126 FERC ¶ 61,095
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Orbit Gas Storage, Inc. Docket No. CP08-409-000

ORDER ISSUING CERTIFICATE

(Issued February 5, 2009)

1. On May 23, 2008, Orbit Gas Storage, Inc. (OGS) filed in Docket No. CP08-409-000 an application pursuant to section 7(c) of the Natural Gas Act (NGA) for a certificate of public convenience and necessity authorizing the construction and operation of the Kentucky Energy Hub Project (project), a natural gas storage facility in Hopkins County, Kentucky, for the purpose of receiving, injecting, storing, withdrawing, and redelivering natural gas in interstate commerce. OGS also requests a blanket construction certificate under Part 157, Subpart F of the Commission's regulations, and a blanket certificate to provide open-access firm and interruptible storage services with pre-granted abandonment under Part 284, Subpart G, of the Commission's regulations. Additionally, OGS requests authority to charge market-based rates for the proposed storage services, and waiver of certain Commission regulations and requirements.

2. As discussed and conditioned below, this order grants OGS's requested certificates for its proposed storage project and services and its request to charge market-based rates for its services.

Background and Proposal

3. OGS is a new company with no existing jurisdictional or non-jurisdictional operations in the natural gas pipeline or storage industry. OGS is an affiliate of OGS Gas Transmission, Inc., a small, privately-held local distribution company which is regulated by the Kentucky Public Service Commission. OGS does not have any subsidiaries.

4. OGS proposes to convert the White Plains Gas Field, a depleted natural gas reservoir located in an undeveloped, rural area in the southern part of Hopkins County, Kentucky, to natural gas storage. OGS asserts that the project will have a total storage capacity of approximately 13.3 billion cubic feet (Bcf), comprising approximately 5 Bcf

of working gas and 8.3 Bcf of cushion gas. OGS states that it will be capable of delivering and injecting natural gas at the rate of approximately 100 million standard cubic feet per day (MMscf/d). OGS also proposes to construct a compressor station, an 8.4-mile, 16-inch diameter storage field header segment[1] and a 13.4-mile, 24-inch diameter pipeline segment[2] to deliver natural gas volumes to and from the storage facility. OGS notes that, to the extent possible, the design of the pipeline facilities will follow existing pipeline right-of-ways in order to minimize potential impacts to the environment, landowners and the surrounding community.[3]

5. OGS states that the project will initially interconnect with ANR near Rabbit Ridge, Kentucky. OGS proposes to construct a bi-directional meter station and associated electronic flow measurement equipment at the interconnection with ANR. OGS also proposes to install ten (10) new horizontal injection/withdrawal wells on three new well pads at the White Plains Gas Field: (i) Well Pad 1 will contain five (5) wells, (ii) Well Pad 2 will contain three (3) wells, and (iii) Well Pad 3 will contain two (2) wells. OGS states that each of the wells will be drilled pursuant to and consistent with permits issued by the Kentucky Environmental and Public Protection Council, Division of Oil and Gas Conservation. OGS notes that it owns and maintains 18 unplugged gas wells within the storage area which will be tested for possible use as monitoring wells for the project.

6. Furthermore, as noted, OGS proposes to construct a compressor station comprising three internal combustion reciprocating engine-driven compressors with a

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[1] OGS states that the construction of the 8.6-mile, 16-inch diameter field header pipeline will connect the three well pads in the White Plains Gas Field to the compressor station, beginning at Well Pad 1 in the eastern part of the White Plains Gas Field, then extending westward to Well Pad 2 and Well Pad 3 before terminating at the compressor station.

[2] OGS states that the construction of the 13.4-mile, 24-inch diameter pipeline will extend westward from the compressor station to an interconnection with the existing ANR Pipeline Company (ANR) system near Rabbit Ridge, Kentucky.

[3] OGS is currently evaluating the potential for future development of additional depleted natural gas reservoirs in the vicinity of the White Plains Gas Field. OGS states that it has incorporated certain design features into the project which could facilitate future storage development, including the centralized compressor station configuration and the 24-inch diameter pipeline segment, which will extend from the compressor station to the ANR interconnection. OGS asserts that it would seek the appropriate authorization from the Commission and other federal, state and local agencies for any future activities associated with potential expansions.

total rating of 5,400 horsepower (hp), and related facilities. OGS states that the compressor station will be constructed on a 17.7-acre parcel located approximately four miles west of the White Plains Gas Field and housed in a single fully enclosed building, containing insulation materials and systems to attenuate any noise generated by the engines and compressors. OGS states that the compressor station site will also include a glycol gas contractor dehydration facility and glycol regenerator in order to remove water from the natural gas withdrawn from storage prior to delivering it ANR.[4]

A. Rates and Services

7. OGS proposes to provide firm and interruptible open-access storage service at market-based rates. Specifically, OGS proposes to offer firm storage service (Rate Schedule FSS), interruptible storage service (Rate Schedule ISS), no-notice service (Rate Schedule NNSS), interruptible park service (Rate Schedule IPS), and interruptible loan service (Rate Schedule ILS). In support of its request, OGS presents a market power analysis in Exhibit I to its application that concludes that OGS will lack market power with respect to the services that it provides.

8. OGS believes that the project will help satisfy the growing demand for natural gas storage in the United States. Initially, OGS states that the project will provide access and storage capabilities to shippers of natural gas in northern Kentucky, Indiana, Illinois, and Ohio, and to customers on the existing ANR mainline. However, OGS believes that the project also has the potential to benefit future pipeline projects designed to transport natural gas produced in the Rocky Mountains to markets in the midwest and mid-Atlantic areas.

9. Although it has not executed any precedent agreements to date, OGS states that it has engaged in discussion with several potential customers which have expressed interest in the project. Based upon these discussions, OGS asserts that there is sufficient market demand for the 5 Bcf of working gas capacity which will be provided by the converted White Plains Gas Field. OGS plans to hold an open season for the project during the second quarter of 2009.

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[4] OGS states that two non-jurisdictional facilities (certain electrical power and water supply facilities) will be required to support the construction and operation of the project. Since no definitive routes have been established for these non-jurisdictional facilities at this time, OGS has presented illustrative routes designed to be representative of the final alignment chosen by the non-jurisdictional entities (Kentucky Utilities Company and South Hopkins Water District) which will construct these facilities in Resource Report 1 in its application. The non-jurisdictional facilities are discussed in greater detail in Section 1.8 of Resource Report 1.

B. Requests for Waivers

10. OGS proposes to charge market-based rates, and OGS requests waiver of certain of the Commission's filing, accounting, and reporting requirements applicable to cost-based rate proposals, which OGS states the Commission previously found inapplicable to storage providers that are granted market-based rate authority. These regulations include: (1) sections 157.6(b)(8), 157.20(c)(3), and 157.14 of the Commission's regulations which require the submission of Exhibits K, L, N, and O; (2) section 157.14(a)(10) of the Commission's regulations which requires the submission of gas supply data; (3) the accounting and reporting requirements of Part 201 and sections 260.1, 260.2, 260.3, and 260.300 (relating to the cost-of-service rate structure, i.e., Form 2 and 2A); (4) section 284.7(d)-(e) (segmentation and reservation charge); (5) section 284.10 (cost-based rate design methodology); and (6) any other waivers necessary and appropriate for the authorizations requested herein.

Notice, Interventions, and Comments

11. Notice of OGS's application was published in the *Federal Register* on June 13, 2008 (73 Fed. Reg. 33,809). No protests, motions to intervene, or adverse comments were filed.

