clarified that it does not schedule natural gas if a *force majeure* event prevents it from providing service. Thus, under Enable's existing tariff, it does not provide any reservation charge credits during *force majeure* outages, except possibly on the first day of a *force majeure* outage if the outage occurs after Enable has scheduled service for that day. If the *force majeure* event extends beyond the first day, Enable would not provide any credits during subsequent days of a *force majeure* outage, because it would not schedule service on such subsequent days.

47. In its response to the April 2012 Order, Enable sought to justify its failure to provide significant reservation charge credits during *force majeure* outages on the ground that the Commission approved this aspect of section 5.2(a) of its tariff in the Restructuring Orders approving Enable's filings to comply with Order No. 636. The September 2013 Order rejected this contention, finding that the Restructuring Orders were inconsistent with the Commission's policy that pipelines should share the risk of *force majeure* events. The September 2013 Order explained that, after the Commission had processed all the interstate pipelines' filings to comply with Order No. 636, the Commission had reviewed its reservation charge crediting policies in Opinion No. 406.[50] In Opinion No. 406, the Commission recognized that Order No. 636's requirement that pipelines shift from a modified fixed variable (MFV) rate design to an SFV rate design

[49] *Id.*

[50] Opinion No. 406, 76 FERC ¶ 61,022 at 61,088-89.

had the effect of shifting the risk of *force majeure* outages entirely to the shippers. Under an MFV rate design, return on equity and associated income taxes were included in the usage charge. As a result, during a *force majeure* outage, "there was a built-in sharing of the risk because the pipeline's recovery of its return on equity and taxes was dependent on its throughput."[51] However, under an SFV rate design, all of the pipeline's fixed costs are included in the pipeline's reservation charge. As a result, during a *force majeure* outage, the pipeline continues to recover its entire cost of service, including its return on equity, while its shippers fail to receive access to the capacity assured them by their payment of reservation charges. Opinion No. 406 stated that requiring shippers to bear the entire risk of *force majeure* outages is inconsistent with the Commission's prior recognition that "a *force majeure* interruption is a no-fault occurrence" and therefore "all parties should bear the risk of *force majeure* events."[52] Therefore, Opinion No. 406 found that Tennessee Gas Pipeline Company's (Tennessee) existing tariff provision excusing it from providing any reservation charge credits during *force majeure* outages was unjust and unreasonable, because it placed all the risk of *force majeure* outages on its shippers. Opinion No. 406 found that this requirement "returns the balance of risk back to the *status quo* before the Commission mandated the use of the SFV rate design."[53] The September 2013 Order also pointed out that, in *North Baja v. FERC*, the D.C. Circuit had affirmed Commission orders applying the Opinion No. 406 precedent concerning partial reservation charge credits for *force majeure* outages.

48. The September 2013 Order found that Enable, like Tennessee at the time of Opinion No. 406, uses an SFV rate design. Therefore, the Commission found that Enable's existing tariff provision in GT&C section 5.2(a) operates to excuse it almost entirely from providing reservation charge credits during *force majeure* outages. For this reason, the September 2013 Order found that tariff provision to be unjust and unreasonable for the same reasons Opinion No. 406 held that Tennessee's similar provision was unjust and unreasonable.

49. On rehearing of the September 2013 Order, Enable has made no argument that would cause us to reconsider the precedent established in Opinion No. 406 requiring partial reservation charge credits in order to share the risk of *force majeure* outages, nor has Enable provided any reason why that policy should not be applied to it. Enable does not contest the underlying premise of the Opinion No. 406 *force majeure* risk sharing policy that "a *force majeure* interruption is a no-fault occurrence" for which neither the pipeline nor its shippers are to blame. Nor does Enable offer any explanation why a

[51] *Id*. at 61,089.

[52] *Id*. at 61,088.

[53] *Id*. at 61,089.

policy requiring pipelines and shippers to share the risk of such no-fault interruptions, in the same manner as they did before Order No. 636, is unreasonable.

50. Enable suggests that, before the Commission can take action under NGA section 5 to require Enable to provide partial reservation charge credits during *force majeure* outages, the Commission must present record evidence that Enable's failure to do so is unjust and unreasonable. However, the Commission has done just that by showing that Enable's SFV rate design imposes almost the entire risk of *force majeure* outages on Enable's shippers, contrary to the Commission's reasonable policy of requiring a sharing of that risk. Enable does not contest that finding. No other factual evidence is necessary, or relevant, to the issue whether Enable's failure to provide significant partial reservation charge credits during *force majeure* outages is unjust and unreasonable. For example, whether Enable's system has had many, some, or no *force majeure* outages in the past has no bearing on the issue of whether it is unjust and unreasonable for its tariff to continue to impose the full cost of all such future *force majeure* outages on its shippers. Regardless of the pipeline's past history of *force majeure* outages, it is inequitable to require Enable's shippers to bear the full cost of any such future outage, rather than have the pipeline and its shippers share equitably the risk of an event for which neither party is responsible. Despite having been given the opportunity, Enable has not provided any evidence of a unique circumstance regarding its system that would justify exempting it from application of the risk sharing policy we have applied consistently and uniformly to other pipelines.

51. Enable also contends that we improperly relied on the D.C. Circuit's decision in *North Baja v. FERC*, in finding that Enable's failure to provide partial reservation charge credits consistent with Commission policy during *force majeure* outages is unjust and unreasonable. Enable argues that *North Baja v. FERC* is not on point, because in that case the pipeline proposed under NGA section 4 to provide partial reservation charge credits, thus according to Enable, conceding that it should pay credits. Enable contends that, therefore, *North Baja v. FERC* did not involve an NGA section 5 case in which the Commission bears the burden of persuasion, and the question of whether the pipeline's preexisting tariff was unjust and unreasonable was not at issue.

52. While the pipeline in *North Baja v. FERC* made an NGA section 4 filing proposing reservation charge crediting provisions, the Commission's suspension order found that the pipeline's proposal failed to provide credits consistent with Commission precedent, and directed the pipeline either to modify its proposal consistent with precedent or provide further justification for its proposal.[54] Therefore, when the Commission in its order next required the pipeline to modify its proposal consistent with

[54] *North Baja*, 109 FERC ¶ 61,159 at P 15.

Commission precedent to provide a higher level of partial reservation charge credits for *force majeure* outages than the pipeline had proposed,[55] the Commission was acting under NGA section 5, despite the fact it did not expressly refer to NGA section 5.[56] Moreover, in Opinion No. 406, the Commission made an express NGA section 5 finding, holding that "[b]ecause Tennessee's shippers bear all of the risk of a *force majeure* interruption under Tennessee's existing tariff provision, that currently effective tariff provision is unjust and unreasonable."[57]

53. Enable's existing tariff provision, like Tennessee's existing tariff provision found unjust and unreasonable in Opinion No. 406, provides essentially no reservation charge credits during *force majeure* outages. In *North Baja v. FERC*, the court affirmed the Commission's requirement that North Baja provide partial credits for *force majeure* outages consistent with the policy adopted in Option No. 406, stating:

> [t]here is nothing unreasonable about the Commission comparing North Baja's proposal to previously approved policies to determine if the proposal equitably shares the risk between North Baja and its shippers. The Commission has simply instructed North Baja to choose the *Texas Eastern* or *Tennessee* formulas or to propose a formula that achieves an equitable cost-sharing in the same ballpark as the *Texas Eastern* and *Tennessee* policies.[58]

54. In this case, we are relying on our past precedent to require Enable to modify its tariff in precisely the same manner as we did in the orders affirmed by the D.C. Circuit in *North Baja v. FERC.* We have found that Enable's requirement that shippers pay their full reservation charges during *force majeure* outages violates the same precedents requiring an equitable sharing of that risk which the court found the Commission reasonably relied on in *North Baja v. FERC*. We therefore deny rehearing of our requirement that Enable modify its tariff to provide partial reservation charge credits during *force majeure* outages.

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[55] *North Baja*, 111 FERC ¶ 61,101.

[56] *Western Resources*, 9 F.3d at 1577-1579 (D.C. Cir. 1993) ("FERC should bear the burden under § 5 whenever it moves beyond rejection of a proposed rate to the task of redesigning it").

[57] Opinion No. 406, 76 FERC ¶ 61,022 at 61,088-61,089.

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

3. Non-*Force Majeure* Full Crediting Policy

55. Enable does not provide any reservation charge credits for outages of primary firm service during non-*force majeure* outages. As clarified by Enable in its filing to comply with the April 2012 Order, section 5.2(a) of Rate Schedule FT only requires Enable to provide reservation charge credits when it fails to deliver scheduled natural gas. Because Enable does not schedule natural gas deliveries when it interrupts service to perform "repair, maintenance, replacement or miscellaneous construction on the system as necessary to maintain operational capability or comply with applicable governmental regulations," as authorized by GT&C section 8.2, section 5.2(a) does not require Enable to provide any reservation charge credits for any resulting service interruptions. Accordingly, as described above, the September 2013 Order found that section 5.2(a) of Rate Schedule FT is contrary to the Commission's policy requiring full reservation charge credits during non-*force majeure* outages, and the Commission ordered Enable to revise its tariff to provide full reservation charge credits for non-*force majeure* outages of primary firm service.

56. On rehearing of the September 2013 Order, Enable contends generally that the Commission has not substantiated its policy requiring full reservation charge credits for non-*force majeure* outages. Enable recognizes that the Commission has the authority to establish binding policy through individual adjudications.[59] However, Enable contends that the Commission has not supported the "baseline assumptions" [60] underlying its policy of requiring full reservation charge credits for non-*force majeure* outages, including that full reservation charge crediting is necessary to give pipelines an incentive to minimize service interruptions. Enable asserts that the individual adjudications cited by the Commission, including Opinion No. 406,[61] were based on general, unsubstantiated assumptions, as opposed to record evidence and therefore cannot justify an industry-wide, binding rule applicable to all pipelines. Enable contends that the Commission has not shown that there is any industry problem with pipelines failing to minimize interruptions of primary service or mismanaging their systems. Therefore, Enable argues that the Commission has not explained the need to provide pipelines an incentive to minimize interruptions of primary firm service by requiring full reservation charge credits for non-*force majeure* outages. It points out that, in *National Fuel Gas Supply*

[59] Enable October 2013 Rehearing Request at 10.

[60] *Id.*

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

Corp. v. FERC,[62] the court stated that "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision-making." Citing *Williston Basin Interstate Pipeline Co. v. FERC,*[63] Enable also argues that reliance on general economic theory to find that a full crediting requirement will provide a greater incentive to minimize outages and thereby benefit consumers fails the test of reasoned decision-making.

57. Enable also asserts that the September 2013 Order adduced no record evidence that Enable needs an additional incentive to reduce service interruptions or that such a reduction would occur if a new incentive is imposed on Enable. Enable contends that, in order to require it to provide full reservation charge credits for non-*force majeure* outages, the Commission must show that a new incentive is required because the current level of interruptions on the Enable system is too high. Enable asserts that the Commission has not presented any such evidence justifying application of its general policy to Enable.

58. In the September 2013 Order, the Commission held that its policy requiring full reservation charge credits for routine maintenance outages of primary firm service reasonably: (1) provides pipelines a financial incentive to manage maintenance of their systems so as to minimize primary service interruptions as much as possible; (2) provides shippers relief from paying reservation charges for primary firm service not provided; and (3) allows pipelines to include in their cost of service prudently incurred costs associated with routine and regulatory maintenance necessary for a pipeline's safe and proper functioning.[64] In this order, we reaffirm that policy and again hold that substantial evidence supports its application to Enable.

59. The primary purpose of our requirement that pipelines provide full reservation charge credits for routine maintenance is to ensure that shippers can rely on the availability of the primary firm service for which they have contracted to the maximum extent possible consistent with safe operation of the pipeline. Accordingly, we first discuss the nature of primary firm service provided by pipelines, including Enable, and why shippers must be able to rely on the availability of that service whenever they need it. We next discuss the role of reservation charge credits in providing a significant financial incentive for pipelines to minimize outages of primary firm service for routine

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[62] *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (*National Fuel*).

