UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Windy Hill Gas Storage, LLC Docket No. CP06-19-001

ORDER AMENDING CERTIFICATE

(Issued June 21, 2007)

1. On January 30, 2007, Windy Hill Gas Storage, LLC (Windy Hill) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA) to amend the certificate of public convenience and necessity issued by the Commission on May 19, 2006 authorizing Windy Hill (then known as Unocal Windy Hill Gas Storage, LLC) to construct and operate a salt bed natural gas storage facility near the City of Brush!, Colorado, and an associated header system to connect the proposed storage facility with the interstate pipeline grid.[1] By this application, Windy Hill seeks amended certificate authorization under section 7(c) of the NGA to replace its originally filed pro forma FERC Gas Tariff offering firm and interruptible storage service with a new pro forma FERC Gas Tariff that, among other things, offers a broader array of firm storage services and interruptible hub services. Windy Hill seeks authority to provide the additional services and requests that the Commission extend Windy Hill's previously granted authorization to charge market-based rates and related waivers to cover the additional proposed services. Windy Hill also requests additional tariff-related waivers.

2. As discussed below, the Commission finds that Windy Hill's proposed replacement pro forma FERC Gas Tariff is required by the public convenience and necessity and amends Windy Hill's certificate authority to accept the replacement pro

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[1] *See Unocal Windy Hill Gas Storage, LLC*, 115 FERC ¶ 61,218 (2006) (May 2006 Order).

forma tariff, subject to the conditions imposed herein. The Commission also authorizes Windy Hill to charge market-based rates for the additional proposed services and grants the requested waivers.

I. Background

3. In November 2005, Unocal Windy Hill Gas Storage, LLC (Unocal Windy Hill) filed its NGA section 7(c) application to construct and operate the Windy Hill Gas Storage Project, a high-deliverability, salt bed gas storage project in Morgan County, Colorado. As proposed and certificated, the project consists of four salt bed gas storage caverns, a header system comprised of two laterals, and a compressor station. Each of the four caverns will be capable of storing approximately 2.39 Bcf of natural gas, including approximately 1.5 Bcf of working gas in each of the four caverns. The completed facility will be designed to allow cycling up to six times a year, with a peak injection rate of 135 MMcf per day. The four caverns will be constructed in two phases. Maximum withdrawal capability will initially be 200 MMcf per day upon completion of the first two caverns in Phase 1 in 2008, and will then increase to 400 MMcf per day after completion of Phase 2 approximately two years later.

4. The header system will consist of a 3.5-mile-long, 16-inch diameter lateral to connect the storage facility to Cheyenne Plains Gas Pipeline Company, LLC and a 10.4-mile-long, 16-inch diameter lateral which will connect the facility to both Colorado Interstate Gas Company and the intrastate pipeline system of Public Service Company of Colorado. A compressor station, located adjacent to the storage caverns, will include three gas-fired compression units, each capable of generating 2,370 horsepower.

5. On May 19, 2006, the Commission issued Unocal Windy Hill, subject to conditions: (1) a certificate of public convenience and necessity under section 7 of the NGA in Docket No. CP06-19-000 to construct and operate the Windy Hill Gas Storage Project; (2) a blanket certificate under subpart G of Part 284 of the Commission's regulations in Docket No. CP06-21-000 to provide open-access firm and interruptible storage services under new Rate Schedules FSS and ISS; and (3) a blanket certificate under subpart F of Part 157 in Docket No. CP06-20-000 to permit Unocal Windy Hill to perform routine activities in connection with the construction, maintenance and operation of the storage facilities. In the May 2006 Order, the Commission also authorized Unocal Windy Hill to charge market-based rates for the storage services offered under Rate Schedules FSS and ISS, subject to conditions, on the basis of its market power analysis, and granted waivers of the filing, reporting and accounting requirements of the Commission's regulations related to cost-based rates.

6. Further, the Commission found in the May 2006 Order that Unocal Windy Hill's proposed pro forma tariff submitted as Exhibit P to its 2005 application generally

complied with Part 284 of the Commission's regulations. The Commission also granted Unocal Windy Hill waivers, subject to conditions, of the "shipper must have title" policy and the requirement that interstate pipelines comply with the electronic data interchange (EDI) standards established by the North American Energy Standards Board (NAESB). In addition, the Commission authorized Unocal Windy Hill to negotiate with its customers, on a not unduly discriminatory basis, whether they will be provided with a Right of First Refusal (ROFR) for the extension of service agreements under Rate Schedule FSS.

7. On September 28, 2006, HUTTS, LLC, the former 100 percent-owner of Unocal Windy Hill, sold all ownership interests in Unocal Windy Hill to Crossroads Morgan LLC (Crossroads), an indirect subsidiary of NGS Energy Fund, LP (NGS).[2] Crossroads is a limited liability company formed under the laws of the State of Colorado, whose members are NGS Colorado LLC, a Delaware limited liability company, and Winchester LLC, a Colorado limited liability company. Winchester's sole member is Fairfield Management Inc., a Colorado corporation. NGS Colorado, in turn, is solely owned by NGS, a Delaware limited partnership who general partner is Westport Energy Advisors LLC.

8. NGS was formed for the purpose of acquiring interests in and developing high performance natural gas storage facilities. NGS, through its subsidiaries, is in the process of developing two jurisdictional independent natural gas storage facilities in addition to the Windy Hill Gas Storage Project. Specifically, Tres Palacios Gas Storage, LLC is developing a salt dome natural gas storage facility in Texas, and Leaf River Energy Center LLC is developing a salt cavern natural gas storage facility in Mississippi. However, Windy Hill states that at this time, except for Crossroads' newly-acquired interests in Windy Hill, neither NGS nor its affiliates have ownership interests in any other operational or Commission-certificated natural gas storage or natural gas transmission facilities. Windy Hill, also, has no existing jurisdictional or non-jurisdictional operations in the natural gas pipeline and storage industry, as the certificated Windy Hill Gas Storage Project currently is still under construction.

[2] Unocal Windy Hill subsequently changed its name to Windy Hill Gas Storage, LLC. Windy Hill notified the Commission of the change in ownership on October 2, 2006, and of the change to its name on November 30, 2006.

II. <u>The Proposal</u>

9. Windy Hill seeks amendment of its certificate in Docket No. CP06-19-000 to permit replacement of its original pro forma FERC Gas Tariff with a different pro forma tariff, which it has submitted as "Replacement *Pro Forma* Tariff" in Exhibit P to its application for certificate amendment. Windy Hill explains that its new owner, NGS, wishes to implement a single form of FERC Gas Tariff that each of its three jurisdictional natural gas storage subsidiaries can adopt with minimal modifications. Windy Hill asserts that standardizing on a single model tariff will afford Windy Hill, its affiliates, their customers, and Windy Hill's parent, the benefits of consistency and administrative efficiency. Windy Hill states that NGS' model FERC Gas Tariff is patterned after, and substantially similar to, the FERC Gas Tariff that the Commission recently reviewed and accepted in *Bluewater Gas Storage, LLC*.[3] Windy Hill has included at Exhibit Z-2 of its instant application, a redline/strikeout comparison of the proposed Windy Hill replacement pro forma tariff and the currently-effective Bluewater FERC Gas Tariff.

10. Windy Hill further explains that its new owner also has determined that the market values the flexibility that park and loan and other hub services can offer and, therefore, wishes to offer the market a broader range of services from the Windy Hill Gas Storage Project than would be available under Rate Schedules FSS and ISS included in Windy Hill's original pro forma tariff. Windy Hill states that it is in the process of soliciting fresh customer commitments for its project, and that its assessment is that prospective customers will favor a variety of firm and interruptible hub services menu of services. Thus, Windy Hill states that a Commission order accepting its replacement pro forma tariff will provide certainty to prospective customers concerning the services Windy Hill will provide.[4]

11. Windy Hill asserts that because of the significant number of revisions it is proposing to its pro forma tariff, it is seeking a certificate amendment permitting it to replace its pro forma tariff, rather than waiting and filing its proposed modifications as part of its filing of actual tariff sheets. Windy Hill explains that replacement of the pro forma tariff not only will afford its customers greater certainty during the open season,

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[3] *BGS Kimball Gas Storage, LLC and Bluewater Gas Storage, LLC,* 117 FERC ¶ 61,122, *reh'g granted,* 117 FERC ¶ 61,351 (2006), and *Bluewater Gas Storage, LLC*, Docket No. CP06-351-001 (unpublished delegated letter order issued Dec. 1, 2006 accepting tariff sheets) (collectively, *Bluewater*).

[4] Windy Hill states that it intends to conduct a binding open season during the second quarter of 2007, with a goal of executing precedent agreements by mid-year 2007.

but also will allow staff more time for review than would be normally available with a compliance tariff filing made, at most, 60 days prior to the project in-service date. Windy Hill states that following approval of its replacement pro forma tariff, it will file its actual tariff sheets not more than 60 nor less than 30 days prior to the in-service date of the project.

12. Specifically, in its replacement pro forma tariff, Windy Hill has: (1) added new rate schedules for a variety of new storage and hub services; (2) made modifications to Rate Schedules FSS and ISS; (3) reorganized the order of, and made minor wording changes to, the provisions of the General Terms and Conditions (GT&C) of the tariff; and (4) made several substantive changes to the GT&Cs. In addition, Windy Hill requests that the Commission reaffirm Windy Hill's authority to charge market-based rates and extend that authority to cover the services under the new rate schedules proposed in its replacement pro forma tariff. Further, Windy Hill requests that the Commission reaffirm its prior grant of the various waivers related to the market-based rate authorization and tariff-related waivers. Windy Hill also seeks a number of additional tariff-related waivers.

A. <u>New Storage and Hub Services</u>

13. Windy Hill's proposed replacement pro forma tariff adds new rate schedules under which Windy Hill proposes to offer firm "no-notice" storage service (Rate Schedule NNSS), firm and interruptible park and loan services (Rate Schedules FP, FL, IP, and IL), and interruptible balancing and wheeling services (Rate Schedules IHBS and IW). Windy Hill states that it will offer these firm and interruptible storage and hub services on an open-access basis under terms and conditions that are consistent with the requirements of Order No. 636 and Subpart A of Part 284 of the Commission's regulations.