Discussion

12. Since the proposed facilities will be used for the storage of natural gas in interstate commerce subject to the jurisdiction of the Commission, the construction and operation of these facilities is subject to the requirements of section 7 of the NGA.

A. Certificate Policy Statement

13. The Commission's September 15, 1999 statement of policy on the Certification of New Interstate Natural Gas Pipeline Facilities provides guidance as to how it will evaluate proposals for certificating new construction.[5] 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

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[5] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order clarifying policy*, 90 FERC ¶ 61,128, *order clarifying policy*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, and the avoidance of the unnecessary exercise of eminent domain or other disruptions of the environment.

14. 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, existing pipelines in the market and their 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, we 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 we proceed to complete the environmental analysis where other interests are considered.

15. As stated, the threshold requirement is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. OGS is a new entrant in the natural gas storage market and has no existing customers. Therefore, there will be no subsidization. Moreover, under its market-based rate proposal, OGS assumes the economic risks associated with the costs of the project's facilities to the extent that any capacity is unsubscribed. Thus, the Commission finds that OGS has satisfied the threshold requirement of the Certificate Policy Statement.

16. Further, the project should not have any adverse impact on existing storage providers or their customers since, as discussed below, the proposed project will be located in a competitive market and will serve demand in a region that is experiencing growth in natural gas usage. The proposal will also enhance storage options available to pipelines and their customers and, thus, will increase competitive alternatives. Additionally, no storage company in OGS's market area has protested OGS's application.

17. In addition, the project should not have any adverse impact on landowners or surrounding community. OGS states that it has endeavored to include landowners, relevant resource agencies, and other interested parties in the early planning stages of the project. OGS held a publicly-advertised open house meeting at the Hopkins County Economic Development Office in Madisonville, Kentucky, on January 8, 2008. Further, OGS states that it has agreed to minor route modifications at the request of landowners. OGS has also acquired more than 80 percent of the storage property rights necessary to develop the White Plains Gas Field, more than 80 percent of the property rights for the pipeline right-of-way, and is currently negotiating for the property rights for the compressor station site. For these reasons, we find that any adverse impacts on landowners and communities will be minimal.

18. The Commission concludes that the project will provide customers access to additional high-deliverability storage capacity. Based on the benefits the project will provide to the market and the lack of any identified adverse effects on existing customers, other pipelines, landowners, or communities, we find, consistent with the Policy Statement and section 7 of the NGA that the public convenience and necessity requires approval of the project, subject to the conditions discussed below.

B. Market-Based Rates

19. Under the Alternative Rate Policy Statement,[6] the Commission's framework for evaluating requests for market-based rates has two principal purposes: (1) to determine whether the applicant can withhold or restrict services and, as a result, increase price by a significant amount for a significant period of time, and (2) to determine whether the applicant can discriminate unduly in price or terms and conditions. To find that an applicant cannot withhold or restrict services, significantly increase prices over an extended period, or unduly discriminate, the Commission must find either that there is a lack of market power[7] because customers have good alternatives,[8] or that the applicant or the Commission can mitigate the market power with specified conditions. The Commission's analysis of whether an applicant has the ability to exercise market power includes three major steps: (1) definition of the relevant markets; (2) measurement of a firm's market share and market concentration; and (3) evaluation of other relevant factors.

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[6] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom., Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998); *Rate Regulation of Certain Natural Gas Storage Facilities,* Order No. 678, FERC Stats. & Regs. ¶ 31,220 (2006), Order No. 678-A, *order on clarification and reh'g*, 117 FERC ¶ 61,190 (2006).

[7] Market power is defined in the Alternative Rate Policy Statement as the ability to profitably maintain prices above competitive levels for a significant period of time. 74 FERC ¶ 61,076, at 61,230.

[8] A good alternative is an alternative that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for an applicant's service. *Id.* at 61,231.

20. OGS's market power analysis[9] identifies the relevant product market as market-area storage services, and identifies the relevant geographic market as the contiguous states of Kentucky, Indiana, Illinois, and Ohio. OGS notes that there are numerous storage fields in Kentucky, Indiana and Illinois, as well as more fields downstream along the pipeline corridor in Ohio. OGS states that while it plans initially to connect with ANR and later with Texas Gas Transmission Corporation, it has the potential to interconnect with several other nearby interstate pipelines.[10] The four-state geographic market used in OGS's analysis contains 20 other independent alternative sellers of storage services.

21. OGS's market power analysis utilizes two measures of natural gas storage capacity to demonstrate its market share and the concentration of the relevant market: working gas capacity and peak day deliverability. OGS's analysis shows a Herfindahl Hirschman Index (HHI)[11] of market concentration for working gas capacity of 1,493, with OGS's market share being 3.33 percent, and an HHI for peak day deliverability of 1330.98, with OGS's market share being 10.45 percent. These HHIs are significantly below the 1,800 level cited in the Alternative Ratemaking Policy Statement, indicating a level of concentration in the defined market that would require less scrutiny into whether the applicant, acting alone or in concert with other providers, would be able to exercise market power. In addition, OGS's relatively small market shares of both total working gas capacity and peak day deliverability in its defined market will not enable OGS to exert market power acting alone in the relevant market area.

22. OGS also asserts that other factors would limit its ability to exercise market power. OGS will be a stand-alone storage provider connected to pipelines that also provide competing storage services. Also, OGS states that several established and prospective competing storage operators have announced plans[12] to add an additional 55 Bcf of working gas capacity and 745,000 Mcf per day of maximum daily withdrawal

[9] OGS's analysis evaluates the proposed development of the White Plains Gas Field as well as additional capacity that may be developed in the future.

[10] OGS Application at 2; OGS Market Power Analysis at 5 and 6.

[11] An HHI is calculated by summing the squares of each storage seller's market share. The Alternative Rate Policy Statement specifies that the HHI is to be used as an indicator of the level of scrutiny to be given to the applicant. An HHI above 1,800 results in the applicant being given closer scrutiny because the HHI indicates that the market is more concentrated and the applicant may have significant market power. *Alternative Rate Policy Statement* at 61,235.

[12] OGS Market Power Analysis at 10.

capacity in the defined market area within the next few years. Finally, OGS maintains that there will be substantial competition among storage providers to meet growing demands and changing gas-acquisition strategies in the cost-based regulatory environment of its relevant market.

23. In prior orders, we have approved requests to charge market-based rates for storage services based on a finding that a proposed project would not be able to exercise market power due to its small size, its anticipated small share of the market, and the existence of other competitors.[13] We find here that OGS's proposed market definition properly identifies good alternatives. Within the relevant market, OGS's prospective market shares are low and the market's concentration is below the threshold for closer scrutiny. Accordingly, we conclude that OGS will lack significant market power. Further, OGS's proposal for market-based rates is unopposed. For these reasons, we will approve OGS's request to charge market-based rates for its services.