[63] *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d 45, 50 (D.C. Cir. 2004) (*Williston v. FERC*).

[64] September 2013 Order, 144 FERC ¶ 61,195 at P 63.

maintenance to the maximum extent possible and the inadequacy of Enable's tariff in providing such a financial incentive. We then discuss the reasonableness of requiring Enable to provide shippers relief from the payment of reservation charges when routine maintenance causes an outage of the primary firm service for which those reservation charges are paid. Finally, we discuss the reasonableness of our policy of requiring full reservation charges for routine maintenance outages without regard to the pipeline's past history of outages or evidence of lack of due diligence to minimize outages.

a. Reliance on Primary Firm Service

60. Primary firm transportation service is the highest priority service provided by pipelines.[65] A shipper's contract for primary firm service specifies its maximum entitlement to service and the receipt and delivery points at which the shipper will have primary firm rights. Consistent with the high priority nature of the service, the Commission has consistently described contracts for primary firm service as providing the shipper "a guaranteed firm right to ship gas up to its mainline contract demand from the designated primary receipt points to the designated primary delivery points."[66] For this right, shippers on pipelines with SFV rates such as Enable, must pay a reservation charge that includes all the pipeline's fixed costs, regardless of whether they actually use the service on any particular day. Shippers pay that reservation charge based on their maximum daily entitlements to service.

61. Enable provides interstate transportation services in the States of Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee and Texas.[67] Enable's "Line CP" connects growing domestic natural gas supplies in eastern Texas and northern Louisiana production areas, including the Barnett Shale, to Enable's Perryville Hub with interconnections with several other major interstate natural gas pipelines, including ANR Pipeline Co. and Trunkline Gas Co.[68] Enable's firm shippers include: (1) major LDCs serving residential and other natural gas consumers; (2) gas-fired electric generators; (3) industrial users of natural gas; and (4) producers and marketers of natural gas,

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[65] *See* 18 C.F.R. § 284.7(a)(3) (2014). *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,050, at PP 14-18 (2012) (*Tennessee II*).

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

[67] *Enable Gas Transmission, LLC*, 148 FERC ¶ 61,046, at P 3 (2014).

[68] *CenterPoint Energy Gas Transmission Co*., 117 FERC ¶ 61,003, at P 4 (2006).

including those who ship Barnett Shale gas on the CP Line. As the Commission found in the September 2013 Order,[69] and Enable does not dispute, these shippers:

> contract for primary firm service to guarantee their ability to obtain natural gas during periods of peak demand for natural gas. For example, LDCs contract for primary firm service in order to be able to serve residential consumers and other high priority users during the winter heating season. Natural gas is also increasingly used for gas-fired electric generation. A pipeline's failure to provide reliable primary firm service when needed by its firm shippers thus entails a serious risk of harm to the public.

62. Accordingly, the Commission's concern that interruptions of primary firm service be kept to an absolute minimum in order to avoid a serious risk of harm to the public applies equally to Enable as to the other pipelines we have required to comply with our reservation charge crediting policy.[70] Indeed, with the increased use of natural gas for gas-fired electric generation,[71] this concern is even more compelling today than when we first established our reservation charge crediting policy following Order No. 636. Enable provides an Enhanced Firm Transportation Service to gas-fired electric generators and others, whose business operations require natural gas consumption at accelerated levels above 24-hour uniform ratable takes,[72] and this year Enable modified that service "to better respond to the dynamic, load-following dispatch requirements of the [Independent System Operators] and [Regional Transmission Operators] in which such customers are located."[73] Moreover, Enable recently requested, and was granted, waiver of one aspect

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[69] September 2013 Order, 144 FERC ¶ 61,195 at P 65.

[70] *See, e.g., Panhandle*, 148 FERC ¶ 61,025 at P 55, and *Texas Eastern*, 149 FERC ¶ 61,143 at P 70.

[71] *See Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, NOPR 79 Fed. Reg. 18,223 (Apr. 1, 2014), FERC Stats. & Regs. ¶ 32,700, at P 5 nn.7-8 (2014); Order No. 809, 80 Fed. Reg. 28,197 (Apr. 24. 2015), FERC Stats. & Regs. ¶ 31,368 at P 9 and nn.10-11 (2015) (cross-referenced at 151 FERC ¶ 61,049 at P 9 and nn.10-11 (2015)).

[72] *CenterPoint Energy Gas Transmission Co.*, 125 FERC ¶ 61,334 (2008).

[73] Enable's December 11, 2014 filing in Docket No. RP15-261-000 at 2. The Commission accepted that filing to be effective February 1, 2015 in a delegated letter order issued on January 23, 2015.

of the Commission's Order No. 787 regulations[74] concerning sharing of non-public operational information between interstate pipelines and electric transmission operators so as to ensure it could make full use of that information to provide reliable service to electric generators.[75] It is thus clear that a failure by Enable to provide primary firm service when needed to natural gas-fired generators contracting for EFT service or Enable's standard firm service could affect the reliability of electric service and thereby harm the public.

63. Moreover, even when harm to the public is not involved, a failure to provide primary firm service can cause significant financial injury to businesses who use natural gas to run their plants and other industrial processes, as well as to producers and marketers who rely on primary firm transportation service to market their gas. Industrial plants could be forced to curb their operations, reducing their output and sales. Producer-marketers may have to incur the expense of purchasing capacity on other pipelines in order to continue marketing their natural gas,[76] and/or they may be unable to deliver natural gas to their regular sales customers, thus disrupting their commercial relationships. In addition, when a shipper can find replacement capacity on another pipeline during a non-*force majeure* outage, the scarcity of such capacity could force a shipper to purchase capacity at a greater cost than the relief provided by reservation charge credits. In these circumstances, the Commission concludes that the public interest requires pipelines, including Enable, to exercise the highest possible standard of care to ensure the reliability of primary firm transportation service in order to minimize harm to the public and financial injury caused by outages of that service.[77]

b. Financial Incentives

64. Our policy requiring pipelines to provide full reservation charge credits for routine maintenance outages is intended to ensure that pipelines exercise the highest standard of

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[74] *Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators*, Order No. 787, 78 Fed. Reg. 70,163 (Nov. 22, 2013), FERC Stats. & Regs. ¶ 31,350 (2013) (cross-referenced at 145 FERC ¶ 61,134 (2013)), *order on reh'g*, Order No. 787-A, 147 FERC ¶ 61,228 (2014) (collectively, Order No. 787).

[75] *Enable Gas Transmission, LLC*, 147 FERC ¶ 61,229 (2014).

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

[77] *Texas Eastern*, 149 FERC ¶ 61,143, at PP 68-72.

care possible to minimize outages of primary firm services. The full crediting requirement imposes an immediate financial cost on pipelines whenever they cannot provide primary firm service because of routine maintenance. This gives the pipeline a strong economic incentive to exercise the greatest care to minimize outages of primary firm service. In short, the full crediting requirement is an incentive mechanism to ensure the maximum reliability of primary firm service.

65. Enable contends that the Commission has not provided any evidence to support its finding that the full crediting requirement provides an additional incentive for it to minimize service interruptions; for example, it asserts, the Commission has provided no empirical evidence that there have been fewer service interruptions on other pipelines after the Commission's reservation charge crediting policy went into effect. However, the fact that exposing the pipeline to financial loss whenever routine maintenance interrupts primary firm service will provide pipelines an incentive to exercise the greatest possible care to minimize outages and thus maximize the reliability of that service is a reasonable economic proposition of the type the courts have held constitutes substantial evidence upon which the Commission may rely in deciding whether a pipeline's tariff is just and reasonable.[78]

66. Enable points out that the D.C. Circuit held that the Commission's reliance on economic theory in *Williston v. FERC* was "unelaborated and, upon elaboration,

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[78] *East Tennessee*, 863 F.2d at 939-940 ("FERC's adoption of an 'incentive theory,' that exposure of fixed costs attributable to a return on equity will improve the competitiveness of the natural gas industry, is a judgment well within its discretion in deciding what is a just and reasonable rate."). *Associated Gas Distrib. v. FERC*, 824 F.2d 981, 1008-9 (D.C. Cir. 1987) ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall, nor need they do so for predictions that competition will normally lead to lower prices."). *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) ("[I]t is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view."). *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 260-61 (D.C. Cir. 2007) (The Commission's prediction that a given formula for allowing electricity suppliers to recover fixed costs in setting prices would "provide an efficient incentive to invest" was a "reasonable predictive judgment."). *Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 109 (2nd Cir. April 2, 2015) (analyzing, with approval, the D.C. Circuit's extensive case law permitting the Commission to make "findings based on 'generic factual predictions' derived from economic research and theory.").

unavailing."[79] However, that case involved a complicated issue concerning whether shippers are benefited more by: (1) permitting the pipeline to increase throughput by offering selective discounts to demand-elastic shippers and restricting the shipper's use of the discount to a particular point; or (2) allowing discounted rate shippers to readily transfer capacity among themselves at the discounted rate, as the Commission's order under review did. The court stated that the Commission's approach of limiting the pipeline's ability to restrict the use of a discount to a particular point could prevent pipelines from increasing throughput through selective discounting, because "economic theory tells us price discrimination, of which selective discounting is a species, is least practical where arbitrage is possible – that is where a low-price buyer can resell to a high-price buyer." Thus, in *Williston v. FERC*, the court found that the Commission failed to demonstrate that economic theory supported its finding that shippers would be benefitted by the policy adopted in that case, not that economic theory cannot constitute substantial evidence. Here, by contrast, we are relying on the straightforward economic prediction that exposing pipelines, including Enable, to financial loss when routine maintenance interrupts primary firm service will provide the pipeline an incentive to exercise the greatest possible care to minimize outages and thus maximize the reliability of that service.[80] The need for such an incentive mechanism is particularly important because, as discussed above, a pipeline's failure to provide reliable primary firm service to its firm shippers entails a serious risk of harm to the public and financial costs to shippers.

67. In conjunction with requiring this incentive mechanism, the Commission allows pipelines to include in their generally applicable rates the prudently incurred costs of operating their systems so as to minimize routine maintenance outages, including the cost of reservation charge credits.[81] As the September 2013 Order stated, pipelines may reflect the cost of reservation charge credits in their rates in a general section 4 rate case either by reducing the billing determinants used to design the pipeline's rates or including a reasonable projection of the recurring cost of providing such credits in the cost of

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[79] Enable October 2013 Rehearing Request at 12 (citing *Williston v. FERC*, 358 F.3d at 50).

[80] *See Sacramento Mun. Utility Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (nothing in court's "case law prevents the Commission from making findings based on 'generic factual predictions' derived from economic research and theory.").

[81] September 2013 Order, 144 FERC ¶ 61,195 at P 67.

service.[82] Moreover, as the Commission also stated in the September 2013 Order,[83] if the pipeline thinks that an NGA section 5 requirement to revise its tariff consistent with Commission policy would result in its rates being too low to recover its overall cost of service, it may file to show why it believes that would be the consequence of that action and seek a rate adjustment in the section 5 proceeding. Reflecting the cost of reservation charge credits in the pipeline's generally applicable rates ensures that the pipeline has an opportunity to recover its prudently incurred costs, without undercutting the pipeline's incentive to avoid the immediate financial cost of providing credits for any particular routine maintenance outage. In *North Baja v. FERC*,[84] the court approved our policy of requiring full credits to provide "the pipeline . . . with an incentive to resolve the interruption as quickly as possible,"[85] 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 costs associated with a pipeline "operating its system so that it can meet its contractual obligations," and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service.[86]

68. Enable suggests that a provision such as its tariff contains in GT&C section 8.2, requiring a pipeline to exercise due diligence to schedule maintenance so as to minimize service interruptions and to provide reasonable advance notice of any necessary interruptions, should be sufficient to ensure reliability of service. However, as the Commission found in *Texas Eastern*,[87] such a tariff requirement is a less effective means of accomplishing the Commission's objective of ensuring that primary firm service is as reliable as possible, than a full reservation charge crediting requirement. Such a tariff

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[82] *Id.*

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

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

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

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

[87] 149 FERC ¶ 61,143 at PP 77-80.

provision simply directs the pipeline to exercise due diligence, without imposing any significant risk that the pipeline will incur a financial cost for outages or providing shippers any financial relief from their costs as a result of such outages. Such a tariff provision contains no mechanism requiring any form of payment by the pipeline to its shippers for service outages. At most, such a tariff provision could provide a basis for a shipper to file a complaint with the Commission or a suit in court for damages, if it believed that the pipeline had failed to comply with its tariff's due diligence and reasonable notice requirements. In any such proceeding, the burden would be on the shipper to show such lack of due diligence or failure to provide reasonable notice. Pursuing either a complaint or a court suit would be time consuming and costly for the shipper, with an uncertain outcome given the difficulties of demonstrating a pipeline's lack of due diligence. As a result, the pipeline would face little risk that it would ever incur any cost when it fails to provide primary firm service because of routine maintenance.

