UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Williston Basin Interstate Pipeline Company Docket No. RP00-107-009

ORDER ON REHEARING

(Issued April 20, 2006)

1. On December 22, 2005, Williston Basin Interstate Pipeline Company (Williston) filed a request for rehearing of the Commission's November 22, 2005 Order on Initial Decision.[1] In the November 22 Order, the Commission held that the Part 157 transportation service provided by Williston to Northern States Power Company (NSP) has become unjust and unreasonable and that it must be converted prospectively to Part 284 transportation service. In that order, the Commission also held that Williston's refusal to increase NSP's Annual Delivery Quantity (ADQ) under its Rate Schedule FT-1 transportation contract from 50 percent to 100 percent was unjust and unreasonable because Williston does not have operational or maintenance concerns that justify the limitation.

2. The November 22 Order directed Williston to comply with its requirements no later than December 22, 2005. However, on December 21, 2005, Williston filed a motion for a stay of the compliance requirement pending rehearing and, if necessary, judicial review. In the alternative, Williston sought an extension of time until 60 days after the Commission issues an order in this proceeding that is no longer subject to rehearing.[2]

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[1] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 (2005) (November 22 Order).

[2] On January 5, 2005, NSP filed an answer opposing Williston's request for a stay or an extension of time. On January 10, 2006, Williston filed a reply, stating that NSP's answer was moot because the Commission had granted the extension of time. Williston also asserted that the Commission acted properly to preserve the status quo, in part because of the Notice of Proposed Rulemaking issued December 27, 2005, in Docket No. RM05-35, S*tandard of Review for Modifications to Jurisdictional Agreements*, 113 FERC ¶ 61,317 (2005). Because any rule issued in that docket would apply only prospectively from the date of its issuance, it does not apply to the instant proceeding.

On December 23, 2005, the Commission issued a notice extending the time for compliance until further order of the Commission.

3. As discussed below, the Commission denies Williston's request for rehearing of the November 22 Order and directs Williston to comply with this order within 15 days of the date on which this order is issued.

Request for Rehearing

4. The central issue on rehearing is whether the Commission applied the proper standard in deciding this case. In the November 22 Order, the Commission rejected Williston's claim that the *Mobile-Sierra* "public interest" standard applies and affirmed the Presiding Administrative Law Judge's (ALJ) determination in the Initial Decision (ID) that the Natural Gas Act (NGA) "just and reasonable" standard is the applicable standard. The Commission emphasized that the Rate Schedule X-13 contract permits both parties to seek changes to the contract under the NGA. Specifically, the Rate Schedule X-13 contract affords Williston the right to apply to the Commission for changes in rates, terms, and conditions pursuant to NGA section 4, while NSP is permitted to initiate proceedings under NGA section 5.[3] On rehearing, Williston again argues that the Rate Schedule X-13 contract can be abrogated only if the public interest so requires. However, the Commission denies rehearing on this issue.

5. In addition to its claim that the Commission applied the wrong legal standard, Williston alleges six other errors by the Commission.[4] Many of these arguments repeat

[3] *See Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 at P 20-24 (2005).

[4] The six errors and issues alleged by Williston are addressed below and are concisely stated as follows:

a. The Commission incorrectly placed the burden of proof on Williston rather than on NSP, which invoked NGA section 5 in its effort to abrogate the Rate Schedule X-13 contract.

b. The Commission failed to support its decision with specific findings from the record, relying instead on generic rulings to justify its determination to abrogate the Rate Schedule X-13 contract.

(continued…)

the allegation that the Commission applied the wrong legal standard in this case. As discussed in greater detail below, the Commission also finds that these claims of error have no merit.

Discussion

6. The Commission affirms that the just and reasonable standard is the proper standard to apply in this proceeding. In addition, the Commission rejects Williston's claim of other errors in the November 22 Order.

A. Applicable Legal Standard

7. Williston argues again that the Commission must adhere to the *Mobile-Sierra* doctrine and may modify a contract only if the public interest so requires.[5] According to

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c. The Commission's changing the Rate Schedule X-13 contract to an open-access contract is inconsistent with its rulings in similar cases, and the Commission's failure to explain this departure from precedent is arbitrary and capricious.

d. The Commission's decision to continue the biennial rate adjustments established by the Rate Schedule X-13 contract provides NSP with an undue preference beyond the Commission's authority and results in a revenue impact that is not *de minimis*.

e. The Commission's determination to increase the ADQ under the Rate Schedule FT-1 contract exceeds the Commission's authority because the Commission did not make the required public interest findings.

f. The Commission's ruling on the ADQ issue intrudes into the discretion allowed pipelines with respect to the safe operation of their systems and ignores valid operational reasons for maintaining the current ADQ.

[5] Williston cites *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1171 (D.C. Cir. 2005), *citing FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). The Court of Appeals stated as follows:

> The circumstances under which § 5 of the NGA allows FERC to order rate changes that are "in the public interest" include circumstances such "as where it might impair the financial ability of the public utility to continue

(continued…)

Williston, the Commission did not merely adjust the rate or term of the service; it invalidated the contract and ordered Williston to enter into a new and different type of contract with NSP. However, continues Williston, the Commission did not satisfy the public interest standard when it ruled that the Rate Schedule X-13 contract has become unjust and unreasonable merely because it does not have the features the Commission now requires to create efficient competition.[6] Williston maintains that, when the Commission acts to change a contract under NGA section 5, it must determine whether the contract adversely affects the public interest. In other words, states Williston, the focus is not on the private interests of a party to the contract because parties may by contract agree to terms that the Commission itself could not impose, and if they have done so, section 5 does not give the Commission the authority to relieve them of an improvident bargain.[7]

8. Thus, contends Williston, while the Rate Schedule X-13 contract may give NSP the right to initiate a proceeding under NGA section 5, that does not change the standard that the Commission must meet in the exercise of its section 5 authority to reform the contract, nor does it evidence an intent by the parties to change the standard which the Commission must apply from the "public interest" standard to the less stringent "just and reasonable" standard.[8] Further, emphasizes Williston, the burden was not on it to justify the status quo, as the Commission suggested.[9]

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its service, cast upon other consumers an excessive burden, or be unduly discriminatory.

[6] Williston cites *Texaco, Inc. v, FERC*, 148 F.3d 1091, 1095, 1097 (D.C. Cir. 1998) (*Texaco*); *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d 45 (D.C. Cir. 2004)

[7] Williston cites *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984). (The obligation to ensure that rates are not unjust and unreasonable under Section 206 of the FPA – comparable to Section 5 of the NGA – "is imposed for the direct benefit of the public at large rather than . . . for the direct benefit of the seller and purchaser.")

[8] Williston cites *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1176, 1177 n.7 (D.C. Cir. 2005) (*ExxonMobil*).

[9] Williston cites *Transcontinental Gas Pipe Line Corp*., 112 FERC ¶ 61,170 at P 11 (2005) (*Transco*).

9. The Commission denies rehearing and affirms its determination in the November 22 Order that the just and reasonable standard is the proper legal standard to apply in this case. In arguing that the Commission must satisfy the public interest standard, Williston starts from the premise that the *Mobile-Sierra* doctrine requires that the Commission satisfy the public interest standard whenever it modifies a contract. This is a mischaracterization of the *Mobile-Sierra* doctrine. As the United States Court of Appeals for the District of Columbia has stated,

> that doctrine holds that where parties have negotiated a natural gas shipment contract that sets firm prices or dictates a specific method for computing shipping charges *and that denies either party the right to change such prices or charges unilaterally*, FERC may abrogate or modify the contract only if the public interest so requires (emphasis added.[10]

10. Thus, contrary to Williston's contention, the *Mobile-Sierra* doctrine does not establish an across-the-board requirement that the Commission must satisfy the public interest standard whenever it orders a change in a contract. Rather, the Commission may order changes in the provisions of a contract pursuant to the ordinary just and reasonable standard in NGA sections 4 and 5, whenever the contract includes provisions permitting the parties to seek such changes. This fact has been well settled since the Supreme Court's 1958 decision in *United Gas Pipe Line Co. v. Memphis Light Gas and Water Division*,[11] holding that the *Mobile-Sierra* public interest standard does not apply to changes a party seeks pursuant to "rights expressly reserved to it by contract."[12]

11. The Rate Schedule X-13 contract at issue here includes a broad *Memphis* clause providing for changes at the behest of either of the parties, pursuant to NGA sections 4 and 5. Among other things, after providing that Williston may seek changes "in rates

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[10] *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998).