24. In addition to other reporting requirements imposed herein, OGS must notify the Commission if future changes in circumstances significantly affect its present market power status. Thus, our approval of market-based rates is subject to reexamination in the event that: (a) OGS seeks to add storage capacity beyond the capacity authorized in this proceeding; (b) an affiliate increases storage capacity; (c) an affiliate links storage facilities to OGS; or (d) OGS, or an affiliate, acquires an interest in, or is acquired by, an interstate pipeline connected to OGS. Since these circumstances could affect its market power status, OGS shall notify the Commission within 10 days of acquiring knowledge of any such changes. The notification shall include a detailed description of the new facilities and their relationship to OGS.[14] The Commission also reserves the right to require such an analysis at any intervening time.[15]

C. Waivers of Filing, Reporting, and Accounting Requirements

25. OGS is requesting authority to charge market-based rates and has no pre-existing facilities. OGS requests that the Commission waive sections 157.6(b)(8) and 157.20(c)(3) of the Commission's regulations to file cost-based data,[16] as well as the

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[13] *See, e.g., Egan Hub Partners, L.P.*, 95 FERC ¶ 61,395 (2001); *Moss Bluff Hub Partners, L.P.*, 80 FERC ¶ 61,181 (1997).

[14] *See Copiah County Storage Co.*, 99 FERC ¶ 61,316 (2002); *Egan Hub*, 99 FERC ¶ 61,269 (2002).

[15] *See Liberty Gas Storage LLC*, 113 FERC ¶ 61,247, at P 51 (2005) and *Rendezvous Gas Services, L.L.C.*, 112 FERC ¶ 61,141, at P 40 (2005).

[16] *See* 18 C.F.R. §§ 157.6(b)(8) and 157.20(c)(3) (2008).

filing requirements of section 157.14(a)(13), (14), (16), and (17), which requires submission of Exhibits K (Cost of Facilities), Exhibit L (Financing), Exhibit N (Revenues, Expenses, and Income), and Exhibit O (Depreciation and Depletion), since these exhibits also support cost-based rate authority.[17] For the same reasons, OGS requests waiver of the accounting and annual reporting requirements under Part 201 and sections 260.1, 260.2, and 260.3 of the Commission's regulations. Similarly, OGS requests waiver of the requirement for reservation charges and the straight fixed-variable rate design set forth in sections 284.7(d)-(e) and 284.10, as being inapplicable to market-based rate design. Finally, OGS requests waiver of the filing requirement of section 157.14(a)(10) to submit total gas supply data (Exhibit H), as inapplicable to natural gas storage operations.

26. The cost-related information, required by the regulations listed above, is not relevant in light of our approval of market-based rates for OGS's storage services. Thus, consistent with our findings in previous orders,[18] the Commission will grant OGS's request for waivers of the regulations requiring the filing of cost-based information, reservation charges, and the use of a straight fixed-variable rate design. We will also grant a waiver of section 157.14(a)(10), requiring an applicant to submit gas supply data, which does not pertain to natural gas storage service. There is also no ongoing regulatory need to have cost-based financial statements prepared in accordance with the Commission's Uniform System of Account (USofA). Accordingly, the Commission will grant OGS's request to waive accounting requirements, as provided in Part 201, Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act. In addition, the Commission will grant OGS's request to waive reporting requirements, as mandated in section 260.2, FERC Form No. 2-A, Annual Report for Nonmajor Natural Gas Companies (Form 2-A), and section 260.300, FERC Form No. 3-Q, Quarterly Financial Report of Electric Utilities, Licensees, and Natural Gas Companies, but we note that such waivers do not extend to the FERC's annual charge assessment (ACA).[19] Therefore, OGS is required to file the Gas Account-Natural Gas Schedule currently at page 520 of Form No. 2-A, reporting the gas volume information which is the basis for imposing an ACA charge.[20] In addition, the Commission also requires OGS to maintain records to separately identify the original cost

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[17] *See* 18 C.F.R. § 157.14(a)(13), (14), (16), and (17) (2008).

[18] *See, e.g., Port Barre Investments, L.L.C.*, 116 FERC ¶ 61,052, at P 33-34 (2006); *Liberty Gas Storage, LLC*, 113 FERC ¶ 61,247, at P 54-55 (2005).

[19] *See BGS Kimball Gas Storage, LLC*, 117 FERC ¶ 61,122, at P 49 (2006).

[20] *Id.; Unocal Windy Hill Gas Storage LLC*, 115 FERC ¶ 61,218, at P 38 (2006) (*Windy Hill Certificate Order*).

and related depreciation on its storage gas facilities should the Commission require OGS to produce these reports in the future.

D. Exemption from Transmission Provider Standards of Conduct

27. OGS requests that the Commission explicitly confirm that OGS meets the requirements for the independent storage provider exemption set forth in section 358.3(a)(3) of the Commission's regulations and, therefore, is exempt from the transmission provider Standards of Conduct promulgated in Order No. 2004.[21] Under section 358.3(a)(3), transmission provider status and the obligations of the Standards of Conduct do not attach to a "natural gas storage provider authorized to charge market-based rates that is not interconnected with the jurisdictional facilities of any affiliated interstate natural gas pipeline, has no exclusive franchise area, no captive ratepayers and no market power."[22] The Commission clarifies that OGS is exempt from the transmission provider Standards of Conduct since it has no interconnections with any affiliated pipelines, no captive ratepayers, no exclusive franchise area, and no market power.

E. Tariff Issues

28. OGS proposes to offer firm (including no-notice) and interruptible storage services; an interruptible park service; and an interruptible loan service on an open-access basis under the terms and conditions set forth in the pro forma tariff attached as Exhibit P to its application. As discussed below, we find that OGS's proposed tariff generally complies with Part 284 of the regulations, with the exceptions further detailed herein to which OGS shall be responsive when it files actual tariff sheets.

1. Requested Waivers of Tariff Requirements

29. OGS requests waivers of certain tariff requirements, which are granted consistent with the following discussions.

a. Segmentation

30. Section 284.7(d) of the Commission's regulations provides that, to the extent operationally feasible, an interstate pipeline must permit a shipper to make use of the firm capacity for which the shipper has contracted by segmenting that capacity into separate parts for the shipper's own use, or for the purpose of releasing that capacity to

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[21] *Standards of Conduct for Transmission Providers, FERC Statutes and Regulations* ¶ 31,155 (2003).

[22] 18 C.F.R. § 358.3(a)(3) (2008).

replacement shippers. OGS requests a waiver of the segmentation requirement in section 284.7(d), contending that segmentation is operationally infeasible because its system consists of a single storage facility with one interconnection to the interstate grid. OGS also notes that it will not perform stand-alone transportation service at the Kentucky Energy Hub project storage facility.

31. In *Clear Creek Gas Storage Company,*[23] we found that the requirements of section 284.7(d) do not apply to pipelines engaged solely in natural gas storage and which do not provide stand-alone transportation services. OGS meets the requirements in *Clear Creek*. Thus, we hold that the requirements of section 284.7(d) do not apply to OGS. Other tariff provisions related to segmentation, such as the allocation of primary point rights in segmented releases and within-the-path scheduling, also do not apply to OGS.

b. Acquisition of Off-System Capacity and Waiver of Shipper Must Have Title Policy

32. OGS requests a generic waiver of the "shipper must hold title" policy for any off-system interstate transportation capacity it may need to acquire in order to provide storage services to shippers with activities in the four-state region covered by its market power analysis, but which do not control capacity on ANR. OGS states that such waiver will allow OGS to avoid having to take title to the gas to be moved to and from the project storage facility by means of that capacity. OGS also states that in order to address the generic waiver requirement, it has included in General Terms and Conditions (GT&C) section 30 of its tariff an affirmative statement that OGS will only transport gas for others using off-system capacity pursuant to its open-access tariff and subject to rates approved by the Commission.

33. GT&C section 30 of OGS's pro forma tariff provides:

> OGS may, from time to time, acquire transportation and/or storage capacity on a third-party pipeline system. OGS will only provide transportation and storage services for others using such capacity pursuant to its open access FERC Gas Tariff subject to its rates approved by the Commission, and the "shipper must hold title" policy is waived to permit such use.

