

124 FERC ¶ 61,089
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Midcontinent Express Pipeline LLC

Docket No. CP08-6-000

Enogex Inc.

Docket No. CP08-9-000

ORDER ISSUING CERTIFICATES

(Issued July 25, 2008)

1. On October 9, 2007, Midcontinent Express Pipeline LLC (Midcontinent) filed in Docket No. CP08-6-000 an application under section 7(c) of the Natural Gas Act (NGA) for authorization to construct and operate a new 506-mile pipeline extending from southeastern Oklahoma to western Alabama with a capacity of up to 1,532,500 dekatherms per day (Dth/d). Midcontinent also requests a blanket construction certificate under Part 157, Subpart F of the Commission's regulations, and a blanket transportation certificate under Part 284, Subpart G of the regulations. As part of the project, Midcontinent further requests authorization to lease up to 272,000 Dth/d of capacity on the Oklahoma intrastate pipeline system of Enogex Inc. (Enogex). On October 9, 2007, Enogex filed in Docket No. CP08-9-000 an application under section 7(c) of the NGA requesting issuance of a limited jurisdiction certificate authorizing its lease of capacity to Midcontinent. For the reasons set forth below, we are granting the requested authorizations, subject to conditions.

I. Background and Proposal

2. Midcontinent is a Delaware limited liability company and is owned 50 percent by Kinder Morgan Energy Partners, L.P. and 50 percent by ETC Midcontinent Express Pipeline, L.L.C. (ETC), a subsidiary of Energy Transfer Partners, L.P. Midcontinent is a new entity which will become a natural gas company subject to the jurisdiction of the Commission under the NGA upon acceptance of authorizations issued by the Commission in this proceeding.

3. Enogex is an intrastate pipeline operating natural gas transportation facilities entirely within the State of Oklahoma. The Enogex system consists of approximately 2,283 miles of transmission pipeline arranged in a web-like configuration. Enogex receives natural gas into its system from numerous wells and gathering facilities and from other intrastate and interstate pipelines. Enogex offers firm and interruptible intrastate transportation services, and it offers interruptible transportation service in interstate commerce under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).

4. Midcontinent states that its project addresses the need for new pipeline infrastructure to link natural gas production from the Barnett Shale and Bossier Sands in Texas, the Woodford/Caney Shale and Granite Wash in Oklahoma, and the Fayetteville Shale in Arkansas¹ with markets further east. Midcontinent provides estimates indicating that growth in production from these areas will provide approximately 7.0 Bcfd in incremental volumes by the year 2015.²

Midcontinent Facilities

5. Midcontinent proposes to construct its project in two phases at a total estimated cost of approximately \$1.34 billion - \$1.28 billion for the initial phase and \$0.06 billion for the expansion phase. The proposed system will have two capacity zones in addition to the Enogex leased capacity. Zone 1 will extend approximately 308 miles from the Enogex interconnection at Bennington, Oklahoma to an interconnection with Columbia Gulf Transmission (Columbia Gulf) near Delhi, Madison Parish, Louisiana and will have an initial capacity of 1,432,500 Dth/d.³ Zone 2 will extend approximately 198 miles further to the terminus at an interconnection with Transcontinental Gas Pipe Line Corporation (Transco) at its Station 85 near Butler in Choctaw County, Alabama, and will have an initial capacity of 1,000,000 Dth/d. The final expanded system's capacities will be 1,532,500 Dth/d in Zone 1 and 1,200,000 Dth/d in Zone 2.

6. The proposed initial phase facilities will consist of 30-inch diameter pipeline extending approximately 40 miles from the interconnection with Enogex at Bennington in Bryon County, Oklahoma, increasing to 42-inch line for the next 268 miles, and

¹ No part of the project will be located in Arkansas; however, a proposed interconnection with Natural Gas Pipeline Company of America (NGPL) can potentially provide Arkansas gas access to the project.

² See, Exhibit H, page 2 of 6, of Midcontinent's application.

³ On May 16, 2008, Midcontinent filed a revised Exhibit G showing an increase in Zone 1 capacity of 32,500 Dth/d for both the initial and expansion phases. The capacity in Zone 2 is unchanged.

decreasing in size to 36-inch line for the last 198 miles.⁴ Fourteen interconnections providing receipt and/or delivery with existing intrastate and interstate pipelines are planned, along with ancillary facilities such as numerous mainline valves and pig launcher/receivers.⁵ Also as part of the initial phase, Midcontinent proposes to construct two mainline compressor stations – the Lamar Compressor Station with 38,855 horsepower (hp) of reciprocating engine-driven compression in Lamar County, Texas, and the Perryville Compressor Station with 32,720 hp of reciprocating engine-driven compression in Union Parish, Louisiana. In order to receive supplies from CenterPoint, Midcontinent proposes to construct the Delhi Booster Station, with 9,470 hp of reciprocating engine-driven compression, at the interconnect with CenterPoint and a 4.2-mile, 16-inch lateral line extending from the booster station to Midcontinent's mainline, all to be located in Richland and Madison Parishes, Louisiana. Midcontinent anticipates an in-service date of October 31, 2008, for the first 40 miles of pipeline from Enogex at Bennington to an interconnection near Paris in Lamar County, Texas with NGPL and Houston Pipe Line, an affiliate of ETC.⁶ The remainder of the initial phase facilities are anticipated to be in service on or about February 28, 2009.

7. The proposed expansion phase facilities will consist of two additional mainline compressor stations – the Atlanta Compressor Station with 12,270 hp of reciprocating engine-driven compression in Cass County, Texas, and the Vicksburg Compressor Station with 18,405 hp of reciprocating engine-driven compression in Warren County, Mississippi. Midcontinent requests authorization to construct these expansion facilities any time during the first five years after its initial phase facilities are in operation.

⁴ The pipeline facilities will cross Bryan County, Oklahoma; Fannin, Lamar, Red River, Franklin, Titus, Morris, and Cass Counties, Texas; Caddo, Bossier, Webster, Claiborne, Lincoln, Union, Ouachita, Morehouse, Richland, and Madison Parishes, Louisiana; Warren, Hinds, Rankin, Simpson, Smith, Jasper, and Clarke Counties, Mississippi; and Choctaw County, Alabama.

⁵ The proposed interconnections are with Enogex, NGPL (twice); Houston Pipe Line Company, L.P (Houston Pipe Line); Texas Gas Transmission, LLC; ANR Pipeline Company; Columbia Gulf (twice); Texas Eastern Transmission, L.P.; Southern Natural Gas Company; Tennessee Gas Pipeline Company; Destin Pipeline Company, LLC; Transco; and CenterPoint Energy Gas Transmission (CenterPoint).

⁶ The revised Exhibit G filed by Midcontinent on May 16, 2008, indicates that the capacity on the first 40 miles of its system will be 875,000 Dth/d.

Enogex Capacity Lease

8. Enogex requests a limited jurisdiction certificate to enable it to lease its capacity to Midcontinent without its facilities and otherwise non-jurisdictional activities becoming jurisdictional, and Midcontinent requests certificate authorization to lease such capacity.

9. Midcontinent and Enogex have entered into a renewable operating lease agreement which provides that Midcontinent will lease 272,000 Dth/d of capacity (exclusive of fuel) on Enogex's intrastate system for a primary term of 10 years.⁷ Enogex will support firm deliveries from the receipt points specified in the lease (Waynoka, West Pool, and East Pool) to the Bennington lease delivery point through a combination of existing capacity and capacity Enogex will create through the addition of compression and certain other pipeline facilities.⁸

10. Enogex states that the lease will enable Midcontinent to transport gas on a firm basis from various points in Oklahoma to the interconnection of the Enogex system with Midcontinent at Bennington. Midcontinent will use the capacity to provide open-access transportation service to its customers pursuant to its FERC Gas Tariff. Midcontinent will pay Enogex a monthly lease charge, plus fuel and gas lost and unaccounted-for.

⁷ On April 23, 2008, Midcontinent filed supplemental information revising the capacity to be leased from 275,334 Dth/d to 272,000 Dth/d, and modifying the receipt point quantities shown in Exhibit A of the lease agreement. As discussed in separate filings also dated April 23, 2008, Midcontinent and Enogex have withdrawn their original requests that the Commission grant authorization to increase the lease capacity, at any time during the first five years of the project operation, up to a total of 800,000 Dth/d.

⁸ Enogex intends to construct 43 miles of 24-inch lateral pipeline in Woods and Major Counties, Oklahoma to provide an interconnection with the Waynoka Plant and a new 24,000 hp compressor station at the Bennington delivery point. These facilities will be integrated with Enogex's existing intrastate system; thus, Enogex must obtain the requisite state authorizations for these facilities. Enogex states that the 43-mile long pipeline will be constructed regardless of whether the Commission approves the subject lease arrangement with Midcontinent. Therefore, the environmental review in this proceeding did not include Enogex's planned pipeline. The compressor station will boost pressure at Bennington where Enogex's system interconnects with several other pipelines. Thus, while the compressor station is needed to deliver gas transported using upstream capacity leased to Gulf Crossing Pipeline Company LLC (Gulf Crossing) and Midcontinent, the compressor station is also needed to deliver gas transported by Enogex under section 311 of the NGPA using its remaining capacity. The compressor station was included in the environmental review in the Gulf Crossing proceeding.

Open Season and Precedent Agreements

11. Midcontinent conducted an open season for the project between December 13, 2006 and January 16, 2007.⁹ The open season provided for three categories of shippers with distinct rights based on level of commitment. “Foundation” shippers commit to 500,000 Dth/d or more in Zone 1 and 300,000 Dth/d or more in Zone 2 for a term of at least 10 years. “Anchor” shippers commit to more than 150,000 Dth/d in Zone 1 and Zone 2 for a term of at least ten years, but less than the commitment required of foundation shippers. “Standard” shippers are all other shippers. Prior to commencement of the open season, Midcontinent had executed agreements with one foundation shipper, one anchor shipper, and one standard shipper. Midcontinent states that all these initial shippers elected to pay negotiated rates. Midcontinent has filed executed precedent agreements for almost the entire Zone 1 and Zone 2 initial phase capacities of its proposed system.¹⁰

12. Midcontinent states that it does not believe that any aspects of the precedent agreements reflect material deviations from the pro forma service agreements in its tariff. However, Midcontinent provides a description of the most important non-conforming provisions and seeks a determination that even if some contractual provisions can be construed to constitute material deviations, no provision of any precedent agreement is unduly discriminatory. These provisions are discussed in detail below.

Midcontinent’s Proposed Rates

13. Midcontinent, as a new pipeline, is proposing to offer firm (Rate Schedule FTS) and interruptible (Rate Schedules ITS, PALS, and IBS) open-access transportation services at cost-based recourse rates under Part 284 of the Commission’s regulations, and has filed a pro forma tariff for review. Midcontinent has proposed three separate sets of rates: (1) interim period rates, for Rate Schedules FTS and ITS only, to be applicable if and when parts of the system go into service but before the entire initial phase facilities are in service; (2) base rates to be applicable when the entire initial phase facilities are in

⁹ On May 9, 2008, Midcontinent filed a data response indicating that the open-season deadline was extended to January 16, 2007, from the January 15, 2007 date stated in its October 9, 2007 application.

¹⁰ Midcontinent has requested privileged and confidential treatment for all of the precedent agreements on the grounds that the agreements are the product of extended negotiations with shippers in a highly competitive environment. On June 17, 2008, Midcontinent filed an amendment to the agreement with the foundation shipper agreeing to provide an additional 100,000 Dth/d of Zone 1 capacity through construction of expansion facilities.

service; and (3) expansion rates to be applicable once the expansion phase facilities are in service. Midcontinent will charge shippers who use the Enogex leased capacity a separate charge that will recover all of the lease costs.

14. Midcontinent states that the pipeline will be laid in four potential segments, with compression added later. Interim rates are proposed for each of the four segments to be applicable when the segments, if any, can go into service ahead of the date the entire initial phase facilities are placed in service. The proposed interim rates are additive.

15. Midcontinent is seeking a determination that rolled-in rate treatment will be appropriate for its expansion phase facilities, consisting of two new compressor stations, one in each of its two zones. Midcontinent has provided information indicating that initial phase shippers will save about \$6.7 million per year if the expansion phase facilities are rolled into the system's cost of service.¹¹

II. Notice, Interventions, Protests, and Motions

16. Notice of Enogex's application in Docket No. CP08-9-000 was published in the *Federal Register* on October 24, 2007 (72 Fed. Reg. 60,332). Notice of Midcontinent's application in Docket No. CP08-6-000 was published in the *Federal Register* on October 26, 2007 (72 Fed. Reg. 60,932).

17. ConocoPhillips Company (ConocoPhillips), Midcontinent, Apache Corporation (Apache), ScissorTail Energy LLC (ScissorTail), BP America Production Company and BP Energy Company (Collectively, BP), Chesapeake Energy Corporation (Chesapeake), Chevron, U.S.A. Inc. (Chevron), Marathon Oil Company (Marathon Oil), and Unimark LLC (Unimark) filed timely, unopposed motions to intervene in the Enogex proceeding. ConocoPhillips, Southern Natural Gas Company (Southern), Calpine Energy Services, L.P., Apache, Chevron, BP, Chesapeake, Marathon, and Enogex Inc., filed timely unopposed motions to intervene in the Midcontinent proceeding. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.¹² CenterPoint, Oklahoma Independent Petroleum Association (OIPA), and American Electric Power Service Corporation filed unopposed motions to intervene out-of-time in the Enogex proceeding. Alan Herbert, Leigh Alexander McClendon, III, Shannon McClendon, MarkWest Energy Partners, L.P and MarkWest Pioneer, L.L.C. (MarkWest); and XTO Energy Inc. (XTO) filed unopposed motions to intervene out-of-time in the Midcontinent proceeding. All have shown an interest in this proceeding, and their intervention at this stage of the proceeding will not cause undue

¹¹ See, Part III, page 1 of 1, of Exhibit P of Midcontinent's application.

¹² 18 C.F.R. § 385.214(c)(1) (2008).

delay or unfairly prejudice the rights of any other party. Accordingly, for good cause shown, we will permit their late intervention.¹³

18. Chesapeake and XTO, as well as Enogex and Midcontinent, filed comments in support of the applicants' proposals. Chesapeake asserts that the lease of facilities to Midcontinent will enable Midcontinent to provide seamless, integrated service to its shippers, thereby facilitating the delivery of important new sources of natural gas to markets. Chesapeake stresses that the lease of facilities to Midcontinent permits the expansion of service in an efficient and environmentally-friendly way. XTO states that the project will tap into under-utilized basins and encourage investments to develop these resources for the ultimate benefit of consumers. Various governmental authorities, and individuals, also filed comments in support of the project, primarily arguing that the project will bring economic benefits.

19. Apache, ConocoPhillips, Indicated Shippers (Chevron and Marathon Oil), and Unimark filed timely protests in the Enogex proceeding. ConocoPhillips, Apache, and BP filed timely protests in the Midcontinent proceeding. Environmental protests and comments are addressed in the environmental discussion below and in the Environmental Impact Statement.

20. ConocoPhillips, Apache, the Indicated Shippers and Unimark argue in their protests that the lease of capacity from Enogex to Midcontinent, in concert with Enogex's lease of capacity to Gulf Crossing,¹⁴ will impair their rights as section 311 interruptible shippers on Enogex's system. They assert that, because Enogex does not offer firm section 311 service, the lease is unduly discriminatory. Unimark requests that the lease proposal be rejected or, alternatively, set for hearing. On November 13, 2007, Apache filed a motion to consolidate Midcontinent's and Enogex's certificate proceedings in these dockets and Enogex's section 311 rate proceeding in Docket No. PR08-1-000,¹⁵ contending that all three proceedings share issues of undue discrimination related to the lease. Apache further raises the issue that Enogex offers its existing section 311 service

¹³ 18 C.F.R. § 385.214(g) (2008).

¹⁴ *Gulf Crossing, et al.*, 123 FERC ¶ 61,100 (2008) (*Gulf Crossing*). The Commission certificated Gulf Crossing's lease of 90,000 Dth/d of capacity on Enogex's system and the construction of new pipeline facilities from an interconnection with Enogex at Bennington to an interconnection with Gulf South Pipeline Company, LP, from whom Gulf Crossing is also approved to lease capacity, to deliver gas to Gulf Crossing's terminus at an interconnection with Transco at its Station 85 in Alabama.

¹⁵ On October 1, 2007, Enogex filed a petition in Docket No. PR08-1-000 for approval to increase its section 311 transportation rates.

only on an interruptible basis and has proposed a rate increase for its section 311 interruptible service, while offering in this certificate proceeding to offer firm transportation service under an NGA certificate only to Midcontinent, by way of the lease, at a rate equal to or less than its existing section 311 rate. Apache states that the rate proceeding is the proper forum for analyzing the rate implications of the proposed lease and the need for Enogex to offer firm section 311 service on its system.

21. On November 28, 2007, Chesapeake, Enogex, and Midcontinent filed motions for leave to file answers and answers to protests, arguing that the Commission views lease arrangements differently than transportation services and that Enogex need not offer firm transportation to its existing section 311 shippers in order to meet the requirement of not being unduly discriminatory. In those filings, Enogex and Midcontinent also oppose Apache's request for consolidation of Enogex's section 311 rate proceeding with Midcontinent's and Enogex's certificate proceedings in these dockets, arguing that the proceedings involve different parties and present distinctly different issues under different federal statutory provisions. Enogex further emphasizes that the issue of potential firm section 311 service on Enogex's system has been raised in its section 311 rate proceeding. On December 13, 2007, Apache filed an answer responding to Chesapeake's, Midcontinent's and Enogex's answers to the protests.¹⁶

22. On April 8, 2008, as amended on April 11, 2008, Apache filed a motion requesting a consolidated hearing, or alternatively, a staff panel in the rate proceeding and a technical conference in the certificate proceedings.¹⁷ Apache argues that contested issues of material fact include: (1) whether Enogex has sufficient capacity to lease firm capacity to Midcontinent without negatively impacting existing interruptible section 311 service; (2) whether Enogex's offering of firm transportation to Midcontinent is unduly discriminatory; and (3) whether Enogex's offering of firm transportation to intrastate shippers but not 311 shippers is unduly discriminatory. At bottom, Apache contends that open-access principles require that firm service be offered on a non-discriminatory basis to all interested parties, including interruptible section 311 shippers, and that existing interruptible section 311 service should not be negatively impacted.