[11] 358 U.S. 103, 112 (1958).

[12] In support of its contention that the Commission must always satisfy the public interest standard to order a change in a contract, Williston quotes the following language from the D.C. Circuit's recent decision in *ExxonMobil*: "under the *Mobile-Sierra* doctrine, the FERC may modify a contact provision if (but only if) the 'public interest so requires.'" However, Williston ignores the very next sentence of the court's decision: "However, *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division* . . . allows pipeline companies to change their rates if their contracts contain clauses (now known as '*Memphis* clauses') reserving the right to do so. 430 F.3d 1166, 1171 (D.C. Cir. 2005).

terms and conditions under Section 4 of the Natural Gas Act," the *Memphis* clause continues: "Nor shall this Agreement be construed as affecting in any way the rights of NSP . . . . to seek to initiate proceedings under Section 5 of the Natural Gas Act, other provisions thereof, or the FERC's rules and regulations thereunder, or any other applicable statute." Pursuant to that provision, NSP has requested that the Commission take action under NGA section 5 to modify the terms and conditions of service under the Rate Schedule X-13 contract so as to permit NSP to obtain the terms and conditions of service provided for the Commission's Part 284 open-access transportation regulations, including capacity release and flexible point rights. Thus, the appropriate standard of review to be applied in this case turns on whether the *Memphis* clause in the Rate Schedule X-13 contract authorizes NSP to seek this type of contract modification pursuant to the just and reasonable standard set forth in NGA section 5.

12. Williston contends that the Rate Schedule X-13 *Memphis* clause should be interpreted as only permitting NSP to seek changes in the X-13 contract under the public interest standard. The Commission disagrees. The Rate Schedule X-13 *Memphis* clause permits NSP to "initiate proceedings under Section 5 of the Natural Gas Act." NGA section 5, by its terms, provides as follows:

> Whenever the Commission, after a hearing had upon . . . complaint of any . . . gas distributing company, shall find that any . . . contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable . . . contract to be thereafter observed and in force and shall fix the same by order.

The Commission believes that the natural reading of the *Memphis* clause at issue here is that it authorizes NSP, a gas distributing company, to do exactly what NGA section 5 says: request the Commission to find that the Rate Schedule X-13 contract is unjust and unreasonable, and fix the just and reasonable contract to be thereafter observed.

13. In so interpreting the Rate Schedule X-13 contract, both the ALJ and the Commission relied on *Papago Tribal Utility Authority v. FERC* (*Papago*).[13] In that case, the court addressed a contract provision that, like the contract provision in the Rate Schedule X-13 contract, provided that either party could seek Commission action to change the contract. The contract provision in *Papago* stated as follows:

[13] 723 F.2d 950 (D.C. Cir. 1983).

> The rates hereinabove set out in this Section 3 . . . . are to remain in effect for the initial one (1) year term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.[14]

14. The court found that, because of the restriction applicable to the first year of the contract, the Commission could only require a rate change during the first year under the public interest standard, pointing out that, if the provision concerning the first year were interpreted to prevent changes under the public interest standard, it would be unlawful. However, the court found that the scheme effective after the first year clearly was intended to be less restrictive and must therefore permit changes that are just and reasonable.[15] As the Commission pointed out in the November 22 Order, the court reasoned that:

> specific acknowledgement of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard. The public-interest standard is practically insurmountable . . . . Future rate changes would be a dim prospect, hardly worthy of recognition, if the parties did not intend the just-and reasonable standard to govern.[16]

The Rate Schedule X-13 *Memphis* clause is similar to the contract provision in *Papago* concerning contract changes after the first year. Since the Rate Schedule X-13 *Memphis* clause specifically acknowledges the possibility of future changes, it is reasonable to find that the parties intended the just and reasonable standard to govern those changes. Indeed, if that were not the case, there would have been no point in including the provision in the Rate Schedule X-13 contract at all, since the contract would be subject to change under the public interest standard even without the *Memphis* clause. Thus, Williston's interpretation of the Rate Schedule X-13 *Memphis* clause would effectively render it useless surplusage.

15. In its request for rehearing, Williston cites a statement from *Papago* that the Commission's obligation to ensure that rates do not violate the public interest is for the

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[14] *See id.* at 953.

[15] *Id*. at 954.

[16] *Id*.

"direct benefit of the public at large rather than (like the prescription of just and reasonable rates) for the direct benefit of the seller and purchaser."[17] However, Williston takes that statement out of context. The court in that statement was addressing the contract provision relating to the rates for the first year. The court pointed out that an agreement not to bring to the Commission's attention a rate contrary to the public interest would be akin to a contract to suppress evidence and thus void. However, the court continued by finding that the second part of the contract provision at issue in that case was "obviously intended to be less restrictive" and therefore intended to permit just and reasonable changes. Thus *Papago* does not support Williston's position; rather, it supports the Commission's decision in the November 22 Order.

16. Williston relies heavily on *Exxon Mobil*[18] to argue that, even assuming the *Memphis* clause at issue here is interpreted as authorizing changes under the just and reasonable standard, the changes to the Rate Schedule X-13 contract which the Commission has ordered here go beyond the type of changes authorized by a *Memphis* clause. In *ExxonMobil*, the court affirmed the Commission's rejection of a proposal by Transcontinental Gas Pipe Line Corp. (Transco) to require certain customers to take primary firm service on an additional part of its system not covered by their existing contracts. The court upheld the Commission's reasoning that, because Transco's "proposal would effectively add service to these shippers' contracts, not merely change contractual rates or terms, the scope of the change exceeds that which is permitted under *Memphis* clauses."[19]

17. Williston attempts to cast the contract change at issue here as similarly going beyond the scope of the change permitted by a *Memphis* clause. However, unlike the situation in *Transcontinental Gas Pipe Line Corp.*,[20] the contract change at issue here is

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[17] *Id*.

[18] 430 F.3d 1166 (D.C. Cir. 2005).

[19] *Id*. at 1173. A contract may be challenged on the less burdensome just and reasonable standard when the contract explicitly reserves the right of the parties to seek a modification pursuant to the NGA during the contract term. This is a type of a *Memphis* clause. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958). Such a clause permits the rates, charges, classifications, and service established in a contract that is subject to Commission regulation to be changed by application of one of the parties to the Commission if the contract so provides, as is the case in this proceeding.

[20] 107 FERC ¶ 61,156 (2004).

well within the type of contract change authorized by a *Memphis* clause. As the Commission explained in the rehearing order affirmed by the court in *ExxonMobil*:

> A *Memphis* clause in a contract authorizes the pipeline to make unilateral Section 4 filings to change the rates, terms, and conditions under which the pipeline will provide the service included in the customer's contract. It does not authorize the pipeline to require the customer to take and pay for additional service for which the customer has not contracted. For example, if a customer's contract specifies that it will reserve capacity in an amount of 10 Dth/day, the service agreement's *Memphis* clause would not allow the pipeline to require the customer to take 20 Dth/day. Similarly, if a customer's contract provides for it to take and pay for firm service on one part of the system, the *Memphis* clause would not permit the pipeline to require the customer to also take and pay for firm service on another part of the system.[21]

Here, neither NSP nor the Commission is seeking to increase NSP's contract demand or change the primary receipt and delivery points in the Rate Schedule X-13 contract defining the guaranteed firm service Williston must provide to NSP. Williston's contract with NSP, as reformed by the Commission at NSP's request, will obligate Williston to provide the same level of guaranteed firm service, in the same location, as previously.