34. This language implements the Commission's policy with respect to pipelines' acquisition of off-system capacity. In *Texas Eastern Transmission Corporation (TETCO),*[24] the Commission found that pipelines no longer need to obtain prior approval

[23] 96 FERC ¶ 61,071 (2001) (*Clear Creek)*.

[24] 93 FERC ¶ 61,273 (2000), *reh'g denied*, 94 FERC ¶ 61,139 (2001).

to acquire capacity on another pipeline, provided the acquiring pipeline has filed tariff language specifying that it will only transport for others using off-system capacity pursuant to its existing tariff and rates. OGS's proposed tariff language is consistent with the requirements set forth in *TETCO* and authorizations granted other storage companies authorized to charge market-based rates.[25]

35. Therefore, we accept OGS's proposed tariff language and grant waiver of the shipper must have title policy, with the following clarifications. Because OGS has proposed only to offer firm, interruptible and no-notice storage services, an interruptible park service, and an interruptible loan service, and has proposed no rates or tariff provisions relating to any other transportation services other than such storage, park, and loan services, OGS may only use capacity obtained on other pipelines pursuant to the *TETCO* waiver in order to move gas into and out of storage. That is, OGS may not use its header facilities and capacity on other pipelines to transport gas which will not physically or contractually enter its storage facility unless and until it has received Commission authorization to provide such transportation services. Furthermore, OGS's authorized use of the *TETCO* waiver to provide storage service shall be limited to the geographic area covered by its market study.

36. To ensure that OGS uses acquired off-system capacity in a manner consistent with its market-based rate authority and tariff provisions, and to satisfy our responsibility to monitor and prevent the exercise of market power, we direct OGS, once it becomes operational, to make an annual informational filing regarding its provision of service using off-system capacity, as detailed below.[26]

37. Within 30 days after its first full year of operation, and every year thereafter, OGS is directed to file, for each acquisition of off-system capacity:

a. the name of the off-system provider;

b. the type, level, term and rate of service contracted for by OGS;

c. a description of the geographic location – boundaries, receipt and delivery points, and segments comprising the capacity;

d. the operational purpose(s) for which the capacity is utilized;

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[25] *See, e.g., SG Resources Mississippi, L.L.C.*, 101 FERC ¶ 61,029, at P 30-33 (2002).

[26] *See, e.g., Starks Gas Storage L.L.C.*, 111 FERC ¶ 61,105, at P 54-57 (2005).

e. a description of how the capacity is associated with specific transactions involving customers of OGS; and

f. an identification of total volumes, by OGS's rate schedule and customer, that OGS has nominated on each off-system provider during the reporting period.

c. Implementation of NAESB Standards

38. The Commission has adopted in Part 284 of its regulations various standards for conducting business practices and electronic communication with interstate pipelines as promulgated by the North American Energy Standards Board (NAESB).[27] These standards govern nominations, allocations, balancing measurement, invoicing, capacity release, and mechanisms for electronic communication between pipelines and those with whom they do business. OGS states that it drafted its pro forma tariff with the intent to comply with the requirements of Part 284 of the Commission's regulations and the NAESB Standards,[28] to the extent that they apply to natural gas companies that are exclusively engaged in the operation of natural gas storage facilities.

39. OGS also requests a limited waiver in the form of an extension of time to comply with section 284.12(a)(1)(v) of the Commission's regulations which requires interstate pipelines to comply with Electronic Data Interchange/Electronic Delivery Mechanism (EDI/EDM) related standards so as to allow OGS to postpone implementation of such standards until 90 days following receipt by OGS of a request to send information via EDI/EDM.[29] OGS states that it expects initially to have a limited number of customers, and does not anticipate receiving a request for EDI/EDM in the foreseeable future. Consistent with Commission precedent, we will grant OGS's request for limited waiver, but will require OGS to implement those standards within 90 days following the receipt of such a request.

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[27] NAESB was formerly called the Gas Industry Standards Board (GISB).

[28] GT&C section 23 incorporates by reference Version 1.7 of the NAESB standards.

[29] *Citing* similar waivers granted in *Windy Hill Certificate Order, 115* FERC ¶ 61,218 (2006)*; MoBay Storage Hub, Inc.,* 117 FERC ¶ 61,298 (2006)*; Saltville Gas Storage Co.,* 109 FERC ¶ 61,200 (2004); *Rendezvous Gas Services, L.L.C.*, 112 FERC ¶ 61,141 (2005); *Missouri Interstate Gas, LLC,* 102 FERC ¶ 61,172 (2003).

d. Netting and Trading of Imbalances

40. Section 284.12(b)(2) of the Commission's regulations requires pipelines to establish provisions for netting and trading imbalances and other imbalance management services. OGS states that in Order No. 637-A,[30] the Commission found that it is unnecessary to require pipelines that do not assess penalties for imbalances to offer imbalance management services. OGS requests an exemption from compliance with these requirements, noting that its tariff does not contain imbalance penalties, and that in Order No. 637-A, the Commission found that pipelines not assessing such penalties do not have to offer imbalance services. In the alternative, OGS requests that the Commission confirm that no such exemption is needed because these requirements are inapplicable to OGS. OGS states that if it seeks to impose imbalance penalties in the future, it will comply with the Commission's policies and regulations regarding imbalance management services.

41. Since OGS is not proposing to assess imbalance penalties, the Commission finds that it qualifies for the requested exemption.[31] Nevertheless, if it seeks to implement imbalance penalty provisions in the future, OGS must comply with § 284.12(b)(2) of the Commission's regulations.

2. General Terms and Conditions

a. Right of First Refusal (ROFR)

42. OGS requests authorization to negotiate a contractual right of first refusal (ROFR) with its customers on a not unduly discriminatory basis, referencing section 8 of Rate Schedule FSS.[32] OGS maintains that since the regulatory ROFR applies only to customers paying the maximum tariff rate and it will have no maximum tariff rate, the

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[30] *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,091, *order on reh'g*, Order No. 637-A 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,099, *order on reh'g*, (Order No. 637-A), Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part*, *Interstate Natural Gas Assoc. of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, *American Gas Assoc. v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

[31] *See Pine Prairie Energy Center, LLC*, 109 FERC ¶ 61,215, at P 47 (2004) (*Pine Prairie*).

[32] The Commission notes that OGS's authority to negotiate a contractual ROFR would also apply to FSS customers receiving no-notice service by virtue of section 2 of Rate Schedule NNSS, which combines the service rights of both rate schedules.

regulatory ROFR does not apply. Furthermore, OGS maintains that as a new market entrant without market power and captive customers, none of the Commission's policy reasons for a regulatory ROFR apply.

43. The Commission has previously approved tariff language that provides for the negotiation of a contractual ROFR on a not unduly discriminatory basis where a regulatory ROFR would not otherwise apply.[33] Since the Commission is authorizing OGS to charge market-based rates in this order, the regulatory ROFR is not applicable. The Commission grants OGS's request to provide for negotiation of a contractual ROFR on a not unduly discriminatory basis.

b. <u>Gas Retention Penalties</u>

44. OGS proposes to retain a customer's gas improperly left in storage in two circumstances: (1) when gas is not withdrawn from storage by a firm or interruptible storage customer by the expiration of the customer's service agreement; and (2) when gas is not withdrawn from storage by an interruptible storage or park customer following notice by OGS that it is going to interrupt the customer's service and directing the customer to remove its gas.