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

70. By contrast, an express provision in Enable's tariff requiring it to provide full reservation charge credits during any routine maintenance outage will provide a strong financial incentive for a pipeline to minimize such outages to the maximum extent possible. With such a requirement, Enable will know that any failure to schedule primary firm service because of the performance of routine maintenance will require the payment of reservation charge credits. The Commission expects that imposing on Enable the risk of such an immediate financial cost if it fails to provide primary firm service will inspire it to exercise the highest possible standard of care to avoid such outages – a standard that is even higher than the level of care sufficient to satisfy a "due diligence" tariff standard.[88] As discussed above, our finding that the reservation charge crediting

[88] Enable points out that the Commission stated in *Panhandle*, 143 FERC ¶ 61,041 at P 80, that compliance with its reservation charge crediting policy "does not necessarily have any significant effect on a pipeline's costs and revenues." Enable suggests that, if this is true, it undercuts the Commission's conclusion that reservation charge crediting will provide pipeline's an incentive to minimize outages. However, it is not the actual cost of reservation charge credits that provides the incentive, but rather the risk that such

(continued…)

requirement will provide a strong incentive to minimize outages of primary firm service is a reasonable economic proposition on which the Commission may rely in deciding whether a pipeline's tariff is just and reasonable. Thus, the crediting requirement will help achieve the Commission's longstanding and important goal of minimizing outages of reserved primary firm service.

71. Enable asserts that, if it is currently achieving a careful balance between minimizing outages of primary firm service while also carrying out necessary maintenance to comply with safety regulations and maintain reliability, then imposing a new reservation charge crediting incentive to reduce outages could interfere with reliability and safety. The Commission expects that pipelines will comply with all applicable safety regulations and other requirements in order to maintain their systems properly. However, as the Commission has noted in other cases, pipelines have some control over the timing of routine maintenance.[89] For example, PHMSA integrity management regulations generally provide for a basic seven-year schedule for reassessing the integrity of pipeline segments in High Consequence Areas.[90] Thus, the Commission expects that reservation charge crediting will provide pipelines, including Enable, a strong incentive to schedule routine maintenance during periods when the subject pipeline facilities are least likely to be used by primary firm shippers, thereby minimizing such outages to the maximum extent possible. However, the Commission has no reason to believe that pipelines will shirk their responsibilities under their certificates of public convenience and necessity[91] and PHMSA regulations to maintain the safe and reliable operation of their systems, simply because full reservation charge credits are required when routine maintenance causes outages of primary firm service. This is particularly the case, since Commission policy permits pipelines to include in their rates a reasonable projection of the costs of such reservation charge credits, and thus the provision of

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a cost will be incurred. Assuming outages of primary firm service are minimized to the maximum extent possible, the costs of providing such credits may indeed be insignificant.

[89] *Texas Eastern*, 149 FERC ¶ 61,143 at P 123.

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

[91] *See Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 68 (2009).

reservation charge credits for outages to perform routine maintenance need not cause the pipeline to underrecover its cost-of-service.[92]

c. Compensation for Unavailability of Primary Firm Service

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

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

74. Enable argues that the September 2013 Order's holding that "it is reasonable to require the pipeline to provide rate relief in the form of full reservation charge credits for the service not provided"[93] is based on the flawed assumption that firm shippers are

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[92] As discussed in *TransColorado*, 144 FERC ¶ 61,175 at PP 35-44, and *Gulf South*, 144 FERC ¶ 61,215 at PP 31-34, the Commission only requires pipelines to provide partial reservation charge credits when an outage is necessitated by a one-time, non-recurring government requirement where the pipeline has less discretion as to when it would comply. *See also Texas Eastern*, 149 FERC ¶ 61,143 at PP 121-128. In addition, the Commission recognizes that PHMSA is considering additional safety regulations pursuant to the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, and the Commission has stated that it will consider how any regulatory changes should affect its reservation charge crediting policies when and if such changes occur, *Gulf South*, 144 FERC ¶ 61,215 at PP 60-61.

[93] September 2013 Order, 144 FERC ¶ 61,195 at P 62.

paying a rate that entitles them to service at all times without interruption and that there should be a credit when service is not provided.[94] Enable states that a pipeline's contracts incorporate the terms and conditions in its tariff and the pipeline's currently effective rates under that tariff. Enable argues that, if the pipeline's tariff does not provide for reservation charge credits, then the shipper has no contractual right to such credits when service is interrupted.

75. Enable also contends that a pipeline's tariff strikes a specific balance between the rates for service and interruptions in service. For example, Enable asserts that its current rates were developed based on the fact that it does not provide firm shippers reservation charge credits when service is interrupted. Therefore, its rates do not reflect any adjustment, such as a reduction in billing determinants, to allow Enable to recover its full cost of service while providing reservation charge credits. Enable asserts that there is nothing unreasonable about its charging a lower rate during all periods, including when service is interrupted, rather than charging a higher rate and then providing credits when service is interrupted. Enable argues that the benefit for shippers of a lower overall rate in time periods not affected by outages may outweigh any benefit from reservation charge credits when service is interrupted. Enable asserts that the Commission has provided no evidence in prior adjudications to justify its reservation charge crediting policy on grounds that it is unfair to shippers to charge them when service is interrupted, and Enable asserts that the Commission has not afforded any pipeline the opportunity to increase its rates to offset the effect of a unilateral reduction in billing determinants that the Commission's reservation crediting policy imposes.

76. The Commission recognizes that, although primary firm service is a pipeline's highest priority transportation service, even that service may be interrupted or reduced under a pipeline's tariff due to certain conditions, i.e., to perform required maintenance, as Enable's GT&C section 8.2 allows. In that sense, the service is not "guaranteed." However, the contract of each firm shipper on Enable includes a "Contract Demand" for that shipper set forth in Dth per day,[95] and each shipper must pay a reservation charge for each Dth of that Contract Demand. Thus, when a firm shipper is unable to obtain primary firm service within its contractual entitlement to service, it is not receiving the service upon which its reservation charge is based. As described above, the shipper's inability to receive its contracted for service entails significant risks of harm to the public and financial costs to the shipper. The crediting requirement provides both an incentive for the pipeline to exercise the highest standard of care to minimize such outages of

[94] Enable Rehearing Request at 13 and 20-23.

[95] *See, e.g.*, section 3 of Enable's form of service agreement for Firm Transportation Service.

primary firm service and provides compensation for any financial harm suffered by firm shipper who is affected by an unavoidable outage.

77. In the circumstances of this case, we reject Enable's contention that the potential adverse effects of increasing a pipeline's overall rate in order to allow it to recover its cost of service despite providing reservation charge credits could more than offset any benefits firm shippers might receive through a reservation charge crediting tariff provision. In the September 2013 Order, the Commission stated that, if Enable was concerned 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, Enable could present evidence in its filing to comply with the September 2013 Order to show why the pipeline believed that would be the consequence of that action.[96] The Commission has also stated that, if a pipeline produces evidence that requiring it to comply with the Commission's reservation charge crediting policy could cause it to incur significant additional costs which the pipeline might not be able to recover absent a significant increase in rates, the Commission and other interested parties could consider whether to proceed with section 5 action to modify the pipeline's crediting provisions.[97] In its filing to comply with the September 2013 Order, Enable did not produce any evidence that providing reservation charge credits would cause it to underrecover its cost of service so as to require an increase in its rates, despite the fact the

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[96] September 2013 Order, 144 FERC ¶ 61,195 at P 67. The September 2013 Order described the information to be included in such a filing as follows:

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

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

information the Commission has stated is necessary for it to estimate the pipeline's cost of compliance with the Commission's reservation charge crediting policy is in the pipeline's possession.

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

d. Lack of Evidence of Mismanagement or Problem with Service Outages

79. In the September 2013 Order, the Commission held that its policy of requiring full reservation charge credits for routine maintenance outages is applicable regardless of whether a pipeline has allowed such outages to occur through "mismanagement" of its system or can avoid such outages.[98] The Commission explained that, in such cases as *El Paso*, *Florida Gas*, and *North Baja*,[99] the Commission clarified that the policy set forth in Opinion No. 406 is not limited to situations involving pipeline "mismanagement." The September 2013 Order also pointed out that in *El Paso*, the Commission stated that its policy on this issue is not dependent upon the specific operating conditions on the pipeline,[100] and that the D.C. Circuit affirmed the policy of requiring full reservation charge credits for all routine maintenance outages of primary firm service in *North Baja v. FERC*.

80. On rehearing, Enable contends that, in order to require pipelines to provide full reservation charge credits during non-*force majeure* outages as an incentive to minimize such outages, the Commission must show that there is currently a problem with pipelines failing to minimize such outages. Enable contends that the Commission has failed to

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[98] September 2013 Order, 144 FERC ¶ 61,195 at PP 59-63.

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

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

make such a showing either in its prior adjudications requiring full reservation charge credits or in this case. Enable states that Opinion No. 406, which established the full crediting policy, stated only that "reservation charge credits also provide an incentive for the pipeline to manage its system so that it can avoid interruptions that it could have avoided if it had better managed its system."[101] Enable states that Opinion No. 406 made no attempt to explain the need for such an incentive or show that maintenance outages were the pipeline's fault. Enable asserts that more recent adjudications do no more than recite the same general assertion from Opinion No. 406.[102] Enable argues that, in this case, the Commission has similarly failed to show that the current level of service interruptions on Enable is too high so as to justify the need for a new incentive for Enable to reduce its service interruptions. Enable points out that, in *National Fuel*,[103] the court reversed Order No. 2000 extending the Standards of Conduct to the pipelines' relationships with their non-marketing affiliates, as well as their marketing affiliates, and the court explained, "FERC staked its rationale in part on a record of abuse, but that record is non-existent. Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." Enable contends that the September 2013 Order in this case suffers from the same flaw.

81. In this case, unlike *National Fuel*, the Commission has not "staked its rationale on a record of abuse," such as pipeline mismanagement of their systems resulting in unnecessary service interruptions. Our reservation charge crediting policy and our application of that policy to Enable are not based on any finding that pipelines generally, or Enable in particular, are currently mismanaging their systems or failing to manage their systems in a prudent manner. Rather, as described above, the Commission has "staked its rationale" for its reservation charge crediting policy on the strong public interest in ensuring that the primary firm service provided by pipelines, including Enable, is as reliable as possible in order to minimize the harm to the public and financial injury caused by outages of that service. In the exercise of our authority under the NGA to determine just and reasonable rates, terms, and conditions of service, the Commission has found that the goal of ensuring the maximum reliability of primary firm service is best accomplished by providing pipelines an economic incentive, through the reservation

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[101] Enable October 2013 Rehearing Request at 12, quoting Option No. 406, 76 FERC ¶ 61,022 at 61,086.

[102] September 2013 Order, 144 FERC ¶ 61,195 at PP 58-56; *Panhandle*, 143 FERC ¶ 61,041 at P 57; *Texas Eastern*, 140 FERC ¶ 61,216 at P 54.