18. In this case, all that the Commission has required to be changed are the terms and conditions pursuant to which the existing Rate Schedule X-13 service is provided so that NSP will receive the terms and conditions of service required by Part 284 of the Commission's regulations. As the Commission emphasized in the November 22 Order, this is the same type of contract change the Commission required in Order Nos. 500 and 636. In those orders, the Commission acted under the NGA section 5 just and reasonable standard to require interstate pipelines to permit their sales customers to convert their individually-certificated sales contracts to Part 284 open-access transportation contracts and to require that contracts for bundled sales and transportation services be unbundled, with the Part 284 transportation service and sales service to be provided under separate contracts.[22] In fact, the contract change the Commission is requiring here is less fundamental than the conversion from sales to transportation required in Order No. 500. Here, the Commission is only requiring that Williston offer an existing transportation-

[21] Id. at P 17.

[22] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 at P 23 (2005).

only service pursuant to different terms and conditions, whereas in Order No. 500, the Commission required the pipeline to permit customers to convert to an entirely different type of service. The just and reasonable standard is appropriate in the instant case as well.

19. Williston also cites *Texaco*[23] in support of its position that the public interest standard is appropriate in the instant case. However, the *Mobile-Sierra* doctrine applied in that case because the contractual provision at issue did not afford the parties the ability to seek Commission action under NGA sections 4 or 5. The court stated that the contract established a formula for determining applicable rates, but the court pointed out that the contract also contained the pipeline's agreement that it "shall not exercise [its] rights under Section 4 of the [NGA, 15 U.S.C. § 717c], to change the rates to be paid by the Shipper."[24]

20. In summary, the Commission rejects Williston's assertion that, by permitting NSP to seek the contract changes at issue here under the just and reasonable standard, the Commission has "tossed aside"[25] the Rate Schedule X-13 contract. As discussed above, that contract, as executed by Williston and NSP, includes a provision permitting NSP to seek these changes under the just and reasonable standard. To accept Williston's position that the contract changes NSP seeks may only be made under the public interest standard would "toss aside" that provision of the Rate Schedule X-13 contract, and deprive NSP of a right enshrined in the contract. The Commission now turns to a discussion of whether the just and reasonable standard has been satisfied in this case.

B. Whether Requiring Conversion Is a New Policy

21. Williston challenges the Commission's statement that its decision in this case is not the result of a policy change. Williston contends that the Commission has never before ordered a conversion from Part 157 service to Part 284 service, and while the Commission may have a policy favoring such conversion, that is not the same as a policy

[23] 148 F.3d 1091 (D.C. Cir. 1998).

[24] *Id*. at 1095.

[25] Request for Rehearing of Williston Basin Interstate Pipeline Company at 15 (December 22, 2005).

requiring conversion.[26] Williston also asserts that the Commission has misstated its argument and misses the principle at issue in these prior cases. Specifically, Williston argues that the previous cases respected the sanctity of contracts so that one party would not be relieved of its bargain unilaterally.

22. Williston maintains that, while the Commission suggests that these cases no longer represent its current policy, the Commission never has acknowledged a change in its conversion policy. Williston also states that the Commission relies on certain recent cases as representative of its current policy,[27] but focuses only on statements that it has the authority to order such conversions, despite the fact that it did not order conversion in either of those cases. Williston contends again that the statement that the Commission "favors" conversions does not indicate a requirement. Further, continues Williston, while

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[26] For example, Williston cites *Tennessee Gas Pipeline Co*., 71 FERC ¶ 61,207 at 61,759-60 (1995), where the Commission stated in part as follows:

> although we would not require the conversion of Rate Schedule X service to Part 284 service prior to the termination of the existing transportation contracts, we did state that the conversion at the termination of those contracts would be reasonable unless shown otherwise under the particular circumstance. In reaching this decision, we recognize that many section 7(c) certificates were designed to address the special circumstances which existed at the time the contracts were executed and that it is thus appropriate, within broad limits, to give effect to these arrangements as long as the contracts are in effect so that the parties' reasonable expectations on entering the contract may be relied on. Implicit in the restructuring orders . . . denying mandatory conversion to Part 284 service was the basic fact that the service agreements under consideration had not expired.

Williston also cites *Texas Eastern Transmission Corp*., 63 FERC ¶ 61,100 at 61,445 (1993); *Algonquin Gas Transmission Co*., 63 FERC ¶ 61,188 at 62,348 (1993); *Tennessee Gas Pipeline Co*., 63 FERC ¶ 61,096 at 61,373 (1993); *Great Lakes Gas Transmission LP*, 70 FERC ¶ 63,001 at 65,013 (1995), *aff'd* 74 FERC ¶ 61,257 at 61,856 (1996); *Northwest Pipeline Corp*., 77 FERC ¶ 61,323 at 62,468 (1996); *Northern Border Pipeline Co*., 81 FERC ¶ 61,402 at 62,847 (1997).

[27] *Transcontinental Gas Pipe Line Corp*., 94 FERC ¶ 61,362 (2001); *Atlanta Gas Light Co*., 100 FERC ¶ 61,071 (2002).

the Commission states that it has the authority to require conversion if "appropriate conditions" are met, it does not articulate what is meant by that term.

23. Williston next argues that the Commission improperly places the burden on it to justify the status quo rather than on NSP to support its request for a change. Williston also insists the Commission must find factual support for harm to the public interest in the record and cannot rely on statements that NSP's customers should, under the less stringent just and reasonable standard, have the benefits of capacity release, greater competition, and more open markets, consistent with the Commission's general goals in restructuring the natural gas markets. Williston asserts that it would not have built the Mapleton Extension but for NSP's commitments that the pipeline's other customers would not be responsible for the costs relating to providing service to NSP, and there was always the intent that those customers would derive a benefit from using the capacity when NSP was not using its firm entitlements.

24. The Commission did not place the burden of proof on Williston with respect to these issues. The Commission is satisfied that NSP met its burden under NGA section 5 to show that the existing Part 157 status of the X-13 contract is no longer just and reasonable and that a change to Part 284 open-access status is necessary. The Commission ordered a supplemental hearing on this issue. Based on the evidence presented at that hearing, the ALJ determined that NSP had met its burden under NGA section 5 of showing that Williston's failure to permit NSP to convert to Part 284 service is unjust and unreasonable,[28] and may be motivated by anticompetitive concerns.[29] In affirming the ID, the Commission adopted the ALJ's citation to and analysis of substantial evidence in the record. Further, because the Commission affirmed the ALJ's finding that NSP pays for the Mapleton Extension capacity (and will continue to do so after conversion), the revenues from segmenting and releasing any of that capacity that is not used by NSP from time-to-time should accrue to NSP and its ratepayers, not to Williston. The record shows clearly that Williston is creating a revenue stream from capacity it has already sold,[30] that it is unwilling or unable to agree with NSP on a mode

[28] *See Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 98-110 (2005).

[29] *Id*. at P 102-04, 110. The ALJ concurred with each of Trial Staff's points supporting conversion, including the fact that Williston's affiliate accounted for 93 percent of Williston's FT-1 load.

[30] *See id*. at P 102.

of transition to Part 284 service under Rate Schedule X-13,[31] and that this is contrary to the Commission's strategic goal for a competitive gas market.[32] To argue (as Williston appears to) that the Commission cannot act in this case in furtherance of this goal, is effectively to reargue the judicial affirmance of the Commission's natural gas restructuring orders.

25. Even if this is the first case where the Commission has required a transition to Part 284 from Part 157 service upon failure of the parties to negotiate a transition, it is not a departure from or inconsistent with existing policy or precedent. Each case rests on its own facts, and it is not a matter of caprice if petitioners have, in other cases, been denied contract reformation based on the different merits of those cases. The factual context of this case began to take shape soon after the inception of Rate Schedule X-13, when NSP and the Commission engaged in litigation with Williston concerning the computation of the rate. As noted above, the Court of Appeals for the Eighth Circuit resolved that issue.[33] Thereafter, at the time of each biennial restatement, NSP requested that the contract status be changed from Part 157 to Part 284, but the Commission did not view those restatements as the proper vehicle for determining the merits of NSP's requested conversion. Finally, NSP renewed its request in this general NGA section 4 rate case, only to have its testimony on X-13 conversion challenged by Williston, whose attorney asserted to the ALJ that "the Commission already said X-13 doesn't belong here."[34] Because the Commission recognized that the parties were unable to negotiate a solution,

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[31] *See id*. at P 7.