45. Specifically, under section 9 (Expiration of Term) of Rate Schedules FSS and ISS, OGS proposes to take title to the gas remaining in the system when the contract ends and to credit the firm shipper whose contract expired with 80 percent of the price realized from OGS's sale of the gas by auction under the provisions of GT&C section 32 (Disposition of Retained Quantities). Thus, the shipper that left gas on the system will be assessed a penalty equal to 20 percent of the auction sale price. OGS will credit customers whose gas was not retained and sold during the applicable periods the net proceeds from such sales, i.e., 20 percent of the sale proceeds, less any other costs incurred by OGS in connection with the retention and sale of the gas.

46. Furthermore, the tariff [34] provides that when gas is not withdrawn from storage by an interruptible storage or park customer in accordance with a notice by OGS that it is going to interrupt the customer's service to satisfy obligations to firm storage customers and directing the customer to remove the gas, OGS will take title to and auction the gas, and credit customers whose gas was not retained and sold during the applicable periods with 100 percent of the net proceeds of the sale (i.e., a 100 percent penalty).

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[33] *See, e.g., Egan Hub Storage, LLC*, 116 FERC ¶ 61,174 (2006).

[34] Section 2.6 of Rate Schedule ISS and sections 2.3 and 2.4 of Rate Schedule IPS.

47. We will approve OGS's gas retention proposals subject to further modification. The Commission has accepted similar gas retention proposals by other storage providers, stating that the retention of gas left in storage at the end of the withdrawal period is an operationally-justified deterrent to shipper behavior that could threaten the system or degrade service to firm shippers.[35] If capacity exists, we would expect that a customer would be able to contract for interruptible service if needed. However, if capacity does not exist, OGS would be unable to provide such service. As for the level of the penalty, OGS's proposed penalties are consistent with what the Commission has approved in other proceedings.[36]

48. However, we will require one modification of OGS's gas retention and sale proposal. Section 9.2 of Rate Schedules FSS and ISS provides that "payment for the remaining quantities of Gas shall appear as a credit on the last statement rendered by OGS to Customer." Thus, it would appear that the credit could be used to offset any charges in the statement. In *Starks Gas Storage, LLC*,[37] the Commission rejected a proposal that would have permitted Starks to offset amounts owed by the shippers against the positive balance in the shipper's gas inventory account held by Starks, but permitted Starks to file tariff language to assert a lien or interest that is consistent with state law or the Uniform Commercial Code. Consistent with *Starks* and with tariff proposals approved in other proceedings,[38] OGS is directed to add language to its FSS and ISS form of service agreements to satisfy this requirement.

c. Creditworthiness

49. OGS's creditworthiness proposals in GT&C sections 4 and 31 are generally consistent with the Commission's 2005 Policy Statement on Creditworthiness[39] and with

[35] *See Unocal Windy Hill Gas Storage LLC*, 119 FERC ¶ 61,291, at P 51-56 (2007) (*Windy Hill Certificate Amendment).*

[36] *See id.* at P 54-56; *Pine Prairie* at P 46; *Blue Lake Gas Storage Co*., 96 FERC ¶ 61,164 at 61,728-29 (2001).

[37] 111 FERC ¶ 61,105 (2005).

[38] *See, e.g*., *MoBay Storage Hub, LLC,* 117 FERC ¶ 61,298, at P 54 (2006); *Windy Hill Certificate Amendment,* 119 FERC ¶ 61,291 at P 57.

[39] *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,191 (2005).

Commission precedent. However, certain provisions require revision, as discussed further.

i. Level of Required Collateral

50. GT&C section 31.9(d) describes the collateral requirements for OGS's non-creditworthy firm shippers, distinguishing between shippers whose service begins on facilities that are already in operation (non-first-day shippers), versus shippers whose use of OGS's initial or expansion facilities begins on the day such facilities are placed in service (first-day shippers). The collateral requirements for non-first-day shippers, up to three months of reservation charges for firm shippers, are consistent with Commission policy. However, the tariff would require higher collateral requirements for first-day shippers, up to 12 months of reservation charges.

51. Since Order Nos. 436 and 636, the Commission's general policy to ensure that open-access service is reasonably available has been to permit pipelines to require shippers that fail to meet the pipeline's creditworthiness requirements for pipeline service to put up collateral equal to three months' worth of reservation charges.[40] In addition, the Commission recognizes that pipelines building new or expanded facilities may require higher collateral requirements from initial shippers in order to satisfy lending arrangements,[41] and that such higher requirements are needed to protect the pipeline's financial commitment to a project. The Commission, however, has found that collateral requirements between the pipeline and such initial shippers should be contained in precedent or other agreements between the pipeline and those shippers, and not in the tariff.[42] The collateral required in the precedent agreements can continue after the pipeline project is in service, but in the absence of any specified collateral requirement in the precedent agreements, the pipeline's standard creditworthiness provisions in its tariff would apply once the facilities go into service.[43]

52. Accordingly, OGS must remove from its proposed tariff any provisions requiring more than the value of three months of reservation charges as collateral for non-creditworthy shippers. Such rejection, however, is without prejudice to OGS entering into precedent agreements with first-day shippers which contain a higher collateral requirement than three months.

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[40] *Id*. P 11.

[41] *Id*.

[42] *Id*. P 18.

[43] *Id*. P 19.

ii. Definition of a Material Adverse Change

53. Under GT&C section 31.9(d), OGS will determine on a daily basis the market value of gas loaned to non-creditworthy shippers. If OGS concludes that the financial assurances required for such redetermined market value exceed by 10 percent or more the level of previously required financial assurances, then the shipper must provide the difference between the required financial assurances within five business days after OGS's written notice. The Commission has approved such five-day deadlines for shippers to provide additional financial assurances for loaned gas, finding that when a storage provider lends gas and gas prices subsequently increase, the storage provider's financial exposure and risk can increase significantly between the time a non-creditworthy shipper is notified that it needs to provide additional collateral and the date by which the additional collateral must be posted.[44] This timeline for providing additional collateral for loaned gas is distinguishable from the Commission's generally approved timeline for non-creditworthy shippers to provide financial assurances in order to avoid suspension or termination of service, as described in GT&C section 31.5 of OGS's tariff. Such timeline requires that non-creditworthy shippers must, within five days after written notification from OGS, prepay for one month of service, and within 30 days, satisfy the financial assurance requirements described in section 31.9.

54. Under GT&C section 31.3, a Material Adverse Change that could lead to a customer's service being suspended or terminated is described in part as "the failure of Customer at any time . . . to maintain or reinstate one of the forms of Financial Assurances specified in section 31.9 within five (5) Business Days after written notice from OGS." The quoted language, while apparently intended to reference the timeline for providing additional collateral for loaned gas, is overly broad because section 31.9 specifies Financial Assurances that are subject to the 30-day timeline as well as Financial Assurances for loaned gas subject to the five-day timeline. Therefore, OGS is directed to clarify section 31.3 to indicate that the five-day deadline referred to therein pertains to additional financial assurances for loaned gas described in section 31.9.

d. Use of Index Pricing

55. Under GT&C section 6.5(h), OGS will use index pricing to calculate penalties for customer violations of an action alert or operational flow order (OFO). Specifically, the action alert penalty will equal 125 percent or, in the case of an OFO, 300 percent of the Platts Gas Daily Midpoint posting for the ANR/La. point for the day on which the deviation from the action alert occurred. These provisions satisfy the criteria that the

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[44] *Bluewater Gas Storage, LLC,* 117 FERC ¶ 61,351 (2006).