¹⁶ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits answers to protest and answers to answers. We will waive this rule to admit all answers described herein because they have assisted us in our decision-making.

¹⁷ Oklahoma Independent Petroleum Association and Unimark filed pleadings on April 15 and April 11, 2008, respectively, supporting Apache's motion.

23. On April 23, 2008, Enogex and Midcontinent filed answers to Apache's motion for hearing. Midcontinent states that it modified its lease agreement with Enogex to reduce the leased capacity from 800,000 Dth/d to 272,000 Dth/d, thereby greatly reducing any adverse impact to Apache. Moreover, Midcontinent restates its position that, because under Commission policy capacity leases are property interests which are fundamentally different from contracts for transportation services, Apache is not a similarly situated shipper. Therefore, the issues in dispute are not of material fact, but rather of Commission policy.

24. Enogex, too, contends that, because lease arrangements are fundamentally different from transportation service agreements, there can be no undue discrimination as claimed by Apache. According to Enogex, Apache is not entitled to the same rates and services as Midcontinent because they are not in a similarly situated position. Moreover, Enogex maintains that the Commission has no legal basis to require that Enogex offer firm section 311 service. Also, states Enogex, under Commission policy and precedent, it is not unduly discriminatory to offer intrastate firm service while only offering interruptible section 311 service.¹⁸ Regarding Apache's claim of adverse impact, Enogex contends that as an interruptible shipper, Apache has no standing to complain that their capacity may be reduced or interrupted from time to time. In any event, states Enogex, there is record evidence demonstrating that the Midcontinent and Gulf Crossing leases will not adversely affect the design flowing capacity of the Enogex system and/or the availability of interruptible service, particularly in view of the fact that the capacity to be leased has been reduced to 272,000 Dth/d.

25. On May 13, 2008, Apache filed an answer to Enogex's and Midcontinent's answers of April 23, 2008, supported by a PowerPoint presentation and affidavit. In this filing, Apache raises the claim that Commission policy requires identification of receipt points (not identified here, as pooling points encompass all points) and delivery points. Also, states Apache, Lease Article I, 1.1(a) provides that the parties may change the receipt points under the lease at any time, thus conveying a floating capacity right to move anywhere on the system at any time, preempting existing gas flows and potentially shutting in production, rather than a defined property interest as other approved leases. In these circumstances, it is not clear, according to Apache, what capacity has been reserved, nor what capacity will remain. Apache now contends that in addition to requiring that Enogex offer firm section 311 transportation service, the Commission should require that Enogex define a clear capacity path, demonstrate that existing shippers will not be harmed, and file an application to amend the lease for any future increases in leased capacity.

¹⁸ See *Cranberry Pipeline Corp.*, 97 FERC ¶ 61,280 (2001).

26. Enogex and Midcontinent filed responsive pleadings on May 28, 2008. In addition to restating the applicability of various Commission policies on which it relies, as well as its position that the record shows that there is sufficient capacity on Enogex to support both the lease and historical section 311 service, Enogex points out that the Commission has approved interstate transportation services that have pools as receipt points.¹⁹ Enogex emphasizes that it has other Commission-approved leases²⁰ (with Gulf Crossing and Ozark Gas Transmission L.L.C.) and argues there is no basis to reject the proposed lease of capacity to Midcontinent on the grounds argued by Apache, i.e., because it does not specify a capacity path. Midcontinent distinguishes the cases on which Apache relies for the premise that specific receipt points must be designated in a capacity lease, asserting that none of those cases ruled on the appropriateness of a capacity lease or address policy on leases in any manner. Further, Midcontinent claims that the approved lease of Enogex capacity to Gulf Crossing has many of the same provisions as Enogex's proposed lease of capacity to Midcontinent. Midcontinent points out that the Commission-approved lease in *Transok*²¹ contained ten primary receipt points, later reduced to eight, with the option to change points upon mutual agreement, and that the lease approved in *Texas Gas Transmission, LLC (Texas Gas)*²² contained four primary and four secondary points. On June 4, 2008, Apache answered, and on June 19, 2008, Enogex answered Apache.²³

27. We will deny Apache's request to consolidate Enogex's section 311 rate proceeding in Docket No. PR08-1-000 and the two NGA section 7(c) certificate proceedings in Docket Nos. CP08-6-000 and CP08-9-000. The Commission consolidates matters only if a hearing is required to resolve common issues of law and fact and consolidation will ultimately result in greater administrative efficiency. We do not believe administrative efficiency will be served by consolidating the section 311 rate

¹⁹ See *CNG Transmission Corp.*, 79 FERC ¶ 61,219, at 61,995 (1997).

²⁰ *Transok, Inc., et al.*, 81 FERC ¶ 61,005 (1997) (Enogex's predecessor, Transok, leased capacity to Kansas Pipeline Company, now Enbridge Pipelines); *Transok, et al.*, 97 FERC ¶ 61,362 (2001) (*Transok*) (Transok leased capacity to Ozark Gas Transmission L.L.C.); *Gulf Crossing, supra*, (Enogex leased capacity to Gulf Crossing).

²¹ 97 FERC ¶ 61,362 (2001).

²² 119 FERC ¶ 61,281 (2007).

²³ Other filings, not specifically noted here, were made which merely reiterate arguments previously raised. Various persons filed either in support of Apache's request for a hearing or stating that Apache's request is baseless. All of the comments filed have been considered herein and are accepted as part of the record.

proceeding with certificate proceedings which involve different questions of law and fact²⁴ and different parties, as well as different statutory provisions and standards. Moreover, we see no purpose in consolidating the two certificate proceedings in view of the fact that all issues in each proceeding are addressed in this order without need for an evidentiary hearing.

28. In addition, we will deny Apache's motion for evidentiary hearing or alternatively, a staff panel in the rate proceeding and a technical conference in the certificate proceedings. We find that there is ample record, based on the parties' various filings, to resolve all material issues of fact. We will address the legal and factual issues raised in the comments and protests below, as appropriate.

III. Discussion

29. Because the facilities proposed by Midcontinent will be used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, their construction and operation are subject to the requirements of sections 7(c) and (e) of the NGA. Likewise, Enogex's operation of capacity that it will lease to Midcontinent, as well as Midcontinent's acquisition of such capacity by lease, are subject to the requirements of section 7(c).

Enogex Capacity Lease

30. Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.²⁵ To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity. Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.²⁶

31. The Commission's practice has been to approve a lease if it finds that: (1) there

²⁴ We note that Apache's assertion that there is a common issue fact, i.e., undue discrimination, hinges on its claim that Enogex should be required to offer firm section 311 service which, as discussed below, the Commission will not do.

²⁵ *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at p. 61,530 (2001).

²⁶ *Texas Gas Transmission, LLC*, 113 FERC ¶ 61185, at P 10 (2005).

are benefits from using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease; and (3) the lease arrangement does not adversely affect existing customers.²⁷ The lease agreement between Midcontinent and Enogex satisfies these requirements.

32. As more fully discussed below, we find that the payments are satisfactory, there are significant benefits, and those benefits outweigh any potential harm to Enogex's customers. Therefore, we find that the proposed lease is required by the public convenience and necessity, subject to the conditions described herein.

33. It is appropriate to ensure that Midcontinent's capacity lease arrangement does not result in subsidization in the future. Therefore, consistent with current policy²⁸ and Midcontinent's proposal to charge its customers separate incremental rates for the leased capacity on Enogex's system, the Commission will condition its approval of the lease on Midcontinent's not being permitted in the future to shift any of its costs associated with the leased capacity to customers that do not use the leased capacity. The Commission will likewise condition its approval of the lease on Enogex's not shifting any costs associated with the leased capacity to their other interstate customers.²⁹ Midcontinent shall maintain separate accounting records to ensure that costs and revenues associated with the leased capacity from Enogex can be identified in any future proceeding and that Midcontinent's other customers are not subsidizing shippers who use capacity leased from Enogex.

34. To enable Enogex to carry out its responsibilities under the lease agreement, we will issue Enogex a limited jurisdiction certificate. The Commission looks closely at proposals that would create dual jurisdiction facilities, i.e., facilities that would be subject to state and federal jurisdiction, in order to avoid duplicative and/or potentially inconsistent regulatory schemes over the same facilities. However, here, although federal regulation of Enogex will be "limited," Enogex and Midcontinent will both be subject to exclusive federal regulation regarding the lease and 272,000 Dth/d of capacity on the Enogex system and any issues that may arise thereunder. The limited jurisdiction certificate will enable Enogex to operate the leased capacity being used for NGA jurisdictional services subject to the terms of the lease and subject to Midcontinent's open-access tariff. The limited jurisdiction certificate will require Enogex to operate the

²⁷ *Id.*; *Islander East Pipeline Company, L.L.C.*, 100 FERC ¶ 61,276, at P 69 (2002).

²⁸ *Gulf South Pipeline Company, L.P., and Texas Gas Transmission, LLC*, 119 FERC ¶ 61,281 (2007).

²⁹ *Gulf Crossing, supra.*

leased capacity in a manner that ensures Midcontinent's ability to provide services, including interruptible transportation, using the leased capacity on an open-access, non-discriminatory basis. We have approved a similar lease in the past involving Enogex.³⁰ Our finding that Enogex is NGA-jurisdictional is limited to its role as lessor-operator of capacity used by Midcontinent to provide Midcontinent's interstate services. Enogex will remain non-jurisdictional as to its intrastate activities and may continue to provide NGPA section 311 transportation services on its system.

Lease Benefits

35. The Commission has found that capacity leases in general have several potential public benefits. Leases can promote efficient use of existing facilities, avoid construction of duplicative facilities, reduce the risk of overbuilding, reduce costs, minimize environmental impacts, and result in administrative efficiencies for shippers.³¹ Here, the lease arrangement will provide for a significant portion of Midcontinent's proposed system without construction of duplicative facilities which would essentially parallel the Enogex system. The leased capacity allows for the efficient use of the available capacity on Enogex, avoids the environmental impact and impacts on landowners associated with constructing duplicative facilities, substantially reduces the costs of constructing Midcontinent's system, and allows Midcontinent's system to be placed in service earlier than if redundant facilities were constructed. The lease will provide Midcontinent's shippers with seamless access, under a single firm transportation contract, from the production area in Oklahoma to multiple pipelines serving the southern and eastern United States.

Lease Payments

36. Midcontinent states that the payment it proposes to make to Enogex under the lease is less than Enogex's maximum applicable transportation rates for comparable service. However, a comparison of the proposed lease payment with an Enogex firm interstate rate is not possible, because although Enogex provides interruptible interstate service under section 311 of the NGPA, it does not currently offer firm section 311 transportation service. While Enogex acknowledges that its firm intrastate transportation rates are also not directly comparable to the Midcontinent lease payment, Midcontinent notes that Enogex's December 28, 2007 response to a Commission data request in CP07-403-000 provides figures for what Enogex avers are its most comparable firm intrastate transportation service agreements. According to this data, the average demand charge

³⁰ See, *Gulf Crossing, supra*.

³¹ See, e.g., *Dominion Transmission, Inc.*, 104 FERC ¶ 61,267, at P 21 (2003); *Islander East Pipeline Company*, 100 FERC ¶ 61,276, at P 70 (2002).

with an MDQ of equal to or greater than 90,000 Dth per day is \$0.193 per Dth. Under the lease, Midcontinent will make a payment equal to \$0.09 per Dth for receipts at the East Pool, \$0.17 per Dth for receipts at Waynoka and \$0.15 per Dth for receipts at the West Pool, all of which are lower than \$0.193 per Dth. In addition, Midcontinent states that the negotiated lease payments to Enogex are substantially less than what Midcontinent's recourse rates for comparable service would be, given the capital costs for construction, if Midcontinent were to duplicate the facilities Enogex will use to provide the lease capacity.

37. We find that Midcontinent's shippers that intend to use the Enogex lease would pay a higher rate if Midcontinent were required to construct redundant facilities in Oklahoma in order to provide the service. In conclusion, the Commission agrees that under the circumstances here, where there is no directly comparable rate, the comparison above is a reasonable comparison method and, for the purposes of approving the lease, we find that the demand charges that Midcontinent will pay under the lease will be less than comparable firm demand charges on the Enogex System.³²

Effect on Existing Customers

38. Apache, BP, Conoco Phillips, Indicated Shippers and Unimark filed protests and comments expressing significant concerns with regards to Midcontinent's lease with Enogex and the lease's impact on Enogex's existing customers. The protesters' concerns are addressed below.³³

Impact on Availability of Capacity for Existing Enogex Services

39. The protesters believe there is a likelihood Enogex's existing interruptible section 311 transportation service will be curtailed due to the size of the lease and state that existing interruptible section 311 shippers have no way of protecting their service since Enogex does not currently offer firm section 311 transportation service. Apache states that Enogex has not provided such assurances that existing interruptible section 311 shippers will continue to receive current levels of service. In fact, Apache and Indicated Shippers note that Enogex has stated just the opposite – that customers who take

³² *Gulf Crossing, supra.*

³³ BP and Apache protested Midcontinent's right to increase the lease capacity to 800,000 Dth/d. The issue is moot, as Midcontinent and Enogex have withdrawn their requests for approval to lease up to 800,000Dth/d and now request authority for a lease capacity of up to only 272,000 Dth/d. Any increase in the lease capacity would require that Midcontinent and Enogex file for certificate authority to amend the lease.

interruptible service on the Enogex system have no claim on Enogex capacity but will continue to receive service to the extent service is available.

40. ConocoPhillips is concerned that the lease will severely impair its current contractual rights on Enogex. ConocoPhillips is a storage customer and uses Enogex's interruptible section 311 transportation service to inject and withdraw its storage gas. It states that Enogex has not offered firm section 311 service to any of its shippers, yet the capacity leased to Midcontinent will be used by Midcontinent to provide firm interstate service, clearly impairing the value and availability of the storage and transportation services provided to ConocoPhillips by Enogex. In addition, ConocoPhillips and Unimark state that it appears the interruptible interstate service offered by Midcontinent pursuant to the lease would have priority over existing section 311 shippers on Enogex.

41. Enogex states in its November 28, 2007 answer that the lease will not adversely affect existing customers entitled to service on the Enogex system. Enogex states interruptible customers are not *per se* entitled to a particular quantum of service on Enogex and these customers cannot legitimately claim a right to continue to receive a specific amount of interruptible service or assert a corollary right to veto an arrangement that would reduce the quantity of service to which they feel entitled. Enogex also states in its April 23, 2008 answer that the flow diagram information provided in its December 31, 2007 Supplemental Data Response demonstrates that the Enogex system, as it will be configured by the in-service dates of the Midcontinent lease and the Gulf Crossing lease, will readily accommodate the initial capacity commitments Enogex has made under those leases and that the proposed interconnects with Midcontinent and Gulf Crossing will not adversely affect the design flowing capacity of the Enogex system.

42. In its June 4, 2008 answer to Midcontinent, Apache states that Enogex's system is becoming more constrained and that the lease will make things worse. Specifically, Apache states that for May 30-31, 2008, capacity was not available at three of Enogex's delivery points, and that several new Apache wells have been refused connection. On June 19, 2008, Enogex answered Apache, stating that the three constrained delivery points were constrained by take-away capacity on the interconnecting pipelines, as well as the capacity of Enogex's laterals feeding them. Enogex also states that the decision of its gathering affiliate was based on specific connection criteria in the agreement with Apache and had nothing to do with availability of capacity on the mainline portions of Enogex. Enogex concludes that the addition of new firm take-away capacity on Midcontinent will help relieve such interconnection-specific capacity constraints.

43. The Commission finds that the lease arrangement will not have an unduly adverse impact on Enogex's existing services. Engineering information provided by Enogex demonstrates that the Enogex system, as it will be configured by the in-service dates of the Midcontinent lease and the Gulf Crossing lease, will readily accommodate the capacity commitments Enogex has made under the Midcontinent and Gulf Crossing leases. Further, while certain individual receipt points may decrease in capacity, there

will be an overall increase in capacity on Enogex's system as discussed below in the engineering section. Thus, rather than the lease arrangement resulting in reduced gas supplies available to the market due to wells being forced to shut-in, the capacity of the Enogex system will increase as a result of the facility additions Enogex plans and the availability of firm transportation on Midcontinent for supplies produced in Oklahoma should promote the development of new prolific sources of supply there. In addition, Enogex states in its answer that the lease will not adversely affect existing customers entitled to service on the Enogex system. Enogex will continue to provide interruptible section 311 transportation service, with the same rights as that service holds today, after implementation of the lease. While the amount of capacity Enogex can provide as interruptible section 311 transportation service could change at some point in the future, those transactions are, by definition, interruptible, and therefore subject to change.³⁴ In these circumstances, the Commission finds that the benefits from the Enogex lease outweigh any possible changes that may result to shippers receiving interruptible section 311 service.

44. The Commission does not believe that the lease will provide priority to interstate interruptible service offered by Midcontinent over existing interruptible section 311 service on Enogex. The Commission views a lease of pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.³⁵ Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. Midcontinent and Enogex will schedule their pipelines separately and according to the provisions of their individual tariff or Statement of Operating Conditions. Enogex must ensure that its use of capacity does not prevent it being able to satisfy its obligation to ensure that Midcontinent is able to use the 272,000 Dth/d, including for interruptible interstate transportation. That said, once satisfaction of that obligation has been assured, Enogex can then use any available capacity for its own intrastate services and section 311 services. Shippers will have the option of contracting for interruptible capacity on either pipeline.