[103] 468 F.3d at 843.

charge crediting requirement, to exercise the highest possible standard of care to provide reliable primary firm transportation service.[104]

82. Enable's contentions that, in order to require pipelines to provide full reservation charge credits for routine maintenance, the Commission must find that there is an industry problem with excessive service interruptions caused by pipeline mismanagement is directly contrary to the decision of the D.C. Circuit in *North Baja v. FERC*. The court's opinion in that case, which was issued less than four months after the court's *National Fuel* decision and was written by the same circuit judge (Judge Kavanaugh), affirmed our requirement that North Baja provide full reservation charge credits during non-*force majeure* outages, despite the absence of any evidence that the current level of service interruptions on North Baja was too high or that it was mismanaging its pipeline, and the court held that the Commission had reasonably relied on its past precedent on this issue, including Opinion No. 406.

83. As described in our rehearing order in that case, North Baja's rehearing request contended that the Commission's earlier order in the case improperly failed:

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

[104] This case is also distinguishable from *National Fuel*, because our reservation charge crediting policy is narrowly focused on the pipeline's performance of its jurisdictional interstate transportation service, whereas the rule at issue in *National Fuel* extended to the pipeline's relationships with non-jurisdictional affiliates. In *National Fuel*, the Commission had sought to extend the Standards of Conduct to the pipeline's relationships with all its energy affiliates, including producers, gatherers, processors, and LDCs, including those that held no capacity on the pipeline in question. The court stated that vertical integration between a pipeline and its affiliates creates efficiencies for consumers, and therefore the Commission cannot impede such vertical integration without adequate justification. By contrast, the reservation charge crediting policy at issue in this case is narrowly focused on ensuring that the pipeline's performance of its jurisdictional interstate transportation service is as reliable as possible, and this policy does not have any broader effects, such as impeding vertical integration of the pipeline with affiliates performing other functions.

> should consider the specific circumstances on the pipeline and extent of control the pipeline had in preventing an interruption of service during planned maintenance.[105]

84. The Commission rejected this contention, stating, "[a]lthough the pipeline in *El Paso* may have had a history of operational problems resulting in curtailments, the Commission has consistently held, at times under circumstances without such a history of operational problems, that interruptions from planned or scheduled maintenance is a non-*force majeure* event that requires the pipeline to provide full credits."[106]

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

> [a]s a general matter, FERC has repeatedly reiterated that scheduled maintenance is not a *force majeure* event. *See Florida Gas Transmission Co*., 107 FERC ¶ 61,074, at 61,245 PP 28-29 (Apr. 20, 2003); *Alliance Pipeline L.P*., 84 FERC ¶ 61,239, at 62,214 (Sept 17, 1998). In *El Paso Natural Gas Co*., moreover, the Commission decided that the rule applies even to pipelines with little excess capacity. *See* 105 FERC ¶ 61,262, at 62,350 P 7, 62,352 P 15 (Nov. 28, 2003). FERC explained that "[t]he Commission's policy on this issue as set forth in the *Florida Gas* decision is not dependent upon specific operating conditions on the pipeline." *Id*. at 62,352 ¶ 14. In its orders here, FERC expressly relied on these precedents and applied its well-established and reasonable definition of a *force majeure* event to the case before it.[107]

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

[106] *Id*. P 17.

[107] *North Baja v. FERC,* 483 F.3d at 822-823. In the *Florida Gas* decision, referred to by the court above, the pipeline maintained that no purpose would be served by requiring it to provide reservation charge credits, because it "has a history of working

(continued…)

86. The court further noted that "North Baja argues that FERC was obligated to consider the specific factual circumstances of North Baja—in particular, that it was operating at full capacity and scheduled maintenance outages were therefore uncontrollable."[108] The court rejected this contention, stating:

> In Opinion No. 406, however, the Commission defined *force majeure* events as events that are not only uncontrollable, but also unexpected. As the Commission wrote, "neither Tennessee nor its shippers are at fault for *force majeure* interruptions, because these are unexpected and uncontrollable events," 76 FERC ¶ 61,022 at 61,088. Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected. There is nothing unreasonable about FERC's policy that pipelines' rates should incorporate the costs associated with a pipeline "operating its system so that it can meet its contractual obligations," and that a cost-sharing mechanism should be reserved for uncontrollable and unexpected events that temporarily stall service. The Commission here reasonably determined that North Baja's circumstances did not exempt it from the Commission's longstanding policy regarding scheduled maintenance [emphasis added].[109]

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

88. In this case, we have relied on the same precedents to find that Enable's failure to provide full reservation charge credits for non-*force majeure* outages as the D.C. Circuit found the Commission reasonably relied on *North Baja v. FERC*. While Enable contends that Opinion No. 406 failed to support the policy requiring full credits for routine maintenance outages with findings of fact based on record evidence, the D.C. Circuit found that Opinion No. 406 "analyzed this issue at length" and "there is nothing unreasonable about FERC's policy" adopted by that opinion. Moreover, in describing the Commission's application of that policy in subsequent cases, the court highlighted our

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with its customers to schedule outages so as to minimize disruptions" and "no party has identified a specific instance when it inappropriately managed the scheduling of maintenance work." *Florida Gas*, 107 FERC ¶ 61,074 at P 22.

[108] *Id.* at 823.

[109] *Id.*

statement in *El Paso* that the Commission's "policy on this issue . . . is not dependent upon the specific operating conditions on the pipeline." Thus, while Enable contends that the Commission must demonstrate that the current level of service interruptions on a pipeline's system is too high in order to require the pipeline to provide full reservation charge credits, the D.C. Circuit held exactly the reverse – that the Commission has reasonably adopted and applied in individual adjudications a policy requiring full reservation charge credits for routine maintenance outages that is not dependent on the "specific operating conditions on the pipeline."[110]

89. Enable argues that *North Baja v. FERC* is distinguishable from the instant case, because that case addressed a pipeline's NGA section 4 tariff filing in which the pipeline had conceded that it should pay reservation charge credits. Enable asserts that North Baja's filing "was novel only in the way it calculated partial credits as applied to *force majeure* events."[111] By contrast, Enable argues that it is challenging the underlying basis for the reservation charge crediting policy. Enable further contends that *North Baja v. FERC* did not involve an NGA section 5 case in which the Commission bears the burden of persuasion, and the question of whether the pipeline's preexisting tariff was unjust and unreasonable was not at issue.

90. We reject Enable's contention that *North Baja v. FERC* is distinguishable from the instant case on the grounds that the Commission was acting under NGA section 4 instead of NGA section 5 and the case only involved an issue concerning the calculation of partial reservation charge credits for *force majeure* outages. In that case, North Baja's preexisting tariff contained no provision for reservation charge credits, similar to Enable's preexisting tariff in this case. North Baja made an NGA section 4 tariff filing, proposing to add to its GT&C a new section 7.6 providing limited partial reservation charge credits during *force majeure* outages.[112] North Baja did not propose any tariff language providing reservation charge credits during non-*force majeure* outages. The Commission's November 2004 suspension order agreed with a protester that North Baja must provide full reservation charge credits during non-*force majeure* outages, and therefore directed "North Baja to modify its proposal to provide full reservation charge credits whenever there is a service interruption in a non-*force majeure* event."[113] North Baja sought rehearing of that requirement, arguing that it should not be required to

[110] *Id.*

[111] Enable October 2013 Rehearing Request at 8.

[112] Proposed section 7.6 of North Baja's GT&C in its October 14, 2004 tariff filing in Docket No. RP05-25-000.

[113] *North Baja*, 109 FERC ¶ 61,159 at P 11.

provide full reservation charge credits for planned maintenance service interruptions because such interruptions are unavoidable on its system. The Commission denied rehearing and required the pipeline to modify its proposal consistent with Commission precedent to provide full reservation charge credits for non-*force majeure* outages,[114] and the court affirmed this requirement in *North Baja v. FERC*. Therefore, contrary to Enable's contentions, *North Baja v. FERC* did involve an issue concerning full reservation charge crediting for non-*force majeure* outages. Moreover, because the Commission's requirement that North Baja modify its tariff to provide full reservation charge credits went beyond accepting or rejecting North Baja's section 4 proposal, the Commission was acting under NGA section 5 when it imposed that requirement, despite the fact it did not expressly refer to NGA section 5.[115]

91. Thus, the facts concerning Enable's system are similar in all relevant respects to the facts presented by such cases as *North Baja*, where there was also no evidence of a lack of prior diligence in minimizing outages. While some outages of primary firm service for routine maintenance may be unavoidable, the pipeline has a degree of control over their timing, giving it the ability to minimize any necessary outages for routine maintenance. It is exactly this situation that creates the greatest need for, and potential benefit from, a tariff provision creating a strong financial incentive for the pipeline to minimize any necessary outages.

92. Finally, while Enable has asserted that the current level of primary firm service outages on its system is relevant to a determination of whether it should be required to provide reservation charge credits, it has not produced any evidence as to how many outages of primary firm service occur on its system. Consistent with the fact that we are proceeding by case-by-case adjudication, we have given Enable the opportunity to produce evidence of the pattern of outages on its system and explain why that pattern indicates our reservation charge crediting policy should not be applied. Information regarding the pattern of outages on Enable's system is in its possession, as the operator of its system. However, Enable chose not to submit any evidence concerning outages on its system, either to indicate that such outages are rare or non-existent or to indicate that such outages are significant but unavoidable. The Commission concludes that it has reasonably relied on its past precedent to require Enable to provide full reservation charge credits during non-*force majeure* outages without considering evidence of Enable's history of outages or how diligently it has managed its system. As discussed

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[114] *North Baja*, 111 FERC ¶ 61,101.

[115] *Western Resources*, 9 F.3d at 1577-1579 (D.C. Cir. 1993) ("FERC should bear the burden under § 5 whenever it moves beyond rejection of a proposed rate to the task of redesigning it.").

above, our requirement that pipelines provide full reservation charge credits during non-*force majeure* outages is not dependent on the "specific operating conditions on the pipeline," nor does it require a showing of a "history of operational problems resulting in curtailments." Indeed, Enable itself recognizes in its Rehearing Request that the Commission has applied that policy to pipelines in prior adjudications without any evidence as to those pipelines' histories of outages or lack of due diligence.[116] While Enable contends that the Commission erred in those prior cases, the D.C. Circuit has ruled otherwise.

4. NGA Section 5 and the Burden of Proof

93. As we have recognized throughout this proceeding, in order to require Enable to modify its reservation charge crediting provisions, we have the burden of persuasion to show both that: (1) Enable's existing reservation charge crediting provisions are unjust and unreasonable; and (2) the replacement tariff provisions the Commission imposes are just and reasonable. The September 2013 Order focused on the first prong of this burden, finding that section 5.2(a) of Rate Schedule FT and section 8.1 of Enable's GT&C are unjust and unreasonable, because they do not provide for partial reservation charge crediting during *force majeure* outages and full reservation charge crediting during non-*force majeure* outages. The September 2013 Order did not address the second prong of this burden, but instead required Enable to make a compliance filing proposing just and reasonable replacement tariff provisions.

94. On rehearing, Enable contends that the September 2013 Order failed to satisfy the Commission's NGA section 5 burden to show that Enable's existing reservation charge crediting provisions are unjust and unreasonable. Enable contends that the September 2013 Order improperly held that the fact Enable's reservation charge crediting provisions are contrary to the Commission's reservation charge crediting policies established in prior adjudications was sufficient to establish a *prima facie* case that Enable's tariff is unjust and unreasonable. Enable accordingly contends that the Commission improperly shifted to Enable the burden of producing evidence to justify retention of its existing reservation charge crediting provisions, without the Commission having first submitting record evidence that Enable's reservation charge crediting provisions are unjust and unreasonable.

95. The Commission finds that its actions in this proceeding are consistent with NGA section 5. In *East Tennessee*,[117] the court held that the Commission may, consistent with its burden of persuasion under section 5, impose on a pipeline the burden of producing

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[116] Enable's October 2013 Rehearing Request at 11-12.