[32] *See id*. at P 100. *See also Federal Energy Regulatory Commission Strategic Plan FY 2005 – FY 2008*, Goal 2: Prevent Exercise of Market Power by Reliance on Effective Competition and Objective 2.2 . . . Prevent undue preference and self dealing in affiliate transactions . . . .

[33] *Williston Basin Interstate Pipeline Co. v. FERC*, 215 F.3d 875 (8th Cir. 2000).

[34] Tr. Aug. 17, 2000, Vol. 2 at 66. It is not clear to what statement by the Commission this refers, and the Commission never said the conversion issue could not be raised in Williston's general rate case proceeding where all of a pipeline's rate structure is open to review, whether the change is proposed by the pipeline or not. All the Commission ever indicated was that the conversion issue was not appropriately examined in the biennial rate restatement proceedings, which only concerned the correct calculation of the X-13 rate every two years.

it established the supplemental hearing in this rate case to receive evidence on the conversion and the ADQ issues.[35]

26. Williston continues to argue that the Commission has not required conversion in previous cases. Yet, it is important to note that Williston admits that it is not arguing that the Commission lacks authority to order conversions if it exercises that authority properly.[36] The Commission has exercised that authority properly under the facts of this case. Further, it is illogical to argue that the Commission has the authority to order the conversion, but that it must justify its exercise of that authority as a "new policy." The authority to take an action assumes that it can and will be exercised in an appropriate case. The Commission has determined here that the Part 157 service denies NSP the benefits of open-access service. Further, it is undisputed that the X-13 rate always was intended to be recalculated until it equals or is less than the maximum FT-1 rate. The Commission's decision here affords NSP the flexibility in managing capacity that is associated with FT service, but requires it to continue paying the X-13 rate, even when it is higher than the maximum FT-1 rate. The Commission also has found that the operation of Rate Schedule X-13 restrains capacity release, to the detriment of NSP and its ratepayers. Additionally, the Commission has found that NSP has been paying the costs of the Mapleton Extension facilities through its incremental rate, which it will continue to do. The Commission has found as well that the impact on Williston's other FT-1 customers would be insignificant. While the Commission would have preferred that the parties resolve their differences though a negotiated settlement, the Commission has the authority to require the conversion and exercised its authority properly under the facts established at the supplemental hearing.

27. In sum, the rate structure of the contract remains intact. The question the Commission decided is that, once the capacity is contracted and paid for, whose capacity is it to use and release: the shipper's or the transporter's? The Commission here confirms the general rule that it is the shipper's right to release and segment the capacity for which it has paid.

28. Williston next contends that the Commission's action is a departure from its rulings in two recent cases; however, those cases are factually distinguishable because they did not concern the same issues of capacity release and segmentation that are present

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[35] *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 (2004).

[36] Request for Rehearing of Williston Basin Interstate Pipeline Company at 20-21 (December 22, 2005).

here. In *Transco,*[37] the issue was whether unbundling certain storage services would impair Transco's ability to provide no-notice service to existing shippers. The Commission found that the other party had failed to meet the NGA section 5 burden to show that the existing Part 157 service was unjust and unreasonable and that the replacement service was just and reasonable. The Commission found that it would not be just and reasonable to make changes to Transco's system that would compromise its operational flexibility and service to existing no-notice customers based on facts limited to certain geographical areas or changes designed to benefit customers only in certain states.[38] In the instant case, the Commission did not base its decision to require conversion on operating conditions. The Commission based its decision on the facts unique to this case that demonstrated that the Part 157 service provided to NSP has become unjust and unreasonable.

29. In *Marathon Oil Co. v. Trailblazer Pipeline Co*. (*Marathon*),[39] the issue concerned an expansion bid process and whether this was done fairly consistent with the Commission's negotiated rate policies. Marathon claimed that the rates under its contracts for the expansion capacity were the result of an exercise of market power and that the Commission should invalidate the rates. In the alternative, Marathon argued that the Commission should find that the subject rates were unduly discriminatory. The Commission stated that, absent a "compelling reason," it would not second-guess the business and economic decisions of knowledgeable business entities when they entered into negotiated rate contracts, and the Commission found that Marathon had not provided a compelling reason that would warrant the Commission action it sought. The Commission also stated that it was reluctant to upset the expectations of the parties when a customer foregoes numerous opportunities to raise its concerns in a more appropriate forum.[40] Thus, Marathon also is distinguishable on its facts. For the reasons previously stated, the facts of the instant case do provide a compelling reason for the Commission to order the requested conversion. NSP made numerous efforts to obtain this relief in the biennial restatement process, but those biennial restatements were not appropriate vehicles for seeking such relief. Once NSP sought X-13 conversion in this NGA section 4 rate case, the Commission confirmed that this was the appropriate proceeding in which to address NSP's request for conversion.

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[37] 112 FERC ¶ 61,170 (2005).

[38] *Id*. at P 17-20.

[39] 111 FERC ¶ 61,236 (2005).

[40] *Id*. at P 63-69.

30. In the November 22 Order, the Commission discussed and distinguished other cases cited again by Williston: *Atlanta Gas Light Co.*,[41] *Algonquin Gas Transmission Co.*,[42] *Texas Eastern Transmission Corp*,[43] *Tennessee Gas Pipeline Co.*,[44] *Great Lakes Gas Transmission, LP*,[45] *Northwest Pipeline Corp.*,[46] and *Northern Border Pipeline Co.*[47] Williston argues that these cases respected the sanctity of contracts and the mutuality of contract obligations so that one party to the contract would not be unilaterally relieved of the benefit of its bargain. However, it is Williston that misses the point here -- the contract at issue in this case explicitly permits either party to seek Commission action to change the contract. This is not a case in which only NSP has the ability to seek changes in the contract; rather, in this case, the parties accepted by mutual agreement the option for either party to seek to have the contract altered.

C. Alleged Impact on Other Williston Customers

31. Williston asserts that NSP did not present evidence of its financial condition to show the burden on it from the existing contract, nor did it present evidence that its customers are paying more than the amount agreed to in the contract. First, Williston's claim that NSP did not present evidence of the financial burden to it or that customers are paying more than the contract rate represents another effort by Williston to impose on the Commission the "public interest" standard discussed above, and it has no merit. The Commission accepted the ALJ's determination that the failure to require the conversion prevents NSP and its ratepayers from realizing the benefits of capacity release and

[41] 100 FERC ¶ 61,071 (2002).

[42] 63 FERC ¶ 61,188 (1993).

[43] 63 FERC ¶ 61,100 (1993).

[44] 63 FERC ¶ 61,096 (1993).

[45] 70 FERC ¶ 63,013 (1995), *aff'd* 74 FERC ¶ 61,257 (1996).

[46] 77 FERC ¶ 61,323 (1996).

[47] 81 FERC ¶ 61,402 (1997).

segmentation with respect to NSP's unused capacity.[48] The financial benefits that Williston has been obtaining by having the ability to utilize NSP's unused capacity should now accrue to NSP's customers. Additionally, the ALJ found that NSP viewed the possibility of greater receipt point flexibility as affording it the benefit of being able to obtain alternative supplies at alternative receipt points when conditions make that necessary.[49] That potential benefit cannot be quantified in advance. As the Commission stated in the November 22 Order, "Rate Schedule X-13 does not afford NSP adequate flexibility in the use of the capacity for which it pays. Further, there are no countervailing circumstances that warrant retention of the Rate Schedule X-13 service"[50] Thus, the Commission found that NSP had met its burden in this case, which was to show that it is no longer just and reasonable to continue the service under Rate Schedule X-13. Williston also attempts to demonstrate that NSP continues to receive the benefits for which it bargained. The Commission rejected that claim in the November 22 Order.[51] In essence, the Commission determined that, even if this claim were true, the countervailing facts of this case would outweigh Williston's claim and support a decision to order the conversion.