B. <u>Modifications to Rate Schedules FSS and ISS</u>

14. Windy Hill states that its replacement pro forma tariff includes versions of Rate Schedules FSS and ISS that are slightly different from the originally filed rates schedules, but essentially identical to storage service rate schedules most gas storage service providers offer. In its certificate amendment application, Windy Hill identifies the following changes to Rate Schedules FSS and ISS: (1) the modification of Rate Schedule FSS to include ratchets, where applicable, only on injections into storage; (2) the elimination of the provision permitting negotiation of a contractual ROFR in a Rate Schedule FSS service agreement; (3) the elimination of overrun service under Rate Schedule FSS; (4) the imposition of gas retention penalties; and (5) the addition of a Warehouseman's Lien provision to each of the Rate Schedule FSS, FP, ISS, IHBS, and IP pro forma service agreements.

C. Changes to General Terms and Conditions

15. In order to track the organization of Bluewater's FERC Gas Tariff, Windy Hill proposes to reorganize the order in which the tariff provisions appear in the GT&C.[5] Windy Hill states that the replacement tariff also incorporates some minor provisions that were not included in the originally filed pro forma tariff.[6] In addition, Windy Hill has made a number of minor wording changes to the GT&C provisions, as well as to the rate schedules, to implement NGS' desire to adopt a standard form of tariff to be employed by all of its jurisdictional natural gas subsidiaries. Windy Hill states that the majority of the wording changes reflect language that the Commission has already accepted in reviewing Bluewater's FERC Gas Tariff, while other changes reflect enhancements that Windy Hill proposes to the Bluewater model.

16. Further, Windy Hill highlights the following proposed substantive changes to the GT&C. Windy Hill proposes to: (1) add creditworthiness provisions under which it will determine the amount of credit it will extend to creditworthy customers based on each customer's credit rating; (2) obtain insurance coverage for the value of customers' gas held in storage to address the customers' risk of loss of gas held in storage; (3) use a specific index pricing for calculating the penalties to be assessed when a customer violates an action alert or operational flow order (OFO); and (4) credit the value of the gas retained, net of costs, to its customers, pursuant to the revenue crediting provisions of Order No. 637.

17. In addition, Windy Hill includes in GT&C section 22 of its replacement pro forma tariff a statement that Windy Hill is not required to comply with the Commission's Standards of Conduct for Transmission Providers promulgated in Order No. 2004.[7]

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[5] Windy Hill has included as Exhibit Z-3 of its application, a chart comparing the order of the GT&C provisions in its replacement pro forma tariff to the order of the GT&C provisions of the originally filed pro forma tariff.

[6] The replacement tariff adds section 1 – Introductory Statement; section 6 – Storage Operations; section 7 – Wheeling Operations; section 24 – Joint Obligations; and section 26 – Modification.

[7] *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (Dec. 11, 2003) FERC Stats. & Regs. ¶ 31,133 (2003), *order on reh'g,* Order No. 2004-A, 69 Fed. Reg. 23,563 (Apr. 29, 2004), FERC Stats. & Regs. ¶ 31,161, *order on reh'g,* Order No. 2004-B, 69 Fed. Reg. 48, 371 (Aug. 10, 2004), FERC Stats. & Regs. ¶ 31,166 (2004), *order on reh'g and clarification,* Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom*

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Windy Hill requests that the Commission explicitly confirm that Windy Hill meets the requirements for the independent storage provider exemption set forth section 358.3(a)(3) of the Commission's regulations and, therefore, is exempt from the transmission provider Standards of Conduct.

18. Also, in GT&C section 23 of its replacement pro forma tariff, Windy Hill continues to adopt Version 1.7 of the North American Energy Standards Board (NAESB), which the Commission adopted in Order No. 587-S. However, Windy Hill states that it will modify its tariff before providing services to reflect the version of the NAESB standards that the Commission has adopted at that time.

D. Market-Based Rate Authorization

19. Windy Hill requests that the Commission reaffirm and extend to the proposed new services the market-based rate authority that the Commission granted in the May 2006 Order. Windy Hill maintains that the Commission's conclusion in that order, that Windy Hill's market power study demonstrates that Windy Hill lacks market power as to firm and interruptible storage services, applies equally to Windy Hill's additional proposed firm and interruptible hub services, with the exception of interruptible wheeling service under Rate Schedule IW. For its wheeling service, Windy Hill has prepared a market power analysis,[8] which it asserts demonstrates that Windy Hill also lacks market power in providing wheeling service. In addition, Windy Hill provides the specific information the Commission requires to support market-based rate authority in a series of statements in its application, as required by Order No. 678[9] and section 284.503 of the Commission's regulations.[10]

E. Requests for Waivers

20. In the event the Commission grants Windy Hill's request for renewed and expanded authorization to charge market-based rates for firm and interruptible storage

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Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006) (Order No. 2004) (codified at 18 C.F.R. Part 358 (Standards of Conduct)).

[8] This market study is attached as Exhibit I to Windy Hill's application.

[9] *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, 71 Fed. Reg. 36,612 (June 27, 2006) FERC Stats. & Regs. ¶ 31,220, *order denying reh'g and granting clarification*, Order No. 678-A, 117 FERC ¶ 61,190 (2006).

[10] 18 C.F.R. §284.503 (2006).

and hub services, Windy Hill requests that the Commission confirm that the waivers of the Commission's filing, accounting, and reporting requirements granted in the May 2006 Order remain applicable to its provision of storage and hub services at the Windy Hill Gas Storage Project, as amended.[11]

21. Further, Windy Hill requests that the Commission also confirm that the following previously-granted waivers will be applicable to its replacement pro forma tariff: (1) waiver of the "shipper must have title" rule; (2) waiver of the Commission's regulations regarding capacity segmentation; and (3) partial waiver of the Commission's regulation requiring interstate pipelines to comply with the EDI standards established by NAESB.[12]

III. <u>Notice, Interventions, and Comments</u>

22. Public notice of Windy Hill's application was published in the *Federal Register* on February 16, 2007, 72 Fed. Reg. 7645. Motions to intervene were due on or before February 23, 2007. BP America Production Company and BP Energy Company (collectively, BP) filed a timely, unopposed motion to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[13]

23. On February 26, 2007, BP also filed a protest to Windy Hill's application after the deadline for interventions, comments and protests. BP states that it was unable to file its protest by the deadline due to the size of the new tariff and the complex issues raised by the new tariff. BP asserts that the filing of its pleading will neither delay the proceeding, nor prejudice other parties and, therefore, requests the Commission to permit the filing of its untimely protest. In addition, on March 9, 2007, Windy Hill filed a motion for leave to answer and answer the BP's protest. The Commission will accept both BP's late-filed protest and Windy Hill's answer because they help to clarify the issues raised by Windy Hill's replacement pro forma tariff and will assist the Commission in its decision-making process.

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[11] These requirements waived by the Commission, generally, are those related to cost-based rate proposals. *See* 115 FERC ¶ 61,218 at PP 36-38 (2006).

[12] *Id.* at PP 40-48. With respect to the latter waiver, the Commission granted Windy Hill's request for a waiver of the EDI standards to delay implementation until 90 days following the receipt of a request from one of its customers to implement EDI.

[13] *See* 18 C.F.R. § 385.214(a)(3)(2006).

24. In its protest, BP raises specific objections to ten different tariff provisions in Windy Hill's replacement tariff. These tariff provisions concern, among other things, the open season process, scheduling priorities, hourly flexibility, the IHBS Rate Schedule, overrun service, fuel charges, liability for lost gas, liability due to negligence, and gas retention penalties. BP also argues that because Windy Hill has filed an entirely new pro forma tariff, Windy Hill bears the burden of demonstrating that each component of the new tariff is just and reasonable. BP maintains that several of the new tariff provisions should be rejected because they violate Commission policy and impose unfair burdens on shippers.

25. In general, Windy Hill asserts in its answer that BP has ignored the fact that Windy Hill is an independent storage service provider and that the Commission deals with independent storage service providers differently in a number of respects from the way it deals with traditional interstate pipelines possessing market power. Windy Hill argues that BP is wrong in citing precedent applicable to tariffs filed by traditional interstate pipelines, rather than precedent dealing directly with independent storage service providers. Windy Hill contends that the majority of the provisions in its new tariff have been reviewed and approved by the Commission in previous cases.

26. BP's specific arguments, as well as the explanations provided by Windy Hill's answer, are addressed below.

IV. Discussion

27. Since Windy Hill's application proposes modifications to its terms and conditions for its initial services under section 7 of the NGA, the proposal is subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

A. The Certificate Policy Statement

28. The Commission's May 2006 Order in this proceeding found that Windy Hill's proposal satisfied the criteria of the Commission's September 15, 1999 Certificate Policy Statement for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest.[14]

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

29. As pertinent here to Windy Hill's proposal to replace its pro forma tariff, Windy Hill is a new entrant in the natural gas storage market and has no existing customers. Thus, as the Commission found in the May 2006 Order, there will be no subsidization of the project by existing customers. Further, as recognized by the may 2006 Order, with the authority to charge market-based rates for its services, Windy Hill will assume the economic risks associated with the project's facilities, to the extent that any capacity is unsubscribed. Windy Hill's proposed amendment of its certificate to replace its pro forma tariff does not affect the Commission's prior finding of no subsidization. Moreover, as discussed, *infra*, the Commission is authorizing Windy Hill to charge market-based rates for the new services proposed in the replacement tariff and, therefore, Windy Hill will remain at risk for the costs of the project.

30. In addition, Windy Hill's proposed replacement of its pro forma tariff also does not change the Commission's previous findings that Windy Hill's storage project should not adversely impact existing service providers or their customers. Rather, Windy Hill's proposed replacement pro forma tariff, offering additional storage and hub services, at market-based rates, should further enhance competition in the region and provide additional flexibility to customers holding capacity on the pipelines interconnecting with Windy Hill.

B. Applicable Standard of Review

31. In its protest, BP asserts that when a pipeline proposes new or revised tariff provisions, the burden is on the pipeline to show that new or revised tariff provisions are just and reasonable,[15] pursuant to sections 154.7(a)(6) and 154.204(b) of the Commission's regulations.[16] BP argues that Windy Hill has essentially discarded its old tariff and substituted a new tariff without justifying each component of its new tariff as just and reasonable. BP contends that several of the new tariff provisions violate Commission policy and impose unfair burdens on shippers and should be rejected.