Commission has established for price indices in jurisdictional tariffs.[45] Accordingly, the Commission will accept OGS's proposal in this regard.

e. Open Seasons

56. OGS proposes to have the authority to decide whether to sell expansion capacity via competitive bidding in an open season, or through a first-come, first-served posting process. GT&C section 3.1(a) states:

> Upon the availability of new storage capacity resulting from an expansion of OGS's facilities, OGS shall sell such capacity to prospective Customers either via the (i) open season procedures described below in Sections 3.1(b)-(f), or (ii) via the first-come, first-served procedures described in Section 3.1(g) below, with the selection of the procedures being at OGS's sole discretion.

57. While it is general Commission policy to require interstate gas pipelines to conduct open seasons for expansion capacity, the Commission has accepted tariff provisions for independent storage providers that allow the storage provider to determine whether to hold an open season or to sell firm expansion capacity on a first-come, first-served basis to a customer offering an acceptable rate.[46] OGS's proposal is consistent with Commission precedent regarding the marketing and award of capacity by an independent storage company authorized to charge market-based rates. Consistent with those orders, the Commission will accept OGS's similar proposal. We note, however, that this provision would not apply to the initial capacity created by the facilities certificated in this proceeding.

f. Liability for Loss or Damage Due to Interruption of Service

58. Proposed GT&C section 6.4 provides that "OGS shall not be liable for any loss or damage to any person or property caused, in whole or in part, by any interruption of service, except to the extent caused solely by OGS's gross negligence or willful misconduct." OGS's proposed gross negligence standard is at odds with Commission policy that a simple negligence standard gives service providers a powerful incentive to

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[45] *See Price Discovery in Natural Gas and Elec. Mkts.*, 109 FERC ¶ 61,184, at Ordering Paragraph (D) (2004).

[46] *See Windy Hill Certificate Amendment,* 119 FERC ¶ 61,291, at P 73 (2007); *Egan Hub Storage, LLC,* 116 FERC ¶ 61,174, at P 11, 14 (2006) (*Egan Hub*).

operate their systems in a reasonable and prudent manner.[47] Therefore, OGS is directed to remove the gross negligence liability standard proposed in GT&C section 6.4 and replace it with a simple negligence standard.

59. Moreover, OGS is directed to remove the word "solely" from GT&C section 6.4. The Commission has previously required a pipeline to remove the word "solely" from a liability standard because "the inclusion of the word 'solely' in its liability standard would rule out a situation where [the pipeline] and another party are both negligent."[48] As explained, use of the word "solely" to trigger pipeline negligence liability beclouds the issue when the pipeline is charged with negligence. Accordingly, we direct OGS to revise section 6.4 so that OGS may be wholly or partially liable for damages caused in whole or in part by its negligence. Any other references in the tariff to a sole negligence standard should also be revised consistent with this direction.

g. Negotiated Injection and Withdrawal Ratchets

60. Several of OGS's proposed forms of service agreements[49] contain blank spaces which appear intended to enable OGS and its customers to negotiate the ratchets that limit a customer's ability to inject or withdraw its maximum daily quantity under the contract.[50] Although the Commission provides pipelines with flexibility in negotiating individual rate provisions through negotiated rate authority, we have not allowed the negotiation of terms and conditions of service that would result in a customer receiving a different quality of service than that provided to other customers contracting for the same

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[47] *See Guardian Pipeline, LLC*, 101 FERC ¶ 61,107, at P 18 (2002); *Cameron LNG*, 115 FERC ¶ 61,229, at P 37 (2006); *Port Arthur LNG*, 115 FERC ¶ 61,344, at P 37 (2006); *Transcontinental Gas Pipeline Corp*., 96 FERC ¶ 61,352, at 62,324 (2001).

[48] *Petal Gas Storage, L.L.C.*, 124 FERC ¶ 61,082, at P 26 (2008), *citing Koch Gateway Pipeline Co.*, 65 FERC ¶ 61,338, at 62,619 (1993) (*Koch*).

[49] Capacity Release Umbrella Agreement under Rate Schedule FSS (Sheet No. 234), the Form of Service Requests for firm storage service (Sheet No. 181) and interruptible storage service (Sheet No. 183), and Exhibit A to the Form of Service Agreements under Rate Schedules FSS and ISS (Sheet Nos. 204, 205, 217 and 218).

[50] Each injection and withdrawal ratchet is defined by a range of percentages expressing the ratio of the customer's storage balance to the maximum storage capacity under the contract.

service under the pipeline's tariff.[51] Further, the Commission has stated that allowing shippers to negotiate ratchets of a storage service fundamentally changes the nature of the service, such that two parties contracting for the same service may no longer be receiving a service that is equal or even similar in quality.[52] While the Commission has previously allowed storage service providers to offer customers the option of receiving either ratcheted or unratcheted storage service, specific and generally applicable ratchet percentages are required to be stated in the tariff when implemented.[53]

61. Therefore, OGS is directed to revise its tariff to eliminate the ability of OGS to negotiate storage ratchets with its customers. However, consistent with our acceptance of ratchets for other storage service providers, OGS may provide customers with the option of choosing unratcheted storage service, or storage service ratcheted in accordance with percentages stated in actual tariff sheets at the time of filing.

62. Finally, section 8.3 of Rate Schedule FSS (Continuation of Service) as proposed would permit OGS to negotiate terms and conditions of service as well as rates with current capacity holders as part of the ROFR process in the event OGS receives no bids or rejects all bids made during a ROFR open season. For reasons similar to those discussed above, OGS is directed to remove the words "terms and conditions" from section 8.3.

h. <u>Interconnection Requests</u>

63. GT&C section 29.1 provides, in part, that OGS is willing to construct requested interconnect facilities unless it determines that the facilities are not operationally feasible, or would violate environmental or safety laws, right-of-way agreements, or "the facilities are not designed to accommodate a minimum volume of 1,000 MMBtu/day." Section 29.2 provides for OGS to be reimbursed for its costs of constructing the facilities.

64. The Commission's policy regarding interconnections was established in *Panhandle Eastern Pipe Line Corporation*.[54] In *Panhandle*, the Commission stated that a party desiring access to a pipeline could obtain an interconnection if it satisfied several

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[51] Section 284.7(b)(2) of the regulations requires that "an interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must provide each service on a basis that is equal in quality for all gas supplies transported under that service, whether purchased from the pipeline or another seller."

[52] *Golden Triangle Storage Inc.*, 121 FERC ¶ 61,313, at P54 (2007).

[53] *Windy Hill Certificate Amendment*, 119 FERC ¶ 61,291 at P 43-44.

[54] 91 FERC ¶ 61,037 (2000) (*Panhandle*).

conditions described therein.[55] Sections 29.1 and 29.2 appear to be generally consistent with the Panhandle policy except for the requirement that the facilities be designed to accommodate a minimum volume of 1,000 MMBtus per day. The Commission generally does not approve minimum volume tariff provisions for receipt and delivery points because they are contrary to the Commission's open-access policies.[56] Moreover, under sections 284.7(b) and 284.9(b) of the Commission's regulations, the transporter may not discriminate as to the level of volumes transported.