[117] *East Tennessee*, 863 F.2d at 938.

evidence justifying a tariff provision, once a *prima facie* showing is made that the provision is unjust and unreasonable. The nature and type of evidence necessary to make a *prima facie* case that a tariff provision is unjust and unreasonable depends upon the tariff provision at issue and the extent to which there may be material issues of fact relevant to the establishment of a *prima facie* case.[118]

96. In this case, Enable's failure to provide partial reservation charge credits during *force majeure* outages and full credits during non-*force majeure* outages is inconsistent with binding Commission policy developed in past adjudications. As discussed in the preceding sections of this order, our policies requiring pipelines to provide partial reservation charge credits during *force majeure* outages and full reservation charge credits during non-*force majeure* outages have been established in adjudications concerning the reservation charge crediting provisions of individual pipelines. In *North Baja v. FERC*, the D.C. Circuit Court of Appeals affirmed our holdings in one of those adjudications. In *PG&E v. FPC*,[119] the court stated an "agency may establish binding policy . . . through adjudications which constitute binding precedent." [120] Accordingly, the Commission's reservation charge crediting policies established in its adjudications, including in *North Baja v. FERC*, are "binding precedent" which establish "binding policy," unless and until changed in a future adjudication.

97. In addition, the primary facts material to establishing a *prima facie* case that the Commission's current "binding precedent" on reservation charge credits is applicable to Enable are uncontested. The Commission requires pipelines to provide partial

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[118] *Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

[119] 506 F.2d 33, 38 (footnote and citations omitted). *See also, e.g., Consolidated Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency may "change the established law and apply newly created rules . . . . in the course of an adjudication").

[120] Similarly, in *Michigan Wisconsin Pipe Line Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975), the court stated:

> There is no question that the Commission may attach precedential, even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a stare decisis manner.

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

reservation charge credits during *force majeure* outages in order to equitably share the risk of outages for which neither the pipeline nor its shippers are at fault. The fact that Enable's tariff, together with its SFV rate design, places almost the entire risk of *force majeure* outages on its shippers demonstrates that Enable does not equitably share the risk of *force majeure* outages under its existing tariff.

98. The Commission requires pipelines to provide full reservation charge credits for routine maintenance outages in order to ensure that primary firm service is as reliable as possible, because interruptions of that service can cause serious harm to the public and financial injury to firm shippers. As explained above, the full crediting requirement acts as an incentive mechanism to ensure pipelines exercise the highest possible standard of care to minimize any interruptions of primary firm transportation service. It also provides shippers relief from the payment of reservation charges when the service reserved by those payments is not available.

99. Enable's firm shippers include: (1) major LDCs serving residential and other natural gas consumers; (2) gas-fired electric generators; (3) industrial users of natural gas; and (4) producers and marketers of natural gas. These shippers, like firm shippers on other pipelines, pay substantial reservation charges for primary firm service in order to have reliable access to natural gas to serve high priority needs, including needs affecting public safety. Therefore, as discussed above, the Commission's concern that interruptions of primary firm service be kept to an absolute minimum in order to avoid a serious risk of harm to the public and financial harm to firm shippers applies equally to Enable as to the other pipelines we have required to comply with our reservation charge crediting policy.[121] In addition, the finding that full reservation credits will provide an incentive for Enable to minimize outages of primary firm service is a reasonable economic proposition of the type that courts have found constitutes substantial evidence. Moreover, as the D.C. Circuit recognized in *North Baja v. FERC*, the Commission's policy requiring full reservation charge credits during non-*force majeure* outages "is not dependent upon specific operating conditions on the pipeline,"[122] and therefore factual issues concerning the operating conditions on Enable are not material to finding that the

[121] *See, e.g.*, *Panhandle*, 148 FERC ¶ 61,025 at P 55; *Texas Eastern*, 149 FERC ¶ 61,143 at 69-70.

[122] *North Baja v. FERC*, 483 F.3d at 823 (quoting *El Paso*, 105 FERC ¶ 61,262 at P 15). *See also Texas Eastern*, 140 FERC ¶ 61,216 at P 29.

Commission's policy requiring full reservation charge credits during non-*force majeure* outages is applicable to Enable.[123]

100. In these circumstances, the Commission has reasonably determined that the fact Enable's reservation charge crediting provisions and tariff definition of *force majeure* conflict with the Commission's "binding policy" on reservation charge crediting, including precedent affirmed by the D.C. Circuit, is sufficient to establish a *prima facie* case that those reservation charge crediting provisions are unjust and unreasonable, thereby shifting the burden of producing evidence to justify those provisions to Enable. Enable seeks to distinguish *East Tennessee* on the ground that, in that case, the Commission established a hearing before an Administrative Law Judge, and the *prima facie* case that the pipeline's minimum bill was anticompetitive, and thus unjust and unreasonable, was based on testimony by a shipper that the minimum bill had prevented it from taking advantage of other options to purchase natural gas. However, the Commission may decide issues based on written pleadings in a non-formal hearing, where there are no contested material factual issues requiring witness testimony.[124] Here, the facts outlined above are sufficient to establish a *prima facie* case that Enable's reservation charge crediting policies are unjust and unreasonable, without the need for a formal hearing before an ALJ.

101. Having made these findings based on the written pleadings submitted by the parties in the non-formal hearing established by the April 2012 Order, we have "then looked to see whether . . . [Enable] had demonstrated justifications for" its challenged reservation charge crediting provisions.[125] As the Fifth Circuit held in similar circumstances in *Transwestern v. FERC*,[126] the burden we have placed on Enable is not a

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[123] In contrast, *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991), cited by Enable, involved factual issues regarding application of the Commission's policies concerning rolled-in versus incremental rates. In that case, the court held that, before requiring a pipeline to implement rolled-in rates under NGA section 5, the Commission must consider factual issues concerning the operations of that particular pipeline, including whether its expansion provided "specific system-wide benefits."

[124] *Conoco Inc. v. FERC*, 90 F.3d 536, 543 n.15 (D.C. Cir. 1996) (quoting *Environmental Action v. FERC*, 993 F.2d 401, 413 (D.C. Cir. 1993) ("The court has repeatedly held that the Commission 'is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions.'").

[125] *Transwestern Pipeline Co. v. FERC*, 820 F.2d 733, 746 (5th Cir. 1987).

[126] *Id.* at 745-746.

burden of persuasion. We have not required it to prove by a preponderance of the evidence that its reservation charge crediting provisions are justified. Rather, the burden we have placed on Enable is a burden of production under which Enable has been obligated merely to proffer justifications for its reservation charge crediting provisions.

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

103. Second, Enable contends that its lack of reservation charge crediting provisions allows it to charge lower rates to its firm shippers since it does not need to increase its rates to recover the cost of such credits, and the benefit of those lower rates outweighs any adverse effects from the lack of reservation charge crediting provisions. Enable also asserts that, when the Commission has acted under NGA section 5 to require a pipeline to provide full reservation charge credits for non-*force majeure* outages, the Commission has not "afforded any pipeline the opportunity to increase its rates to offset the effect of a unilateral reduction in billing determinants that the Commission's reservation charge crediting policy imposes,"[127] and that the Commission cannot redress any harm the Commission causes to Enable's ability to recover its cost of service by stating that Enable can increase its rates in a future NGA section 4 filing where the burden of proof will be on Enable.

104. Contrary to these contentions by Enable, the Commission has recognized that when it acts under NGA section 5 to require a pipeline to adopt reservation charge crediting provisions, it must afford the pipeline an opportunity to increase its rates to take

[127] Enable October 2013 Rehearing Request at 14.

into account the costs of providing reservation charge credits.[128] The September 2013 Order in this case recognized that precedent and expressly stated that, if Enable believes that providing reservation charge credits would cause it to underrecover its cost-of-service, it "may present evidence in its filing to comply with this order to show why the pipeline believes that would be the consequence of" NGA section 5 action in this case.[129] However, in its filing to comply with the September 2013 Order, Enable did not produce any evidence that providing reservation charge credits would cause it to underrecover its cost of service so as to require an increase in its rates, despite the fact that the relevant information, such as the number of outages that would have required payment of reservation charge credits in a past representative period, is in its possession.

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

106. Finally, although we have relied on our existing reservation charge crediting policies, as affirmed by the D.C. Circuit in *North Baja v. FERC*, in establishing a *prima facie* case that Enable's current tariff is unjust and unreasonable, we have also provided Enable a full opportunity in this proceeding to present evidence and argument in order to challenge the validity of our reservation charge crediting policies and their application to it as required by the Fifth Circuit's *Florida Gas* and *Shell Oil* decisions. However, unlike in those cases, Enable has not produced any evidence that the factual circumstances on its system render the precedents established in prior adjudications concerning reservation charge crediting inapplicable to its system, nor has Enable provided us a rationale that would satisfy the Commission's burden to provide a

[128] *Northern*, 137 FERC ¶ 61,202 at P 36 (citing *ANR Pipeline Co. v. FERC*, 863 F.2d 959, 962-64 (D.C. Cir. 1988)), *order on reh'g*, 141 FERC ¶ 61,221 at PP 46-50. *See also Panhandle*, 143 FERC ¶ 61,041 at P 81, *reh'g*, 148 FERC ¶ 61,025 at PP 59-60.

[129] September 2013 Order, 144 FERC ¶ 61,195 at P 67.

"reasoned explanation for its departure from established case law"[130] concerning reservation charge crediting.

107. *Shell Oil* concerned whether Shell Oil's production from its "sidetracked" wells was entitled to a new vintage price which was higher than the old vintage price applicable to the existing well used in the sidetracking operation.[131] In a prior adjudication involving onshore wells, the Commission held that sidetracked wells were not eligible for a new vintage price, because producers undertaking sidetracking operations are able to utilize existing well footage to a great degree, and therefore, the Commission did not allow new vintage price treatment for these wells. In requesting a new vintage price for its sidetracked wells, Shell Oil contended that, while the onshore wells in the prior case had utilized existing well footage to a great degree, that fact was not true of its wells, which were drilled from offshore platforms and sidetracked from points only slightly below the surface without utilizing existing well footage to a great degree. Nevertheless, the Commission denied Shell Oil a new vintage price for its sidetracked wells.

108. On appeal to the Fifth Circuit, the Commission defended its action on the ground that Shell Oil was seeking to "reargue a matter that has been considered and settled by the Commission on general policy grounds."[132] The Commission asserted that, having failed to intervene in the earlier case, Shell Oil had forfeited any opportunity to challenge the rule established in that case. The court, however, held that Shell Oil had not had an opportunity in the earlier case to challenge the key factual assumption underlying the rule adopted in that case – that sidetracked wells utilize existing well footage to a great degree, and the court concluded that "due process requires that Shell be allowed to challenge that assumption here and now."[133] The court concluded that the general rule applied in onshore situations would not be a basis for ruling on offshore wells, because "the Commission… failed to substantiate the single factor upon which the rule" was based – the factual finding that sidetracked wells utilize existing well footage to a great degree.[134]

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[130] *Jupiter Energy*, 482 F.3d at 298 (quoting *EP Operating*, 876 F.2d at 48). *See also Wisconsin Valley*, 236 F.3d at 748.

[131] Sidetracked wells are created by drilling part of an existing well and then sideways to a new location.

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

[133] *Id.* at 236.

[134] *Id.* at 235-36.

109. In this case, unlike in *Shell Oil*, we have not claimed that Enable forfeited any opportunity to challenge our reservation charge crediting policy by failing to intervene in prior adjudications where the Commission established that policy. Rather, we have provided Enable a full opportunity to produce evidence that the reservation charge crediting policies established in our prior adjudications should not be applied to it, either because of factual differences between it and the pipelines in the prior cases or because the policy should be modified. However, as discussed *supra*, Enable has not produced any evidence of relevant factual differences between its situation and the situations of the pipelines in our prior reservation charge crediting adjudications similar to the distinction between onshore and offshore sidetracking operations raised in *Shell Oil*. Nor has Enable provided a basis for us to modify the policies established in those adjudications.