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[15] BP cites *Northern Natural Gas Co.*, 118 FERC ¶ 61,072 (2007); *Gulf South Pipeline Co.*, 104 FERC ¶ 61,160 at P 16 (2003); *Kern River Transmission Co.*, 98 FERC ¶ 61,079 (2002); and *Williams Natural Gas Co.*, 78 FERC ¶ 61,342 at p. 62,458 (1997).

[16] 18 C.F.R. §§ 154.7(a)(6) and 154.204(d) (2006). BP states that section 154.7(a)(6) requires the pipeline to "provide a 'detailed explanation of the need for' the proposed service condition, including documentation 'sufficiently detailed to support the company's proposed change.'" Protest of BP at 3. BP asserts that section 154.204(d) requires that the pipeline "'explain the impact' of the proposed provision 'on firm and interruptible customers . . .'" *Id.*

32. Windy Hill replies that its filing is an amendment to its certificate of public convenience and necessity under section 7 of the NGA and is thus governed by Part 157 of the Commission's regulations, not Part 154, as suggested by BP. Because Windy Hill has not yet submitted its actual tariff for Commission acceptance under the "just and reasonable" standard of section 4 of the NGA, its revised pro forma tariff is subject to review under the "public convenience and necessity" standard of section 7. Windy Hill concludes that the Commission can ignore BP's argument on this issue.

33. Windy Hill is correct that its filing is an amendment to its certificate of public convenience and necessity pursuant to section 7 of the NGA and not a tariff filing pursuant to section 4. The requirements of Part 154 of the Commission's regulations apply to filings made under section 4.[17] The NGA does not require Windy Hill to make a section 4 filing in order to change the rates and terms and conditions of service for initial services that have not yet gone into effect. Rather, section 4(d) of the NGA states, in part:

> Unless the Commission otherwise orders, no change shall be made by any natural gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules *then in force* and the time when the change or changes will go into effect.[18]

Windy Hill is proposing changes to its pro forma tariff, which is not yet in force.[19] Below, the Commission reviews Windy Hill's replacement pro forma tariff to determine whether the proposed provisions of the replacement pro forma tariff are appropriate and supported by the public convenience and necessity.

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[17] 18 C.F.R. § 154.1(a) (2006).

[18] 15 U.S.C. § 717c (2007) (emphasis added).

[19] *See, e.g., Kern River Gas Transmission Compan*y, 58 FERC ¶ 61, 073 at p. 61,239 (1992) (where the Commission stated, "[s]ince Kern River's initial rates are not yet in effect, there are no rate schedules 'then in force' that necessitate a section 4 filing to effectuate a change).

C. New Storage and Hub Services

1. Rate Schedules NNSS, FP, FL, and IW

34. In new Rate Schedule NNSS, Windy Hill proposes to provide firm “no-notice” storage service. Windy Hill states that this service will permit customers to adjust their injections into, and withdrawals from, Windy Hill storage as their requirements dictate, without having to give Windy Hill advance notice of such changes.

35. In new Rate Schedules FP and FL, Windy Hill proposes to offer firm parking and loan services under which Windy Hill and a customer would agree to park or loan a fixed quantity of gas for a fixed time period.[20] Windy Hill states that the proposed Rate Schedule FP service would cover three time periods: (1) an injection period, during which the customer would inject the agreed-upon quantity; (2) a storage period, during which the customer would retain its gas in Windy Hill storage; and (3) a withdrawal period, during which the customer would withdraw parked gas from storage.[21] Windy Hill explains that it and the customer would negotiate the duration of each of the three time periods in advance, which would be specified in the service agreement, and that customers would have the right to withdraw gas only during the withdrawal period and to inject gas only during the injection period. Windy Hill asserts that each Rate Schedule FP or FL customer’s capacity, injection, and withdrawal rights would be firm in the sense that they would not be subordinate to other classes of service, although there would be times during the term of a customer’s service agreement that the customer would not have the right to inject and/or withdraw gas from storage. Further, Windy Hill states that it only will provide firm park and loan service to the extent that it has otherwise unsubscribed capacity and gas in storage not dedicated to another service.[22]

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[20] Windy Hill proposes to offer interruptible parking and loan services under new Rate Schedules IP and IL, under which a customer could temporarily deposit gas at Windy Hill’s storage facility or borrow gas from Windy Hill to meet the customer’s balancing or other needs.

[21] Rate Schedule FL service would involve a withdrawal period and then an injection period.

[22] Windy Hill points out that, in this respect, its firm park and loan proposal is unlike the proposal the Commission rejected in *Questar Pipeline Co.*, 99 FERC ¶ 61,129 (2002), where a pipeline proposed to offer firm parking service using capacity not being used from time to time by firm storage customers. Windy Hill states that its proposal is also unlike the rejected proposal in *National Fuel Gas Supply Corp.*, 78 FERC ¶ 61,036

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36. Finally, in new Rate Schedule IW, Windy Hill proposes to offer interruptible wheeling service. This service would permit a customer to transfer gas using Windy Hill's header pipeline system between or among the interstate and intrastate pipelines that will interconnect with Windy Hill.

37. The Commission will approve Windy Hill's proposed new services. These new services will provide additional service options for prospective customers. The proposed rate schedules are consistent with those provided by other storage service providers, such as Bluewater, with the exception of the overrun service and right of first refusal provisions, which are discussed below.

2. Rate Schedule IHBS

38. In new Rate Schedule IHBS, Windy Hill proposes to provide interruptible hourly balancing service that would allow a customer served by one of the pipelines that interconnects with Windy Hill to sculpt its daily nominations on an hourly basis. Windy Hill states that this service is intended to meet the needs of end-use customers who might find value in hourly service flexibility, as well as natural gas-fired electric generating facilities that purchase hourly and balance services, particularly in response to the growth of wind generation with its unpredictable dispatch. Windy Hill notes that Rate Schedule IHBS is consistent with the Commission's policy that pipeline shippers be afforded the opportunity to obtain imbalance management services from off-system service providers.[23]

39. BP asserts that the Commission should require Windy Hill to modify the standards that govern the availability of Rate Schedule IHBS service. BP objects to the proposed tariff language that "availability of service under this Rate Schedule shall be subject to a determination by Windy Hill that its performance of the service requested hereunder shall not cause a reduction in Windy Hill's current or future ability to provide Firm Storage Services under currently effective or potential Storage Service Agreements."[24] BP argues that Windy Hill cannot refuse to schedule interruptible service based on its speculation that it might sell the associated capacity on a firm basis sometime in the future to some

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(1997), where the applicant sought to offer firm advance loan service using gas in storage dedicated to no-notice service. Application for Amendment at 12, n.19.

[23] *See* 18 C.F.R. § 284.12(b)(2)(iii) (2006).

[24] *See* Exhibit P, Rate Schedule IHBS, section 1(e); Original Sheet No. 41.

prospective shipper.[25] BP further contends that the tariff language provides Windy Hill with unbounded discretion, creating a risk that the pipeline could grant preferential treatment to favored shippers. BP concludes that, because interruptible service is scheduled daily based on available capacity on the next Gas Day, after scheduling firm service, there is never a risk that interruptible service could impair existing service.

40. Windy Hill replies that BP misunderstands the availability provision in Rate Schedule IHBS. Windy Hill explains that this provision governs Windy Hill's determination that it has adequate capacity to enter into a new IHBS service agreement, not whether Windy Hill will schedule IHBS service under an executed service agreement on a given day. Windy Hill argues that the provision that it "must determine that it has sufficient operationally available and uncommitted Interruptible storage capacity and injection and withdrawal capacity to perform the service" is a standard provision that does not artificially limit the amount of interruptible service Windy Hill is willing to sell, but merely limits the availability of service to that level which can be offered without requiring such frequent interruption as to lessen the viability and value of the service.[26] Windy Hill asserts that unsold capacity may be used temporarily to provide interruptible service, but Windy Hill must always retain the right to sell unsold firm capacity as firm service in preference to interruptible service.

41. BP raises a valid concern regarding the availability of IHBS service. The availability of interruptible service should not be limited by potential future firm service. Windy Hill's answer is not responsive to BP's concern over how Windy Hill will determine that it has adequate capacity to enter into new IHBS service agreements, not how Windy Hill will schedule IHBS service under an executed service agreement. Windy Hill argues that its tariff provision (section 1(a)), which provides that Windy Hill will determine that it has sufficient operationally available capacity to provide the service, is a standard provision. We agree. However, our concern (and BP's) is with section 1(e) of Rate Schedule IHBS (and the similar section 1(d) of Rate Schedule ISS) which further limits availability of interruptible service to the extent it may reduce Windy

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[25] BP cites *Questar Southern Trails Pipeline Co.*, 92 FERC ¶ 61,110 at 61,410 (2000) (stating that the Commission's policy is that a pipeline "is required to sell available interruptible service to a customer that is willing to pay the maximum rate, regardless of whether the system is partially or fully subscribed.")

[26] Windy Hill cites Egan Hub Gas Storage, LLC, FERC Gas Tariff, Original Volume No. 1, IWS Rate Schedule, section 1 (First Revised Sheet No. 50); Petal Gas Storage, L.L.C., FERC Gas Tariff, Original Volume No. 1, ISS Rate Schedule, section 1 (Second Revised Sheet No. 50).

Hill's current or future ability to provide firm storage service. The provision is unclear as to whether it would allow Windy Hill to hold capacity for future potential firm storage contracts or whether it simply allows Windy Hill to deny a request to execute an interruptible storage service agreement if Windy Hill has received a request for firm service but has not yet executed a contract.

42. Windy Hill may sell unsold firm capacity as firm service in preference to interruptible service, but Windy Hill may not hold capacity for undefined future firm contracts. Windy Hill's tariff provides adequate protections against interruptible service impeding the contracting of firm service; Windy Hill's tariff requires an interruptible customer to remove its gas from storage if that capacity is subsequently needed for firm service.[27] The Commission will thus require Windy Hill to file an explanation within 15 days of the date of this order to clarify the intent of section 1(e) of Rate Schedule IHBS and section 1(d) of Rate Schedule ISS, in accordance with this discussion.