32. Williston continues to argue for the public interest standard by citing *Nevada Power Company v. Enron Power Marketing, Inc*. (*Nevada Power*) and pointing out that the Commission there held the Complainants to the bargain they made rather than modifying the contracts.[52] However, as stated above, the Commission has determined that the public interest standard does not apply in this case. In *Nevada Power*, the Commission determined that the contracts allowed the parties a joint right to seek modification of the rates, terms, and conditions,[53] in contrast to the instant case where each party has the unilateral right to seek Commission action to alter the contract. Thus, in *Nevada Power*, the Commission evaluated the complainants' failure to pursue other alternatives at the time of contract execution under the more stringent "public interest"

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[48] *See Williston Basin Interstate Pipeline Co*., 111 FERC ¶ 63,007 at P 99, 102, 106 (2005).

[49] *Id.* at P 99.

[50] *Williston Basin Interstate Pipeline Co*., 113 FERC ¶ 61,201 at P 22 (2005).

[51] *Id*. at P 42-43.

[52] 103 FERC ¶ 61,353 (2003).

[53] *Id*. at P 36.

standard, rather than under the "just and reasonable" standard that applies in the instant case. Moreover, the ALJ thoroughly addressed NSP's failure to seek conversion at an earlier time and reasonably found that Williston's argument lacked merit,[54] as did the Commission in the November 22 Order.[55] In fact, the ALJ suggested that Williston's argument on this point was untimely and should have been raised at an earlier point in this proceeding.[56]

33. Williston suggests again that NSP delayed seeking conversion in order to avoid paying take-or-pay surcharges. Williston challenges the Commission's statement that NSP did not contribute to the incurrence of those costs, contending that the Commission originally sought to spread the costs to Part 157 shippers, but that the court rejected that effort.[57] Williston maintains that NSP took advantage of the court's ruling and did not seek to become a Part 284 shipper until take-or-pay and transition cost surcharges had been recovered. Yet, in fact, NSP did not cause any of the take-or-pay costs that Williston was seeking to recover. Williston first made its take-or-pay recovery proposal in 1990, whereas the Rate Schedule X-13 agreement was executed in 1991. Pipelines had leeway to craft their own proposals within parameters set by the Commission, and initially a component of the recovery surcharge was proposed to be assessed also on section 7(c) shippers based on a rationale that they too might benefit eventually from the Commission's move to open-access transmission. The Commission accepted Williston's proposal and the related rationale for the allocation of some take-or-pay costs via a volumetric surcharge on all shippers, including separately certificated section 7(c) shippers. However, the Court of Appeals for the District of Columbia Circuit rejected this rationale, finding unpersuasive the benefit rationale for allocation of costs to shippers who did not have open-access rights. The Commission accepted the court's decision and declined to attempt any further justification for allocation of such costs to those who had no part in their causation.

34. Thus, there is no basis to suggest, as Williston does, that NSP made some strategic decision to avoid take-or-pay responsibility by not seeking to convert the X-13 rate schedule. At the outset of the X-13 rate program, NSP (and the Commission) were forced to litigate the very price that was being charged under the rate schedule. As soon

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[54] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 86-97 (2005).

[55] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 at P 44-46 (2005).

[56] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 97 (2005).

[57] Williston cites *KN Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992).

as that was decided, NSP consistently and repeatedly sought the conversion of its service to open access, finally finding the forum to make its case in this rate proceeding.

35. Next, Williston maintains that its other customers will be harmed and that the Commission improperly found that the impact on the other customers would be non-existent, speculative, or *de minimis*. Williston points out that the ALJ found that NSP would benefit by approximately $402,000 to $695,000, and attempts to rehabilitate its hearing testimony that was rejected by the ALJ, which estimated revenues from NSP's segmentation and release of unused X-13 capacity in the $2 million per year range.[58] Williston contends that this amount will be recovered from other shippers. The Commission reasonably found, based on the record evidence weighed by the ALJ, that the revenue impact of shifting the capacity release and segmentation rights from the transporter to the shipper who paid for the capacity would likely be approximately $402,000 to $695,000 annually rather than approximately $2 million annually that Williston claimed based on the notion that NSP would be segmenting and releasing capacity almost 100 percent of the time.[59] The impact of the actual $50,000 adjustment (about 1/10 of the $402,000 to $695,000) to Williston's FT-1 rates is in fact *de minimis*, and if Williston seeks to eliminate or change that adjustment, it must make a section 4 filing to do so.[60] Moreover, it is reasonable (absent the agreement of the parties to some other rate mechanism) to maintain the biennial restatement process, because the X-13 rate always was intended to converge with the FT-1 rate. Thus, the X-13 rate revenue to Williston remains essentially the same after conversion, and the adjustment for revenues derived from re-selling unused X-13 capacity is an incidental factor in the FT-1 rate.

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[58] Ex. WBIP-14; *See* also Request for Rehearing of Williston Basin Interstate Pipeline Company at 31-32 (December 22, 2005). Williston argues that, if its estimate of potential release revenue to NSP is a possibility, then the impact may not be *de minimis.* The Commission finds that even in the unlikely event Williston's estimates prove true, it is the shipper and its customers who should receive the revenues, since they are paying for the capacity.

[59] *See Williston Basin Interstate Pipeline Co*., 111 FERC ¶ 63,007 at P 101-110 (2005); *Williston Basin Interstate Pipeline Co*., 113 FERC ¶ 61,201 at P 51-58 (2005).

[60] Williston's rehearing petition appears to apply the *de minimis* appellation to the estimates in the record of revenues to be derived from releases of idle X-13 capacity, but the Commission's order used *de minimis* in speaking of the relatively small amount Williston had adjusted its IT throughput to reflect revenues from Williston's use of NSP's unused capacity.

36. Williston next states that the Commission appears to assume that there will be no impact from the conversion until Williston's next rate case, and the Commission speculates, without any basis, that any cost shifting will be offset by cost reductions. In fact, continues Williston, until it does file a new rate case, the revenue losses will fall solely on it, so the conversion is not revenue-neutral. The Commission has not assumed that there will be no impact on Williston and its customers, but has found that the revenue from use of NSP's capacity should flow to NSP and its customers. As the ALJ concluded, the essence of the controversy centers around the entitlement to revenues generated by the sale of NSP's capacity.[61] NSP and the Commission's Staff argued at the hearing that Williston's failure to allow the conversion is rooted in the unjust benefit that Williston now receives from the interruptible transportation it provides with unused NSP capacity. The effect of the conversion will be that Williston's other FT-1 customers, including its affiliate, Montana-Dakota Utilities Company (MDU), which accounts for the vast majority of Williston's FT-1 load,[62] will no longer receive this subsidy. When the Commission balances the impact on Williston and its other FT-1 customers with the benefits to NSP and its customers to be obtained from converting the Rate Schedule X-13 contract to an open-access Part 284 contract, the Commission finds that the benefits to NSP and its customers outweigh the relatively minor impact on Williston and its other customers. The Commission properly affirmed the ALJ's determination on this issue.

37. Williston contends that the November 22 Order ignores the position of the State Agencies arguing against conversion. According to Williston, most of the other customers are small captive customers who do not have the ability to litigate rate cases before the Commission, but who were in part represented in this proceeding by the State Agencies whose witness opposed the conversion if it would result in an adverse rate impact on Williston's other customers. However, as the ALJ recognized, the State Agencies made it clear that they do not oppose NSP's proposal to convert its service on the Mapleton Extension from Part 157 service to Part 284 service, as long as existing firm transmission shippers are held harmless from any adverse impact of the conversion. These agencies generally support a customer's right to use capacity for which it has paid by reselling unused capacity.[63] They did not file exceptions to the initial decision, and the November 22 Order took pains to protect other customers from any adverse impact, concluding that neither NSP's rates nor any other customer's rates should be increased

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[61] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 101 (2005).

[62] *See id*. at P 102.

[63] *See Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 63-67 (2005).

further at this time.[64] The State Agencies, which represent the small customers that individually may not have the means to intervene in Commission proceedings, also chose not to seek rehearing of the November 22 Order.