110. *Florida Gas v. FERC* concerned applications for five individual certificates to perform interruptible transportation service for particular customers filed by Florida Gas Transmission Co. (Florida Gas) during the transition to open access transportation under Order No. 436. In a prior case, involving a pipeline which had already applied for an open access transportation blanket certificate but whose blanket certificate had not yet been granted, the Commission limited the terms of similar individual certificates to the earlier of one year or until the pipeline accepted a blanket certificate. In that prior case, the Commission held that the term limit was necessary to avoid undue discrimination that could occur if some shippers received service under individual certificates, while others received open access transportation under a blanket certificate, and the D.C. Circuit affirmed the Commission's action in that case in *New Jersey Zinc Co. v. FERC*.[135] However, unlike the pipeline *New Jersey Zinc*, Florida Gas had not yet applied for a blanket open access certificate. Nevertheless, the Commission imposed the same term limit on the individual certificates in *Florida Gas v. FERC*, as it did in *New Jersey Zinc*.

111. On appeal, the Fifth Circuit stated that the Commission "justifies its action in this case solely on the grounds of a 'policy' which would limit the duration of every individual transportation certificate to a one year term. FERC did not hear evidence on the need for, or the effect of, this one year limit in these five instances, but instead rested its decision on the stated policy alone."[136] However, the court stated, when a rule "is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule."[137] The court found that the Commission had not substantiated applying the one-year limit to Florida Gas, because the facts in this case

[135] 843 F.2d 1497 (D.C. Cir. 1988) (*New Jersey Zinc*).

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

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

were substantially different from the facts in the earlier *New Jersey Zinc* case.[138] While in *Florida Gas* the pipeline never sought a blanket certificate, the pipeline in *New Jersey Zinc* had already applied for a blanket certificate. As a result, in *New Jersey Zinc*, a long term individual certificate may have frustrated the pipeline's ongoing conversion to open access transportation.[139] However, the court stated, the Commission had not explained in *Florida Gas* why, when a pipeline has not yet applied for a blanket open access certificate, the Commission's concerns about undue discrimination could not be addressed solely by a condition terminating the individual certificate upon acceptance of a blanket certificate, without further limiting the term of the certificate to one year.

112. In this case, unlike in *Florida Gas v. FERC*, the Commission has not simply applied its reservation charge crediting policy without giving Enable an opportunity to produce evidence on the need for, or effect of, our reservation charge crediting policies on Enable's system. Rather, we have provided Enable a full opportunity to produce such evidence, and we have addressed Enable's contentions on the merits. However, as discussed above, Enable has not produced any evidence of relevant factual differences between it and the pipelines in our prior reservation charge crediting adjudications that would render the precedent established in the earlier cases inapplicable to Enable. By contrast, in *Florida Gas v. FERC*, the pipeline had not yet applied for a blanket certificate to perform open access transportation, whereas the key fact the Commission had relied on in the prior adjudication limiting the term of an individual certificate to one year was that the pipeline had already sought a blanket certificate and was in the midst of converting to open access transportation. Moreover, for the reasons discussed above, Enable has not provided a basis for us to modify the policies established in those adjudications.

113. For these reasons, the *Shell Oil* and *Florida Gas v. FERC* decisions cited by *Texas Eastern* are distinguishable from this case. In both of those cases, unlike here, there were significant factual differences from the prior adjudications the Commission had relied on in reaching its decision, rendering the prior precedent inapplicable to those cases.

114. Finally, the Commission rejects Enable's contention that we have required Enable to modify its existing tariff based solely on a finding that the Commission's reservation charge crediting policy is just and reasonable, without ever supporting a finding that Enable's tariff provisions are unjust and unreasonable as required by NGA section 5. It is within the Commission's authority under the NGA to: (1) find that the public interest requires that pipelines exercise the highest possible standard of care to ensure the reliability of primary firm transportation service in order to avoid a serious risk of harm

[138] *Id.* at 45.

[139] *Id.* at 44.

to the public and financial injury caused by outages of that service; (2) require pipelines to provide full relief from the payment of reservation charges during any non-*force majeure* outage of primary firm service; and (3) share the risk of *force majeure* outages by providing partial reservation charge credits. Enable's tariff does none of these things and is therefore unjust and unreasonable.

C. October 2013 Compliance Filing

115. In October 2013, Enable filed *pro forma* tariff records to revise its reservation charge crediting provisions consistent with the directives of the September 2013 Order.[140] For the reasons discussed below, we find that Enable's revised tariff records generally comply with the Commission's policy on reservation charge crediting, *force majeure*, and our rulings in the September 2013 Order. However, we find that Enable must make one modification to those tariff records in order to render them fully just and reasonable. Therefore, we require Enable to file revised tariff records consistent with the discussion below within 20 days of the date of this order. Enable's October 2013 Compliance Filing requests the tariff records be made effective at least sixty days from the date of the Commission order accepting the tariff records in order to allow sufficient time to make changes to its scheduling, nominations, accounting and/or capacity release processes.

1. The Compliance Filing

116. The October 2013 Compliance Filing includes a new GT&C Section 18 (Reservation Charge Crediting) which describes the circumstances under which full and partial reservation charge credits will be provided and the method for calculating such credits. Enable proposes to use the Safe Harbor method to provide partial reservation charge credits during a *force majeure* event. Further the September 2013 Order held that "pipelines may include in their tariffs a provision permitting partial reservation charge crediting for a transitional period of two years from outages resulting from orders issued by the … PHMSA … pursuant to section 60139(c) of Chapter 601 of Title 49 added by section 23 of the Pipeline Safety, Regulatory and Job Creation Act of 2011." The Compliance Filing provides that reservation charge credits due to an outage that commences on or before the date that is two years from the effective date of GT&C Section 18 and that is required to comply with a PHMSA order or directive pursuant to Section 60139(c) of Title 49 of the United States Code, Chapter 601, will also be subject to a ten-day Safe Harbor.

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[140] *Pro Forma* Sheet Nos. 22, 35-36, 56-58, 91-92, 199-201, 240, 242-243, 277-278, 406, 500, 510, 515, 524, 528-530, 657-658, 669, 717-719, 719A, 844, 864, and 1201.

117. GT&C Section 18 includes provisions describing the calculation of the reservation charge credit to be provided, and includes provisions regarding the calculation of reservation charge credits for capacity release transactions. Consistent with the Commission's findings in the September 2013 Order,[141] for shippers with negotiated rate agreements or discount agreements, GT&C Sections 18.1(f)(ii) and 18.1(f)(iii) provide that the reservation charge credit shall be calculated in accordance with the applicable discount agreement or negotiated rate agreement.

118. Revised GT&C Section 8.1 (Definition of *Force Majeure*) removes planned and scheduled maintenance, tests and repairs from the definition of *force majeure*.

119. Revised GT&C Section 8.2 (Maintenance and Repairs) deletes the reference to Enable's ability to "curtail" service.

120. Public notice of Enable's October 2013 Compliance Filing was issued on October 28, 2013. Indicated Shippers protested the filing.[142] On November 12, 2013, Enable filed an answer to Indicated Shippers' protest. The Commission accepts the answer as it does not delay the proceeding, and assisted the Commission in understanding the issues raised.

121. Below we address the issues raised in Indicated Shippers' protest.

2. <u>Calculation of Reservation Charge Credits</u>

122. In GT&C Section 18.1(g)(i), Enable proposes generally to calculate reservation charge credits based upon the shipper's average usage during the seven days before the first day of the outage. However, on the first day of the outage, if Enable "has not provided prior notice of the [outage]," the reservation charge credits shall be based on "(A) Shipper's quantity of Primary Firm Service confirmed and scheduled prior to the [outage] or (B) the quantity Shipper nominated for Primary Firm Service, if Shipper nominated before the [outage] but [Enable] was unable to confirm that quantity for scheduling because of the [outage]."

123. Indicated Shippers assert this proposal is vague in that "prior notice" could be provided prior to the start of Gas Day, but after nominations have been submitted for the Gas Day. Indicated Shippers state that the Commission's policy is that notice of the

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[141] 144 FERC ¶ 61,195 at PP 76-78.

[142] Indicated Shippers consists of Chevron U.S.A. Inc., ConocoPhillips Company, Cross Timbers Energy Services, Inc., Shell Energy North America (US), L.P., and SWEPI LP.

outage must be provided before the Timely nomination cycle in order for a pipeline to base reservation charge credits on the seven-day average instead of the actual amount nominated, citing *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, at P 33 (2011). Indicated Shippers contend the Commission should require Enable to revise the proposal to state that notice must be provided prior to the Timely nomination cycle in order for Enable to use the seven-day average.

124. In its answer, Enable states Indicated Shippers misinterpret both Enable's compliance filing and the Commission's prior orders on the use of seven-day historical average usage data in the calculation of reservation charge credits when prior notice is given of an outage. Enable states that in the order on rehearing in *Southern*,[143] the Commission held it is reasonable for pipelines to use a historical average as a substitute for actual scheduled quantities when advance notice is given "before shippers have submitted nominations for the day (or days) of the outage." Enable asserts that Indicated Shippers quotes a few phrases from Section 18.1(g)(i) of the Compliance Filing but ignores subsection (B) providing that, if the shipper nominated before the outage occurred, the reservation charge credits will be based on the quantity the shipper nominated for primary firm service but the pipeline was unable to confirm for scheduling. Therefore, Enable states that section 18.1(g)(1) only allows it to use the seven-day historical average on a day when Enable provided notice of the outage before the shipper nominated. If a shipper nominates before Enable has given notice of an outage, its credits will be based on the amount of its nomination that Enable was unable to schedule.

125. We find that proposed section 18.1(g)(i) is consistent with Commission policy and find no merit in Indicated Shippers' protest. In *Southern*,[144] the Commission explained its policy concerning the use of historical usage to calculate reservation charge credits as follows:

> it is reasonable for the pipeline to use an appropriate historical average of usage as a substitute for use of actual scheduled amounts to determine the level of the shipper's reservation charge credits under circumstances where the pipeline has given advance notice of the unavailability of service, i.e., due to an outage or scheduled maintenance, prior to shippers' scheduling nominations. As Southern argues, this approach minimizes the potential for gaming, where shippers would submit scheduling nominations for high amounts knowing that the scheduling nomination will be

[143] 137 FERC ¶ 61,050 at P 20.

[144] 135 FERC ¶ 61,056 at P 33.

> rejected, while ensuring that shippers who do not nominate will receive credits based on their recent usage of the system.

126. Consistent with this policy, proposed section 18.1(g)(i) only allows Enable to use seven-day historical average usage data in calculating reservation charge credits when Enable has provided notice of the outage before the shipper submits a scheduling nomination. If Enable has not given notice of the outage before the shipper nominates, then its reservation charge credits will be based on the quantity it nominated that was not scheduled. While other pipelines have implemented Commission policy on this issue by limiting use of the historical average to situations where the pipeline gave notice of the outage before the Timely nomination cycle, Enable's proposal is also a reasonable method of implementing this policy.

3. <u>GT&C Section 18.1(h)(i)</u>

127. Section 18.1(h)(i) provides that the quantity eligible for reservation charge credits on any day would be reduced by "any quantities of service provided by Transporter to Shipper on such Day." According to Indicated Shippers, the Commission should require Enable to revise section 18.1(h)(i) to ensure that Enable does not limit reservation charges where a shipper is not able to obtain nominated service under one of its contracts, but Enable does provide nominated service under another of its contracts. Indicated Shippers includes a hypothetical example where a shipper has two firm contracts, each for 10,000 Dth per day, and the shipper nominates its full 20,000 Dth per day. Indicated Shippers is concerned that, if Enable is able to fully schedule the nominations for service under one contract (for 10,000 Dth/d) but is unable to schedule or deliver the 10,000 Dth per day under the other contract, Enable could argue that, since it provided "any quantity" (of 10,000 Dth/d) under one contract, it does not owe reservation charge credits up to this "quantity" under the other contract. To ensure that Enable does not so limit reservation charge credits, Indicated Shippers urge that Enable be required to revise that section to state that the limitation on credits would apply only to the quantities provided under that particular contract for service.