D. Modifications to Rate Schedules FSS and ISS

1. Injection Ratchets

43. Windy Hill proposes to modify Rate Schedule FSS to include ratchets, where applicable, only on injections into storage; withdrawals from storage would not be subject to ratchets. Windy Hill also proposes to offer a customer the option of receiving either ratcheted or unratcheted firm storage service. Windy Hill states that the Commission has previously allowed storage service providers to offer this option.[28] Windy Hill, however, indicates that it cannot at this time state the injection ratchet percentages that will apply to its ratcheted services, but will provide the injection ratchet values shortly before its in-service date in its actual tariff sheet filing and includes this commitment in its Rate Schedule FSS tariff provisions.[29]

44. Consistent with our acceptance of ratchets for other storage service providers, the Commission will accept Windy Hill's proposed use of ratchets, subject to Windy Hill including the injection ratchet values in its actual tariff sheet filing, as proposed.

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[27] *See* Exhibit P, Rate Schedule IHBS, section 2.4.

[28] Windy Hill cites *Bluewater*, (unpublished delegated letter order issued Dec.1, 2006); and *ANR Pipeline Co.*, 62 FERC ¶ 61,079 (1993).

[29] Exhibit P, Rate Schedule FSS, section 9.

2. Right of First Refusal

45. Windy Hill has eliminated the provision that would allow Windy Hill and a Rate Schedule FSS customer to negotiate in a Rate Schedule FSS service agreement whether to include a contractual ROFR for renewal of the customer's service agreement. Windy Hill states its belief that ROFR rights are unnecessary to protect customers or inappropriate for services provided at market-based rates, and cites *Bluewater* as precedent for the Commission's acceptance of an independent storage company's tariff that does not include contractual ROFR provisions.

46. The Commission does not require a storage service provider to include a provision that permits negotiation of a contractual ROFR and has accepted storage service provider tariffs that do not include such a provision. We will, therefore, accept Windy Hill's proposal to remove the option of negotiating a contractual ROFR for Rate Schedule FSS.

3. Overrun Service

47. Windy Hill's original pro forma tariff allowed firm shippers to overrun their maximum daily injection quantity (MDIQ) or maximum daily withdrawal quantity (MDWQ). However, Windy Hill's replacement Rate Schedule FSS does not provide for overrun service.

48. BP protests Windy Hill's elimination of overrun rights for firm and no-notice shippers. BP states that Windy Hill's transmittal letter cites this change, but offers no justification for it.[30]

49. Windy Hill replies that it is not obligated to offer such an overrun service. Windy Hill asserts that BP has cited no precedent requiring that independent storage providers must offer overrun service. Windy Hill contends that BP's cite to Order No. 637-A's statement regarding whether pipelines should allow flexibility before assessing overrun penalties is irrelevant since Windy Hill is not proposing overrun penalties, except for violation of an action alert or operational flow order. Windy Hill asserts that overrun service is unnecessary since any difference between receipts and deliveries to or from Windy Hill's storage facility will be resolved under the operational balancing agreements with the interconnecting pipelines. Windy Hill concludes that it will not be possible for a shipper to overrun a service inadvertently. Windy Hill states that a shipper can request an amendment to its service agreement if it needs greater injection or withdrawal rights.

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[30] BP cites Windy Hill's Transmittal Letter at 8, n.13.

50. As discussed earlier, Windy Hill will offer hourly flexibility on an operationally available basis so that shippers have flexibility within their contract levels. In addition, Windy Hill indicates that operational balancing agreements will resolve any difference between receipts and deliveries to or from Windy Hill's storage facility. A shipper's contract entitles it to service up to the maximum contracted quantities. The Commission does not require storage providers to offer overrun service in excess of contracted volumes.

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

51. Windy Hill 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 storage or parking customer prior to the expiration of the customer's service agreement; and (2) when gas is not withdrawn from storage by an interruptible storage or parking customer following notice by Windy Hill interrupting the customer's service and directing the customer to remove its gas. In the first situation, Windy Hill proposes to credit the firm shipper with 80 percent of the net revenue that the pipeline receives from an auction sale of the shipper's gas (a 20 percent penalty).[31] In the latter situation, Windy Hill proposes to retain the gas without crediting to the shipper any of the revenue that Windy Hill receives from the sale of the gas (a 100 percent penalty).[32] Windy Hill states that such gas retention penalties are appropriate and consistent with Order No. 637.

52. In addition, Windy Hill further proposes, in its replacement GT&C,[33] to credit to all of its customers whose gas was not purchased or retained, the net proceeds[34] from the sale of the retained gas (*i.e.*, the 20 percent penalty associated with firm service and the 100 percent associated with interruptible service), pursuant to the revenue crediting provisions of Order No. 637.

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[31] Exhibit P, Rate Schedule FSS, section 8.1 and Rate Schedule FP, section 8.1.

[32] Exhibit P, Rate Schedule ISS, section 2.2 and Rate Schedule ISP, section 2.

[33] Exhibit P, GT&C, section 32. Windy Hill cites *Ozark Gas Transmission, L.L.C.*, 96 FERC ¶ 61,160 at 61,702-03 (2001), as precedent for such revenue crediting.

[34] "Net proceeds" is defined in GT&C section 32 as "the total proceeds received from the auction less any costs Windy Hill incurred as a result of conducting the auction or the purchase or retention of Customer's gas." Original Sheet No. 158.

53. BP argues that Windy Hill's gas retention penalties are too harsh. BP contends that rather than confiscate a firm storage or firm parking service shipper's storage gas, and crediting to the shipper only 80 percent of the net revenue it receives from the sale of the shipper's gas, Windy Hill should instead continue to store the gas for up to thirty days after the contract's termination, on an interruptible basis, to the extent capacity is available, taking into account Windy Hill's existing firm and interruptible service commitments. BP argues that if there is no available capacity, Windy Hill should be able to sell the gas but the penalty should only be 5 percent of the revenue. BP further labels as unduly harsh Windy Hill's proposal to confiscate an interruptible shipper's gas, if it fails to obey a directive to remove its gas, without any crediting of revenue. BP asserts that this penalty is particularly harsh compared with the less severe penalty for firm loan service shippers, who need only reimburse Windy Hill for the costs that Windy Hill incurs in buying replacement gas.[35]

54. Windy Hill replies that its gas retention proposals are consistent with penalty provisions previously accepted by the Commission.[36] Windy Hill asserts that its retention penalties are somewhat more forgiving than Pine Prairie's in that Windy Hill will credit 80 percent of the auction value of the gas to the customer. Windy Hill notes that it will not profit from retention penalties, since it will credit the net proceeds from sales of retained gas to its customers, consistent with Commission policy. Further, Windy Hill contends that a customer is likely to fail to remove its gas on a timely basis only if it makes an economic decision not to do so. For this reason, Windy Hill states that BP's proposals for reduced penalties or mandatory interruptible service could make Windy Hill the guarantor of its customers' economics, which Windy Hill considers inappropriate.

55. 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.[37] We will not require Windy Hill to provide interruptible storage service following the termination of the service, as requested by BP. If capacity exists, we would expect that a customer would be able to contract for

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[35] BP cites Rate Schedule FL, section 2.2, Original Sheet No. 33.

[36] Windy Hill cites *Pine Prairie Energy Center, LLC,* 109 FERC ¶ 61,215 at P 46 (2004)(*Pine Prairie*) and *Blue Lake Gas Storage Co.,* 96 FERC ¶ 61,164 at 61,728-29 (2001) (*Blue Lake*).

[37] *See Pine Prairie* at P 46 and *Blue Lake* at 61,729.

interruptible service if needed. However, if capacity does not exist, Windy Hill would be unable to provide such service. As for the level of the penalty, Windy Hill has proposed to credit 80 percent of the auction value of the gas back to the firm or interruptible customer and credit the net proceeds from the auction to its other customers. Windy Hill thus proposes a less severe penalty than other storage providers, who do not credit any portion of the value of the retained gas to the customer. BP has cited no Commission precedent to support requiring Windy Hill to further lessen its penalty level.

56. Finally, if an interruptible storage customer does not remove its gas when Windy Hill determines that such interruptible storage capacity is needed to provide firm storage service, Windy Hill proposes to retain the gas with no credit back to the customer. This provision is also consistent with the tariffs of other storage service providers. BP argues that this penalty is particularly harsh when compared with the less severe penalty for firm loan service customers. BP fails to recognize that firm loan service is fundamentally different from interruptible storage service. In particular, loaned gas is not gas that resides in Windy Hill's storage facilities and thus does not use capacity that otherwise would be available for firm storage service. Because Windy Hill does not have possession of loaned gas, retention of the gas is not feasible. For these reasons, we find that Windy Hill's gas retention and penalty proposals are consistent with Commission precedent and are accepted.

5. Warehouseman's Lien

57. Windy Hill has added a Warehouseman's Lien provision to each of the Rate Schedule FSS, FP, ISS, IHBS, and IP pro forma service agreements in its tariff. This provision permits Windy Hill to establish a lien or interest on all gas received from the shipper in order to satisfy charges for storage or transportation. Windy Hill states that these provisions are substantially identical to those recently approved in *MoBay Storage Hub, LLC*.[38] The Commission will accept these provisions, consistent with our prior order.

E. Changes to General Terms and Conditions

1. Creditworthiness

58. Windy Hill states that it has added new creditworthiness provisions in its replacement tariff that comply with the Commission's 2005 policy statement on

[38] 117 FERC ¶ 61,298 at P 54 (2006).

creditworthiness[39] and reflect virtually the same creditworthiness provisions included in Bluewater's FERC Gas Tariff, with one significant deviation. Windy Hill proposes to distinguish not only between "creditworthy" and "non-creditworthy" customers, as do most tariffs, but also among those customers found "creditworthy," with respect to the amount of credit Windy Hill will extend to those creditworthy customers. For creditworthy customers, Windy Hill proposes to determine the amount of credit it will extend based on each customer's credit rating, and to extend higher levels of credit to customers with higher credit ratings.[40]

59. Windy Hill explains that normally, a customer that is deemed "creditworthy" is not required to post any security and will be extended credit equal to the value of its service charges and, if applicable, the value of loaned gas, while a "non-creditworthy" customer must post security for three months' worth of service charges and, if applicable, the value of any gas loaned to the customer. Windy Hill states that this typical approach does not protect against the potential for a storage provider's credit exposure to increase dramatically with increases in the value of loaned gas. Windy Hill asserts that while the value of service charges can be determined with relative certainty, is not generally subject to market volatility, and is typically only a fraction of the gas commodity value, in contrast, the value of loaned gas varies dramatically over time in response to market forces and can be many times greater than the value of service charges. Windy Hill asserts that it is concerned that it not become overextended by reason of changes in its exposure to creditworthy customers taking loan service in times of extreme gas price volatility.