65. We have, however, allowed a pipeline to include a minimum volume interconnection restriction in its tariff where the pipeline was able to show that quantities below the threshold were too small to be metered, and the pipeline was able to provide operational and cost justification for the restriction.[57] OGS has not provided such justification. Therefore, OGS is directed to remove the minimum volume condition from section 29.1 or, in the alternative, provide justification for the limitation.

i. Force Majeure and Reservation Charge Credits

66. Section 17.4 (Nature of Force Majeure) generally describes a force majeure event as "any cause, whether of the kind enumerated herein or otherwise, not reasonably within the control of OGS," followed by illustrative descriptions of such an event. Such descriptions include "maintenance to plant facilities, including machinery, lines of pipe" and "the making of repairs or alterations to pipelines, storage and plant facilities." The Commission has consistently held that interruptions from planned or scheduled maintenance are non-force majeure events.[58] Therefore, OGS is directed to add the words "unscheduled or emergency" before the words "maintenance" and "repairs or alterations" in the quoted language.

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[55] *Id.* at 61,141.

[56] *See, e.g., Petal Gas Storage Co.*, 64 FERC ¶ 61,190, at 62,576 (1993).

[57] *Texas Eastern Transmission Corp.*, 37 FERC ¶ 61,260, at 61,680-81 (1986); *Gulf South Pipeline Co., LP,* 103 FERC ¶ 61,105, at P 13 (2003).

[58] *See, e.g., Natural Gas Pipeline Company of America*, 108 FERC ¶ 61,170 at P 7 (2004); *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074 at P 27-28 (2004) (stating that "scheduled maintenance and repairs are to be treated as non-*force majeure* events." The Commission disagreed with the pipeline's assertion that "non-discretionary but planned events are appropriately included in its definition of *force majeure*"); *Alliance Pipeline, L.P.*, 84 FERC ¶ 61,239, at 62,214 (1998).

67. In addition, we find that the following description in section 17.4 is not consistent with Commission precedent regarding the nature of a force majeure event: "testing (as required by governmental authority or as deemed necessary by OGS for the safe operation of the facilities required to perform the services hereunder)."

68. In *Tarpon Whitetail Gas Storage, LLC*,[59] we required a similar description to be revised, stating that while the Commission has recognized that the actions of an administrative or regulatory agency may support declaration of a force majeure, testing and maintenance are a part of the service provider's duties under a certificate of public convenience and necessity that are not appropriately considered a force majeure event. Therefore, OGS is directed to remove the proposed language regarding testing from section 17.4.

69. Finally, OGS must revise that part of GT&C section 17.3 (Calculation of Credits Against Reservation Charges) stating that OGS will provide reservation charge credits for each day on which a customer's firm service is curtailed such that the customer does not receive at least 98 percent of its scheduled service.[60] The Commission's policy regarding reservation charge adjustments is that when scheduled gas is not delivered due to a non-force majeure or planned maintenance event, there must be a full reservation charge adjustment as to the undelivered amount. This is because the failure was due to the pipeline's conduct and was within its control. OGS's proposal not to provide reservation charge credits when it schedules at least 98 percent of a shipper's nominations in non-force majeure situations does not comply with Commission policy because it requires shippers to bear the risk associated with interruption of service within the pipeline's control.[61] OGS is directed to revise the threshold for triggering reservation charge credits from 98 percent to 100 percent of scheduled service.

Engineering

70. Commission staff completed an engineering analysis of the facility proposed for natural gas storage, including the design capacity of the proposed facility. Based on this analysis, we conclude that the facilities are properly designed to provide 13.3 Bcf of total storage capacity (5 Bcf working gas and 8.3 Bcf cushion gas). Further, we conclude that

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[59] 125 FERC ¶ 61,050 at P 5 (2008).

[60] However, OGS is not required to provide such credits during the first ten days of a force majeure event.

[61] *See, e.g., Rockies Express Pipeline LLC,* 116 FERC ¶ 61,272, at P 63 (2006); *SG Resources Mississippi, L.L.C.,* 122 FERC ¶ 61,180 (2008).

the natural gas facilities proposed by OGS are properly designed to withdraw up to 100 MMcf per day.

71. OGS has applied for a Part 157, Subpart F blanket certificate which is generally applicable to all interstate pipelines. A Part 157, Subpart F blanket certificate accords a natural gas company certain automatic NGA facility and service authorizations and allows it to make several simplified prior notice requests for certain minimal section 7 facility and service authorizations. Because OGS will become an interstate pipeline with the issuance of a certificate to construct and operate the proposed facilities, we will issue the requested Part 157, Subpart F blanket certificate. However, OGS's blanket certificate shall not include automatic authorization to increase storage capacity. This restriction on OGS's Part 157, Subpart F blanket certificate is based on the fact that OGS's storage facility is in the initial stages of development for which future expansion will require reevaluation by the Commission of historical data and new engineering and geological data.[62]

72. OGS also requests a Part 284, Subpart G blanket certificate, in order to provide open-access storage services. A Part 284, Subpart G blanket certificate provides a natural gas pipeline certain automatic NGA section 7 natural gas transportation authorizations for individual customers under the terms of its contract and tariff. Under a Part 284 blanket certificate, OGS will not require individual authorizations to provide storage services to particular customers. OGS filed a pro forma Part 284 tariff to provide open-access storage services. Since a Part 284 blanket certificate is required for OGS to offer these services, we will grant OGS a Part 284, Subpart G blanket certificate, subject to the conditions imposed herein.

Environmental Analysis

73. On January 7, 2008, we issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Kentucky Energy Hub project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting* (NOI). The NOI was mailed to about 300 interested parties including federal, state, and local officials; agency representatives; conservation organizations; Native American groups; local libraries and newspapers; and landowners in the vicinity of the proposed project. No substantive comments were received in response to the NOI.

74. Our staff prepared an environmental assessment (EA) for OGS's proposal. The EA addresses geology and soils, water and wetland resources, vegetation and wildlife, threatened and endangered species, cultural resources, land use, air and noise quality, safety, cumulative impacts, and alternatives. The EA was issued and placed in the record

[62] *See, e.g., Windy Hill Certificate Order*, 115 FERC ¶ 61,218 (2006).

on November 21, 2008. The EA comment period ended on December 22, 2008, and we received one comment.

75. In a letter dated December 3, 2008, the Choctaw Nation of Oklahoma commented on the EA and indicated that "the project is out of our area of interest," but requested to be contacted should construction expose buried archaeological or building materials. The project's Unanticipated Discovery Plan, discussed in the EA, provides for notification of Native American tribes in the event of a discovery.

76. On December 9, 2008, OGS filed the Kentucky State Historic Preservation Office's (SHPO) comments on the second addendum cultural resources survey report in response to environmental recommendation 12 in the EA. The SHPO concurred with the findings and recommendations in the report. Therefore, we have revised environmental condition 12 in Appendix B of this order to reflect this information.

77. Based on the discussion in the EA, we conclude that if constructed and operated in accordance with OGS's application and our staff's recommended mitigation measures, as provided in Appendix B to this order, approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

78. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages 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.[63]

79. For the reasons discussed above, the Commission finds that the OGS's project is required by the public convenience and necessity and that a certificate authorizing the construction and operation of the facilities described in this order and in the application should be issued, subject to the conditions discussed herein and listed in Appendices A and B.

80. The Commission, on its own motion, received and made part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorizations sought herein, and upon consideration of the record,

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

<u>The Commission orders</u>*:*

(A) A certificate of public convenience and necessity is issued to OGS in Docket No. CP08-409-000, authorizing the construction and operation of the described storage facilities, as described more fully in this order and in the application.