128. In response, Enable states that Indicated Shippers' protest does not accurately reflect how the tariff works. Enable states that GT&C Section 18.1(g) defines the "Affected Usage Quantity" eligible for reservation charge credits as "the quantity on any Day that equals Shipper's average nominated quantity of Primary Firm Service." Enable states that this quantity is determined for all of the shipper's primary firm service under all its firm contracts during the day in question. Enable states that GT&C section 18.1(h) then provides for this quantity to be reduced by "any quantities of service provided by Transporter to Shipper on such Day." Enable states that this quantity equals the quantities actually delivered to the shipper under all its firm contracts during the day in question. In other words, Enable states, the credit is applied to a quantity that equals Enable's primary firm service obligation to that shipper under all its firm contracts on that

day minus the amount of service actually delivered to the shipper on that day under all its firm contracts.

129. We find that revised section 18.1(h)(i) as proposed is consistent with Commission policy. Enable's explanation of how sections 18.1(g) and (h) are intended to operate addresses the concern raised by Indicated Shippers. As Enable explains, it will determine both the "Affected Usage Quantity" eligible for reservation charge credits and the "quantities of service provided by Transporter to Shipper on such Day" based on the relevant quantities for all of the shipper's firm contracts for the day in question. As a result, service provided under one firm contract will not reduce the reservation charge credits to be provided for Enable's failure to provide service under another contract. For example in Indicated Shippers' hypothetical, the shipper's total service nominations of 20,000 Dth per day under both its firm contracts would be reduced by the 10,000 Dth per day Enable actually delivered under one of the shipper's firm contracts, with the result that Enable would provide the 10,000 Dth per day of reservation charge credits for which Indicated Shippers contend the shipper should be entitled under its other firm contract.

4. Section 18.1(h)(ii)

130. GT&C section 18.1(h)(ii) excludes from the quantities for which reservation charge credits are due any quantities that could not be confirmed and scheduled "to the extent that Transporter's inability to confirm and schedule service is caused by the conduct, activities or operations of Shipper and/or upstream or downstream parties (including *force majeure* events affecting shipper or such parties) including but not limited to, activities and/or events such as: (A) Shipper's failure to perform in accordance with the terms of the Service Agreement and Transporter's tariff, including but not limited to Operational Flow Orders and failure to meet all applicable gas quality specifications; (B) failure of supply or transportation upstream of Transporter's pipeline; or (C) failure of market or transportation downstream from Transporter's system."

131. Indicated Shippers state Enable's filing is not consistent with Commission policy that limits reservation charge credits only where the pipeline's failure to confirm and schedule the shipper's nominated volumes is "solely" the result of actions "not within the control of Transporter," citing *Gulf South*, 144 FERC ¶ 61,215 at P 68 and *TransColorado*, 144 FERC ¶ 61,175 at P 59. Indicated Shippers assert that Enable should be directed to include this language in the revised tariff.

132. Enable responds that its tariff operates in a different manner than the tariffs in the cited cases. In those cases the proposed language provided a complete exemption from providing any credits to the shipper where the pipeline's failure to schedule was due to the conduct of the shipper or a third party. Here, Enable argues, its proposal reduces the Affected Service Quantity "to the extent" the outage was caused by the conduct of the shipper and/upstream or downstream parties. Enable states that under this provision, if the shipper's conduct was a small cause of the failure for it to receive the requested

service, there would be a small reduction in the reservation charge credits the shipper would receive. If the shipper's conduct was the sole cause of the failure to schedule, then no credits would be due that shipper.

133. In *TransColorado*, 139 FERC ¶ 61,229 at P 45, the pipeline proposed "that no reservation charge credits would be required" when TransColorado's "failure to schedule nominated and confirmed quantities is the result [of] the conduct of Shipper or the downstream operator of the facilities at the Receipt or Delivery Point, respectively." The Commission accepted the pipeline's proposal but required two modifications. First, the Commission required the pipeline to clarify that, in a non-*force majeure* situation, the conduct of others that would permit a reduction in credits must be by a party "not controlled by the pipeline." Second, the Commission stated that, in a *force majeure* situation, where only the third parties' facilities are affected by the *force majeure* event, the pipeline need not provide credits because it was ready and able to perform service. However, when both the pipeline's facilities and the facilities of third parties are affected by the *force majeure* event, then the pipeline could not have provided service regardless of the situation on interconnecting facilities, and therefore the pipeline must provide partial credits in order to share the risk of the *force majeure* event. The Commission accordingly required the pipeline to revise its tariff to provide it would only be exempted from providing credits when the failure to deliver was due *solely* to the conduct of others. The Commission made similar rulings in *Gulf South*.

134. We find that, consistent with *TransColorado* and *Gulf South*, Enable must revise section 18.1(h)(ii) to clarify that the conduct of others that would permit a reduction in credits must be a party "not controlled by Enable." However, the Commission will not require Enable to add the word "solely." As Enable contends, its proposed tariff language is different from the proposed tariff language in the cited cases, because it does not provide Enable a total exemption from providing credits when the listed events or conduct occur. Instead, it only exempts Enable from providing credits "to the extent" the listed events or conduct prevent Enable from providing service. Thus, when a *force majeure* event affects the facilities of both Enable and a third party, such that Enable could not have provided service regardless of the situation on the interconnecting facilities, Enable's proposed section 18.1(h)(ii) would not exempt it from providing partial credits. However, if Enable was ready to perform, but a *force majeure* event affected the interconnecting facilities of a third party, section 18.1(h)(ii) would exempt Enable from providing credits. This result is consistent with the Commission's holdings in *TransColorado* and *Gulf South*. Accordingly, the Commission will accept the proposed language but require Enable to add the phrase "not controlled by Enable."

5. *Force Majeure* and the Phrase "Unplanned or Unscheduled"

135. The September 2013 Order[145] explained that Enable's existing tariff provision in GT&C Section 8.1 that defines all service interruptions for tests, maintenance and repairs of certain pipeline facilities as *force majeure* events was overbroad because it could include routine and scheduled maintenance which the Commission treats as non-*force majeure* events. Accordingly, the order directed Enable to revise that section and clarify that "planned and scheduled tests, maintenance and repairs are excluded from its definition of *force majeure*."

136. In the Compliance Filing Enable proposed the following revision which added the phrase "unplanned or unscheduled" in three places:

> The term '*force majeure*' as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, arrests, wars, blockades, insurrections, riots and epidemics; landslides, lightning, earthquakes, fires, hurricanes, storms, floods and washouts; priority limitation or restraining orders of any governmental authority and civil disturbances; explosions, breakage, accidents, <u>unplanned or unscheduled</u> tests, <u>unplanned or unscheduled</u> maintenance, or <u>unplanned or unscheduled</u> repairs to machinery, equipment, lines of pipe or other facilities; freezing of equipment, lines of pipe or other facilities; inability to obtain, or unavoidable delay in obtaining material, equipment, rights-of-way or permits; and any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension.[146]

137. Indicated Shippers argue that the insertion of the words "unplanned or unscheduled" could be interpreted to apply to routine-type maintenance that was not planned, such as a failure to plan or schedule that was not due to an emergency but rather because of some level of mismanagement. They request that the tariff be clarified to state that only tests, maintenance, or repairs that are unplanned or unscheduled due to events outside the control of Enable would be considered *force majeure*.

138. In its response, Enable contends that the events included in the definition of *force majeure* now are restricted to those that are unexpected, and thus are by definition

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[145] 144 FERC ¶ 61,195 at P 71.

[146] *Pro Forma* Sheet No. 657 (emphasis added).

events outside of Enable's control. It asserts that Indicated Shippers' contention that the proposed language would include Enable's affirmative mismanagement of its system as *force majeure* events for purposes of reservation charge crediting is implausible nor is it supported by the plain language of Section 8.1. Moreover, Enable asserts, it is inconsistent with Enable's affirmative duty to minimize service interruptions under GT&C Section 8.2.

139. The Commission finds that Enable's proposal to revise GT&C section 8.1 definition of *force majeure* is just and reasonable. Indicated Shippers' request to add the phrase "not within the control of Enable" immediately after the new words "unplanned or unscheduled" is unnecessary. The final phrase of Section 8.1, including in the definition of *force majeure* "any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension" sufficiently indicates that the listed *force majeure* events are events not within Enable's control.

II. Liability and Damages Tariff Provision

1. Existing Liability and Damages Provision

140. Enable's tariff currently provides as follows: "Transporter shall not be liable in damages to Shipper … absent a showing that Transporter caused such claimed damage by its sole or gross negligence, bad faith or willful misconduct … in such instance, Transporter's liability shall extend to general damages only and shall not include special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits or other such elements of damage."[147]

2. The April 2012 and September 2013 Orders on Enable's Liability and Damage Provisions

141. The April 2012 Order found that Enable's liability provision was inconsistent with Commission policy in two respects. First, the Commission stated that the Commission has prohibited pipelines from limiting liability in a manner that would immunize them from direct liability resulting from simple negligence. The Commission explained that "a simple negligence standard gives service providers a powerful incentive to operate their systems in a reasonable and prudent manner."[148] Consistent with this policy, the Commission stated that the Commission has prohibited pipelines from limiting liability to situations involving their "sole" negligence, because such a limitation would rule out a

[147] *Pro Forma* Sheet No. 658.

[148] April 2012 Order, 139 FERC ¶ 61,064 at P 19 (quoting *Orbit Gas Storage Inc.*, 126 FERC ¶ 61,095 at P 58 (*Orbit*)).

situation where the pipeline and another party are both negligent, citing *Orbit*. Accordingly, the Commission found that Enable's tariff provision limiting its liability to situations involving its "sole . . . negligence" violated this policy.

142. Second, the Commission stated that it has prohibited pipelines from insulating their exposure to indirect damages resulting from their gross negligence, bad faith, or willful misconduct, citing *MarkWest Pioneer, L.L.C.*[149] The April 2012 Order found that Enable's tariff violated this policy by limiting its liability in situations of gross negligence only to general damages and excluding liability for "special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits or other such elements of damage." The April 2012 Order accordingly required Enable to revise its tariff "or show cause why it should not be required to do so."[150]

143. The September 2013 Order determined that Enable's liability provision was inconsistent with current Commission policy by limiting its liability to "sole or gross negligence, bad faith or willful misconduct," and by limiting its liability in situations of gross negligence, bad faith and willful misconduct only to general damages and expressly excluding liability for other indirect or consequential damages.[151]

144. The Commission rejected Enable's arguments regarding the Commission's holdings in the order in Enable's Order No. 636 restructuring proceeding.[152] In that case, the Commission approved liability and damages provisions for Enable's predecessor in interest, Arkla, which are now reflected in Enable's tariff. However, the September 2013 Order explained that the Commission's liability policy had evolved since *the Restructuring Orders* were issued in 1993,[153] and that Enable's liability provisions were inconsistent with current Commission policy, which imposes liability for negligent acts and bars any limitation on damages in the case of willful misconduct or gross negligence. Consequently, the Commission ordered Enable to revise its tariff to conform to current policy.[154]

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[149] 125 FERC ¶ 61,165, at P 54 (2008) (*MarkWest)*.

[150] April 2012 Order, 139 FERC ¶ 61,064 at P 21.

[151] September 2013 Order, 144 FERC ¶ 61,195 at P 85.

[152] *See Restructuring Orders*, 64 FERC ¶ 61,166 at 62,489-91.

[153] September 2013 Order, 144 FERC ¶ 61,195 at P 85.

[154] *Id*.