60. Windy Hill proposes to determine an "Unsecured Collateral Limit" applicable to each level of Standard & Poor's and Moody's credit ratings, which will be set out in its tariff. Windy Hill states that higher limits would apply to higher credit ratings and that a customer's Unsecured Collateral Limit would change with changes in the customer's credit rating. Windy Hill will also determine the "Credit Exposure" for each customer (typically equal to three months worth of service charges plus the value of any loaned

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[39] *Policy Statement on Creditworthiness for Interstate natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 70 Fed. Reg. 37,717 (June 30, 2005), FERC Stats. & Regs. Regulations ¶ 31,191 (2005) (Creditworthiness Policy Statement*).*

[40] Exhibit P, GT&C, section 31. Windy Hill asserts that such a proposal is consistent with credit practices universally employed in the natural gas commodity market, and that it is appropriate to rely upon natural gas trading credit practices in establishing mechanisms for calculating credit support pertaining to loaned gas. Application at 23-24.

gas), which it will recalculate daily to reflect changes in the market value of loaned gas. Windy Hill proposes that a customer will be required to post security equal to the positive difference, if any, between the Credit Exposure attributable to a customer and the customer's Unsecured Collateral Limit. Windy Hill anticipates that the proposed credit thresholds will generally affect customers contracting for loan services under Rate Schedules FL and IL, since the Unsecured Collateral Limit for the lowest investment grade credit rating typically will be greater than three months worth of service charges for most of Windy Hill's customers.

61. The Commission finds that Windy Hill's creditworthiness provisions are consistent with the Commission's Creditworthiness Policy Statement in that they are objective and transparent.[41] Windy Hill's creditworthiness provisions are also consistent with other creditworthiness provisions approved by the Commission for storage pipeline providers, such as Bluewater.[42] The refinement to those provisions that Windy Hill proposes in this case would determine the amount of credit extended to creditworthy customers based on each customer's credit rating. This refinement will provide Windy Hill with additional flexibility to address the potential for Windy Hill's credit exposure for loaned gas to increase dramatically due to the volatile gas commodity market. Therefore, consistent with the Creditworthiness Policy Statement and previous Commission orders, the Commission will accept the proposed creditworthiness tariff provisions.

2. <u>Insurance Coverage for Risk of Loss of Gas in Storage</u>

62. Section 12.2 of the GT&C of Windy Hill's replacement pro forma tariff, governing risk of loss, provides, in relevant part, that "the risk of loss of any quantity of Gas wheeled through, injected into, parked or stored in and withdrawn from the Windy Hill storage facilities shall remain with the customer, and Windy Hill shall not be liable to Customer for any loss of Gas, except as may be the consequence of the intentional or negligent acts or omissions of Windy Hill."[43] In response to concerns expressed by its

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[41] Creditworthiness Policy Statement at P 10.

[42] *See Bluewater*, 117 FERC ¶ 61,122 (2006) and *order on reh'g* 117 FERC ¶ 61,351 (2006). *See also Egan Hub Storage, LLC*, 114 FERC ¶ 61,154 (2006); *Entrega Gas Pipeline, LLC*, 114 FERC ¶ 61,326 at PP 5, 26 (2006).

[43] Exhibit P, GT&C, section 12.2. Section 12.2 of Windy Hill's originally filed tariff provided that Windy Hill would not be liable to customers for any loss of gas, except due to the "intentional or grossly negligent acts or omissions" of Windy Hill.

prospective customers regarding this allocation of the risk of loss of gas held in storage, Windy Hill has added in its replacement tariff, as an accommodation to customers under Rate Schedules FSS, ISS, FP, IP, and IHBS, section 16 to its GT&C providing that Windy Hill will obtain insurance for the value of customers' gas held in storage.

63. Section 16 provides that Windy Hill will be responsible for obtaining for the benefit of its customers insurance coverage against casualty events that result in the loss of gas held in the Windy Hill storage facility, provided that such insurance coverage is available to Windy Hill on commercially reasonable terms. Section 16 also provides that Windy Hill's undertaking to obtain such insurance coverage will not be deemed to shift the risk of loss of customer's gas in storage to Windy Hill.

64. BP argues that the Commission should require Windy Hill to adopt tariff language that complies with the "Control Liability Standard." BP states that this standard, which it maintains is Commission policy, dictates that a pipeline must be liable for gas that is lost when the gas is within the sole custody of the pipeline, such as gas that is in the pipeline's storage facility or gas that is within the custody of a third party pursuant to an arrangement between the pipeline and the third party.[44] Conversely, BP states that under the Control Liability Standard, a shipper bears the loss of gas before the gas is delivered into the pipeline's facilities or the facility of a third party, and after the gas is redelivered to the shipper at a delivery point. BP asserts that this Control Liability Standard is essential to ensure that a pipeline has a strong incentive to prevent gas losses. BP further states that Windy Hill is attempting to mitigate the risks to its shippers with tariff provisions that state that Windy Hill can choose to acquire insurance to cover storage gas losses, but only if insurance is available to Windy Hill on commercially reasonable terms.[45] BP asserts that this gives Windy Hill total discretion regarding whether to acquire insurance and, if so, how much insurance. BP concludes that Windy Hill's option to buy insurance does not justify its failure to adopt the Control Liability Standard.

65. Windy Hill replies that BP has cited no Commission precedent to support its position that storage providers must accept liability for storage gas losses. Windy Hill states that most independent storage company tariffs, and the tariffs of most interstate pipelines providing storage service, assign to customers liability for storage gas losses in

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[44] BP cites *Tennessee Gas Pipeline Co.,* 118 FERC ¶ 61,038 at P 34 (2007) (*Tennessee*).

[45] *See* Exhibit P, GT&C, section 16; Original Sheet No. 144; Transmittal Letter at 25.

circumstances not involving the service provider's negligence.[46] Under Windy Hill's replacement tariff, as in its original tariff, Windy Hill assigns the risk of loss of gas in storage to customers. Windy Hill states that storage customers typically procure insurance against gas losses or self-insure.[47] Windy Hill states that it proposes to soften what it calls this industry-standard approach to the assignment of liability by providing insurance against storage gas losses, for the benefit of its customers, where such coverage is available on commercially-reasonable terms. Windy Hill asserts that its proposal to provide insurance is an additional benefit it will provide to its customers and not, as BP suggests, a substitute for Windy Hill's assumption of liability. Windy Hill contends that it is neither required to provide insurance nor to assume the risk of loss of customers' gas. Windy Hill states that whether insurance is available on commercially-reasonable terms is an objective standard that will preclude Windy Hill from arbitrarily deciding not to purchase insurance.

66. The Commission's policy, as articulated in *Colorado Interstate Gas Co.*,[48] is that the pipeline and shipper are deemed to be responsible for the gas while it is in their respective control and possession; it is reasonable to assume that the parties can more readily insure against loss while the gas is in their possession. The Commission requires that a pipeline be responsible for gas lost while in its possession, even if the loss is due to force majeure; a pipeline's responsibility for gas while in its possession requires that the pipeline indemnify the owner of the gas if the gas is lost.[49]

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[46] Windy Hill cites Bluewater Gas Storage, LLC, FERC Gas Tariff, Original Volume No. 1, GT&C, section 12.2 (Original Sheet No. 136) (Windy Hill notes that GT&C section 16 provides that customer shall be responsible for providing its own insurance coverage); Egan Hub Storage, LLC, FERC Gas Tariff, First Revised Volume No. 1, GT&C, section 12.2 (First Revised Sheet No. 142); Columbia Gas Transmission Corp., FERC Gas Tariff, Second Revised Volume No. 1, FSS Rate Schedule, section 6(g) (Third Revised Sheet No. 170); Moss Bluff Hub Partners, L.P., Statement of Operating Conditions, section 12.2.

[47] Windy Hill states that certain pipeline tariffs recognize this. Windy Hill cites Columbia Gas Transmission Corp., FERC Gas Tariff, Second Revised Volume No. 1, FSS Rate Schedule, section 6(g) (Third Revised Sheet No. 170) ("Shipper shall be responsible for obtaining its own insurance for any gas in storage….").

[48] *See Colorado Interstate Gas Co.*, 42 FERC ¶ 61,380 at 62,126 (1988). *See also Wyoming Interstate Co., Ltd.*, 57 FERC ¶ 61,328 at 62,049 (1991).

[49] *See Overthrust Pipeline Co.*, 58 FERC ¶ 61,104 at 61,365 (1992).

67. However, Windy Hill is correct that the tariffs of many storage service providers assign to customers liability for storage gas losses other than in circumstances involving the service provider's negligence.[50] These storage service providers, like Windy Hill, provide storage services under market-based rate authority. In these circumstances, a customer can factor Windy Hill's lack of liability, coupled with its proposal to offer insurance, into their rate negotiations. In this context, the Commission finds that Windy Hill's proposal is reasonable, consistent with other market-based rate storage service provider tariffs.

68. We further find reasonable Windy Hill's proposal to offer insurance when it is available on commercially-reasonable terms. As Windy Hill asserts, storage providers are not required to provide insurance for their customers and many storage providers' tariffs state that their customers are responsible for providing their own insurance.[51] Windy Hill's proposal is an additional service to its customers and can be a factor in rate negotiations along with the lack of liability for storage gas losses. The Commission will accept Windy Hill's proposal.

3. Use of Index Pricing

69. Windy Hill proposes to use index pricing for calculating the penalties to be assessed when a customer violates an action alert or operational flow order (OFO).[52] Specifically, Windy Hill proposes to use the "CIG, Rocky Mountains" daily index as published in *Gas Daily* for calculating action alert and OFO penalties.[53] Windy Hill asserts that this price index satisfies the criteria that the Commission has established for

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[50] *See* Bluewater Gas Storage, LLC, FERC Gas Tariff, Original Volume No. 1, section 12.2, GT&C, Original Sheet No. 141; Egan Hub Storage, LLC, FERC Gas Tariff, First Revised Volume No. 1, section 12.2, GT&C, First Revised Sheet No. 142.

[51] *See* Bluewater Gas Storage, LLC, FERC Gas Tariff, Original Volume No. 1, section 16, Original Sheet No. 144; Columbia Gas Transmission Corp., FERC Gas Tariff, Second Revised Volume No. 1, FSS Rate Schedule, section 6(g), Third Revised Sheet No. 170.