(B) A blanket construction certificate is issued to OGS under Subpart F of Part 157 of the Commission's regulations.

(C) A blanket transportation certificate is issued to OGS under Subpart G of Part 284 of the Commission's regulations.

(D) The certificate issued in Ordering Paragraph (A) is conditioned on OGS's compliance with all applicable Commission regulations under the Natural Gas Act, including, but not limited to, the general terms and conditions set forth in Parts 154, 157 and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the regulations, excluding those provisions from which OGS is granted waiver by this order.

(E) Pursuant to section 157.20(b) of the Commission's regulations, the facilities authorized in Ordering Paragraph (A) must be constructed and placed in service within one year of the date of the final order in this proceeding.

(F) OGS's request to charge market-based rates for firm and interruptible storage service and interruptible park and loan service is approved, as discussed in this order.

(G) Waiver is granted of the Commission's regulations that have been deemed inapplicable to storage providers with market-based rates, as discussed in the text of this order.

(H) OGS shall file revised tariff sheets that comply with the requirements contained in the body of this order not less than 60 days prior to the commencement of service.

(I) Within 30 days after its first full year of operation, and every year thereafter, OGS is directed to file an annual informational filing on its provision of service using off-system capacity, as detailed in this order.

(J) The certificate issued in Ordering Paragraph (A) is conditioned upon OGS's compliance with the engineering and environmental conditions set forth in Appendices A and B to this order.

(K) OGS 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 OGS. OGS shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A

Engineering Conditions for OGS's Proposed project

1. Maximum inventory of natural gas stored in the Kentucky Energy Hub field shall not exceed the certificated levels of 13.3 Bcf at 14.73 psia and 60 degrees Fahrenheit, and the maximum shut-in bottom hole storage pressure shall not exceed 675 psia and the minimum shut-in bottom hole pressure shall not be below 350 psia, without prior authorization of the Commission.

2. OGS shall operate the Kentucky Energy Hub in such a manner as to prevent/minimize gas loss or migration. OGS must file an annual inventory verification report and hysteresis curves to account for any potential gas loss.

3. OGS shall file its drilling plan for the well completed in Region III prior to initiation of drilling, with a description of how the fault would be identified, and a contingency plan should the fault be encountered and the steps taken to prevent any potential for gas migration.

4. OGS shall file an annual inventory verification report and hysteresis curves to account for any potential gas loss.

5. OGS shall file a report discussing the final disposition of the eighteen "potential observation wells" as indicated on the Structure Map included in its data response submitted July 3, 2008.

6. OGS shall submit semiannual reports (to coincide with the termination of the injection and withdrawal cycles) containing the following information (volumes shall be stated at 14.73 psia and 60 degrees Fahrenheit, and pressures shall be stated in psia):

(1) The daily volumes of natural gas injected into and withdrawn from the storage reservoir.
(2) The volume of natural gas in the reservoirs at the end of the reporting period.
(3) The maximum daily injection and withdrawal rates experienced during the reporting period. Average working pressure on such maximum days taken at a central measuring point where the total volume injected or withdrawn is measured.
(4) Results of any tracer program by which the leakage of injected gas may be determined. If leakage of gas exists, the report should show the estimated total volume of gas leakage, the volume of recycled gas, and the estimated remaining inventory of gas in the reservoir at the end of the reporting period.

(5) Any surveys of pressures in gas wells, and the results of back-pressure tests conducted during the reporting period.

(6) The latest revised structural and isopach maps showing the surface and bottom hole locations of the wells and the location of the gas-water contact. These maps need not be filed if there is no material change from the maps previously filed.

(7) For the reporting period, a summary of wells drilled, worked over, or recompleted with subsea depth of formation and casing settings. Copies of any new core analyses, back-pressure tests, or well log analyses.

(8) Discussion of current operating problems and conclusions.

(9) Such other data or reports which may aid the Commission in the evaluation of the storage project.

(10) Reports shall continue to be filed semiannually until the storage inventory volume and pressure have reached or closely approximate the maximum permitted in the Commission's Order. Thereafter, the reports shall continue on a semiannual basis for a period of one year.

Appendix B
Environmental Conditions for OGS's Proposed project

1. OGS Gas Storage, Incorporated (OGS) shall follow the construction procedures and mitigation measures described in its application and supplements, including responses to staff data requests, and as identified in the environmental assessment (EA), unless modified by the Commission Order. OGS must:

   a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (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
   d. receive approval in writing from the Director of the Office of Energy projects (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 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**, OGS shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), 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 locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, OGS 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 Commission 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.

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

5. OGS 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, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species will 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 **before construction in or near that area**.

This requirement does not apply to extra workspace allowed by the FERC Upland Erosion Control, Revegetation, and Maintenance Plan, and/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 could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of this Certificate and before construction** begins, OGS shall file an initial Implementation Plan with the Secretary for review and written approval by the Director of OEP. OGS must file revisions to the plan as schedules change. The plan shall identify:

   a. how OGS will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Commission Order;
   b. how OGS 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;
   c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
   d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
   e. the training and instructions OGS will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
   f. the company personnel (if known) and specific portion of OGS's organization having responsibility for compliance;
   g. the procedures (including use of contract penalties) OGS will follow if noncompliance occurs; and
   h. 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. OGS shall file updated status reports prepared by the EI with the Secretary on a **biweekly** basis **until all construction and restoration activities are complete.** 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 the project, 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 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 which may relate to compliance with the requirements of the Commission Order, and the measures taken to satisfy their concerns; and
f. copies of any correspondence received by OGS from other federal, state or local permitting agencies concerning instances of noncompliance, and OGS's response.

8. OGS shall employ at least one environmental inspector. The environmental inspector shall be:

a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Commission Order and other grants, permits, certificates, or authorizing documents;
b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) 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.

9. OGS must receive written authorization from the Director of OEP **before commencing service** from the project. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas of project-related disturbance are proceeding satisfactorily.

10. **Within 30 days of placing the certificated facilities in service**, OGS 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 OGS 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. OGS shall not begin construction activities **until:**

a. the staff completes any necessary consultation with the U.S. Fish and Wildlife Service, if required; and

b. OGS has received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin.

12. OGS shall not begin construction of facilities; or use of all facilities and staging, storage, or temporary work areas and new or to-be improved access roads **until**:

a. OGS files with the Secretary, a cultural resources survey report for the remaining denied access areas, the Colonial Farm Pipe Yard, and any additional or newly identified areas requiring survey, and the Kentucky State Historic Preservation Office's comments on the report; and

b. the Director of OEP reviews and approves all reports and notifies OGS in writing that it may proceed.

All material filed with the Commission 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."**

13. **Prior to construction,** OGS shall file with the Secretary, for review and written approval by the Director of OEP, a horizontal directional-drill (HDD) noise analysis identifying the existing and projected noise levels at each noise-sensitive area (NSA) within 0.5 mile of each HDD entry and exit site. If noise attributable to the HDD is projected to exceed a day-night sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at any NSA, provide a mitigation plan to reduce projected noise levels at the NSAs. During drilling operations, OGS shall monitor noise and make all

reasonable efforts to restrict noise attributable to drilling operations to no more than an L_{dn} of 55 dBA at the nearby NSAs.

14. OGS shall file a noise survey with the Secretary **no later than 60 days** after placing the OGS Compressor Station in service. If the noise attributable to the operation of all of the equipment at the OGS Compressor Station at full load exceeds an L_{dn} of 55 dBA at any nearby NSAs, OGS shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. OGS shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.