38. Williston challenges the assumption in the November 22 Order that, in a general section 4 rate case, other cost reductions likely would offset the cost increases arising from reallocation of the Rate Schedule X-13 costs. However, it is reasonable to expect that some parts of Williston's cost-of-service would be reduced in a general rate case review. In any event, while Williston claims that its revenues from selling NSP's unused Rate Schedule X-13 capacity should be reallocated, the effect when spread over Williston's entire throughput arguably would not be substantial. It is relevant here that the amount of revenues reflected in the current rates for Williston's use of NSP's unused capacity is indeed *de minimis*. According to Williston's witness, Mr. Tiggelaar, FT-1 customers' current rates were reduced only by approximately $50,000 (or 140,000 dekatherms out of a total interruptible throughput of 19,903,783 dekatherms) for the revenues that Williston expected to generate from NSP's unused capacity. Thus, most of the revenues from selling IT service employing unused NSP capacity seem never to have been reflected in Williston's rates, assuming Williston's claim that such revenues could amount to as much as $2.2 million is accurate, which the ALJ concluded was not the case. Accordingly, the ALJ correctly found and the Commission affirmed that the impact of allowing the conversion would have an insignificant impact on FT-1 customers.[65]

39. Williston argues that the Commission's order is unduly discriminatory to Williston and unduly preferential to NSP because it does not substantively alter the rate computation provisions of Rate Schedule X-13, specifically the biennial rate restatements. In this effort, Williston relies not on the public interest standard on which it has rested most of its argument, but on standards of undue preference and undue discrimination that are rooted in language related to NGA sections 4 and 5.[66] Williston's

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[64] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 at P 51-58 (2005).

[65] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 108 (2005).

[66] The ALJ had held that the Part 157 Rate Schedule X-13 service and related ADQ limits on the Mapleton Extension were not unduly discriminatory or preferential to NSP. Because the Commission affirmed the ALJ's finding that the X-13 Part 157 type service and related ADQ limits were unjust and unreasonable, there was no need to address arguments that they also were unduly discriminatory and preferential. The Commission still need not reach that issue as it is only rebutting Williston's rehearing argument that the Commission's order was unduly preferential toNSP, in that it basically kept the X-13 rate structure intact, including the biennial restatement process.

(continued…)

claim is that no other shipper gets biennial rate restatements, and so they should now be eliminated for NSP going forward because NSP will now have open-access benefits.

40. Williston also contends that NSP currently pays a rate that includes no contribution toward the costs of the mainline system. Williston states that, under Commission policy, shippers are entitled to secondary receipt and delivery points only on the parts of the pipeline system included in their rates.[67] Yet, continues Williston, the Commission wrongly assumes that the mainline facilities are included in NSP's current rates when it states that, under the existing Rate Schedule X-13 service, NSP transports gas to the Mapleton Extension through other parts of Williston's mainline system, so mainline transportation arguably is contemplated in NSP's current rates.[68] Then, states Williston, the Commission allows NSP all the flexibility of Part 284 service on the part of the system that is not included in its rates, while preventing Williston from changing NSP's rates. Williston concludes that the November 22 Order would require pre-expansion shippers to subsidize the costs of the expansion, contrary to Commission policy[69] and contrary to the original bargain between NSP and Williston.

41. Contrary to Williston's characterization, it is its affiliate MDU that has been subsidized by the revenues Williston generates by selling NSP's unused capacity. The costs of the expansion are fully compensated in the X-13 rate, which will continue to be paid after the conversion. Even if mainline facility costs are not unambiguously included in the design of the X-13 rate, NSP has received mainline service under Rate Schedule X-13. Specifically, under Rate Schedule X-13, NSP has received service from various receipt points located on Williston's mainline facilities, including points such as the West Shore Pine Hills receipt point located in Harding County, South Dakota, the Little Knife Plant receipt point located in Billings County, North Dakota, and the Lignite Plant receipt point located in Burke County, North Dakota. Therefore, it is unclear why Williston seeks to limit secondary point rights to NSP upon conversion to FT-1 service to

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[67] Williston cites *Transcontinental Gas Pipe Line Corp*., 107 FERC ¶ 61,156 (2004); *Algonquin Gas Transmission Co*., 105 FERC ¶ 61,180 (2003); *Texas Eastern Transmission, LP*, 99 FERC ¶ 61,308 (2002); *Tennessee Gas Pipeline Co*., 95 FERC ¶ 61,096 (2001).

[68] Williston cites *Williston Basin Interstate Pipeline Co*., 113 FERC ¶ 61,201 at P 57 (2005).

[69] Williston cites *Iroquois Gas Transmission System, L.P*., 97 FERC ¶ 61,379 (2001); *Northwest Pipeline Corp*., 87 FERC ¶ 61,227 (1999).

the expansion facilities, given that NSP receives primary point rights over Williston's mainline facilities and will continue to pay a higher (X-13 equivalent) rate than the maximum FT-1 rate until the X-13 rate becomes the same as the maximum FT rate. Therefore, it is reasonable to grant NSP the same flexibility of Part 284 open-access upon conversion to Rate Schedule FT-1 as all other FT-1 shippers receive on the Williston system.

42. Next, Williston states that the Commission affirmed the ALJ's ruling that NSP should continue to receive biennial rate adjustments that are established in the Rate Schedule X-13 contract; however, neither the ALJ nor the Commission provided a rationale for what Williston describes as an unduly preferential requirement. Williston reasons that, if the Rate Schedule X-13 contract is abrogated so that Williston will not get the benefit of the bargain, this special rate treatment should no longer be given to NSP. According to Williston, NSP's rate should be changed only when Williston files a general section 4 rate case.[70] As discussed above, the Commission's view is that Williston has in no way been deprived of its bargain with respect to the X-13 rate itself. What is unduly preferential and unreasonable is for Williston to garner revenues from the sale of the capacity NSP has paid for. Such revenues should flow to NSP and its customers, and not to MDU and its customers.

43. The Commission's intent was to preserve as much of the parties' original agreement as possible, while according NSP the ability to release capacity and other features of Part 284 service that are accorded FT shippers. The Rate Schedule X-13 agreement always envisioned the ultimate convergence of the X-13 rate with the FT rate, and the biennial rate adjustments were the mechanism for accomplishing that. Thus, continuing the restatement process preserves the parties' agreement as much as possible, while adapting the agreement to include the capacity release and segmenting possibilities that arise from the Commission's regulatory framework for a competitive natural gas market. The Commission directed a change in the regulatory status of the agreement from a separately-certificated contract to an open-access FT contract, while keeping its rate terms essentially the same. If Williston no longer considers the X-13 rate terms acceptable to it as a consequence of that change, it retains the right, pursuant to the still-effective terms of the agreement itself, to seek a change in those terms pursuant to NGA section 4.

44. The Commission observes that, in his direct testimony, NSP's witness Hults offered alternative approaches to determining the incremental rate NSP would pay post-

[70] Williston cites *Public Service Commission of New York v. FERC*, 866 F.2d 487 (D.C. Cir. 1989).

conversion.[71] Among these was a predetermined declining surcharge that would eliminate the biennial restatements, but Williston's witness Tiggelaar opposed this proposal.[72] Mr. Hults then agreed on cross-examination to retain the restatements.[73] However, Williston began to argue in its initial brief that NSP should not have the benefits of the biennial restatements post-conversion.[74] In its reply brief, NSP countered that Williston touts biennial restatements as a benefit that supports its refusal to convert, while at the same time rejecting NSP's willingness to abandon the biennial restatement in conjunction with the conversion.[75] Given this exchange over whether to modify the biennial restatement process post-conversion, as well the lengthy history of litigation surrounding how the biennial rates would be set, which the Court of Appeals for the Eighth Circuit finally resolved, the Commission reasonably decided to preserve the rate framework agreed to by the parties.

45. Finally, Williston argues that the word "favor" in the Commission's statement of its policy on conversion[76] of the remaining individually-certificated rate schedules that still exist, has been read to mean "require" in its case, and it is unclear what the appropriate conditions were that impelled the Commission to so require. Quite simply, these conditions were: the history of Williston's aggressive interpretation of Rate Schedule X-13, reflected in its mispricing of the rates thereunder, the unique fact of its affiliation with its largest customer and the protection from transmission competition the vestigial X-13 arrangement offered these entities, the impairment of market health resulting from this diminution of competition, and the rejection by the transporter of alternatives offered at hearing for transitioning to open-access service from X-13, which was the culmination of many years of rebuffing the shipper's request to negotiate such a

[71] Ex. NSP-1 at 10.