[52] Exhibit P, GT&C, section 5.5(i).

[53] Section 4.5(b) of the GT&C of Windy Hill's originally filed pro forma tariff simply provided that a customer would be subject to a penalty of five times the Maximum Daily Gas Index for each Dth of gas associated with the quantity of gas that does not comply with the OFO.

inclusion of price indices in jurisdictional tariffs.[54] The Commission will accept Windy Hill's proposal.

4. Exemption from Transmission Provider Standards of Conduct

70. As stated, *supra*, Windy Hill requests that the Commission explicitly confirm that Windy Hill meets the requirements for the independent storage provider exemption set forth 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. 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 rate payers and no market power."[55] The Commission clarifies that Windy Hill 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.

5. Open Seasons

71. BP is concerned that the new tariff allows Windy Hill to decide whether to sell expansion capacity via competitive bidding in an open season, or by a first-come, first-served posting.[56] Section 3.1(a) of Windy Hill's replacement GT&C states:

> Upon the availability of new storage capacity resulting from an expansion of Windy Hill's facilities, Windy Hill shall sell such capacity to prospective Customers either via the open season procedures described in sections 3.1(b)-(f) below or via the first-come, first-served procedures described in section 3.1(g) below, with the selection of the procedures being at Windy Hill's sole option. This section 3.1 shall apply to sales of capacity under Rate Schedules FSS, NNSS, FP and FL.[57]

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

[55] 18 C.F.R. § 358.3(a)(3) (2006).

[56] Exhibit P, GT&C, section 3.1(a).

[57] Original Sheet No. 105.

72. BP argues that the Commission should require Windy Hill to revise the above tariff language to require an open season for all future expansion capacity, including capacity created in existing storage caverns and capacity created by construction of new caverns. BP cites Order No. 2005 as requiring that "all interstate pipeline construction be preceded by a non-discriminatory 'open season' process through which potential shippers may seek and obtain firm capacity rights."[58] BP argues that the Commission requires an open season because it "provides a nondiscriminatory method of assessing demand for a project" and "provide[s] shippers an opportunity to indicate their willingness to turn back capacity."[59] BP maintains that, in light of the fact that the demand for new storage capacity significantly exceeds the amount of available storage capacity, it is essential that all potential customers have an opportunity to bid for expansion capacity on Windy Hill through an open season.

73. Windy Hill replies that 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.[60] Windy Hill states that its proposed replacement tariff is entirely consistent with Commission precedent regarding the marketing and award of capacity by an independent storage company authorized to charge market-based rates.

74. The Commission will accept Windy Hill's proposal to sell firm capacity resulting from an expansion of Windy Hill's facilities either by an open season or on a first-come, first-served basis. While BP is correct that the Commission's policy is that new interstate pipeline construction be preceded by an open season, Windy Hill correctly points out that the Commission has accepted proposals similar to Windy Hill's for independent storage providers.[61] In those cases, the Commission found that the storage service providers' proposals to sell new storage capacity resulting from an expansion through either an open

[58] Order No. 2005, FERC Stats. & Regs. (Preambles) ¶ 31,174 at P 9, *order on reh'g*, Order No. 2005-A, FERC Stats. & Regs. (Preambles) ¶ 31,187 (2005).

[59] *Gulf South Pipeline*, 95 FERC ¶ 61,132 at 61,415 (2001).

[60] Windy Hill cites *Egan Hub Storage, LLC*, 116 FERC ¶ 61,174 at PP 11, 14 (2006) (*Egan Hub*); *Bluewater Gas Storage*, LLC, Docket No. CP06-351-001 (unpublished letter order issued December 1, 2006) (*Bluewater*).

[61] *Id*.

season or on a first-come, first-served basis are designed to reflect the storage providers' market-based environment and to respond to specific market realities.[62] Consistent with those orders, the Commission will accept Windy Hill's similar proposal. We note that this provision would not apply to the initial capacity created by the facilities certificated in this proceeding. Windy Hill has stated in its application that its intent is to conduct a binding open season during the second quarter of 2007 for the Windy Hill Gas Storage Project capacity.

6. Scheduling Priorities

75. BP requests that the Commission require Windy Hill to explain its scheduling priorities.[63] BP states that it is unclear why, if a constraint develops after service is scheduled, the highest scheduling priority includes firm storage service in excess of MDRQ (maximum daily receipt quantity) but less than or equal to MDIQ (maximum daily injection quantity) or MDWQ (maximum daily withdrawal quantity), which BP states appears to be overrun service. BP claims that overrun service should have a lower priority than primary firm service.

76. Windy Hill replies that BP appears to be confusing firm service at secondary points with interruptible overrun service. Windy Hill states that BP misunderstands MDRQ, which Windy Hill defines as a firm customer's primary point rights at a specific receipt point. Windy Hill states that physical receipts on a given day above a customer's MDRQ for a specific receipt point but below the customer's MDIQ would be treated as firm within the customer's MDIQ, but would be treated as having been received in part at a secondary receipt point. Windy Hill clarifies that, in contrast, receipts in excess of a customer's MDIQ could only be accommodated as interruptible overrun service. Windy Hill concludes that its proposed firm service priorities are consistent with applicable Commission polices. Windy Hill states that its language was adapted from language found in Pine Prairie's pro forma tariff. Windy Hill asserts that its provisions comply with the Commission's directives to Pine Prairie to comply with Order No. 636-B's requirement that, once primary and secondary points have been scheduled, curtailment should treat such points on a pro rata basis.[64]

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[62] *See Egan Hub* at P14; s*ee also Bluewater*.

[63] *See* Exhibit P, GT&C, section 5.1; Original Sheet No. 129.

[64] *Pine Prairie Energy Center, LLC*, 109 FERC ¶ 61,215 at P 45 (2004) (*Pine Prairie*).

77. The Commission finds that Windy Hill's answer clarifies that service in excess of MDRQ, but less than or equal to MDIQ or MDWQ, is not overrun service but is treated as service at a secondary point. We confirm that, after service is scheduled, primary and secondary point service has the same scheduling priority. Windy Hill's scheduling priorities are consistent with the Commission's policy and precedent and are accepted here.

7. **Scheduling of Interruptible Service**

78. BP contends that Windy Hill should schedule interruptible services based on the rate that each shipper is paying rather than on a pro rata basis. BP states that the Commission has noted that such economic scheduling for interruptible service is consistent with Commission policy,[65] and that it promotes allocative efficiency. BP also states that regional transmission organizations rely on economic scheduling for non-firm transmission service.[66] BP concludes that Windy Hill should adopt economic scheduling of interruptible service and should allow an interruptible shipper to increase the rate that it is paying.

79. Windy Hill replies that, while the Commission has expressed it preference for economic scheduling, it has not required all pipelines and storage service providers to use economic scheduling but has instead required them to provide justification for allocation mechanisms other than economic scheduling.[67] Windy Hill states that it has proposed pro rata curtailment in the interest of fairness. Windy Hill asserts that pro rata curtailment will allow each interruptible shipper to receive a portion of the service requested and will permit a more efficient curtailment process. Windy Hill states that the Commission has allowed other independent storage providers to use an identical pro rata curtailment mechanism.[68]

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[65] BP cites *Enogex*, 103 FERC ¶ 61,161 at P 19 (2003), *reh'g denied*, 106 FERC ¶ 61,093 (2004).

[66] BP cites PJM Interconnection tariff, Fourth Revised Volume No. 1, § 14.7, Original Sheet No. 43.

[67] Windy Hill cites *Sea Robin Pipeline Co*., 81 FERC ¶ 61,041 at 61,225 (1997).

[68] Windy Hill cites Bluewater Gas Storage, LLC, FERC Gas Tariff, Original Volume No. 1, GT&C, section 5.3(a) (Original Sheet No. 124); *Pine Prairie*, 109 FERC ¶ 61,215 at P 42 (approving proposed tariff, including GT&C section 5.3 which provides for pro rata curtailment of interruptible service); *Port Barre Invs., L.L.C. d/b/a Bobcat*

(continued)

80. While the Commission's preference is for economic scheduling, we have allowed alternative proposals, if justified. Here, Windy Hill's fairness and administrative ease arguments are not persuasive and provide insufficient justification to depart from our policy of scheduling by price. While there may be more than one approach to scheduling that is equitable, economic scheduling provides capacity to those who value it the most, and the Commission has found that method to be a more equitable process. Similarly, we are not convinced that pro rata curtailment would result in a more efficient curtailment process in these circumstances. A pro rata curtailment process could involve an iterative process where shippers would need to determine whether to accept a partial nomination. While we have accepted tariffs containing similar provisions for other storage providers,[69] no party objected and the orders accepting those tariffs did not specifically address this issue. For these reasons, we will reject Windy Hill's proposal for pro rata curtailment of interruptible service and will require Windy Hill to revise its tariff to implement economic scheduling for interruptible services.

8. Hourly Flexibility

81. Windy Hill's proposed replacement tariff requires shippers to deliver gas into Windy Hill and to take delivery from Windy Hill on a uniform hourly basis.[70] BP argues that greater hourly flexibility should be a component of firm and interruptible storage service because most gas utilities and end-users cannot take deliveries on a uniform hourly basis, as would be required by Windy Hill's proposed tariff. BP asserts that gas demand in residential and commercial markets surges during different portions of the day and is affected by weather fluctuations. In addition, because there is no hourly traded gas market, shippers have no means to manage hourly fluctuations in usage. BP asserts that the Commission requires pipelines to provide a reasonable degree of hourly flexibility, to the extent operationally feasible.[71] BP states that the Commission should require Windy Hill to allow reasonable hourly flexibility.

Gas Storage, 116 FERC ¶ 61,052 (2006) (approving, in part, pro forma Original Sheet No. 77).

[69] *Id*.

[70] Exhibit P, GT&C, section 8.3; Original Sheet No. 138.

[71] BP cites *Portland Natural Gas Transmission*, 106 FERC ¶ 61,289 at P 62 (2004) (*Portland*), *Texas Eastern Transmission, LP*, 102 FERC ¶ 61,198 at P 54 (2003) (*Texas Eastern*), and *CNG Transmission Corp*., 90 FERC ¶ 61,351 at 62,161 (2000).