3. <u>Enable's Rehearing Request</u>

145. Enable argues that the Commission failed to articulate why Enable's existing tariff provisions had become unjust and unreasonable (beyond the fact that they are inconsistent with current Commission policy).[155]

146. Enable complains that the Commission suddenly departed from past practice without justification, describing the September 2013 Order's analysis of the 1993 *Restructuring Orders* as conclusory.[156] Enable argues that the Commission did not explain why this formerly acceptable allocation of liability and risk for losses has now become unjust and unreasonable.[157]

147. Enable believes that the September 2013 Order failed to respond to Enable's objection that the Commission had not justified requiring natural gas companies to procure insurance for losses for which they previously had no risk of liability and such insurance may not even be available.[158] Enable also objects that the Commission should not be allowed to apply the current Commission policy on negligence liability and for gross negligence and willful misconduct without analyzing how Enable's liability provisions and other aspects of its rates and services relate to one another,[159] and that the Commission did not explain adequately its preference for allocating these risks and their costs to the pipeline, rather than to the pipeline's shippers.[160]

4. <u>Commission Determination</u>

148. As noted above, the Commission has made two adjustments in its policy on a pipeline's ability to limit its liability for simple negligence or for gross negligence and

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[155] Enable October 2013 Rehearing Request at 23. Enable essentially couches the matter in terms of lack of evidence and burden of proof, rather than as an issue of policy change articulated in a series of decisions that has binding effect so long as the path of the agency's reasoning in support of the change is reasonable and clearly articulated. The Commission considers the issue much more of the latter than the former.

[156] *Id.* at 24-25.

[157] *Id.* at 23.

[158] *Id.* at 24.

[159] *Id.*

[160] *Id.*

willful misconduct, since the tariff language for Enable's predecessor-in-interest, Arkla, was approved in 1993. First, with respect to a pipeline's liability for simple negligence, the Arkla *Restructuring Order*, relied on by Enable, set forth the Commission's policy that pipelines should be liable for direct damages for their own negligence,[161] and Arkla interpreted the tariff language approved by the Commission as subjecting it "to liability in the event of its own negligence," excluding consequential damages.[162] Thus, the *Restructuring Order,* itself, established the general principle that Enable must be liable for direct damages for its own simple negligence. However, in that order, the Commission failed to address the fact the subject tariff provision only provided for such liability in situations involving Enable's "sole" negligence. Nevertheless, one day later in an order addressing the restructuring of another pipeline, the Commission required that pipeline to remove the word "solely" from its liability provision, so that the pipeline's liability for simple negligence would extend to situations where both the pipeline and another party were negligent.[163] In subsequent cases, the Commission has consistently required pipelines to remove tariff provisions limiting their liability for simple negligence to situations involving their "sole" negligence, finding pipelines should also be liable for simple negligence in a situation where the pipeline and another party are both negligent.[164]

149. The Commission has also explained that requiring a pipeline to be liable for direct damages for their simple negligence "gives service providers a powerful incentive to operate their systems in a reasonable and prudent manner."[165] This policy objective applies both in situations involving the pipeline's sole negligence and its contributory negligence. Moreover, as discussed in the preceding section concerning reservation charge credits, a finding that exposing the pipeline to financial loss when it is negligent will provide it an incentive to operate its system in a prudent manner is a reasonable economic proposition of the type the courts have held constitutes substantial evidence upon which the Commission may rely in deciding whether a pipeline's tariff is just and reasonable. Accordingly, the September 2013 Order's requirement that Enable remove its tariff provision limiting its liability for simple negligence to situations involving its

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[161] *Restructuring Order*, 64 FERC ¶ 61,166 at 62,490.

[162] *Id*. at 62,489.

[163] *Algonquin LNG, Inc*., 64 FERC ¶ 61,173, at 62,526 (1993).

[164] *Koch Gateway Pipeline Co*., 65 FERC ¶ 61,338, at 62,619 (1993). *Gulf South Pipeline Co., LP,* 98 FERC ¶ 61,278, at 62,182 n.55 (2002). *Petal Gas Storage, L.L.C.,* 124 FERC ¶ 61,082, at PP 26-28 (2008). *Orbit*, 126 FERC ¶ 61,095 at P 58.

[165] *Id.*

"sole" negligence was consistent with longstanding Commission policy and supported by substantial evidence.

150. Second, with respect to liability for consequential damages for gross negligence, the Commission recognizes that the Arkla *Restructuring Order* approved Enable's existing tariff provision limiting its liability to direct damages for both simple and gross negligence. However, in subsequent cases,[166] the Commission has held that tariff provisions limiting a pipeline's liability to direct damages are only permitted for simple negligence. For example, in *MarkWest*, the Commission prohibited a pipeline from insulating itself from exposure to consequential damages resulting from the pipeline's gross negligence.[167]

151. It is just such egregious behavior that often gives rise to the assessment of liability costs for indirect and consequential damages, and there is no basis for using a tariff provision as a shield from such damages, which would only tend to invite a more lax attitude toward such behavior. Tariff provisions that limit liability for simple negligence to direct damages, whether the negligence of the pipeline or the shipper, are less controversial, and are not on their face unreasonable, particularly where this provides a balance between the pipeline and the shipper's liability for similar behavior. A pipeline tariff cannot completely free a pipeline from all liability for simple negligence, but may limit liability for simple negligence to direct damages. No such limitation on indirect or consequential damages should be allowed for gross negligence, however, since gross negligence or willful misconduct should be strongly discouraged.

152. Enable argues that an agency must provide reasoned analysis when it departs from prior practice.[168] However, in this case, as explained above, the Commission is not departing from a policy, but applying to Enable a well-established policy which has been developed since the Arkla *Restructuring Orders* and consistently applied in a long line of cases.[169] This rehearing order offers an opportunity to respond to Enable's objections

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[166] *ANR Pipeline Co.*, 100 FERC ¶ 61,132, at P 13 (2002); *Guardian Pipeline, L.L.C.*, 101 FERC ¶ 61,107 (2002); *MarkWest*, 125 FERC ¶ 61,165 at P 54.

[167] *Trailblazer Pipeline Co., LLC*, 142 FERC ¶ 61,007, at P 8 (2013) (citing *MarkWest*, 125 FERC ¶ 61,165 at P 54).

[168] Enable October 2013 Rehearing Request at 25 n.66.

[169] *E.g.*, *Orbit*, 126 FERC ¶ 61,095 at P 58; *Guardian Pipeline, LLC*, 101 FERC ¶ 61,107 at P 18; *Cameron LNG, LLC*, 115 FERC ¶ 61,229, at P 37 (2006); *Port Arthur*, 115 FERC ¶ 61,344 at P 37; *Transcontinental Gas Pipe Line Corp*., 96 FERC ¶ 61,352, at 62,324 (2001).

noted earlier, and in so doing recapitulates the Commission's policy that there should be at least direct liability for simple negligence if there is fault, and moreover a person should not be able to evade the indirect consequences of its gross negligence or willful misconduct.

153. Keeping that framework in mind, one can turn to Enable's first objection − that it is not clear that Enable can acquire appropriate insurance. Perhaps it cannot, and that would be understandable, but that is not a reason for allowing a pipeline to create a tariff "protection" for the full consequences of such behavior. Thus, the ability or inability to acquire insurance is essentially irrelevant.

154. Enable argues that the Commission did not explain its apparent preference to allocate these risks and their attendant costs to pipelines, rather than to shippers. However, the Commission has fully explained that preference. The purpose of allocating these risks and costs to pipelines is to provide them "a powerful incentive to operate their systems in a reasonable and prudent manner."[170] Moreover, simple fairness supports allocating to the pipeline the risks of losses due to the pipeline's own negligence, rather than shifting those risks to the pipeline's shippers.

155. Enable next contends that it is not clear that it can acquire appropriate insurance to cover any losses it may incur as a result of its negligence. However, any difficulty Enable may encounter in seeking such insurance does not justify a tariff provision shifting the risk of losses resulting from the pipeline's own negligence to its shippers, contrary to the Commission's policy of allocating that risk to pipelines in order to provide then an incentive to operate their systems in a reasonable and prudent manner.

156. Whether internal controls, redundant systems, or insurance can be used to ensure this prudent management depends on how the pipeline decides to prudently manage its business and what tools are available to that end. In that sense, it is irrelevant whether or not insurance is available to ensure operating in a prudent, non-negligent manner. In other words, the decision to acquire this insurance is a business decision for the pipelines to make. However, as discussed in *Iroquois Gas Transmission System, L.P.*, 145 FERC ¶ 61,233, at PP 28-33 (2013), the decision to acquire insurance coverage does not affect our allocation of risks as between the pipeline and its shippers for *force majeure* outages or, as the case may be, losses due to the pipeline's negligence.

[170] April 2012 Order at P 19.

157. Enable asserts that the Commission failed to analyze the relationship between Enable's liability provisions and the other aspects of its rates and services.[171] However, the April 2012 Order's direction that Enable modify its tariff consistent with Commission policy "or show cause why it should not be required to do so" provided Enable an opportunity to produce whatever evidence it desired in order to contest the Commission's *prima facie* showing that its liability tariff provisions were unjust and unreasonable because contrary to Commission precedent. If Enable believed that a modification of its tariff liability provisions would affect its ability to recover its cost of service, it could have produced such evidence. However, Enable did not produce any such evidence, despite the fact that evidence concerning its costs and revenues was in its possession. Nor has Enable produced any evidence that circumstances on its system differ from those on other pipelines such that the Commission's general policy concerning liability for simple and gross negligence should not be applied to it.

158. Finally, Enable argues that the Commission failed to explain why its policy on using a tariff to shield a regulated entity for consequential liability for gross negligence or willful misconduct has evolved.[172] In fact, the September 2013 Order explained that the liability policy provides Enable with a "powerful incentive" to operate reliably and prudently,[173] and the Commission has further explained the path of its reasoning above.

159. In these circumstances, the Commission has satisfied its burden of persuasion under NGA section 5 to show that Enable's existing tariff provisions concerning liability were unjust and unreasonable. Accordingly, the Commission denies rehearing on this issue.

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[171] It is not entirely clear what Enable is asking be done when it asks the Commission to analyze the relationship between its existing rates and terms of service and its existing tariff liability limitations, before its liability language can be brought up to date. The terms and conditions of service accepted for the tariff of a regulated natural gas pipeline are premised on the expectation of prudent management, and such prudent management by definition excludes negligent behavior, and especially gross negligence and willful misconduct; therefore, conforming Enable's liability language to the Commission's current policy on liability provisions in pipeline tariffs should have no relevance to its existing rates and terms of service. To the extent that what Enable is alluding to are increased costs to ensure prudent management, or to acquire insurance, then such costs may be sought to be recovered in some future rate filing if they are shown to be reasonable.

[172] Enable October 2013 Rehearing Request at 24.

[173] September 2013 Order, 144 FERC ¶ 61,195 at P 85 (citing April 2012 Order, 139 FERC ¶ 61,064 at P 19).

5. **Enable's October Compliance Filing on Liability**

160. On October 15, 2013, Enable made a *pro forma* compliance filing responsive to the September 2013 Order. Enabled proffered the following liability section:

> Transporter shall not be liable in damages to Shipper for Transporter's actions or inactions, including those taken in accordance with the provisions of this Tariff, absent a showing that such damages were caused by Transporter's negligence. In such instance, Transporter's liability shall extend only to general damages. For purposes hereof, Transporter shall not be deemed to have been negligent unless it is shown that Transporter's actions or failure to act proximately caused such damages at a time when such result was reasonably foreseeable or avoidable. Transporter's liability shall include special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits or other such elements of damage only to the extent it is shown that such damages were caused by Transporter's gross negligence, bad faith or willful misconduct.[174]

161. No party objected to this part of Enable's compliance filing, and the Commission finds this revised liability section appears to adequately comply with the September 2013 Order. The *pro forma* language now clearly provides general direct damages for simple negligence. Although in cases of simple negligence it limits Enable's liability only to general damages, it does not limit Enable's liability for "special, continuing, exemplary, presumptive, incidental, indirect or consequential damages, including lost profits …" in cases of gross negligence, bad faith, or willful misconduct. Accordingly, Enable is directed to file actual tariff revisions consistent with the *pro forma* proposal, within 20 days of this order.

The Commission orders:

(A) Enable's request for rehearing is denied.

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[174] *Pro Forma* Sheet No. 658.

(B) Enable's October 2013 Compliance Filing is accepted. Enable is directed to file revised tariff records in compliance with directives in this order within twenty days of the date of this order to be effective sixty days from the date of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.