[72] Ex. WBIP-5 at.5.

[73] Tr. 58-59.

[74] *See* Initial Brief of Williston Basin Interstate Pipeline Company at 23 (February 3, 2005).

[75] Reply Brief of Northern States Power Company at 17 (March 1, 2005).

[76] The Commission "favors conversions of all individually-certificated services unless (1) the conversion of a particular service would adversely affect other customers of the pipeline, or (2) in an appropriate case, where the pipeline and the customer have agreed that they desire the individually-certificated services to continue." *Williston Basin Interstate Pipeline Co*., 113 FERC ¶ 61,201 at P 28 (2005).

transition. Since these elements in the aggregate evidenced obstruction of the Commission's policy favoring open-access use of capacity by those who pay for it, the appropriate conditions were presented for the Commission to act in furtherance of that pro-competitive goal. Accordingly, rehearing on the issue of the conversion of the X-13 service is denied.

D. Whether the Requirement to Increase NSP's ADQ Is Justified

46. Williston states that its standard Rate Schedule FT-1 contract obligates it to deliver up to the maximum transportation quantities specified in Exhibit A to the contract, and Exhibit A contains fill-in-the-blank spaces for Maximum Daily Delivery Quantities (MDDQ) and ADQs. Williston states that these quantities are negotiated with each shipper. In this case, however, Williston states that only the ADQ is at issue. According to Williston, the Commission evaluated the ADQ issue as a tariff provision rather than a contractual provision and thus applied the wrong legal standard in its evaluation of the issue. Williston maintains on rehearing (although it did not appear to make that argument with respect to the ADQ issue before) that the public interest standard applies to the ADQ issue also, and, under that standard, the record does not support a change to the ADQ.

47. Williston explains that, when the Mapleton Extension was constructed, NSP requested additional capacity to serve more customers under what is now its Rate Schedule FT-1 contract, and Williston determined the MDDQ that could be made available. While NSP requested a 100-percent ADQ, Williston maintains that it evaluated the request and determined that it could provide only a 50-percent ADQ level of 84,150 dkt per year. According to Williston, in the November 22 Order, the Commission suggested that this limitation is inappropriate because NSP pays a reservation charge based on its MDDQ, but cannot demand firm service at that level every day of the year due to the ADQ limitation. However, Williston contends that this misperceives the nature of the contractual rights and the rate NSP pays. Williston explains that the contract specifies multiple delivery and receipt quantities, so the firm service NSP receives and pays for is the result of the total of all the delivery and receipt quantities rather than merely one of the parameters of the contract's limitations. Williston further explains that NSP pays a reservation charge to take up to the MDDQ on any day of the year, but not to take that quantity every day because of the ADQ limitation. Williston maintains that the contract is designed to allow it to perform maintenance in the least intrusive manner without curtailing NSP's service.

48. Williston further claims that the specific ADQ provision in the NSP contract exists because of the particular circumstances of the NSP service and the location of the NSP delivery points on the portion of the Williston system with unidirectional flow of gas. According to Williston, this section of the system has no receipt points or

interconnections with other pipelines, so gas cannot be routed via alternative routes to reach the delivery points.[77] Williston also emphasizes that, between the two contracts, NSP has all the firm capacity of the Mapleton Extension under contract, effectively giving it the right to an overall 97–percent load factor.[78] Moreover, continues Williston, the majority of the capacity is subject to the Rate Schedule X-13 contract, which has a 100-percent ADQ, giving NSP the right to take service under that contract at a 100-percent load factor every day of the year. Therefore, reasons Williston, the only flexibility it has for performing normal maintenance without affecting NSP's right to call on capacity is from the ADQ limit in the Rate Schedule FT-1 contract, which would become more important if NSP is allowed to convert the Rate Schedule X-13 capacity. Williston states that this would allow NSP to release capacity, which would potentially increase the use of NSP's capacity and further limit Williston's ability to perform normal maintenance without interrupting service to NSP.

49. Williston asserts that the Commission has recognized that NSP's total capacity under both contracts gives it a 97-percent load factor on the Mapleton Extension.[79] Now, however, argues Williston , the Commission takes the position that NSP's two contracts give it the contractual right to use the entire Mapleton Extension at such a high level that it has little bearing on the evaluation of the ADQ provision in the Rate Schedule FT-1 contract.

50. Williston states that, when NSP asked it to construct the Mapleton Extension, it had to install a compressor station (the Cleveland Compressor Station) to enable it to perform the requested service. According to Williston, NSP asked it to specify the facilities that it could take out of service to perform normal maintenance, assuming various customer load levels and assuming that NSP had reached the 50-percent load level on the Rate Schedule FT-1 contract.[80] Williston states that it replied that, if the customers are taking service at 50 percent of their respective MDDQs and NSP has reached its 50-percent ADQ level on its FT-1 contract, the Cleveland Compressor Station

[77] Williston cites Ex. WBIP-13 at 8-9.

[78] Williston cites Ex. WBIP-12 at 1-3.

[79] Williston cites *Williston Basin Interstate Pipeline Co*., 107 FERC ¶ 61,164 at P 101 (2004).

[80] Williston cites Ex. WBIP-42; Ex. WBIP-43; and Ex. WBIP-44.

could be take out of service to allow it to perform normal maintenance; however, Williston emphasizes that this is not the case at higher levels of customer service.[81]

51. Williston states that the Commission has ruled that the ADQ limitation is unnecessary because the same purpose can be achieved under section 6.2 of the General Terms and Conditions (GT&C) of Williston's tariff, making the ADQ unnecessary. However, Williston argues that section 6.2 does not function the same way as the ADQ limitation. According to Williston, section 6.2 allows it to interrupt service to perform repairs, while the ADQ allows time when Williston would not have to interrupt service because it places a contractual limit on the customer's ability to schedule deliveries. Williston points out that its witness testified that Williston tries to avoid impacting a customer's contractual rights, and while Williston has been able to work out times with NSP in the past, there is no guarantee that this will continue.[82]

52. Further, argues Williston, pointing to other ways that Williston can balance customer needs and still perform normal maintenance does not establish that Williston's method is unjust and unreasonable or that contractual provisions must be overridden because the public's interest will be harmed. In fact, continues Williston, the Commission allows a pipeline to impose reasonable operating conditions on shippers.[83] Despite that, states Williston, the Commission here concluded that there is no reasonable operational basis for the ADQ limitation and that Williston must eliminate the ADQ limitation. In Williston's view, the Commission has reversed the burden of proof and applied the wrong legal standard.

53. Williston states that the November 22 Order does not direct it to remove the ADQ limitations from the standard contract form in its tariff. Thus, reasons Williston, because the Commission is changing a contract rather than the pipeline's tariff, it must first find that the "public interest" requires that change. Williston contends that the *Mobile-Sierra* doctrine applies here, even though the Commission is not seeking to reform the entire Rate Schedule FT-1 contract.

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[81] Williston cites Ex. WBIP-42; Ex. WBIP-44; Tr. 338-39.

[82] Williston cites Tr. 323, 339-40.

[83] Williston cites *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol,* FERC Stats. & Regs. [Regulations Preambles 1991-1996] ¶ 30,939 at 30,413-14, 30,424 (1992).