82. Windy Hill replies that in order to ensure that firm shippers receive the full service they have reserved, it may need to hold hourly receipts or deliveries to as nearly uniform hourly rates as possible during peak periods. Windy Hill states, however, that it is proposing to offer reasonable hourly flexibility by offering its customers, when it can, additional flexibility on a non-discriminatory basis.[72] Windy Hill argues that BP has cited no precedent that would require Windy Hill to provide more flexibility. Windy Hill asserts that certain cases cited by BP are not on point as they address pipelines accused of degrading existing service by eliminating flexibility, while Windy Hill has no existing customers or service. Windy Hill contends that other cases cited by BP support Windy Hill's proposal in that they accept tariff provisions that permit the service provider to enforce uniform hourly flow limits to protect system integrity and allow, but do not require, that the service provider permit non-uniform hourly flows if operational circumstances exists.[73]

83. The Commission finds that Windy Hill's replacement tariff provides reasonable hourly flexibility. Windy Hill indicates that uniform hourly rates may be needed during peak periods but that it will offer its customers additional flexibility on a best-efforts, non-discriminatory basis. The Commission has found in numerous cases that it is not unreasonable to require shippers to maintain uniform hourly flows. To mandate more hourly flexibility than Windy Hill proposes could compromise reliable service to other shippers and affect line pack fuel costs. However, the Commission has encouraged pipelines to provide such flexibility when operational circumstances allow. Accordingly, we will accept Windy Hill's proposed provision.[74]

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[72] GT&C section 8.3 of its replacement pro forma tariff provides that "[a]s determined by Windy Hill in its sole and reasonable judgment, flow rates above 1/24 of Customer's MDRQ or MDDQ may be permitted."

[73] Windy Hill cites *Portland*, 106 FERC ¶ 61,289 at P 62 (2002) (tariff allows for departure from uniform hourly flows by mutual agreement); *Texas Eastern*, 102 FERC ¶ 61,198 at P 54 (2003) (uniform hourly flows may be required to protect system integrity).

[74] *See* Bluewater, Original Sheet No. 138, Original Volume No. 1; Egan Hub, Original Sheet No. 137, First Revised Volume No. 1.

9. Fuel Charge

84. BP takes issue with Windy Hill's proposal to impose a fuel reimbursement surcharge on all services, except no-notice service.[75] BP argues that a pipeline cannot impose a fuel charge on a service that is not supported by fuel, and the Windy Hill must justify the imposition of such a fuel charge.[76] BP states that several of the proposed hub services appear to be paper transactions, such as the Rate Schedule IW wheeling service, and would not rely on compression. Since shippers would already be paying for fuel as part of the storage service, BP requests that the Commission require Windy Hill to demonstrate that the services that would be subject to the fuel charge are supported by fuel.

85. Windy Hill replies that a storage provider authorized to charge market-based rates is not required to offer cost support for its rates and is thus not obligated to justify its imposition of a fuel charge, service by service. Windy Hill argues that a service provider with market-based rate authority is authorized to charge market-based rates at levels it deems to be adequately compensatory and that potential customers are free to negotiate the level of those rates with the storage service provider or go elsewhere if they find the rates unacceptable. Windy Hill contends that its proposal to reserve flexibility to set fuel rates is fully consistent with its market-based rate authority and with the approach to fuel retention the Commission has authorized for other independent storage service providers.[77] Windy Hill also notes that BP is incorrect in stating that wheeling service requires no fuel. Windy Hill explains that wheeling from a lower-pressure pipeline to a higher-pressure pipeline will require compression and will thus consume fuel.

86. Windy Hill is correct that its market-based rate authority gives a storage service provider the ability to offer service at rates it deems adequately compensatory. Storage providers with market-based rate authority are not required to provide cost justification for fuel charges or other rates, as market-based rates are not cost-based.

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[75] Exhibit P, GT&C, section 19.1; Sheet No. 147.

[76] BP cites *Gulf South Pipeline Co.*, 114 FERC ¶ 61,085 at P 6 (2006).

[77] Windy Hill cites Egan Hub Gas Storage, LLC, FERC Gas Tariff, Original Volume No. 1, FSS Rate Statement (Original Sheet No. 10).

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

87. Windy Hill's proposed replacement tariff provides that "WINDY HILL 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 WINDY HILL'S gross negligence or willful misconduct."[78] BP argues that Windy Hill's proposed gross negligence standard is at odds with Commission policy. BP states that the simple negligence standard gives pipelines a powerful incentive to operate their systems in a reasonable and prudent manner.

88. Windy Hill concedes that BP's objection has merit. Windy Hill thus states that it agrees to eliminate the gross negligence standard in its pro forma tariff and replace it with a simple negligence standard. In its answer, Windy Hill has submitted a substitute tariff sheet making this change.

89. The agreed-to revision is consistent with Commission policy on this issue.[79] As such, we will accept Windy Hill's proposal to eliminate the gross negligence standard and replace it with the simple negligence standard.

F. Market-Based Rates

90. Under the Alternative Rate Policy Statement, [80] 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

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[78] Exhibit P, GT&C, section 5.4; Original Sheet No. 130.

[79] *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); and *Transcontinental Gas Pipeline Corp*. 96 FERC ¶ 61,352 at 62,324 (2001).

[80] *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) (Alternative Rate Policy Statement).

lack of market power[81] because customers have good alternatives,[82] 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, such as ease of entry into the market.

91. In the May 2006 Order, the Commission determined that Windy Hill lacked market power with regard to firm and interruptible storage services in the relevant market. Windy Hill's market power analysis identified the relevant product market as interruptible and firm natural gas storage services. The relevant geographic market was identified as storage facilities that are connected to or directly accessible to the pipelines and hubs south and north of Windy Hill,[83] and includes 36 other storage facilities located in Wyoming, Colorado, Kansas, Oklahoma, and southwestern Nebraska. Further, Windy Hill's market power analysis showed a Herfindahl Hirschman Index (HHI)[84] of market concentration for working gas capacity of 1,311, with Windy Hill's market share being 1.9 percent.[85] Windy Hill's HHI for peak day deliverability was 1,491, with Windy Hill's market share being 6.3 percent.

92. The Commission concluded that: (1) Windy Hill's proposed market definition properly identified good alternatives to Windy Hill; (2) that within this relevant market,

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

[82] 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.

[83] These hubs include the Cheyenne Hub (north of Windy Hill on Cheyenne Plains) and Greensburg Hub (south of Windy Hill on Cheyenne Plains).

[84] 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.

[85] 115 FERC ¶ 61,218 at P 31.

Windy Hill's prospective market shares are low and that the market's concentration is below the threshold for closer scrutiny; and (3) that barriers to entry are likely to be low in the relevant market. For these reasons, the Commission granted Windy Hill authority to provide firm and interruptible storage services at market-based rates pursuant to Rate Schedules FSS and ISS.[86]

93. Subsequent to the issuance of the May 2006 Order, Windy Hill notified the Commission that it was acquired by its new owner, Crossroads, an indirect subsidiary of NGS, and that the acquisition would have no impact on its market power status.[87] While NGS, through subsidiaries, is in the process of developing two additional jurisdictional independent natural gas storage facilities, in Texas and Mississippi,[88] those prospective storage projects are outside the relevant geographic market for Windy Hill. The Commission, therefore, finds that the acquisition will have no impact on Windy Hill's market power status and, thus, reaffirms Windy Hill's authority to charge market-based rates for its FSS and ISS services. With regard to Windy Hill's request to extend that authority to cover the additional services Windy Hill is proposing in its replacement tariff, we note that parking and loaning services are essentially variations of storage service.[89] Balancing services are also forms of storage service. Therefore, the Commission finds that the market power analysis in the May 2006 Order also demonstrates that Windy Hill lacks market power over its parking, loaning, and balancing services.

94. In evaluating whether shippers of an applicant seeking market-based rate authority for interruptible wheeling service could obtain the same services from alternative providers, the Commission has used a matrix, referred to as a "bingo card," which identifies all possible interconnects for pipelines attached to a hub and indicates whether good alternatives exist. To support its request for market-based rate authority for its interruptible wheeling service under Rate Schedule IW, Windy Hill supplemented its prior market analysis by submitting in its amendment application an analysis to

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[86] *Id.* at P 34.

[87] Windy Hill filed a "Notification of Transaction Involving Change in Ownership" in Docket No. CP06-19-000 on October 2, 2006.

[88] As stated, *supra*, those facilities are the Tres Palacios Gas Storage facility in Texas and the Leaf River Energy Center gas storage facility in Mississippi.

[89] *Katy Storage and Transportation, L.P.*, 106 FERC ¶ 61,145 (2004).

demonstrate that Windy Hill also lacks market power in performing the service of wheeling natural gas.[90]

95. Windy Hill states that the relevant geographic market consists of Colorado, Wyoming, Kansas, Oklahoma, and southwestern Nebraska (the Rocky Mountain Region). The Commission previously accepted the Rocky Mountain Region as the relevant geographic market applicable to the Windy Hill project.[91] For purposes of its analysis, Windy Hill identifies the relevant products as firm and interruptible natural gas storage, hub and wheeling services in the Rocky Mountain Region. According to Windy Hill, it has received certificate authorization to construct, own and operate a salt cavern storage facility consisting of four caverns with a total working gas capacity of 6 Bcf and peak day deliverability of 400 MMcf. The storage facility will be located near the Cheyenne Hub in Morgan County, Colorado, and will be interconnected with two interstate natural gas pipelines (Cheyenne Plains Gas Pipeline Company, LLC and Colorado Interstate Gas Company) as well as an intrastate pipeline company (Public Service Company of Colorado).

96. Windy Hill performed an analysis of alternative delivery and receipt points for the proposed pipelines that will be connected to Windy Hill. Windy Hill's analysis considers different paths customers could use as alternatives to the wheeling services Windy Hill will be able to provide using its header system and pipeline interconnects. According to Windy Hill, its analysis demonstrates that competitive alternatives exist using pipeline interconnects and hubs in the relevant market so that customers could bypass wheeling services provided by Windy Hill's header pipeline system in the event Windy Hill attempted to raise rates above market levels. Windy Hill states that, because it is a new facility, it will be forced to charge rates at or below current market rates for comparable services, including wheeling, in order to attract customers. Windy Hill asserts that its storage and services will also provide competition to existing facilities and will have a pro-competitive effect on the Rocky Mountain Region.