Lease is Unduly Discriminatory

45. Apache, ConocoPhillips, Unimark and Indicated Shippers allege that because Enogex is offering firm capacity to Midcontinent through the lease but has not sought to offer firm section 311 transportation service to its existing shippers, the proposed lease is unduly discriminatory. They believe this discriminatory treatment is further exacerbated by the fact that the proposed rate Midcontinent will pay for the lease capacity may be lower than Enogex's section 311 interruptible rate. In addition, they note that Enogex did

³⁴ *Gulf Crossing, supra* at P 121.

³⁵ *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at p. 61,530 (2001).

not post the availability of firm service to interstate delivery points or hold an open season for firm interstate service. Apache states that the discrimination is especially egregious since Apache has dedicated production to the Enogex system and is, in essence, hostage to its system.

46. Apache and Indicated Shippers state that while the Commission has found that a pipeline offering to provide section 311 transportation service may limit the overall capacity that it makes available for firm section 311 contracts, in the event it does offer firm interstate transportation (via section 311) that transportation must be offered on a nondiscriminatory basis.³⁶ Indicated Shippers state that it appears Enogex may be trying to circumvent this non-discriminatory requirement by granting firm interstate capacity but only in the form of the capacity leased to other pipelines. Indicated Shippers state it is unduly discriminatory that Enogex has entered into leases with Midcontinent and Gulf Crossing for firm service despite the fact that many existing shippers using interruptible section 311 service want firm service on Enogex and are willing to convert their existing interruptible service to firm service. Apache and Indicated Shippers request that the Commission address the undue preference for the leased capacity by requiring Enogex to provide firm section 311 service to existing shippers who want it, if the Commission does not reject the lease outright.

47. Chesapeake states the Commission cannot require Enogex to offer firm section 311 service, therefore, the lease offers shippers an opportunity to obtain firm capacity to which they otherwise would not have access. Chesapeake avers that the lease allows Midcontinent to provide a seamless, integrated service to its shippers, facilitating the delivery of important new supply sources to pipelines serving growing markets in the Northeast and Florida. Chesapeake states Apache and other producers were free to participate in the Midcontinent open seasons and obtain such capacity, and their business decisions not to participate should not prevent Chesapeake and other Midcontinent shippers from obtaining firm transportation rights that would otherwise be unavailable to them.

48. Enogex states in its answer that the Commission views lease arrangements differently than transportation services under rate contracts and that to meet the requirement that a capacity lease be non-discriminatory, a lessor need only offer the same type of service to other similarly situated shippers, which, the Commission has held does not necessarily require that the lessor make such service available to 'shippers.'³⁷ Enogex states this principle is based upon the premise that a capacity lease is a property

³⁶ *Peoples Gas Light and Coke Co.*, 118 FERC ¶ 61,203 (2007); *Transok, Inc.*, 54 FERC ¶ 61,229 (1991).

³⁷ *Islander East Pipeline Company*, 100 FERC ¶ 61,276 (2002).

interest that requires NGA section 7 certificate authorization, which is only available to a natural gas company under the NGA. Enogex states that under Commission precedent the lease affords Midcontinent property rights to capacity in the Enogex system that are not equivalent to firm section 311 transportation service. Enogex states that none of the parties that contend the lease is discriminatory can properly lay a claim to the same type of “service” as in the lease since none are natural gas companies under the NGA and none are in a position, or are actually seeking, to enter into an NGA lease-type arrangement with Enogex.

49. Enogex also states there is no basis on which the Commission can lawfully compel Enogex to offer firm transportation service to its section 311 shippers. Enogex states the Commission has held that pipelines offering transportation service under NGPA section 311 have the sole discretion to decide whether or not to offer service on a firm basis and the Commission has specifically stated it cannot require section 311 pipelines to offer firm services.³⁸

50. Apache states in its answer that Enogex’s proposition that a lease is different from transportation service and that property rights transferred in a lease are not equivalent to firm transportation service is flawed since they ignore that the discrimination occurs by virtue of the fact that shippers on the leased Enogex capacity are offered firm transportation, whereas shippers on the unleased Enogex capacity are not. Therefore, Apache believes Enogex is not treating similarly situated shippers the same and is not in compliance with the Commission’s regulations for section 311 pipelines. Apache also states that while it is true that the Commission has not required a section 311 pipeline to offer firm service, if a section 311 pipeline does elect to offer service on a firm or interruptible basis, under the Commission’s regulations it must do so without undue discrimination.³⁹

51. As stated above, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline that requires NGA section 7 certificate authorization. As such, this type of arrangement is only available to a natural gas company under the NGA. Lessees are not treated as shippers and the Commission does not consider them to be similarly situated to interstate shippers on the lessor’s pipeline.⁴⁰ Enogex will not be

³⁸ See, e.g., *Peoples Gas Light & Coke Co.*, 118 FERC ¶ 61,203 (2007); *Tejas Gas Pipeline Co.*, 81 FERC ¶ 61,053 (1997).

³⁹ *Id.*

⁴⁰ See, *Islander East Pipeline Company, L.L.C.*, 100 FERC ¶ 61,276 at P 87-89 (2002).

providing firm transportation service over the leased capacity – Midcontinent will. Therefore, the Commission does not believe that Enogex is acting in an unduly discriminatory manner in leasing capacity to Midcontinent while not electing to provide firm section 311 transportation service.

52. Enogex is an intrastate pipeline and section 284.7(a)(2) of the Commission's regulations⁴¹ states that intrastate pipelines that provide transportation service under Subpart C (section 311) *may* offer such transportation on a firm basis.⁴² Part 284 of the Commission's regulations require that intrastate pipelines that offer section 311 transportation service on a firm or interruptible basis must provide such service without undue discrimination, or preference. The Commission's regulations do not require intrastate pipelines to provide NGPA section 311 interstate service on a firm basis. However, to the extent an intrastate pipeline does provide interstate firm service, it must do so consistent with the Commission's regulations.⁴³ Therefore, the Commission will not require Enogex to provide firm section 311 service to existing shippers; however, if Enogex does elect to provide that service, it must do so on a non-discriminatory basis.

Rate Stacking

53. Apache, ConocoPhillips, Unimark and Indicated Shippers state that for a shipper that only desires service to Enogex's existing interstate delivery points, having to purchase firm service on Midcontinent adds incremental costs for undesired incremental services and provides Midcontinent an unfair competitive advantage compared to other pipelines that can take delivery of gas off Enogex. The anti-competitive impact of this tying of capacity is exacerbated by the substantial payments shippers would have to make for Midcontinent capacity in order to access firm capacity on Enogex. For example, ConocoPhillips states that currently a shipper moving from Enogex's West zone to Bennington would pay a maximum rate of \$0.17 per Dth plus fuel charges of 0.82 percent. To receive the identical service under Midcontinent's ITS, ConocoPhillips states that a shipper would have to pay the Zone 1 rate of \$0.3015, plus the lease charge of \$0.15, for a total of \$0.4515 per Dth and a fuel charge of 1.51 percent.

54. Apache notes in its answer that if it were to purchase firm capacity on the Midcontinent leased portion of Enogex, it would be paying twice for the same capacity – once to Enogex and once to Midcontinent. Apache states it has dedicated production to Enogex and, therefore, is not “free” to purchase capacity on Midcontinent on a firm basis

⁴¹ 18 C.F.R. § 284.7(a)(2)

⁴² *See, e.g., Cranberry Pipeline Corporation*, 97 FERC ¶ 61,280 (2001).

⁴³ *Peoples Gas Light and Coke Company*, 118 FERC ¶ 61,203 (2007).

because it must deliver its dedicated gas into Enogex's gathering and transportation system.⁴⁴ Thus, even if Apache purchased firm capacity on Midcontinent, it would not be guaranteed delivery through the gathering system to the leased Midcontinent portion of the Enogex mainline, and even if it could, it would suffer the unduly discriminatory consequences of rate stacking.

55. In its February 26, 2008 data response, Midcontinent states that customers on Enogex will pay Enogex's interruptible section 311 rate to make their gas available at the West Pool and East Pool lease receipt points, while gas taken at the Waynoka receipt point does not incur any Enogex fees as there are no upstream Enogex facilities. Midcontinent also states that the lease is specific in providing that the delivery point under the lease is a point of interconnection with Midcontinent.⁴⁵ Midcontinent continues that the lease as negotiated was a critical factor in the foundation shipper's and other shippers' decisions to sign agreements for firm service on Midcontinent, and, if the lease is modified, the foundation shipper has certain reduction rights. However, Midcontinent states, shippers on the Enogex system making use of capacity not subject to the Midcontinent lease should continue to be able to use Enogex's interruptible section 311 services to bring gas to Midcontinent at Bennington and Midcontinent would allow its shippers (those holding capacity downstream of Bennington) to nominate such volumes into Midcontinent at Bennington. No lease charges from Midcontinent would be associated with receipts of gas which Enogex transported under section 311.

56. An Enogex shipper who chooses to purchase capacity on Midcontinent and utilize the lease capacity to receive its own gas at either the West Pool or the East Pool will pay the Enogex interruptible section 311 rate in addition to Midcontinent's rates just as the Enogex shipper would for delivery from Enogex system into any interstate pipeline with whom it had acquired capacity. That is not rate stacking. Enogex's shippers do not have to contract for firm capacity on Midcontinent in order to sell their gas into Midcontinent's system, even via the leased capacity. In fact, the shippers are free to deliver their volumes elsewhere, as they do now. However, there are multiple Enogex shippers who have made a business decision to contract for capacity on Midcontinent, including the

⁴⁴ In its June 19, 2008 filing, Enogex counters that Apache could have participated because it delivers much of its gas to the West Pool and its contracts with Enogex do not prevent its contracting with Midcontinent.

⁴⁵ Midcontinent's February 26, 2008 data response states that shippers that committed to firm capacity on the Midcontinent project sought a seamless means by which to move gas received into the Enogex system in Oklahoma to Midcontinent's various points of delivery and did not request the option to have gas delivered to a pipeline other than Midcontinent at Bennington.

lease capacity. We find that the claims that Enogex shippers will be forced to pay stacked rates are baseless.

Lease Rates are Unduly Discriminatory

57. ConocoPhillips, Indicated Shippers and Unimark are concerned that the lease payments are unduly discriminatory. They state that the lease payments are substantially less than Enogex's interruptible rates⁴⁶ and since firm capacity is inherently more valuable than interruptible capacity, it seems obvious that the lease payment is unduly discriminatory against similarly situated shippers forced to pay the higher interruptible rate. Indicated Shippers state that the Commission recognizes that rates should reflect the differences in quality between firm and interruptible service and application of this principle makes it clear that the proposed lease payment is unjustified. It avers that section 311 interruptible service on Enogex is inferior to firm capacity service and is likely to become significantly less reliable if Enogex enters into leases with Gulf Crossing and Midcontinent. In view of the lower quality of interruptible service, Indicated Shippers state that Enogex needs to justify why the lease payments may be even less than rates for interruptible service.⁴⁷

58. Enogex states in its answer that the Commission's lease policy, as stated in *Texas Eastern Transmission Corp.*,⁴⁸ recognizes that capacity lease arrangements differ from firm section 311 transportation service and the Commission has declined to engage in direct comparisons between a lessor's existing rates and payments to be charged under a lease agreement. Instead, according to Enogex, where parties challenging a lease arrangement have urged the Commission to compare lease payments with existing system rates, the Commission has approved a lease where the rates existing customers will pay will not increase as a consequence of the lease arrangement.⁴⁹

59. As noted above, a lease of capacity is not the same as the provision of firm transportation service. Under Commission policy, a lease proposal will not be approved unless the lease payments are less than, or equal to, the lessor's firm transportation rates

⁴⁶ ConocoPhillips states that Enogex has filed for substantial increases to its interruptible section 311 rates in Docket No. PR08-1-000.

⁴⁷ Indicated Shippers note that Enogex is currently seeking Commission authorization to increase its interruptible section 311 rates by up to 215 percent in PR08-1-000.

⁴⁸ 74 FERC ¶ 61,074 (1996).

⁴⁹ *Islander East Pipeline Company*, 100 FERC ¶ 61,276, at P 69 (2002).

for comparable service over the terms of the lease. That the payments may also be less than the lessor's interruptible rates is not a disqualifying factor. Shippers on Enogex are not similarly situated to interruptible shippers on Midcontinent. Therefore, the Commission does not believe the lease payment is indicative of undue discrimination.⁵⁰

Lease Points

60. Apache's May 13, 2008 answer states that Article I, 1.1(a) of the lease provides that the parties may change the receipt points under the lease at any time and, therefore, the lease does not identify the physical location of pipeline facilities that will be reserved for service under the lease. Apache states that the lease is an attempt to lease an entire pipeline system without specifying a path and this distinguishes the lease from other leases the Commission has approved, which convey a defined property interest. Apache states that it is unjust and unreasonable for the Commission to approve a lease that has no defined facilities reserved for its use and that the Commission may not approve the Midcontinent lease unless it can be demonstrated that the path avoids congestion on its system.

61. Enogex states in its January 11, 2008 data response that because its system is not a long haul pipeline, the multidirectional and frequently changing flows driven by changes in market demands mean there is no dominant flow pattern on the Enogex system. Enogex states it will use its entire system as necessary to receive and deliver gas under the lease arrangements from and to the specified receipt and delivery points, rather than specific paths.

62. The operational attributes of a pipeline system will dictate the specific point and path rights shippers have in their transportation contract. For those pipelines such as Enogex that have multidirectional and frequently changing flows, it may be operationally infeasible to implement physical pathing. On these systems gas may flow over multiple routes depending upon a variety of factors, including the location of other pipeline interconnections, the location and volume of storage, and local production requirements, as well as the demands placed on the pipeline on a particular day. Reflecting the operations of their systems, some pipelines contract firm capacity to customers at specific receipt points and at specific delivery points and do not identify any specific gas flow path.⁵¹

⁵⁰ *Id.* P 89.

⁵¹ *See, e.g., Gulf South Pipeline Company, LP*, 98 FERC ¶ 61,278 (2002); *Dominion Transmission, Inc.*, 95 FERC ¶ 61,316 (2001).

63. Midcontinent's lease with Enogex clearly identifies in Exhibit A, as modified in Amendment No. 4 filed with the Commission on April 23, 2008, the specific receipt and delivery points in the lease. Although two of the receipt points are located at Enogex's East and West Pool and not at a physical receipt meter,⁵² establishing the receipt points at the pools is not inappropriate. The specific points and capacities in the lease were negotiated by the parties and the payment under the lease reflects their economic value to the parties. The lease agreement does not provide Midcontinent with a defined capacity path. However, it is not necessary to have a defined path in order to assess the effects of the lease on Enogex's system and its existing shippers, as discussed in the engineering section below. Apache's request to deny the lease due to it not establishing a defined transportation path is denied.

Conclusion

64. Based on the benefits the proposed lease will provide to the market and the lack of adverse effect on existing customers, we find that the public convenience and necessity requires approval of the proposed lease arrangement. Midcontinent has designed incremental firm and interruptible rates based on the lease charges it will pay to Enogex under the lease to recover the costs of the leased capacity from only those shippers that will use the leased capacity.⁵³ We approve Midcontinent's proposed incremental recourse rates for the leased capacity.

Certificate Policy Statement

65. On September 15, 1999, the Commission issued its Certificate Policy Statement to provide guidance as to how it will evaluate proposals for certificating new construction.⁵⁴ The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. Our goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's

⁵² Midcontinent's February 26, 2008 data response states that these pooling points are paper points at which gas is made available for purchase on an aggregated basis.

⁵³ Midcontinent will also track and charge fuel for the Enogex leased capacity.

⁵⁴ *Certification of New Interstate Natural Gas Pipeline Facilities* (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000).

responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

66. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers.

67. The Commission also considers potential impacts of the proposed project on other pipelines in the market and those existing pipelines' captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered.

68. Midcontinent is a new entrant with no existing customers. Thus, there is no potential for subsidization on Midcontinent's system through the construction of the initial phase facilities, and, as discussed below, we are approving recourse rates associated with the construction of the expansion phase facilities which will result in lower rates for the initial phase shippers. However, as discussed above, we are conditioning our approval of Midcontinent's incremental rates for leased capacity on Midcontinent's not being permitted in the future to shift any of its costs associated with the leased capacity to customers that do not use the leased capacity. As conditioned, the Commission finds that Midcontinent's proposal will meet the threshold test that existing customers not subsidize the project.

69. Furthermore, the project will not degrade any present services to existing customers, as Midcontinent has no existing customers. The project will likewise have no adverse impact on existing pipelines or their captive customers as the proposed facilities will be transporting new domestic sources of gas so that the project will not replace service currently provided on existing pipelines. Further, no pipelines have objected to the project.

70. We are also satisfied that Midcontinent has taken appropriate steps to minimize adverse impacts on landowners. Over 51 percent of the proposed pipeline facilities will be collocated with existing utility rights-of-way. Midcontinent's project will require approximately 3,158 acres for operation. Midcontinent states that it expects to acquire 93

percent of the total necessary easements by July 15, 2008, with the rest acquired through the use of eminent domain.⁵⁵

71. The proposed project will benefit the public because it will provide an important transportation link for new and diverse sources of natural gas supplies to numerous other pipeline systems and new natural gas markets across the eastern United States. The increased take away capacity from areas of rapidly expanding production will promote the development of significant new supplies. Midcontinent has entered into precedent agreements with shippers for almost all of the capacity of the initial phase facilities and all of the Zone 1 expansion capacity. Therefore, consistent with the criteria discussed in the Certificate Policy Statement and section 7(c) of the NGA, we find that the benefits of Midcontinent's proposed project will outweigh any potential adverse effects, and that the proposed project is required by the public convenience and necessity.⁵⁶

72. Consistent with our standard practice, we will condition our certificate authorization so that construction cannot commence until after Midcontinent executes contracts that reflect the levels and terms of service represented in its precedent agreements.⁵⁷

Precedent Agreements

73. The precedent agreements filed by Midcontinent contain the particular agreements between Midcontinent and the various shippers supporting the project. According to Midcontinent, these agreements define the negotiated rates shippers will pay, spell out certain rights parties have prior to the Midcontinent system going into service and provide rights as to future actions. Shipper rights may vary depending on whether the shipper qualifies as a foundation shipper, an anchor shipper or a standard shipper.

74. Midcontinent states that the precedent agreements it filed represent the financial support for the project and that absent these commitments the project could not go forward. Therefore, other shippers or potential shippers cannot be viewed as similarly situated to these initial shippers. In addition, according to Midcontinent none of the

⁵⁵ See, Midcontinent's February 28, 2008 Data Response No. 9.

⁵⁶ We will not grant Midcontinent's request for a five year time period in which to construct the expansion phase facilities. We will instead condition Midcontinent's certificate on construction of all of its proposed facilities, including the expansion phase facilities, within three years of the date of this order.

⁵⁷ See, e.g., *Tennessee Gas Pipeline Company*, 101 FERC ¶ 61,360, at P 21 (2002).

provisions in the precedent agreements affects the actual terms of any service and, therefore, none of these contract provisions creates the risk of undue discrimination. For these reasons, Midcontinent does not believe that any aspect of the precedent agreements results in a material deviation from the pro forma service agreements contained in the tariff. However, Midcontinent believes that if the Commission determines that a deviation exists, that deviation should be acceptable and not material. Therefore, Midcontinent seeks a predetermination that even if some contractual provisions could be construed to constitute a material deviation from the form of service agreement, none of the provisions are unduly discriminatory. The non-conforming provisions are discussed below.

Expansion Phase Rights

75. Foundation shippers have a one-time right during the first five years of their contracts to require that Midcontinent construct the expansion phase capacity in Zone 1. According to Midcontinent, foundation shippers provide the most critical contract support for the construction of the project and this provision is an integral part of the arrangements under which foundation shippers agreed to provide contractual support for construction of the Midcontinent system.⁵⁸

Additional Capacity Expansion Rights

76. Under certain precedent agreements, the shipper will have defined rights to require that Midcontinent file an application with the Commission to increase the capacity of specific portions of the pipeline. Midcontinent states that this right does not determine any allocation of capacity, but will entail a new open season for the expansion capacity for all interested shippers. Midcontinent states this provision addresses potential future capacity needs of the shippers and is an integral part of the arrangements under which they agreed to provide contractual support for construction of the Midcontinent system. However, Midcontinent notes that this provision does not require any current Commission action and does not affect either the initial firm transportation contracts or the firm transportation service provided by the facilities Midcontinent is constructing.⁵⁹

⁵⁸ In its June 17, 2008 filing, Midcontinent states that the foundation shipper has now exercised its right to acquire 100,000 Dth/d of capacity in Zone 1 through the construction of expansion facilities.

⁵⁹ BP has protested the provisions of Rate Schedule FTS that provide foundation shippers with the right to acquire future expansion capacity and that issue will be discussed in further detail below.

Most Favored Nation Provision for Rates

77. Certain precedent agreements contain a most favored nation provision such that, if Midcontinent offers a negotiated, discount, or recourse rate to another shipper more favorable than the precedent agreement shippers' negotiated rates, Midcontinent must provide the favorable rate to the precedent agreement shipper. Midcontinent states that this provision reflects the expectation of the expansion shippers that Midcontinent will not place them in the position of subsidizing other competing shippers for the purchase and sale of gas. Midcontinent states that the Commission has previously accepted this type of rate provision.⁶⁰

Liquidated Damages Provision

78. Certain precedent agreements allow for liquidated damages in the event Midcontinent fails to meet a specified in-service date or other such conditions. Since this arrangement pre-dates the actual construction of the Midcontinent system, Midcontinent states it is reasonable that Midcontinent and shippers share the construction and start-up risk through a liquidated damages provision. Midcontinent notes that liquidated damages in no way affect the terms of service once the Midcontinent system goes into operation.

Termination Rights

79. Shippers entering into precedent agreements are permitted to terminate their contracts under certain circumstances prior to the in-service date. Midcontinent states these rights have no effect on the nature of service once the Midcontinent system becomes operational and the termination provisions are a reasonable means to address the risks being taken by these shippers during the certification and construction phase in contracting for capacity on the new pipeline.

Interruptible Revenue Crediting

80. In certain precedent agreements, Midcontinent has agreed to provide an additional credit for interruptible revenues. Midcontinent notes that all shippers benefit in the form of lower rates from the costs Midcontinent has allocated to interruptible services in the design of its recourse rates and that it is reasonable as part of a negotiated rate agreement that shippers can negotiate in the precedent agreement to obtain some additional benefit if interruptible shippers utilize the capacity which the contractual commitments of the firm shippers make possible.

⁶⁰*Gulfstream Natural Gas System*, 100 FERC ¶ 61,036 (2002), *order on reh'g*, 101 FERC ¶ 61,368 (2002).

Fuel Caps

81. Certain precedent agreements set out a cap on the fuel gas and lost and unaccounted-for gas which may be assessed. Midcontinent states this represents a negotiated fuel arrangement, which is permissible under Commission policy, and that the Commission has accepted negotiated rate tariff provisions which encompass the negotiation of fuel rates.⁶¹ Consistent with Commission policy, Midcontinent states it will calculate fuel and lost and unaccounted-for percentages on the assumption that full volumes will be achieved from all shippers and, therefore, no other shipper will be subsidizing these negotiated rate arrangements.

82. The Commission finds that the above non-conforming provisions as described by Midcontinent would constitute material deviations from Midcontinent's pro forma service agreements. However, the Commission in other proceedings has found such non-conforming provisions necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of the project.⁶² Here, Midcontinent has adequately supported the need for each provision to secure the necessary financial commitments for construction of the project or clearly stated how the provision will not affect the terms of service once the pipeline goes into service. In addition, several of these rights have no effect once the system becomes operational. For these reasons, the Commission finds the proposed non-conforming provisions permissible, in that they do not present a risk of undue discrimination, and will not affect the operational conditions of providing service, nor result in any customer receiving a different quality of service from that available to Midcontinent's other customers.⁶³

83. When a contract deviates materially from the form of service agreement, the contract must be filed and made public.⁶⁴ We require disclosure of contracts with material deviations because the public disclosure of these agreements prevents undue discrimination through secret rates or terms. Accordingly, Midcontinent must file at least 30 days before the in-service date of the proposed facilities an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet

⁶¹ See, e.g., *Florida Gas Transmission Company*, 93 FERC ¶ 61,203 (2000), citing *Noram Gas Transmission*, 77 FERC ¶ 61,011, at 61,035 (1996).

⁶² See, e.g., *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 78 (2006).

⁶³ See, e.g., *Gulf South Pipeline Co., L.P.*, 115 FERC ¶ 61,123 (2006); and *Gulf South Pipeline Co.*, 98 FERC ¶ 61,318, at p. 62,345 (2002).

⁶⁴ 18 C.F.R. § 154.1(d) (2008).

identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations. In addition, the Commission emphasizes that the above determination relates only to those items as described by Midcontinent in its application and not to the entirety of the precedent agreements or the language contained in the precedent agreements.

Midcontinent's Initial Rates

84. Midcontinent proposes to offer cost-based firm (Rate Schedule FTS) and interruptible (Rate Schedules ITS, PALS and IBS) open-access transportation services on a non-discriminatory basis under Part 284 of the Commission's regulations.⁶⁵

Midcontinent states that the proposed rates reflect a straight fixed-variable rate design. Midcontinent states that it may offer negotiated rates as an option pursuant to section 30 of the General Terms and Conditions (GT&C) of its pro forma tariff. The pro forma tariff has been developed in consultation with the shippers that have entered into precedent agreements supporting the construction of the project.

85. Midcontinent will be divided into two capacity zones in addition to the Enogex lease capacity. Midcontinent has filed three separate sets of rates, including: (1) interim period rates which would be applicable if and when parts of the Midcontinent system go into service but before the entire initial phase system goes into service; (2) base rates for the period once the entire initial phase of the Midcontinent system goes into service; and (3) expansion rates reflecting the addition of expansion compression facilities needed to increase capacity in Zone 1 by 100,000 Dth/d and in Zone 2 by 200,000 Dth/d (referred to as expansion phase capacity).

86. The initial phase proposed base FTS rates are derived using a \$253,710,901 first year cost of service⁶⁶ (with \$154,067,961 of the cost of service allocated to Zone 1 and \$99,642,940 allocated to Zone 2) and annual FTS reservation billing determinants of

⁶⁵ See Midcontinent's FERC Gas Tariff, Pro Forma Original Volume No. 1.

⁶⁶ Midcontinent's proposed cost of service consists of \$7,921,087 of operation and maintenance expenses, \$38,333,186 of depreciation expenses, \$129,333,959 of return allowance (at 13.0 percent rate of return on equity based on a capital structure of 55 percent equity and 45 percent debt, and 7.0 percent cost of debt), \$55,509,871 of income taxes, \$25,612,798 of taxes other than income taxes and a \$3,000,000 credit for interruptible services for a total cost of service of \$253,710,901. For year 1, Midcontinent reflects a proposed rate base comprised of gross plant investment of \$1,279,042,285, less accumulated depreciation of \$19,166,593, plus materials and supplies inventory of \$675,200, less accumulated deferred income taxes of \$4,881,391 for a total rate base of \$1,255,669,501.

16,800,000 Dth for Zone 1 and 12,000,000 Dth for Zone 2 based on Midcontinent's maximum daily design capacity.⁶⁷ The proposed maximum cost-based FTS reservation rate for Zone 1 is \$9.13 per Dth (a \$0.3015 per Dth daily rate) and for Zone 2 is \$8.28 per Dth (a \$0.2730 per Dth daily rate). Midcontinent estimates \$676,793 of variable costs for Zone 1 and \$284,070 of variable costs for Zone 2 resulting in a proposed FTS commodity rate of \$0.0013 per Dth for Zone 1 and \$0.0008 per Dth for Zone 2.

87. Customers using the Enogex lease capacity will pay Midcontinent a separate charge for service on the leased capacity, in addition to the applicable charges for Midcontinent's Zone 1 and Zone 2. Customers will pay a daily demand rate of \$0.17 per Dth for transportation from the Wayanoka receipt points, a daily demand rate of \$0.15 per Dth for transportation from receipt points in Enogex's Western Pool and a daily demand rate of \$0.09 per Dth for transportation from receipt points in Enogex's East Pool. Since all costs incurred (transportation fees, fuel, and lost and unaccounted-for) by shippers will be passed through without profit or loss, no costs relating to the Enogex lease are included in the calculation of Zone 1 or Zone 2 recourse rates.

88. The proposed maximum ITS rate for Zone 1 is \$0.3015 per Dth and for Zone 2 is \$0.2730 per Dth. Midcontinent is proposing to recover its fuel gas, including lost and unaccounted-for gas, through a tracker mechanism defined in section 36 of the pro forma tariff. Fuel gas will be tracked and charged separately for Zone 1 and Zone 2. Customers using the Enogex lease capacity will pay Enogex's fuel and lost and unaccounted-for charges consistent with Enogex's Statement of Operating Conditions in addition to the Midcontinent fuel rate.

Interim Rates

89. In response to shipper requests, Midcontinent is proposing interim rates for service should service be available on one segment of the pipeline before the in-service date for the entire initial phase system. Midcontinent intends to construct the pipeline using a number of different construction spreads and states that based on when construction ends, interim service may be provided in one or as many as four distinct, separate pipeline segments. The interim rates are derived in the same manner as the recourse rates, however, it is anticipated that compression will not be installed during the interim period.⁶⁸ Midcontinent has developed separate rates based on the minimum facilities required to be in service for each segment and the anticipated capacity available on each

⁶⁷ Midcontinent is required to recalculate its rates using billing determinants based on its revised Exhibit G filed on May 16, 2008.

⁶⁸ Midcontinent proposes to charge only an Unaccounted For Gas charge of 0.15 percent, which will be assessed only once on each Dth transported.

segment. In addition, Midcontinent has elected to charge a rate for Segment 4⁶⁹ no greater than the Zone 2 fully-operational recourse rate since the calculated interim rate is extremely high (\$1.3463/Dth) given the limited flow capability without compression.

Expansion Phase Rates

90. Midcontinent is seeking authorization to allow it to add, at any time during the first five years of the project, the compression facilities needed to increase Zone 1 capacity by 100,000 Dth/d and Zone 2 capacity by 200,000 Dth/d. The proposed maximum cost-based FTS reservation rate for Zone 1 for the expansion phase capacity is \$8.75 per Dth (a \$0.2877 per Dth daily rate) and for Zone 2 is \$7.58 per Dth (a \$0.2492 per Dth daily rate). The proposed FTS commodity rate for Zone 1 is \$0.0015 per Dth and \$0.0014 per Dth for Zone 2. Midcontinent is seeking a Commission determination that rolled-in rate treatment is appropriate for these facilities. The rolled-in rate analysis submitted by Midcontinent shows that the resulting recourse rates and fuel retention percentages that would result from rolling in the expansion facilities would reduce the total transportation costs to recourse rate shippers.

91. The Commission has reviewed the proposed cost of service and proposed initial phase rates, interim rates and expansion phase rates and generally finds them reasonable for a new pipeline entity, such as Midcontinent, subject to the modifications and conditions discussed below. In addition, the Commission has reviewed the rolled-in rate analysis submitted by Midcontinent and is in agreement that the recourse rates and fuel retention percentages resulting from the expansion phase capacity, based on the cost estimates provided by Midcontinent, will result in reduced transportation costs for recourse rate shippers, barring any significant change in the circumstances. If future rate review shows that the benefits of the project are significantly offset by increased construction or fuel costs associated with the project, the Commission would consider such offset a significant change in circumstances.

Return on Equity and Capital Structure

92. Midcontinent proposes a capital structure of 55 percent equity and 45 percent debt. The overall rate of return of 10.3 percent incorporates a return on equity of 13.0 percent based upon the project's business and financial risk. Midcontinent states that the proposed rate of return is consistent with that granted to other new pipeline projects.⁷⁰

⁶⁹ Segment 4 extends 198 miles from the interconnection with Columbia Gulf to the system terminus at Transco's Station 85 near Butler, Alabama.

⁷⁰ See, e.g., *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006); *Cheniere Corpus Christi Pipeline Co.*, 111 FERC ¶ 61,081 (2005) (order approving initial rates reflecting 14 percent rate of return on equity); *Midwestern Gas Transmission Co.*,

(continued...)

We find that Midcontinent's proposal to finance the instant project is consistent with other recent projects approved by the Commission for new pipeline companies. In these projects, the Commission approved a capital structure of 45 percent debt and 55 percent equity, as well as a return on equity of 13.0 percent.⁷¹ Accordingly, we will approve Midcontinent's proposed capital structure and rate of return on equity.

Interruptible Services Revenue Crediting

93. Midcontinent has proposed a \$3,000,000 credit to the cost of service for interruptible services. The Commission's policy regarding new interruptible services requires the pipeline to either credit 100 percent of the interruptible revenues, net of variable costs, to firm and interruptible customers or to allocate costs and volumes to these services.⁷² Midcontinent's crediting of \$3,000,000 to the cost of service in the design of initial rates has the same effect as allocating costs to interruptible services, therefore, Midcontinent's crediting is in compliance with the Commission's policy.

PALS Rate

94. The rate for Midcontinent's Rate Schedule PALS service is a single rate for each rate zone that reflects the sum of the ITS rates of both rate zones. Midcontinent states that since usage of the service may impact the entire system, Midcontinent has derived the rate by combining the ITS rates for both zones. However, Midcontinent's PALS Rate Schedule provides that parked or loaned gas is to be delivered or received at specific points on its system. In addition, parked quantities are to be redelivered to a shipper at the same point that the shipper tendered the gas to Midcontinent and loaned quantities are to be returned to Midcontinent at the same point where the shipper borrowed the gas. The Commission finds that the PALS rate proposed by Midcontinent is inappropriate, because it exaggerates the rate for the service provided.⁷³ Midcontinent's proposal charges PALS customers as if they are using Midcontinent's entire system. However, Midcontinent's tariff specifically limits PALS customers to delivering and receiving gas at the same point. Thus, Midcontinent's PALS customers may use only one zone.

114 FERC ¶ 61,257 (2006) (order approving initial rates reflecting 13 percent rate of return on equity).

⁷¹ See, e.g., *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006).

⁷² See, e.g., *Creole Trail LNG, L.P. and Cheniere Creole Trail Pipeline, L.P.*, 115 FERC ¶ 61,331, at P 27 (2006); *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, at P 51 (2005).

⁷³ See, e.g., *Williams Central Gas Pipelines, Inc.*, 85 FERC ¶ 61,187 (1998).

Although Midcontinent returns a thermally equivalent quantity of parked gas, the fact that gas is delivered and received at the same specified point in either Zone 1 or Zone 2 affects the PALS shipper as if the gas were physically parked at one specified area on the system. Accordingly, the Commission directs Midcontinent to charge a PALS rate for each zone solely reflecting the interruptible rate for that zone.

Rate Changes and Three-Year Filing Requirements

95. If Midcontinent desires to make any other rate changes not specifically authorized by this order prior to placing its facilities into service, it must file an amendment to its application under NGA section 7(c). In that filing, Midcontinent will need to provide cost data and the required exhibits supporting any revised rates. After the facilities are constructed and placed in service, Midcontinent must make a NGA section 4 filing to change its rates to reflect any revised construction and operating costs.

96. Consistent with Commission precedent, the Commission will require Midcontinent to file a cost and revenue study at the end of its first three years of actual operation to justify its existing cost-based firm and interruptible recourse rates.⁷⁴ In its filing, the projected units of service should be no lower than those upon which Midcontinent's approved initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the regulations to update cost of service data.⁷⁵ After reviewing the data, the Commission will determine whether to exercise our authority under NGA section 5 to establish just and reasonable rates. In the alternative, in lieu of this filing, Midcontinent may make an NGA section 4 filing to propose alternative rates to be effective no later than 3 years after the in-service date for its proposed facilities.

Pro Forma Tariff Issues

Currently Effective Rates

97. The Rate Schedule ITS Overrun rate on Original Sheet No. 6 is incorrectly stated as \$0.0315. The correct rate is \$0.3015. Midcontinent is directed to correct the rate.

⁷⁴ See, e.g., *Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074, at P 133 (2006); *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, at P 52 (2005)

⁷⁵ 18 C.F.R. § 154.313 (2008).

Rate Schedule FTS and PALS

98. BP protests section 2.7 of Rate Schedule FTS, which it believes provides foundation shippers with a preferential right to acquire future expansion capacity. BP believes this is unduly discriminatory and should be rejected. According to BP, the Commission allows a pipeline to offer rate incentives to attract anchor shippers and a pipeline can also agree to initiate an open season for a future expansion for an anchor shipper. However, the Commission does not allow a pipeline to offer anchor shippers preferential service conditions or a preferential right to future expansion capacity.

99. Chesapeake urges the Commission to approve the rights of foundation shippers to obtain additional capacity as provided in section 2.7 of Rate Schedule FTS. Chesapeake states the granting of rights to expansion phase capacity are clearly presented to the Commission as part of Midcontinent's application and reflect a business resolution of complicated and important financial issues – Midcontinent wanted long-term firm commitments for the greatest amount of capacity while Chesapeake wants to limit the risk that it will be required to pay for capacity that it cannot use. Chesapeake also states the protesters misread the right of foundation shippers to contract for unsubscribed firm capacity in that it only establishes the right under which a foundation shipper can contract for capacity which is not otherwise subscribed by other shippers. Chesapeake states that the capacity remains available for firm contract under Midcontinent's usual tariff provisions.

100. Midcontinent states in its answer that the Commission has recognized that foundation and anchor shippers can receive certain rights beyond those provided to other shippers given their status as the stepping stone for the project going forward. According to Midcontinent, the modest 100,000 Dth per day of expansion rights provided to foundation shippers for the expansion phase capacity was a necessary precondition to the foundation shipper signing their precedent agreement. Midcontinent states that any other expansion rights contained in the precedent agreement would be the subject of a new competitive open season.

101. Section 2.7 of Rate Schedule FTS provides foundation shippers with the rights to obtain capacity through two separate processes. The first option provides a foundation shipper with a right to cause Midcontinent to construct expansion phase capacity and to acquire such capacity at a mutually agreed rate and term. Order No. 686 recognized a pipeline's right to provide rate incentives in order to get project sponsors to commit to a project.⁷⁶ However, the Commission also affirmed that there must be no discrimination in announcing an open season for new capacity, and in accepting bids, all potential

⁷⁶ *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, (2006).

customers must have an equal opportunity to obtain firm capacity. Midcontinent states in its May 9, 2008 data response that the one-time right to require that Midcontinent construct expansion phase capacity was stated in the terms and conditions of the form of Precedent Agreement for foundation shippers which was made available to all parties who were interested in contracting for capacity. Therefore, the Commission believes Midcontinent's procedures assured that all potential customers interested in contracting for capacity had an equal opportunity to obtain this capacity right.

102. Section 2.7 also provides foundation shippers with the right, within a period of up to five years after the project's commencement date, to acquire unsubscribed firm capacity at an agreed rate for an agreed term. However, this right does not provide foundation shippers with a preferential right to capacity over other shippers.

Midcontinent states in its May 9, 2008 data response that it is Midcontinent's intent to make any unsubscribed firm capacity (other than expansion phase capacity) available to all shippers and that once in service, Midcontinent will clearly post on its interactive website the level of unsubscribed capacity that may exist from time to time. Therefore, any available capacity a foundation shipper wishes to acquire as a result of this right will have previously been made available to all shippers⁷⁷ and that capacity will need to be acquired through the procedures outlined in section 2 of Midcontinent's GT&C. In addition, the Commission clarifies that once the expansion phase capacity has been constructed any capacity that is unsubscribed as a result of that expansion must also be made available to all shippers.

103. BP objects to the penalty provisions of Rate Schedule PALS associated with undelivered loaned gas or unparked gas at the end of the customer's contract. BP states that if a shipper cannot extend the terms of a PALS contract, Midcontinent's 50 percent cashout penalty is too harsh and a 20 percent cashout penalty on end-of-contract balances would suffice to encourage customers to ensure against end-of-contract balances.

104. Midcontinent states that if there is still undelivered loaned gas or unparked gas at the end of a customer's PALS contract, Midcontinent will first attempt to agree to an extension of the agreement in order to allow for any remaining imbalance to be reduced to zero. Midcontinent states it is only if an agreement cannot be reached that Midcontinent will provide the shipper with a time frame within which the remaining gas must be reduced to zero and that it is only after this time period that a penalty is imposed. Midcontinent states that given that these situations can impact Midcontinent's ability to provide service to other shippers, the penalty needs to be severe enough to prevent this type of activity. Therefore, Midcontinent believes its penalties are appropriate.

⁷⁷GT&C section 2.1(b)(1) states that Midcontinent shall conduct an initial open season for all firm forward-haul capacity.

105. On June 9, 2008, BP stated in its status report it would withdraw its protest based on BP's understanding that Midcontinent will file revised tariff language that restricts the penalty during a Non-Critical Period to 35 percent of the Daily Index Price. BP also states that if, due to an interruption on Midcontinent's system during a Non-Critical Period a shipper is unable to nominate PALS volume to clear its PALS account, the revised tariff language will state the PALS penalty will be waived for a term equal to the greater of five business days or the length of the interruption.

106. In previous orders addressing PAL service the Commission has approved the concept of the 50 percent adder.⁷⁸ However, the Commission has found that the use of the daily index price in determining the penalty rate for failing to redeliver loaned gas or remove parked gas can be unnecessarily punitive since the daily highest or lowest price can greatly vary from the actual cost of the gas when the imbalance occurred and may unduly increase the penalties for imbalances, which is contrary to Order No. 637. Accordingly, the Commission has required PALS penalties to be based on 150 percent of the average weekly price for the appropriate geographic area.⁷⁹ Therefore, Midcontinent is directed to base the penalty for failing to redeliver loaned gas or remove parked gas on 150 percent of the average *weekly* price for the appropriate geographic area and to revise its tariff to address BP's concerns with regards to penalties being assessed when a shipper is unable to nominate to clear its PALS account during a Non-Critical Period.

Operational Balancing Agreement

107. Section 6(b) of Rate Schedule FTS, section 6(b) of Rate Schedule ITS and GT&C section 1.31 state that Midcontinent will enter into Operational Balancing Agreements (OBAs) at delivery points whenever feasible to deal with imbalances. Section 1.31 also states that Midcontinent shall not be obligated to enter into an OBA with any form of cashout. In Order No. 587-G,⁸⁰ the Commission adopted a regulation (section 284.10(c)(2)(i))⁸¹ requiring each interstate pipeline to enter into operational balancing agreements at all points of interconnection between its system and the system of another

⁷⁸ See, e.g., *Algonquin Gas Transmission Co.*, 98 FERC ¶ 61,211 (2002); *order on rehearing and compliance filings*, 104 FERC ¶ 61,118 (2003).

⁷⁹ *Texas Eastern Transmission, LP*, 102 FERC ¶ 61,198 (2003).

⁸⁰ *Standards For Business Practices Of Interstate Natural Gas Pipelines*, Order No. 587-G, FERC Statutes and Regulations, ¶ 31,062 (Apr. 16, 1998), *on reh'g*, Order No. 587-I, FERC Statutes and Regulations ¶ 31, 067 (Sep. 29, 1998).

⁸¹ 18 C.F.R. §284.10 (c)(2)(i) (2008).

interstate or intrastate pipeline. Midcontinent will be required to comply fully with this regulation once in service.

Section 2 – Priority of Service

108. BP states that Midcontinent's Net Present Value (NPV) discount factor (GT&C section 2.1(c)(3)) should reflect the interest rate the Commission establishes for refunds. BP states the purpose of the discount factor is to reflect the time value of money associated with payments for capacity and the Commission's refund interest rate, which relies on the Federal Reserve's Quarterly Prime Rate, is the appropriate NPV discount factor. In its answer, Midcontinent agrees with BP that the NPV discount factor should reflect the interest rate that the Commission establishes for refunds. Midcontinent is directed to revise its tariff accordingly.

109. BP also states that since the value of capacity on Midcontinent will vary daily based on market conditions, an interruptible shipper with a discount rate should be able to indicate in its nomination that the shipper would be willing to increase the rate it is paying for service on a specific Gas Day as part of the scheduling process. Midcontinent opposes this in its answer, stating a shipper will have no incentive to sign a contract that reflects the full market cost of the transport if the shipper knows it may simply bid a higher rate during the nomination process if the system became constrained. On June 9, 2008, BP stated in its status report that it would withdraw its protest based on BP's understanding that Midcontinent will revise its tariff to allow interruptible shippers to increase their rate during the timely nomination cycle.⁸² Midcontinent is directed to revise its tariff accordingly.

110. BP states that Midcontinent proposes to give a higher scheduling priority to authorized overrun service as compared to interruptible services (section 2.5(a)) as well as give authorized overrun service scheduling priority over interruptible services at delivery points (section 8.2).⁸³ According to BP, this is in conflict with the Commission's policy that authorized overrun service be accorded the same priority as interruptible service. Both Midcontinent and Chesapeake state in their answers that they recognize the Commission's general preference to schedule all interruptible services based on price, however, they believe it is reasonable, as part of the overall allocation of risk between Midcontinent and firm shippers, to provide firm shippers with this limited priority in exchange for the financial commitments they have made and the corresponding risks they will bear.

⁸² BP states this would also apply to the scheduling of authorized overrun volumes that are billed at the ITS rate.

⁸³ The Commission notes this also occurs in section 2.3(a)(4).

111. The Commission considers authorized overrun and interruptible service to be identical, and has held that pipelines must revise their tariffs so that interruptible and overrun services are accorded the same scheduling priority.⁸⁴ Although authorized FTS overrun service is associated with a firm service contract, it remains an interruptible service. Firm shippers do not pay a reservation charge for authorized overrun service. Authorized overrun service is to be provided only for nominations in excess of the firm shipper's contract demand. Further, the authorized overrun service rate is a charge equal to the rate paid by Midcontinent's interruptible transportation customers. Although the Commission clarified in Order No. 686 that pipelines may provide rate incentives in order to get project sponsors to commit to a project, the order did not apply to non-rate issues such as capacity allocation.⁸⁵ The Commission considers the proposal by Midcontinent to provide authorized overrun service a higher scheduling priority than interruptible service to be contrary to Commission policy. Therefore, Midcontinent is directed to revise these provisions of its tariff, as well as section 2.3, to provide the same priority to authorized overrun service and interruptible service.

Section 6 – Title Transfer Nominations

112. Section 6.9 requires an entity to submit a transfer nomination to Midcontinent whenever gas is purchased at a receipt point on Midcontinent's system by an entity that is not going to nominate that gas for receipt by Midcontinent. Midcontinent states transfer nominations are needed in order to be able to confirm the nominated receipts at that point. Midcontinent is proposing to assess a Title Transfer Charge of \$25 per transaction for transactions where gas is purchased and sold at a receipt point, including a pooling point. The charge is to cover the administrative costs of tracking title to the gas as it changes at these points, which Midcontinent states involves the use of pipeline computer services and personnel. Each day the title transfer nomination is in effect shall be considered to be a separate transaction. Midcontinent's tariff states that a third party may provide title tracking services on Midcontinent's system.

113. Midcontinent states that it has reduced its allocable cost of service by an allocation of costs to this title transfer service. Midcontinent's February 26, 2008 data response states that it expects to incur \$257,000 in annual costs which it describes as "Transportation/Services – Scheduling" in order to provide the title transfer service. Midcontinent also states that it estimates a total of 10,220 title transfer tracking transactions per year. However, Midcontinent does not provide any description of the additional computer systems it will have to purchase or additional staff it will have to hire in order to provide title transfer service that are in addition to the systems and staff

⁸⁴ See, e.g., *Cheniere Creole Trail Pipeline*, 121 FERC ¶ 61,171 (2007).

⁸⁵ FERC Statutes and Regulations ¶ 31,231(2006).

already required to provide transportation service. The Commission does not believe that Midcontinent has made a clear showing that the costs it states it will incur in order to provide title transfer tracking service are charges it will incur separate and apart from the costs it will already incur to schedule the pipeline and provide other transportation services and that shippers are already paying for as part of Midcontinent's cost of service. In addition, Midcontinent has no rate schedule on file for title transfer service and the Commission has not permitted pipelines to collect surcharges on these types of administrative functions without a rate schedule on file.⁸⁶ Finally, the Commission has concerns over the impact of Midcontinent's title transfer charge on the development of market centers on Midcontinent's system since that charge appears to be mandatory and apply to all transactions. Therefore, Midcontinent's proposal to assess a Title Transfer Charge of \$25 on all transfer nominations is rejected, subject to Midcontinent providing a rate schedule to provide the service, additional data to support the fee, and Midcontinent addressing the Commission's concerns with regard to market centers.

Section 6.12 – Pooling

114. Section 6.12 of Midcontinent's GT&C states that Midcontinent has established one pooling point in Zone 1 and one pooling point in Zone 2, and that gas may be scheduled for delivery to, or receipt from, either pooling point. These pooling points are not physical points, but are paper points used for aggregation and nominations. Midcontinent's application states that a shipper nominating for delivery into a pool in either zone will pay all applicable reservation, commodity, fuel and gas lost and unaccounted-for charges.⁸⁷ In addition, Midcontinent's application states that shippers will pay a commodity charge of 2 cents per Dth for transportation under an ITS Agreement from a Pooling Point to a delivery point in the same zone as the receipt pooling point. Midcontinent's application also states that a shipper may nominate the pooling point as a receipt point for delivery within that zone if, in the case of Zone 1, the delivery is to be west of the Perryville compressor station and, in the case of Zone 2, if the delivery is to be west of mile post 352 in Warren County, Mississippi and the shipper will pay all applicable reservation, commodity, fuel and lost and unaccounted-for charges for that zone.

115. Order No. 587-F states that when a pool exists in a rate zone, the charge for shipment in that zone must be incurred either for shipment to the pool or shipment out of

⁸⁶ *Natural Gas Pipeline Company of America*, 80 FERC ¶ 61,372 (1997); *order on reh'g*, 81 FERC ¶ 61,296 (1997).

⁸⁷ *See* Application at p. 7.

the pool.⁸⁸ In several instances Midcontinent's proposed pooling structure appears to recover commodity and fuel charges from transportation into and out of Midcontinent's pools that are within the same rate zone as the delivery. Midcontinent is directed to revise its pooling procedures so that the charge for shipment within the rate zone is only incurred once either for shipment to the pool or from the pool.

Section 6.13 - Segmentation

116. BP states that GT&C section 6.13(d) requires a shipper to obtain Midcontinent's consent to reverse the flow direction as part of its segmentation of capacity and avers that this is against Commission policy which requires pipelines to give shippers comprehensive rights to segment capacity.⁸⁹ Midcontinent states in its answer that its system, as designed, does not have reverse flow capabilities so that any backhaul may only be by displacement and Midcontinent's consent requirement is reasonable because a backhaul can only be accommodated depending on the operational condition of the system at a given point in time. BP states in its January 24, 2008 reply that it is withdrawing its protest based on BP's understanding that Midcontinent will not bar a segmentation of capacity that involves a reversal in the gas flow as long as the transaction can be scheduled as part of Midcontinent's scheduling priorities. Midcontinent is directed to modify its tariff accordingly.

Section 10 – Imbalances and Scheduling Charges

117. BP states that the Commission requires a pipeline to submit a filing to recover operational gas costs, not to invoice it as an additional charge or credit as Midcontinent proposes in section 10.6. This ensures there will be a Commission proceeding to determine that operational purchases are prudent. BP also believes the Commission should require Midcontinent to rely on competitive bidding to buy or sell operational gas. BP believes that competitive bidding ensures fair competition among gas suppliers and buyers, minimizes the costs incurred by the pipeline in buying operational gas and maximizes the revenue received by the pipeline from the sale of operational gas.

118. Midcontinent states in its answer that the notion of competitive bidding assumes that Midcontinent has sufficient time to go through a posting and bidding process. Midcontinent does not believe this may always be the case. Midcontinent states that as long as Midcontinent does not discriminate in the buying and selling of gas, Midcontinent's tariff provision is proper. Midcontinent also states the process of how

⁸⁸ Order No. 587-F, FERC Statutes and Regulations, Proposed Regulations 1988-1998, ¶ 32,527, at p. 33,351 (1997).

⁸⁹ Order No. 637-B, 92 FERC ¶ 61,062, at 61,165.

Midcontinent will pass back or collect the costs and revenues associated with the buying and selling of gas was negotiated with the shippers that signed precedent agreements and if an individual shipper feels the revenues passed back or surcharged are not supported, they may bring the issue to the Commission's attention at that time. Midcontinent states there is no need to require a formal filing.

119. On June 9, 2008, BP stated in its status report it would withdraw its protest based on BP's understanding that Midcontinent will file revised tariff language that states that

Midcontinent will rely on competitive bidding for the purchase and sale of operational gas, except in an emergency situation.

120. Midcontinent is directed to revise its tariff so that it will rely on competitive bidding for the purchase and sale of operational gas, except in emergency situations. In addition, the Commission believes that it is appropriate for Midcontinent to be required to file a report for review of its operational purchases and sales.⁹⁰ In *Dominion Transmission, Inc.*,⁹¹ the Commission required an annual report to help ensure that the pipeline was not charging its customers for the under-recovery of gas on the one hand while realizing revenue generated from the sale of gas for over-recovery on the other.⁹² The Commission also found that the annual filing will provide interested parties with the opportunity to examine the pipeline's sales of excess gas and question the revenues realized from such sales. Accordingly, Midcontinent is required to file to revise its tariff to provide for the filing of an annual report on operational purchases and sales. The report should indicate the source of the gas, date of the purchase/sale, volumes, purchase/sale price, costs and revenues from the purchase/sale, and the disposition of the costs and revenues.

Section 12 – Creditworthiness

121. Sections 12.1(b)(1)(i) through (iv) provide that a shipper that fails to satisfy Midcontinent's credit criteria may continue to receive service if it provides security for 12 months of reservation fees through a variety of forms of collateral. Midcontinent states that the Commission has recognized that, in conjunction with the construction of new facilities, interstate pipelines can require more than the standard three months of

⁹⁰ See, e.g., *WIC*, 107 FERC ¶ 61,315 (2004), *order on reh'g*, 111 FERC ¶ 61,215 (2005); *Colorado Interstate Gas Co.*, 107 FERC ¶ 61,312 (2004), *order on reh'g*, 111 FERC ¶ 61,216 (2005).

⁹¹ 106 FERC ¶ 61,029 (2004).

⁹² *Id.* at 61,101.

collateral if the shipper is not creditworthy. Midcontinent has determined that 12 months worth of reservation fees backed by a creditworthy source is the minimum required to justify taking the risk in the project. Midcontinent states this reflects a reasonable balance between Midcontinent and the shippers that have contracted for capacity to support construction of the project. Midcontinent also states that 12 months of collateral protects it from shippers that are not as creditworthy stepping directly into the shoes of the initial shippers (that met the requisite credit assurances) through a permanent release and receiving service on credit terms and conditions that do not appropriately reflect the overall risk of the project.

122. The Commission's longstanding policy has been to require no more than the equivalent of three months' worth of reservation charges as security for a shipper that has been found to be non-creditworthy. The Commission believes this amount reasonably balances the shippers' right to continued service with the pipelines' risk in remarketing the capacity.⁹³ When undertaking a major system expansion or constructing a greenfield pipeline, such as Midcontinent, a transporter and its lenders bear a substantially greater risk of cost recovery. Therefore, the Commission's creditworthiness policy permits larger collateral requirements for pipeline construction projects to be executed between the pipeline and the initial shippers. However, once the pipeline is in service, new shippers on the system should not be subject to that same standard.

123. In addition, the Commission permits a pipeline to refuse to allow a permanent release of capacity if it has a reasonable basis to conclude that it will not be financially indifferent to the release.⁹⁴ Therefore, the concerns raised by Midcontinent about noncreditworthy shippers directly stepping into the shoes of the initial shippers should be minimized. For the reasons stated above the Commission finds that Midcontinent's proposal to require security equal to twelve months of service charges for shippers found to be non-creditworthy is excessive for shippers subscribing to service after the pipeline is in operation. Midcontinent is directed to change its tariff to require security for up to three months of service charges.

Section 14 – Capacity Release by Firm Shippers

124. BP states that GT&C section 14.18(a) of Midcontinent's tariff states that if a shipper releases capacity for the remaining duration of its contract at the higher of the maximum tariff rate or the negotiated rate the shipper is paying, the releasing shipper can

⁹³ *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs. ¶ 31,191 (2005).

⁹⁴ *See, e.g., Texas Eastern Transmission Corp.*, 83 FERC ¶ 61,092, at p. 61,446 (1998).

ask Midcontinent to relieve it of any liability in connection with the contract (a Permanent Release). BP states a Permanent Release requires a release for the remaining duration of the contract, where the pipeline is not adversely affected in terms of the reservation charge payments the pipeline will receive. Therefore, according to BP, as long as the Replacement Shipper will pay a rate that is no lower than the Releasing Shipper's rate the pipeline will be financially-neutral and the release qualifies as a Permanent Release. Therefore, BP believes Midcontinent must allow Permanent Releases at the rate that the Releasing Shipper is paying.

125. Midcontinent states in its answer that BP misreads section 14.18 of the GT&C and section 14.18(b) sets forth the criteria under which MEP will allow a Permanent Release of capacity with the Releasing Shipper no longer being liable to Midcontinent. The three criteria are: (1) the release shall be for the remaining term of the agreement; (2) the replacement shipper shall agree to pay a rate equal to or greater than the reservation rate which the Releasing Shipper paid (or another rate as Midcontinent shall agree to accept); and (3) the Replacement Shipper shall have met the creditworthy standards of Midcontinent's tariff. Midcontinent states that each of these conditions is consistent with Commission policy.

126. BP states in its January 24, 2008 reply it is withdrawing its challenge of the proposed tariff language on Permanent Releases based on the understanding that Midcontinent will propose revised tariff language that addresses BP's concerns. Midcontinent is directed to revise its tariff to address BP's concerns.

127. BP states that Midcontinent's proposed section 14.20(b), which states that if Midcontinent terminates a Releasing Shipper's contract due to the Releasing Shipper's lack of creditworthiness or failure to pay, the Replacement Shipper can retain the capacity by paying a rate that equals the greater of the applicable maximum rate or the same rate as the Releasing Shipper paid, violates the Commission's policy that the Replacement Shipper can retain the capacity if it agrees to pay the lesser of the Releasing Shipper's contract rate, the maximum rate or some other rate acceptable to the pipeline.⁹⁵ BP believes Midcontinent should revise its tariff to comply with Commission policy. Midcontinent states in its answer that it accepts BP's proposed revision. Midcontinent is directed to revise its tariff accordingly.

*Section 16 – Pre-Granted Abandonment, Contract Rollovers
and Right of First Refusal*

128. BP protests Midcontinent's proposal to require a shipper that wants to retain its capacity via the Right of First Refusal (ROFR) process to agree to both a price (up to the

⁹⁵ *Columbia Gulf Transmission Co.*, 117 FERC ¶ 61,073, at P14 (2006).

maximum rate) and a term which at least equals the bid on all or any portion of the service the existing shipper wishes to retain (GT&C section 16.2(d)(3)). BP states that an existing shipper should be able to retain its capacity by submitting a bid that has a net present value (NPV) that is equal to or greater than the NPV of the best bid. BP avers that Midcontinent relies on the NPV method to determine which shipper has submitted the best bid and BP states that the Commission has recognized that it would be unduly discriminatory to utilize the NPV method to determine the best bid but to impose a bid component match requirement on the existing shipper. Therefore, BP urges the Commission to find that the existing shipper should only have to match the NPV of the best bid.

129. Midcontinent states in its answer it is not required to deem any bid as acceptable to the extent that it is below the maximum recourse rate. If Midcontinent accepts a bid at or below the maximum recourse rate it is in effect establishing the form of discount that it will accept. Midcontinent states it should not be forced to accept another form of bid for a shorter term as this would require Midcontinent to accept a discount that it does not find acceptable. If the acceptable bid in the ROFR process is a maximum recourse rate bid, then in order to have an equal NPV the existing shipper would have to match the term of the acceptable bid.

130. On June 9, 2008, BP stated in its status report it would withdraw its protest based on BP's understanding that Midcontinent will file revised tariff language to state that an existing shipper can retain its capacity via ROFR by matching the NPV of the best bid; however, if the best bid is for more than five years, the existing shipper need only match the NPV associated with the first five years covered by the bid. Midcontinent is directed to revise its tariff accordingly.

Section 20 and Section 2.2(d) – Force Majeure

131. Section 20 of Midcontinent's GT&C provides a definition of Force Majeure, describes the responsibilities of Midcontinent and its shippers when Force Majeure is declared and states that Midcontinent will post on the Informational Posting section of its Interactive Website any information related to a declaration of Force Majeure. Section 2.2(d) lists those situations under which Midcontinent will provide a reservation charge credit for service not provided. According to section 2.2(d)(2)(ii), no credit is provided during the first 10 days of a Force Majeure event or prior to the date Midcontinent should have overcome the Force Majeure, whichever occurs first. Section 2.2(d)(2) also requires Midcontinent to provide a full reservation charge credit in a Force Majeure situation if Midcontinent is not able to schedule 95 percent of the firm daily volume. In Opinion No. 406,⁹⁶ the Commission denied the pipeline's proposal to reduce its reservation charge

⁹⁶ *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022 (1996); *order on reh'g*, 80 FERC ¶ 61,070 (1997).

credit threshold from 98 percent to 95 percent and required the pipeline to provide full reservation charge credits when it failed to provide 98 percent of scheduled volumes. We see no reason to permit the lower percentage amount here and direct Midcontinent to revise its tariff to provide a full reservation charge credit if Midcontinent is not able to deliver 98 percent of firm scheduled volumes.

Section 29 – NAESB Standards

132. The Commission believes that Midcontinent has complied with the bulk of the NAESB standards, however, several standards have not been included in its pro forma tariff. Midcontinent has not complied with the following NAESB standards: 1.3.6, 4.3.89, 4.3.90, 4.3.91 and 4.3.92. In its compliance filing, Midcontinent is directed to either incorporate these standards verbatim or by reference.

Accounting

133. An allowance for funds used during construction (AFUDC) is a component part of the cost of constructing the project. Gas Plant Instruction 3(17) prescribes a formula for determining the maximum amount of AFUDC that may be capitalized as a component of construction cost.⁹⁷ That formula, however, uses prior year book balances and cost rates of borrowed and other capital. In cases of newly created entities, such as Midcontinent, prior year book balances do not exist; therefore, using the formula contained in Gas Plant Instruction 3(17) could produce inappropriate results for initial construction projects. Therefore, to ensure that the amounts of AFUDC are properly capitalized in this project, we will require Midcontinent to capitalize the actual costs of borrowed and other funds for construction purposes not to exceed the amount of debt and equity AFUDC that would be capitalized based on the overall rate of return approved.⁹⁸

134. In cases similar to Midcontinent's, the Commission has required the applicant to limit its AFUDC rate to a rate no higher than it could earn on operating assets. The Commission limited the maximum amount of AFUDC that the pipeline could capitalize by limiting the AFUDC rate to a rate no higher than the overall rate of return underlying its recourse rates.⁹⁹ We will therefore require Midcontinent to ensure that its maximum

⁹⁷ 18 C.F.R. Part 201 (2008).

⁹⁸ See, e.g., *Cheniere Creole Trail Pipeline, L.P.*, 115 FERC ¶ 61,331 (2006), *Port Arthur Pipeline, L.P.*, 115 FERC ¶ 61,344 (2006), and *Golden Pass Pipeline, L.P.*, 112 FERC ¶ 61,041 (2005).

⁹⁹ See, *Gulfstream Natural Gas System, L.L.C.*, 91 FERC ¶ 61,119 (2000) and *Buccaneer Gas Pipeline Company L.L.C.*, 91 FERC ¶ 61,117 (2000).

AFUDC rate for the entire construction period is no higher than the overall rate of return underlying its recourse rates. Further, Midcontinent must use its actual cost of debt (short-term and long-term) in the determination of its AFUDC rate, if it results in an AFUDC rate lower than the overall rate of return underlying its recourse rates.¹⁰⁰

135. As detailed above, Midcontinent will lease up to an additional 272,000 Dth/d of firm capacity on Enogex's intrastate pipeline system. We will accept Midcontinent's proposal to treat the capacity lease with Enogex as an operating lease and to record the monthly lease payments in Account 858, Transmission and Compression of Gas by Others.¹⁰¹ This accounting treatment is consistent with similar capacity lease agreements approved by the Commission.¹⁰²

Engineering

136. Our analysis of the engineering information submitted by Midcontinent in its Exhibits G, G-I, and G-II, as amended, concludes that Midcontinent's facilities are appropriately designed to provide up to 1,532,500 Dth/d of firm capacity in Zone 1 and 1,200,000 Dth/d in Zone 2.

137. Our analysis of the engineering information supplied by Enogex, as well as our review of Apache's May 13, 2008 filing of information in rebuttal, as supplemented on July 1, 2008, concludes that, while certain individual receipt points may decrease in capacity, the overall amount of capacity on Enogex's system will increase as a result of the facility addition Enogex plans. The Enogex system is web-like in configuration, with gas flows changing direction regularly depending on market demands. Thus, there is no dominant flow pattern. In such cases, historical operating conditions can be used in conjunction with estimates of future operating conditions to determine changes in receipt and delivery point capacities. The Midcontinent lease provides for a single delivery point at Bennington and receipts of up to 100,000 Dth/d at Waynoka, in Enogex's West Zone, up to 165,000 Dth/d at West Pool, and 7,000 Dth/d at East Pool, with the flexibility to also receive Waynoka volumes at West Pool, at the Waynoka rate, and West Pool volumes at either West Pool or East Pool, at the West Pool rate. Receipts at the pooling

¹⁰⁰ See, *Mill River Pipeline, L.L.C.*, 112 FERC ¶ 61,070 (2005).

¹⁰¹ See Midcontinent's data request response dated February 26, 2008.

¹⁰² See, e.g., *Gulf Crossing, supra*; *Gulf South Pipeline Company*, 119 FERC ¶ 61,281 (2007); *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069 (2007); *Natural Gas Pipeline Company*, 118 FERC ¶ 61,211 (2007); *Discovery Producer Services LLC*, 117 FERC ¶ 61,243 (2006); and *Midwest Gas Transmission Company and Trunkline Gas Company*, 73 FERC ¶ 61,320 (1995).

points may originate from any receipt point within the applicable zone. While no specific path for deliveries under the lease can be determined, the effect of the lease on the operational capacities at receipt and delivery points on Enogex's system can be reasonably determined from the information provided by Enogex in its December 31, 2007 filing.

Environment

138. The potential environmental impacts of Midcontinent's project were evaluated in the draft and final environmental impact statements (EIS) to satisfy the requirements of the National Environmental Policy Act (NEPA).¹⁰³ The final EIS has been prepared in cooperation with the U.S. Fish and Wildlife Service (FWS), the U.S. Environmental Protection Agency (EPA), the National Park Service (NPS), the Natural Resources Conservation Service (NRCS), the U.S. Army Corps of Engineers (COE), the Louisiana Department of Environmental Quality (LDEQ), the Texas Parks and Wildlife Department (TPWD), the Louisiana Department of Wildlife and Fisheries (LDWF), the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP), and the Alabama Department of Conservation and Natural Resources (ADCNR).

139. The Commission approved Midcontinent's request to use the Pre-Filing Review Process for the proposed Project on February 22, 2007, in Docket No. PF07-4. As part of our Pre-Filing review, Staff issued a *Notice of Intent to Prepare an Environmental Impact Statement, Request for Comments on Environmental Issues and Notice of Public Scoping Meetings* (NOI) on April 2, 2007. Subsequently, on August 14, 2007, the FERC issued a *Supplemental Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Midcontinent Express Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Site Visit* (Supplemental NOI). These notices were published in the *Federal Register*¹⁰⁴ and sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; local libraries; newspapers; and, other interested parties.

140. Subsequent to the issuance of our NOIs, six public scoping meetings were held in communities along the proposed route, Staff participated in three public site visits, and Staff received numerous written and verbal comments from landowners, concerned citizens, public officials, and government agencies concerning project impacts on land uses, soils, wetlands and waterbodies; water quality; vegetation and wildlife; threatened and endangered species; air quality, noise impacts; visual impacts, future development; property values; tribal lands and cultural resources; use of eminent domain; timber

¹⁰³ 42 U.S.C. §§ 4321-4347 (2005).

¹⁰⁴ 72 Fed. Reg. 17,153 (April 6, 2007), and 72 Fed Reg. 39,617 (July 19, 2007).

production; the project purpose and need; environmental justice; safety; state- and federally-managed lands; and potential alternatives to the proposed route and planned facilities.

141. The Commission issued a draft EIS on February 8, 2008. Public notice of the availability of the draft EIS was published in the *Federal Register*.¹⁰⁵ The draft EIS was mailed to federal, state, and local government agencies; elected officials; Native American tribes; local libraries and newspapers; intervenors; and other interested parties (i.e., affected landowners, miscellaneous individuals, and environmental groups who provided scoping comments or asked to remain on the mailing list). In addition, affected landowners who were added to the mailing list after the NOI was issued, and landowners potentially affected by some of the alternatives under consideration, were sent the draft EIS. The public was given 45 days from the date of publication in the *Federal Register* to review and comment on the draft EIS. Six public draft EIS comment meetings were held in the project area to solicit comments, and in addition, written and electronic comments were submitted directly to the Commission.

142. During this period and at the public comment meetings Staff received numerous comments regarding the location of the proposed pipeline, the affects to land use, safety and reliability, cumulative impacts, alternatives, and other factors. Specifically, Staff received comment letters from three federal agencies: the U.S. Department of Interior (DOI), the NRCS, and the EPA; seven state agencies: the Oklahoma Historical Society, the TPWD, the Texas Historical Commission, the LDWF, the Louisiana Department of Natural Resources, the Louisiana Economic Development Department, and the Alabama Historical Commission; and three local government agencies: the Bossier Parish (Louisiana) Tax Assessor, the Paris (Texas) Economic Development Corporation, and the Hinds County (Mississippi) Economic Development District; as well as 23 landowners or interested individuals. Staff also received a comment from one Louisiana State Senator.

143. The Commission issued the final EIS on May 30, 2008. Public notice of the availability of the final EIS was published in the *Federal Register*.¹⁰⁶ The final EIS was mailed to the same parties as the draft EIS, as well as to parties that commented on the draft EIS and landowners newly identified as affected by proposed route variations. The distribution list is provided as Appendix A of the final EIS.

144. The final EIS considers and responds to the comments received on the draft EIS. The final EIS concludes that construction and operation of Midcontinent's proposed

¹⁰⁵ 72 Fed. Reg. 63,566 (Nov. 9, 2007).

¹⁰⁶ 73 Fed. Reg. 16,663 (March 28, 2008).

project would result in limited adverse environmental impacts. The limited impacts would be most significant during the period of construction. The final EIS finds that if constructed and operated in accordance with applicable laws and regulations, Midcontinent's proposed mitigation plans, and the recommended mitigation measures set forth in the final EIS, the proposed project would be an environmentally acceptable action.

Landowner Comments on the Final EIS

145. Staff received a comment from a family in Louisiana, the Price Family Co-heirs, who were concerned about potential project-related impacts to their property. Specifically, the family was concerned that the location of the proposed project on their property (i.e., routing through the central portion of the property and along frontage to the single access road) near Milepost (MP) LA 185.6 would limit future development potential for family members. Additionally, the family was concerned about the proximity of the proposed project to an existing residence on their property, the resulting safety risk, and a possible loss of property value.

146. Staff evaluated multiple route variations during the scoping and draft EIS comment periods. These route variation evaluations included review of landowner-identified issues and suggested pipeline routes. The proposed route identified in the final EIS was based on our consideration of this input received during that time. Slight adjustments to the location of the proposed route or additional temporary workspaces are possible even if the certificate is approved and construction begins. This process is typically related to site-specific conditions and landowners may continue to work with the pipeline company regarding possible adjustments.

147. Aboveground structures (such as new homes), not associated with the project, would be precluded from the 50-foot-wide permanent pipeline right-of-way (ROW). Structures may be built outside of the permanent ROW, but their location in relation to the proposed route would depend on many factors, including personal preference in regard to proximity to a pipeline.

148. The Commission encourages pipeline companies to avoid residences and residential areas to the maximum extent possible. Midcontinent has routed the proposed project in a manner to avoid residences to the extent possible and has considered and adopted numerous route variations designed to avoid or minimize impacts to residences. Midcontinent has further provided site-specific residential crossing plans for all residences within 25 feet of the proposed project. The Commission has also evaluated several route variations that would minimize impacts to residential areas and has reviewed the site-specific residential construction plans submitted by Midcontinent and has found them to be acceptable. It appears that the proposed pipeline would be located at least 150 feet away from the existing Price family residence.

149. The Commission does acknowledge in section 3.9.5 of the final EIS that a variety of factors could affect the resale value of land. Potential property value loss would be addressed during easement negotiations. However, the Commission does not get involved in landowner negotiations with the pipeline company.

150. Staff received a comment on the final EIS from Ms. Martha Anderson, a landowner in Bryan County, Oklahoma, who is upset about the loss of trees on her property due to the use of construction right-of-way and/or extra temporary workspaces. The subject property has two existing pipeline easements and the proposed project would overlap some of the existing Kinder Morgan right-of-way during construction. Also, Ms. Anderson was displeased about Midcontinent using threatening language regarding obtaining use of the property.

151. Slight adjustments to the location of the proposed route or additional temporary workspaces are possible, even if the certificate is approved and construction begins. This process is typically related to site-specific conditions and landowners may continue to work with the pipeline company regarding possible adjustments, such as those to avoid or minimize impacts to large trees, if practical and feasible.

152. As stated in the final EIS (section 2.2.2), our regulations give primary consideration to the use, enlargement, or extension of existing right-of-ways rather than developing new rights-of-way in order to reduce impacts on potentially sensitive resources. As shown in Appendices C and D, Midcontinent proposes to overlap multiple existing pipeline, low-voltage powerlines, and high-voltage powerlines, in areas where overlap can be done safely. This overlap of rights-of-way in conjunction with the reductions in the project's temporary and permanent rights-of-way would reduce the overall land consumption of the project resulting in a reduction of both landowner and environmental impacts.

153. As stated above, the Commission does not get involved with negotiations between the pipeline companies and the landowner over the value of the land and its uses. Natural gas pipeline companies do not have authority under the NGA to use the power of eminent domain until they receive an NGA section 7(c) certificate approving the project.

154. Staff received a comment from D. H. Jones, a landowner, regarding ambient noise testing near the proposed Lamar Compressor Station. Mr. Jones states that noise modeling data depicted in the final EIS is incorrect due to faulty survey methods conducted by the Midcontinent. Further, Mr. Jones requests that additional noise modeling be submitted to the Commission and be available for public comment prior to the issuance of a certificate to Midcontinent.

155. The final EIS indicates that the accuracy of Midcontinent's noise data for the Lamar Compressor Station has been questioned and that competing noise surveys were

submitted to the Commission. Our review of Midcontinent's noise survey (and resultant data used for analyses in the EIS) and the commenter-filed noise survey indicates that the two surveys used different field methods and that study results were not interpreted or presented in a consistent manner. In order to address this apparent discrepancy, Midcontinent committed to conduct an additional 24-hour ambient noise survey at the Ditzler Jones and Ray Martin properties located near the proposed Lamar Compressor Station prior to construction and file survey results with the Commission staff.

156. Further, the final EIS contains a condition that stipulates that Midcontinent should conduct noise surveys to verify that the noise attributable to the operation of each compressor station does not exceed a day-night sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at any Noise Sensitive Area. If these noise levels are exceeded, Midcontinent would install additional noise controls to meet the required 55 dBA operational noise level.

157. While the new ambient noise survey for the Ditzler Jones and Ray Martin properties will not be completed prior to the issuance of a certificate, the results of the new survey will be made publicly available on the Commission's eLibrary system.

158. In this order we are requiring Midcontinent to limit the project disturbance to a 50-foot wide permanent right-of-way and a 100 foot construction right-of-way. The burden that multiple pipeline easements have on individual landowners, as well as concerns regarding excessive use or loss of property for the proposed project, were indicated by our receipt of 34 comments from affected landowners during the scoping and draft EIS comments periods. Staff evaluated each landowner's concerns and, where practical, analyzed route alternatives to reduce impacts to the environment and to landowners. To reduce impacts on landowners with existing easements already on the property, we are requiring that Midcontinent utilize 10 feet of adjacent pipeline right-of-way as part of their 100-foot wide nominal construction right-of-way and for any additional temporary workspaces where needed, also utilize the adjacent right-of-way where possible.

Alternatives

159. The final EIS addressed alternatives, including major alternatives and the analysis found no reasonable major route alternatives that would be environmentally preferable to the proposed route. Staff also evaluated the No Action Alternative, the Postponed Action Alternative, alternative energy sources, and the potential effects of energy conservation, system alternatives, route alternatives, route variations, and aboveground facility site alternatives to determine whether they would be technically and economically feasible and environmentally preferable to the proposed action. During the Pre-filing, scoping, and draft EIS comment periods, public and agency comments resulted in Midcontinent adopting 184 route variations. Staff identified and evaluated 22 additional route variations in response to public comments for the proposed project. Based on the

recommendations in the final EIS, we are requiring that Midcontinent adopt four additional route variations that we believe would result in environmental benefits compared to the analogous portions of the proposed project.

Water Resources

160. Construction of the proposed project pipeline would affect 368 wetland areas resulting in a total of approximately 321.9 acres of wetland disturbance, including approximately 217.6 acres of forested wetlands and approximately 104.4 acres of scrub-shrub or emergent wetlands. No wetlands would be affected by the proposed aboveground facilities. During operations, approximately 86.4 acres of wetlands, including approximately 82.5 acres of currently forested wetlands, would be converted to other wetland types in the maintained portion of the permanent pipeline right-of-way. Special-status wetlands potentially affected by the proposed project include lands in the NRCS-administered Wetland Reserve Program and high-quality bald cypress-tupelo forested wetlands.

161. The proposed project would cross 231 perennial streams, 774 intermittent streams, and 41 lakes or ponds. As proposed, most waterbody crossings would be accomplished using open-cut methods. Potential effects to most major and sensitive waterbodies would be largely avoided through implementation of horizontal directional drill (HDD) installation techniques, which would be used to accomplish pipeline installation across 39 waterbodies. Waterbodies that would be crossed using HDD include 26 of the 40 major waterbody crossings and all navigable waterways; all of the streams designated as Louisiana Natural and Scenic Rivers or National Rivers Inventory-listed; and the majority of the impaired waterbodies that occur along the proposed Project route.

Vegetation and Wildlife

162. The construction and operation of the proposed project would affect four primary types of upland vegetative communities: upland forest, pine plantation, agricultural land, and open lands. Approximately 56 percent of the upland vegetation resources that would be affected during construction would consist of pine plantation and upland forest, with agricultural and open lands making up the remainder. Several extensive forested tracts and areas containing exotic and/or invasive plant species would also be crossed by the proposed pipeline route, as well as vegetative communities of special concern. Based on our analysis, the total estimated area of contiguous, extensive forested tracts that would be impacted by the proposed project is approximately 584.2 acres during construction and 292.1 acres during operation. Impacts to forested areas, including large forested tracts, would be minimized by routing the proposed project along existing rights-of-way and through other previously disturbed areas, such as agricultural and open lands, where possible.

163. The wetlands and upland vegetation communities crossed by the proposed project route support habitats that provide cover and forage for a variety of wildlife species including birds, mammals, reptiles, and amphibians. Physical disturbance, displacement, and clearing of herbaceous upland and wetland habitats would affect wildlife at or near the time of construction, but such effects would be largely temporary and many habitats would generally recover quickly following construction. Upland and wetland forested habitats would be affected most substantially, with a long-term conversion of wooded areas to successional stages in the temporary construction right-of-way and a permanent conversion to scrub-shrub or herbaceous levels within the permanent pipeline right-of-way. The proposed project route would be collocated with or parallel to existing utility rights-of-way for approximately 53 percent of the proposed mainline pipeline route. Collocation would minimize impacts to previously undisturbed vegetation and wildlife habitats, and Midcontinent would further minimize impacts to wildlife habitats through implementation of its Plan and Procedures.

164. The waterbodies that would be traversed by the proposed project provide habitat for a variety of aquatic species, including warm water fishes and mussels. Potential impacts to fisheries and aquatic habitats would include sedimentation and turbidity, loss of cover, introduction of pollutants into the aquatic environment, potential blockage of fish migrations and interruptions of spawning, and entrainment or loss of stream flow during hydrostatic testing. Direct impacts would be avoided by the use of HDD installation at many waterbody crossings, and aquatic habitat impacts at other crossing locations would be largely temporary, as crossings would be completed in less than 48 hours in most instances.

Threatened and Endangered Species

165. In consultation with the FWS and state wildlife management agencies, Staff identified 22 federally-listed threatened, endangered, or candidate species that could potentially be affected by the proposed project. In addition, the bald eagle, which is federally protected under the Bald and Golden Eagle Protection Act, was identified as potentially occurring within the project area. Based on our review of these species and the survey reports prepared by Midcontinent, Staff has determined that these species and their preferred habitats either do not occur along the proposed project route, their potential habitats would be avoided through special construction procedures, or that adverse effects would be unlikely. Additionally, the final EIS included numerous recommendations for development and implementation of measures to minimize the potential for project-related effects to various species, including measures to protect the interior least tern and development of site-specific crossing plans at several streams in consultation with FWS to avoid impacts to listed aquatic species. Midcontinent has committed to developing a program in consultation with FWS regarding the training of construction workers and contractors in the identification of least terns and their nesting habitat. Field surveys have been completed along approximately 96.6 percent of the

proposed project route, but completion of surveys and habitat evaluations along the remaining portions of the proposed project route, would be required to complete the process of compliance with section 7 of the Endangered Species Act (ESA). The FWS indicated in its letter dated May 28, 2008, that it concurred with Staff's conclusions regarding federally threatened and endangered species in Louisiana and that no further ESA coordination would be necessary in Louisiana. Staff concludes that project effects would be not likely to adversely affect any federally listed species.

Land Use and Visual Impacts

166. As proposed, construction of the proposed project would affect approximately 8,310.3 acres of land, including 5,884.6 acres for the project mainline construction right-of-way; 24.3 acres for the CenterPoint Lateral construction right-of-way; 102.2 acres for the aboveground facilities; and 2,299.2 acres for extra work areas (extra workspaces, pipe storage and contractor yards, and access roads). In accordance with the recommendation in the draft EIS, Midcontinent committed to limit its nominal construction right-of-way width to 100 feet along upland sections of the proposed project mainline. This would reduce the overall project land requirements by more than 1,000 acres compared to Midcontinent's original proposal. During operation of the proposed project, the permanent pipeline right-of-way, aboveground facilities, and permanent access roads would encumber approximately 3,158.3 acres.

167. Approximately 33 residential structures are located within 50 feet of proposed project construction work areas, but Midcontinent would attempt to maintain a minimum separation of 25 feet between residences and any construction work area wherever feasible. Where maintenance of such a separation is not feasible, Midcontinent has developed site-specific residential construction plans for each residence located within 25 feet of proposed construction work areas that would minimize impacts to these structures. Staff has reviewed these plans and find them to be acceptable.

168. Visual resources along the proposed project route would be affected by the installation of certain aboveground facilities and through the alteration of existing vegetative patterns associated with the clearing and maintenance of the construction and permanent pipeline ROWs. However, the impact is not expected to be significant in most areas, and we are including a condition (see No. 33) requiring Midcontinent to develop and finalize site-specific visual screening plans to minimize any visual impacts to adjacent landowners prior to construction of the Lamar and Delhi Booster Compressor Stations.

Cultural Resources

169. Where survey permission was obtained, Midcontinent has conducted cultural resource surveys and prepared associated technical reports covering approximately 96.6

percent (488.6 miles) of the proposed project mainline route; the full length of the proposed CenterPoint Lateral route; 144 of the 157 proposed project access roads; 21 of the 29 proposed offsite pipe storage and contractor yards; 10 of the 14 proposed meter stations, and all of the proposed compressor station facilities. In total, these surveys identified 105 prehistoric sites (not including 37 isolated finds), including 1 site eligible for listing on the National Register of Historic Places (NRHP) and 11 sites potentially eligible for listing on the NRHP. Midcontinent indicated that the eligible site would be avoided. If avoidance of the other sites is not feasible, Phase II testing would be conducted to further characterize the sites and determine their NRHP eligibility status. Midcontinent also identified 47 historic sites (22 sites contained both prehistoric and historic characteristics) and four architectural sites within the project area of potential effect. Only one site, which had both prehistoric and historic components, was recommended to be eligible for listing in the NRHP.

170. Midcontinent contacted 11 Native American groups regarding the proposed project, and although some requested additional consultation or information, none have expressed opposition to the proposed project. The cultural resource survey reports for the surveyed portions of the project have been submitted to the various state historic preservation officers (SHPOs) for review, but consultations with the SHPOs regarding the unsurveyed portions of the proposed project route are still pending. To ensure that all our responsibilities under section 106 of the National Historic Preservation Act are met, we are recommending that Midcontinent defer construction until surveys and evaluations of areas not previously accessed are completed, all survey reports and any necessary treatment plans have been reviewed by appropriate parties, and the Commission provides written notification to proceed.

Air Quality & Noise Impacts

171. Impacts to noise quality associated with construction of the proposed project would generally be temporary, minor, and limited to daylight hours, except at HDD sites, where drilling and related construction equipment would likely operate on a continuous basis. To minimize the potential for HDD-related construction noise, we are requiring in Condition No. 35 that Midcontinent develop a Noise Analysis and Mitigation Plan for selected HDD entry and exit locations where drilling would occur 24 hours per day.

172. The proposed compressor stations would generate noise on a continuous basis during operations. However, the predicted noise levels attributable to operations of the new compressor stations typically would not result in significant effects on the Noise Sensitive Areas nearest to those facilities as the largest increase in noise level would be 4.2 dBA and overall noise levels would not exceed 55 dBA. To verify the predictions, we are requiring in Condition 36 that Midcontinent confirm through noise surveys that the 55dBA threshold is not exceeded and to report on what additional noise controls would be utilized, if needed.

Conclusion

173. We have reviewed the information and analysis contained in the final EIS regarding the potential environmental effect of the project. Based on our consideration of this information, we agree with the conclusions presented in the final EIS and find that Midcontinent's project is environmentally acceptable if the project is constructed and operated in accordance with the recommended environmental mitigation measures in the appendix to this order. The Commission adopts the findings and conclusions of the final EIS. We are including the environmental mitigation measures recommended in the final EIS as conditions to the authorization issued to Midcontinent in this order.

174. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁰⁷

175. The Commission on its own motion, received and made a part of the record all evidence, including the application, as supplemented, and exhibits thereto, submitted in this proceeding and upon consideration of the record,

The Commission orders:

(A) In Docket No. CP08-6-000, a certificate of public convenience and necessity is issued to Midcontinent to construct, install, and operate an approximately 506-mile pipeline system from near Bennington, Oklahoma to near Butler, Alabama and to lease 272,000 Dth/d of capacity in Enogex's Oklahoma intrastate pipeline system, as described and conditioned herein and as more fully described in the application. Midcontinent is also issued blanket construction and transportation certificates under Subpart F of Part 157 and Subpart G of Part 284 of the Commission's regulations.

(B) In Docket No. CP08-9-000, a limited-jurisdiction certificate of public convenience and necessity is issued to Enogex to operate 272,000 Dth/d of capacity on its Oklahoma intrastate pipeline system to Midcontinent. This limited jurisdiction certificate will enable Enogex to operate the leased capacity being used for NGA jurisdictional

¹⁰⁷ See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

services subject to the terms of the lease and subject to Midcontinent's open-access tariff, and will require Enogex to operate the leased capacity in a manner that ensures Midcontinent's ability to provide services, including interruptible transportation, using the leased capacity on an open-access, non-discriminatory basis. Enogex shall not shift any unrecovered costs of leased capacity to customers for whom it is providing jurisdictional interstate services under section 311 of the NGPA.

(C) The certificate authority in Ordering Paragraph (A) shall be conditioned on the following:

- (1) Midcontinent's completing the authorized construction of the proposed facilities and making them available for service within three years of the issuance of this order pursuant to paragraph (b) of section 157.20 of the Commission's regulations;
- (2) Midcontinent's compliance with all applicable Commission regulations, including, but not limited to, Parts 154 and 284, and paragraphs (a), (c), (e), and (f) of section 157.20;
- (3) Midcontinent's executing firm service agreements for the capacity levels and terms of service requested, in signed precedent agreements, prior to construction;
- (4) Midcontinent's not shifting any of its costs associated with the leased capacity to customers that do not use the leased capacity;
- (5) Midcontinent's maintenance of separate accounting records to ensure that costs and revenues associated with the leased capacity from Enogex can be identified in any future proceeding and that Midcontinent's other customers are not subsidizing shippers who use capacity leased from Enogex; and
- (6) Midcontinent's compliance with the environmental conditions listed in the appendix to this order.

(D) Midcontinent shall notify the Commission's environmental staff by telephone, email, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Midcontinent. Midcontinent shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

(E) Midcontinent's initial rates and tariff are approved, as conditioned and modified herein in the body of this order.

(F) Midcontinent's incremental recourse rates for the capacity lease are approved as initial section 7 rates, as discussed in the body of this order.

(G) Midcontinent must file actual tariff sheets that comply with the requirements contained in the body of this order no less than 60 days and no more than 90 days prior to the commencement of interstate service.

(H) Midcontinent is directed to file its negotiated rate agreements no less than 30 days or more than 60 days before service commences.

(I) Within three years after its in-service date, as discussed herein, Midcontinent must make a filing to justify its existing cost-based firm and interruptible recourse rates. In the alternative, in lieu of such filing, Midcontinent may make an NGA section 4 filing to propose alternative rates to be effective no later than three years after the in-service date for its proposed facilities.

(J) Midcontinent shall adhere to the accounting requirements discussed in the body of this order.

(K) All untimely motions to intervene in Docket Nos. CP08-6-000 and CP08-9-000 are granted.

(L) All motions for consolidation and for evidentiary hearing and or technical conference are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix—Environmental Conditions

As recommended in the EIS, this authorization includes the following conditions:

1. Midcontinent shall follow the construction procedures and mitigation measures described in its application, supplemental filings (including responses to staff information requests), and as identified in the EIS, unless modified by the Order. Midcontinent must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary;
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and receive approval in writing from the Director of the OEP **before using that modification.**
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Commission's Order; and
 - b. the design and implementation of any additional measures deemed necessary (including stop work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Midcontinent shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, EIs, and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs before becoming involved with construction and restoration activities.
4. The authorized facility location shall be as shown in the EIS, as supplemented by filed alignment sheets, and shall include all of the staff's recommended facility locations. **As soon as they are available, and prior to the start of construction**, Midcontinent shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental

conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Midcontinent's exercise of eminent domain authority granted under NGA section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Midcontinent's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Midcontinent shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, and documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **prior to construction** in or near that area.

This requirement does not apply to route variations required herein or minor field realignments per landowner needs and requirements, which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or would affect sensitive environmental areas.
6. **Within 60 days of the acceptance of this certificate and prior to construction**, Midcontinent shall file an initial Implementation Plan with the Secretary for review and written approval by the Director of OEP describing how Midcontinent will implement the mitigation measures required by the Order. Midcontinent must file revisions to the plan as schedules change. The plan shall identify:

- a. how Midcontinent will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - b. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - c. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - d. what training and instructions Midcontinent will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change), with the opportunity for OEP staff to participate in the training session;
 - e. the company personnel (if known) and specific portion of Midcontinent's organization having responsibility for compliance;
 - f. the procedures (including use of contract penalties) Midcontinent will follow if noncompliance occurs; and
 - g. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) the completion of all required surveys and reports;
 - (2) the mitigation training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. Midcontinent shall employ one or more EIs per construction spread. The EIs shall be:
- a. responsible for monitoring and ensuring compliance with all mitigative measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Midcontinent shall file updated status reports with the Secretary on a **weekly** basis **until all construction-related activities, including restoration, are complete for**

each phase of the project. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

- a. the current construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - b. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - c. a description of corrective actions implemented in response to all instances of noncompliance, and their cost;
 - d. the effectiveness of all corrective actions implemented;
 - e. a description of any landowner/resident complaints that may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - f. copies of any correspondence received by Midcontinent from other federal, state or local permitting agencies concerning instances of noncompliance, and Midcontinent's response.
9. Midcontinent must receive written authorization from the Director of OEP **before commencing service** for each phase of the project. Such authorization will only be granted following a determination that rehabilitation and restoration of areas affected by the project are proceeding satisfactorily.
10. **Within 30 days of placing the certificated facilities in service**, Midcontinent shall file an affirmative statement with the Secretary, certified by a senior company official:
- a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the certificate conditions Midcontinent has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
11. Midcontinent shall develop and implement an environmental complaint resolution procedure. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the right-

of-way. **Prior to construction**, Midcontinent shall mail the complaint procedures to each landowner whose property would be crossed by the Project.

- a. In its letter to affected landowners, Midcontinent shall:
 - (1) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
 - (2) instruct the landowners that, if they are not satisfied with the response, they should call Midcontinent's Hotline; the letter should indicate how soon to expect a response; and
 - (3) instruct the landowners that, if they are still not satisfied with the response from Midcontinent's Hotline, they should contact the Commission's Enforcement Hotline at (888) 889-8030, or at hotline@ferc.gov.
 - b. In addition, Midcontinent shall include in its weekly status report a copy of a table that contains the following information for each problem/concern:
 - (1) the date of the call;
 - (2) the identification number from the certificated alignment sheets of the affected property and approximate location by MP;
 - (3) the description of the problem/concern; and
 - (4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.
12. Midcontinent shall not exercise the eminent domain authority granted under section 7(h) of the NGA to acquire a permanent pipeline right-of-way exceeding 50 feet in width, and where collocated, the 50-foot-wide permanent right-of-way shall abut the existing right-of-way. (*Section 2.2.1*)
 13. **Prior to construction**, Midcontinent shall revise its Water Well Testing Program to include provisions for pre- and post-construction monitoring and mitigation, if required, for all wells and springs identified within 150 feet of the proposed construction work areas that are used for domestic water supply or agricultural use. (*Section 3.3.1*)
 14. Midcontinent shall file a report with the Secretary, **within 30 days of placing its pipeline facilities in service**, identifying all private and domestic water wells/systems and springs damaged by construction and how they were repaired. The report shall include a discussion of any complaints concerning well or spring yield and/or quality and how each problem was resolved. (*Section 3.3.1*)

15. Midcontinent shall consult with the LDWF regarding the proposed HDD crossing of, and surface water withdrawal from, designated Louisiana Natural and Scenic Rivers (Dorcheat Bayou [MP LA 42.1], Bayou D'Arbonne [MP LA 106.6], and Bayou D'Loutre [MP LA 113.1]) and file copies of all permits, approvals, or comments that may be obtained, including plans to address any additional mitigation measures recommended by LDWF, with the Secretary **prior to construction at these crossings.** (*Section 3.3.2*)
16. Midcontinent shall consult with NPS regarding its proposed HDD crossing of, and hydrostatic test water withdrawal from, the NRI-listed Bayou D'Arbonne (MP LA 90.6 and MP LA 106.6; two separate crossings), Bayou D'Loutre (MP LA 113.1), Big Black River (MP MS 12.7), Chickasawhay River (MP MS 137.8), Pearl River (MP MS 44.8), and Strong River (MP MS 76.1), and file the results of those consultations, including plans to address any additional mitigation measures recommended by NPS, with the Secretary **prior to construction at these crossings.** (*Section 3.3.2*)
17. Midcontinent shall develop site-specific plans to cross Coulee Ditch (MP LA 134.2), Steen Creek (MP MS 47.3), Tallahala Creek (MP MS 115.6), and Souenlovie Creek (MP MS 134.6) in consultation with FWS and file these plans with the Director of OEP for review and written approval **prior to construction at these crossings.** (*Section 3.3.2*)
18. Midcontinent shall develop site-specific plans to cross Bakers Creek (MP MS 19.4), Dabbs Creek (MP MS 63.2), Campbell Creek (MP MS 68.3), Oakohay Creek (MP MS 86.7), West Tallahala Creek (MP MS 98.1), Buckatunna Creek (MP MS 147.8), and Okatuppa Creek (MP AL 2.2) in consultation with FWS and file these plans with the Director of OEP for review and written approval **prior to construction at these crossings.** (*Section 3.3.2*)
19. Midcontinent shall not begin an open-cut crossing of any of the waterbodies proposed to be crossed using HDD until it files an amended crossing plan with the Secretary for review and written approval by the Director of OEP. The amended crossing plan shall include site-specific drawings identifying all areas that would be disturbed using the proposed alternate crossing method and the results of agency consultations including the COE, EPA, FWS, NPS, and other applicable federal and state agencies. Midcontinent shall file the amended crossing plan **concurrent with the appropriate state and federal applications** required for implementation of the plan. (*Section 3.3.2*)
20. Midcontinent shall develop site-specific plans to cross the forested wetlands at MP LA 96.7, MP LA 104.7, MP LA 151.1, and MP MS 14.2 prepared in consultation with the COE, FWS, LDWF, MDWFP, and other appropriate agencies.

Midcontinent shall identify and evaluate appropriate avoidance and/or minimization measures (e.g., implementation of an HDD, route variation, and/or development of site-specific forested wetland crossing and restoration plans) to reduce impacts to these forested wetlands. Midcontinent shall file the site-specific crossing plans, along with the results of the consultations, with the Director of OEP for review and written approval **prior to construction at these crossings.** (*Section 3.4.2*)

21. Midcontinent shall develop site-specific plans to cross the mature cypress-tupelo forested wetlands at MP LA 115.5 and MP MS 144.8 prepared in consultation with the COE, FWS, LDWF, MDWFP, and other appropriate agencies. Midcontinent shall identify and evaluate appropriate avoidance and/or minimization measures (e.g., implementation of an HDD, route variation, and/or development of site-specific forested wetland crossing and restoration plans) to reduce impacts to these forested wetlands. Midcontinent shall file the site-specific crossing plans, along with the results of the consultations, with the Director of OEP for review and written approval **prior to construction at these crossings.** (*Section 3.4.3*)
22. **Prior to construction**, and in consultation with LDWF, FWS, and EPA, Midcontinent shall file with the Secretary its final COE-approved compensatory wetlands mitigation plan. (*Section 3.4.4*)
23. **Prior to construction within Bodcau WMA**, Midcontinent shall consult with the COE and LDWF and file with the Secretary copies of any agreements for Project-related use and impacts to lands held in the Bodcau WMA. In that filing, Midcontinent shall also document how it would implement any COE or LDWF-recommended measures to avoid, minimize, or mitigate unavoidable impacts to Bodcau WMA lands. (*Section 3.5.3*)
24. Midcontinent shall consult with the FWS, NRCS, and the following state agencies: ODWC, TPWD, LDWF, MDWFP, ADCNR, regarding its Draft Control Plan for Noxious and Invasive Species. **Prior to construction**, Midcontinent shall file with the Secretary a finalized version of its Control Plan for Noxious and Invasive Species that identifies all agency recommended measures that would be implemented during construction and operations to control exotic and invasive plant species. (*Section 3.5.3*)
25. Midcontinent shall file a Migratory Bird Conservation Plan developed in consultation with the FWS. The plan shall consider the effects of forest fragmentation on migratory birds and include measures to prevent, minimize, or mitigate such effects. (*Section 3.6.1*)

26. **Prior to construction**, Midcontinent shall file with the Secretary the results of the FWS-approved preconstruction surveys for the interior least tern. These surveys shall include evaluation of nesting habitat located within 650 feet of any proposed construction work area at the Red and Mississippi River crossings. If interior least terns are observed during the preconstruction surveys, Midcontinent shall not conduct any construction activity within 650 feet of interior least terns or their actively-used habitat. Midcontinent shall immediately notify the Commission staff and the FWS if interior least tern nesting colonies are observed within 650 feet of any work area at any time prior to or during construction. (*Section 3.7.1*)
27. Midcontinent shall not begin any construction activities **until**:
 - a. Midcontinent completes any outstanding species-specific surveys, files all applicable results and agency correspondence with the Secretary, and the Commission receives comments from the FWS regarding the preconstruction survey reports;
 - b. The Commission completes section 7 consultations with the FWS; and
 - c. Midcontinent receives written notification from the Director of the OEP that construction and/or implementation of conservation measures may begin. (*Section 3.7.1*)
28. Midcontinent shall consult further with the ODWC, TPWD, LDWF, MDWFP, and the ADCNR regarding state-listed and rare species to determine the need for additional surveys or mitigation that would further minimize or avoid potential impacts to such species. Midcontinent shall file the results of that consultation, as well as any associated survey reports, with the Secretary **prior to construction**. (*Section 3.7.2*)
29. **Prior to construction across any levee managed by the Caddo, Tensas Basin, and 5th Louisiana Levee Districts; the Louisiana Levee Board; the Louisiana Department of Transportation; and the COE**, Midcontinent shall file with the Secretary the applicable levee crossing permits and authorizations. (*Section 3.8.4*)
30. Midcontinent shall consult with the PHWD regarding the proposed crossing of the Archusa Creek Water Park and file copies of any easement agreement, permits, approvals, or comments that may be obtained, including plans to address any additional mitigation measures recommended by the PHWD, with the Secretary **prior to construction within Archusa Creek Water Park boundaries**. (*Section 3.8.4*)
31. **Prior to construction on WRP lands**, Midcontinent shall file with the Secretary the applicable documentation of meetings, special considerations, and agreements

reached as a result of consultation with the NRCS regarding the proposed construction activities on WRP lands. (*Section 3.8.4*)

32. Midcontinent shall consult with the Mississippi Secretary of State and associated managing local school boards regarding the proposed crossings of all Sixteenth Section Lands and file copies of any easement agreement, permits, approvals, or comments that may be obtained, including plans to address any additional mitigation measures recommended by these entities, with the Secretary **prior to construction across Sixteenth Section Lands.** (*Section 3.8.4*)
33. **Prior to construction,** Midcontinent shall file with the Secretary final site screening plans for the Lamar and Delhi Booster Compressor Stations and include copies of any screening plan agreements and correspondence with community groups. Midcontinent shall also file final site screening plans for the CEGT and ANR meter stations / interconnect facilities and the pig launcher/receiver facility located at MP TX 123.4. (*Section 3.8.7*)
34. Midcontinent shall defer implementation of any treatment plans/measures (including archaeological data recovery); construction of facilities; and use of all staging, storage, or temporary work areas and new or to-be-improved access roads **until:**
 - a. Midcontinent files with the Secretary cultural resources survey and evaluation reports, any necessary treatment plans, and the comments of the Oklahoma, Texas, Louisiana, Mississippi, and Alabama SHPOs on the reports and plans; and
 - b. The Director of OEP reviews and approves all cultural resources survey reports and plans and notifies Midcontinent in writing that treatment plans/procedures may be implemented and/or construction may proceed.

All material filed with the Secretary containing location, character, and ownership information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: **“CONTAINS PRIVILEGED INFORMATION - DO NOT RELEASE.”** (*Section 3.10.4*)

35. **Prior to construction,** Midcontinent shall file with the Secretary, for review and written approval by the Director of OEP, a Noise Analysis and Mitigation Plan for the entry and exit locations for the HDD sites listed in Table 3.11.2-2 of the Final EIS where drilling would occur 24 hours per day. The plan shall include:
 - a. the estimated number of days of drilling required for each location;
 - b. a list indicating the direction and distance of the NSAs within 0.5 mile;
 - c. a topographic map showing the location of the NSAs within 0.5 mile;

- d. the existing day-night average noise (L_{dn}) at the NSAs nearest to each drill location, and the predicted noise impacts at the NSAs during drilling activities; and
 - e. a description of any noise mitigation that would be implemented prior to the start of drilling activities to reduce noise impacts, or alternate measures proposed by Midcontinent, such as temporary relocation or compensation. (*Section 3.11.2*)
36. Midcontinent shall conduct noise surveys to verify that the noise attributable to operation of each of the compressor stations does not exceed an L_{dn} of 55 dBA at any NSA following the installation of all authorized compressor units at each station and file the results of those surveys with the Secretary **no later than 60 days** after placing all authorized compressor units in service or prior to the start of the next phase of construction, whichever is sooner. If the noise attributable to operation of any of the compressor stations exceeds 55 dBA L_{dn} at any NSA, Midcontinent shall file a report on what additional noise controls are needed to meet that level and install any required controls **within one year** of the in-service date of the associated compressor unit(s) or prior to the start of the next phase of construction, whichever is sooner. Midcontinent shall confirm compliance with the L_{dn} of 55 dBA requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls or **prior to the start of the next phase of construction**, whichever is sooner. (*Section 3.11.2*)
37. Midcontinent shall incorporate the Carswell Route Variation, as described in the Final EIS, into its proposed project. Midcontinent shall file with the Secretary, for review and written approval by the Director of OEP, revised construction alignment sheets that show the modified route and workspaces, **prior to construction in this area**. (*Section 4.4.1*)
38. Midcontinent shall incorporate the Bridges Route Variation II, as described in the Final EIS, into its proposed project. Midcontinent shall file with the Secretary, for review and written approval by the Director of OEP, revised construction alignment sheets that show the modified route and workspaces, **prior to construction in this area**. (*Section 4.4.1*)
39. Midcontinent shall incorporate the Bridgers Route Variation II, as described in the Final EIS, into its proposed project. Midcontinent shall file with the Secretary, for review and written approval by the Director of OEP, revised construction alignment sheets that show the modified route and workspaces, **prior to construction in this area**. Midcontinent shall also provide an adequate water supply for livestock operations at the affected property **until the existing water source is restored**. (*Section 4.4.1*)

40. Midcontinent shall incorporate the Twin Lakes Route Variation II, as described in the Final EIS, into its proposed project. Midcontinent shall file with the Secretary, for review and written approval by the Director of OEP, revised construction alignment sheets that show the modified route and workspaces, **prior to construction in this area.** (*Section 4.4.1*)