54. The Commission denies rehearing with respect to the ADQ issue. The ALJ weighed the evidence and reviewed section 6.2 of Williston's GT&C and determined that NSP and the Commission's Staff had shown that Williston's refusal to increase the ADQ is unjust and unreasonable because Williston does not have operational and maintenance concerns that warrant such a limitation.[84]

55. Williston provides NSP service under Rate Schedule FT-1 pursuant to its blanket certificate to perform open-access transportation issued pursuant to section 284.221 of the Commission's regulations.[85] The Commission's Part 284 regulations require pipelines to offer all existing capacity for sale to customers willing to pay the maximum just and reasonable rate.[86] Of specific relevance here, section 284.7(b) requires that pipelines provide Part 284 service "without undue discrimination, or preference . . . in the . . . volumes of natural gas to be transported.[87] Section 284.7(c) provides that pipelines "may impose reasonable operational conditions" on such service.[88]

56. In this case, NSP has requested an increase in the ADQ of its Rate Schedule FT-1 contract for which it is paying the maximum rate so that it can make full use of its daily contract demand. Williston defends the limit as an operational condition intended to permit it to perform routine maintenance without interruption of service. As discussed below, the Commission finds that the ADQ limitation is not a reasonable operational condition, and therefore Williston's refusal to increase NSP's ADQ is an unreasonable withholding of capacity in violation of the Part 284 regulations.

57. There was evidence in the record that no other non-affiliated customer has such a limitation and that Williston had adequate tariff tools at section 6.2 of its GT&C to meet operational emergencies that could not be addressed by advance planning of routine maintenance. Williston argues on rehearing that the substantial ADQ limitation of 50

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[84] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 153 (2005).

[85] 18 C.F.R. § 284.221 (2005).

[86] *Tennessee Gas Pipeline Co*., 91 FERC ¶ 61,053 at 61,191 (2000), *reh'g denied*, 94 FERC ¶ 61,097 (2001), *aff'd*, *Process Gas Consumers v. FERC*, 292 F.3d 831 (D.C. Cir. 2002). *Regulation of Short-Term Natural Gas Transportation Services*, 101 FERC ¶ 61,127 at P 12 (2001), *reh'g denied*, 106 FERC ¶ 61,088 (2004), *aff'd AGA v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

[87] 18 C.F.R. §284.7(b) (2005).

[88] 18 C.F.R. § 284.7(c) (2005).

percent gives it the opportunity to perform repairs without using its tariff to interrupt service to make repairs, and that this distinction is important. Yet the 50-percent ADQ limit impairs NSP's FT service rights substantially, whether repairs are needed or not. This is no longer a just and reasonable solution, if it ever was. Rather, the parties should be able to work out reasonable times to accomplish routine maintenance without interrupting deliveries in most circumstances. Williston acknowledges that the relations between the parties have "not been completely harmonious", and suggests there may be disputes over the timing of normal maintenance absent the 50-percent ADQ limit. This is not a logical basis for maintaining the 50-percent limit on ADQ. NSP is on record that it "would gladly exchange the elimination of the ADQ limitation for the possibility that Contract No. FT-00157 might be 'impacted' from time-to-time by Williston Basin invoking its rights under section 6.2 to perform routine maintenance."[89] It is plain that this substantial limit on ADQ is unique among non-affiliated shippers, since only MDU and NSP have such a limitation. The limitation unreasonably and unjustly deprives NSP of the capacity it pays for under the FT contract, without operational justification. It appears that NSP never "agreed" to a permanent 50-percent ADQ limit on its FT service, but rather accepted this limit reluctantly as a temporary resolution of an even more draconian limitation.[90] NSP showed at the supplemental hearing that but for the limitation, NSP could pursue services to interruptible retail customers and capacity release more aggressively, and by limiting NSP's ADQ, Williston eliminates a potential competitor. This undermines the vibrancy of the secondary market and provides upward pressure on the price Williston may demand for interruptible and short-term firm services.[91]

58. The Commission also rejects Williston's contention that the Commission must satisfy the public interest standard in order to require Williston to permit an increase in NSP's ADQ. As discussed previously, the Commission may order changes in the provisions of a contract pursuant to the just and reasonable standard whenever the contract contains a provision permitting the parties to seek such changes. Paragraph 6 of the form of service agreement for FT service in Williston's tariff [92] governs the operation of the subject FT agreement and provides as follows:

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[89] Initial Brief of Northern States Power Company at 24-25 (February 3, 2005).

[90] Ex. NSP-11 in RP00-107-000, at 11-12.

[91] Ex. NSP-6 in RP00-107-003, at 11-12.

[92] First Rev. Sheet No. 504.

> Changes in Rates and Terms. Nothing contained herein shall be construed as affecting in any way the right of Transporter to make unilateral changes in the applicable rates, charges, adjustments, terms, conditions, tariffs and rate schedules pursuant to section 4 of the Natural Gas Act, or any other applicable statute, and the rules and regulations promulgated thereunder. Shipper agrees to pay such rates as may be made effective hereunder *without prejudice to the rights of Shipper to contest such changes*. . . . (emphasis added).

The Commission understands this provision as according the Shipper the parallel right, under section 5 of the Natural Gas Act, to contest the ADQ limit at issue here. The FT contract, if it is a conforming one, is subject to the Commission's regulation and to the Commission's interpretation of the Form of FT Service Agreement in Williston's tariff. Therefore, changes thereto may be initiated and reviewed under the NGA standards of justness, reasonableness, and no undue discrimination or preference. Just as the NGA is the enabling authority for Williston's gas tariff, the terms of the tariff governing FT agreements thereunder are the enabling authority for execution of, and changes to, specific FT service agreements. Thus, the NGA standards, and not the "public interest" standard, apply to changes to the ADQ limitation.

59. Williston suggests that, because the specific ADQ level included in NSP's contract was an individually-negotiated contract provision, the Commission can only change that provision under the public interest standard, regardless of the *Memphis* clause in its form of service agreement. As discussed above, the Commission has held in the *Transco* order, affirmed by the court in *ExxonMobil*, that a *Memphis* clause does not authorize the pipeline to require a customer to take and pay for additional service for which the customer has not contracted. However, this case presents an entirely different situation. Here, the customer is seeking to remove an annual restriction on its use of its daily contract demand. Thus, this case involves an effort by an open-access pipeline to withhold capacity, not an effort by the pipeline to require the customer to take additional service it does not want. The Commission's reliance on the just and reasonable standard to require Williston to accept NSP's request for an increase in its ADQ is similar to reliance on the just and reasonable standard to require open-access pipelines to permit shippers to change the primary receipt and delivery points in their contracts, where this is operationally feasible.[93]

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[93] *See Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053 at 61,192-93 (2000), *reh'g denied*, 94 FERC ¶ 61,097 at 61,401-03 (2001), *aff'd, Process Gas Consumers v. FERC*, 292 F.3d 831 (D.C. Cir. 2002).

60. There being no operational reason for the limitation based on the complete record before the Commission, and there being substantial evidence of the limitation's operating in an anti-competitive manner, rehearing on this issue is denied.

Conclusion

61. Finally, to avoid any further delay or obstruction in the implementation of the Commission's orders in this case, the actions directed in the ordering paragraphs below are essentially an administrative, ministerial matter, to create the requisite regulatory documentation to comply with the Commission's order. This is not to say they are unimportant, or that non-compliance would not be considered a violation of a Commission order, but only that the Commission's order is effective no later than 15 days after it is issued, whether or not the filings are made as directed on or before that date.

62. Should the requisite documentation not be submitted as ordered, the Commission will consider the conversion of X-13 service and the removal of the ADQ limitation to have been effectuated 15 days from the date this order is issued, and will pursue the issue of the submission of the required documentation as a separate matter.

The Commission orders:

(A) Rehearing of the November 22 Order is denied, as discussed in the body of this order.

(B) Within 15 days of the date of issuance of this order, Williston must file to cancel Rate Schedule X-13 and must file the provisions of said contract as a non-conforming FT service agreement with NSP under the terms discussed in the November 22 Order (*i.e.*, without any 25-basis-point reduction in the return on equity component), to be effective as a non-conforming FT contract. [94] The cancellation of the Rate Schedule X-13 agreement and the effectiveness of the successor FT agreement shall occur simultaneously, but no later than 15 days from the date of issuance of this order.

[94] Thus, the terms of the non-conforming FT contract shall be identical to those of the predecessor X-13 contract except that there shall be no 25-basis-point reduction in the return on equity component.

(C) Within 15 days of the date of issuance of this order, Williston shall file an amended Contract No. FT-00157 to reflect the removal of the 50-percent ADQ limitation. The removal of the 50-percent ADQ limitation shall be effective 15 days from the date of issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.