97. The market analysis shows that, including the proposed Windy Hill facility, there will be 20 delivery and 17 receipt points among four market centers and hubs in the relevant geographic market. Total delivery capacity to the hubs and market centers is 8,111 MMcf per day, of which Windy Hill will account for 1,200 MMcf per day, or about 15 percent. Windy Hill states that the HHI for total delivery capacity at market centers and hubs, with the addition of Windy Hill, will be 3,408, a 22 percent reduction from the

[90] Application of Windy Hill at Exhibit I.

[91] 115 FERC ¶ 61,218 at P 30.

current HHI of 4,393. Similarly, Windy Hill states that the total receipt capacity at the hubs and market centers is 4,557 MMcf/day of which Windy Hill will account for 405 MMcf/day or about 9 percent. Windy Hill states that the addition of Windy Hill will reduce the HHI calculation for receipt capacity 15 percent, from an HHI of 3,478 to 2,967. Windy Hill concludes that these calculations suggest that the addition of Windy Hill's capacity to provide wheeling services in competition with incumbent providers will reduce the level of concentration and will result in a more competitive marketplace than currently exists. Windy Hill contends that the number of choices available to shippers in the region suggests that Windy Hill will be forced to compete with existing facilities by charging competitive rates for wheeling services.

98. We find that Windy Hill's market analysis shows that Windy Hill's facilities will be in a competitive market where good alternatives to Windy Hill's interruptible wheeling service exist for potential customers. We also find that Windy Hill's prospective market shares are low and that the addition of Windy Hill's wheeling service will result in a more competitive marketplace. Further, Windy Hill's request for market-based rate authority is unopposed. For these reasons, the Commission will approve Windy Hill's request for authority to charge market-based rates for interruptible wheeling services.

99. Our affirmation of market-based rate authority for Windy Hill's previously approved services, and grant of market-based rate authority in this order for the proposed services, are subject to re-examination if a significant change occurs to Windy Hill's market power status. Windy Hill 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) Windy Hill seeks to add storage capacity beyond the capacity authorized; (b) an affiliate increases storage capacity; (c) an affiliate links storage facilities to Windy Hill: or (d) Windy Hill, or an affiliate, acquires an interest in, or is acquired by, an interstate pipeline connected to Windy Hill. Since these circumstances could affect its market power status, Windy Hill 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 Windy Hill.[92] The Commission also reserves the right to require an updated market power analysis at any time.[93]

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

[93] *See Bluewater,* 117 FERC ¶ 61,122 at P 32 (2006) and *Rendezvous Gas Services, L.L.C.,* 112 FERC ¶ 61,141 at P 40 (2005). The Commission notes that in (continued)

G. Waivers

100. Windy Hill requests that the Commission confirm that the waivers of the Commission's filing, accounting, and reporting requirements granted in the May 2006 Order remain applicable to its provision of storage and hub services proposed herein. The cost-related information required by these regulations is not relevant in light of our approval of market-based rates for Windy Hill's storage and hub services. Thus, we confirm that these waivers, granted in our previous order, remain applicable.

101. Windy Hill further requests that the Commission also confirm that the following previously-granted waivers will be applicable to its replacement pro forma tariff: (1) waiver of the "shipper must have title" rule; (2) waiver of the Commission's regulations regarding capacity segmentation; and (3) partial waiver of the Commission's regulation requiring interstate pipelines to comply with the electronic data interchange (EDI) standards established by NAESB.

102. We confirm that the "shipper must have title" waiver will be applicable to Windy Hill's replacement pro forma tariff, with the following clarification, consistent with our previous order.[94] Windy Hill may only use capacity obtained on other pipelines in order to render services set forth in its tariff. That is, Windy Hill may not use 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, Windy Hill's authorized use of this waiver to provide storage services shall be limited to the geographic area covered by Windy Hill's market study. As stated in the May 2006 Order, Windy Hill is required to make an annual informational filing on its provision of service using off-system capacity, once it becomes operational.[95]

Order No. 678, it chose not to impose a requirement that storage providers granted market-based rates file an updated market power analysis every five years. *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, 71 Fed. Reg. 36,612 (June 27, 2006) FERC Stats. & Regs. ¶ 31,220 at P 90, *order denying reh'g and granting clarification,* Order No. 678-A, 117 FERC ¶ 61,190 at P 15 (2006).

[94] 115 FERC ¶ 61,218 at PP 42-46; *see, also, Bluewater* 117 FERC ¶ 61,122 at P 54.

[95] 115 FERC ¶ 61,218 at PP 45-46.

103. We further confirm that the segmentation waiver will be applicable to Windy Hill's replacement pro forma tariff. The Commission has found that the segmentation requirements of section 284.7(d) of the Commission's regulations do not apply to pipelines engaged solely in natural gas storage and which do not provide other stand-along transportation services.[96] Similarly, in the May 2006 Order, we granted Windy Hill an exemption from the EDI standards, based on its statement that it anticipates having only a small number of customers and that those customers would not require EDI. We required Windy Hill to implement the EDI standards within 90 days following a request from one of its customers that it implement EDI.[97] We confirm that the exemption will be applicable to the replacement pro forma tariff.

104. Finally, Windy Hill requests in its application for amendment of its certificate that the Commission grant it an exemption from compliance with Order Nos. 587-G and 587-L regarding netting and trading of imbalances.[98] Windy Hill states that in its September 28, 2000 Order granting clarification of Order No. 587-L,[99] the Commission ruled that pipelines that do not have imbalance penalties as part of their tariffs may request exemption from compliance with Order Nos. 587-G and 587-L. Accordingly, because Windy Hill's replacement pro forma tariff does not include imbalance penalty provisions, Windy Hill requests that it be exempt from offering the netting and trading of imbalances under Order Nos. 587-G and 587-L.[100] Windy Hill notes that the

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[96] *See id.* at P 41; *see, also, Bluewater* at P 51.

[97] 115 FERC ¶ 61,218 at P 48.

[98] *Standards For Business Practices of Interstate Natural Gas Pipelines,* Order No. 587-G, 63 Fed. Reg. 20,072 (April 23, 1998), FERC Stats. & Regs. ¶ 31,062 (April 16, 1998), *order on reh'g,* Order No. 587-I, 63 Fed. Reg. 53,565 (October 6, 1998), FERC Stats. & Regs. ¶ 31,067 (September 29, 1998); *Standards for Business Practices of Interstate Natural Gas Pipelines,* Order No. 587-L, 65 Fed. Reg. 41,873 (July 7, 2000), FERC Stats. & Regs. ¶ 31,100 (June 30, 2000).

[99] *Standards for Business Practices of Interstate Natural Gas Pipelines,* 92 FERC ¶ 61,266 (2000).

[100] Windy Hill points out that even though it is not required under Order No. 637 and the Commission's regulations to provide imbalance management services, since its tariff does not include imbalance penalties, Windy Hill nevertheless is proposing to provide a variety of services that its customers will be able to use for imbalance management, such as parking, lending, wheeling, and hourly balancing services.

Commission has previously granted such an exemption in numerous cases involving independent gas storage operators.[101] Consistent with prior Commission orders,[102] the Commission will grant Windy Hill's request.

H. Environment

105. Windy Hill's application for a certificate amendment seeks approval of the terms and conditions for storage service and involves no construction of facilities. As such, under section 380.4(a)(27) of the Commission's regulations, it qualifies for a categorical exclusion from the need for environmental review.[103]

I. Conclusion

106. For the reasons set forth herein, the Commission finds, subject to the conditions below, that the public convenience and necessity requires the amendment of the certificate issued under section 7 of the NGA for Windy Hill's proposed facilities on May 19, 2006 in this proceeding.

107. At a hearing held on June 21, 2007, the Commission on its own motion, received and made a part of the record all evidence, including the application(s), as supplemented, and exhibits thereto, submitted in this proceeding and upon consideration of the record,

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

(A) Windy Hill's certificate authority issued on May 19, 2006 in Docket No. CP06-19-000 is amended to permit the replacement of Windy Hill's pro forma FERC Gas Tariff, as described more fully in the application and in the body of this order. Except as provided herein, Windy Hill's certificate authority remains subject to all of the conditions imposed in the May 2006 Order.

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[101] Application for Amendment at 30, n. 68.

[102] *See, e.g., Pine Prairie* at P 47.

[103] 18 C.F.R. § 380.4(a)(27) (2006). This section categorically excludes from environmental review projects or actions involving the "[s]ale, exchange, and transportation of natural gas under sections 4, 5 and 7 of the Natural Gas Act that requires no construction of facilities."

(B) Windy Hill's amended certificate authority is conditioned upon Windy Hill's compliance with all applicable Commission regulations under the Natural Gas Act, particularly the terms and conditions in Parts 154 and 284 and paragraphs (a), (e) and (f) of section 157.20, except that the requirements of section 157.20(c)(3) are waived.

(C) Windy Hill is authorized to charge market-based rates for its previously approved proposed firm and interruptible storage services, and for its proposed no-notice storage service, park and loan services, and balancing and wheeling services, subject to the conditions, as discussed more fully in the body of this order.

(D) Windy Hill shall notify the Commission within 10 days of acquiring knowledge of: (a) Windy Hill's adding storage capacity beyond the capacity authorized in this order; (b) an affiliate's increasing storage capacity; (c) an affiliate's linking storage facilities to Windy Hill; and (d) Windy Hill's or an affiliate's acquisition of an interest in, or being acquired by, an interstate pipeline connected to Windy Hill. The notification shall include a detailed description of the new facilities and their relationship to Windy Hill. The Commission reserves the right to require an updated market power analysis at any time.

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

(F) Waiver is granted of the Commission's "shipper must have title" policy, subject to the conditions discussed in the body of this order.

(G) Within 30 days after its first full year of operation, and every year thereafter, Windy Hill is directed to file an annual informational filing on its provision of service using off-system capacity, as described in both the May 19, 2006 Order and this order.

(H) Waiver is granted of section 284.12(a)(1)(iv) of the Commission's regulations requiring compliance with the electronic data interchange standards established by NAESB, subject to the conditions discussed herein and in the May 19, 2006 Order.

(I) Windy Hill is exempt from compliance with Order Nos. 587-G and 587-L regarding netting and trading of imbalances.

(J) Windy Hill must submit actual tariff sheets that comply with the requirements contained in the body of this order within 60 days of the issuance of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary