129 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Williston Basin Interstate Pipeline Company Docket No. RP00-107-011

ORDER ON REMAND

(Issued October 30, 2009)

1. This order responds to the remand by the United States Court of Appeals for the District of Columbia Circuit in *Williston Basin Interstate Pipeline Company*,[1] and is informed by the further data and comment elicited by a subsequent Commission order.[2] In *Williston Basin*, the court reviewed Commission orders requiring the conversion of a Part 157 transportation service agreement (Rate Schedule X-13) between Williston Basin Interstate Pipeline Company (Williston) and Northern States Power Company (NSP) to an open-access contract pursuant to Part 284 of the Commission's regulations and Williston's Rate Schedule FT-1. The court found, among other things, that the Commission had not sufficiently explained its decision to require this conversion and remanded the matter to the Commission for further explanation. The Commission provided the parties an opportunity to present further data and comment and to update and complete the record. After reviewing the court's decision in *Williston Basin*, as well as the supplemental data and comments submitted by Williston and NSP, we reaffirm our decision to require the conversion of Rate Schedule X-13, as explained more fully below.

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[1] *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497 (D.C. Cir. 2008) (*Williston Basin*).

[2] *Williston Basin Interstate Pipeline Co.*, 125 FERC ¶ 61,303 (2008) (Data and Comment Order).

I. Background

2. The extensive background to this matter is set forth in prior Commission orders[3] and the opinion of the court of appeals, and is reproduced here only to the extent necessary to understand the remanded issue. NSP, a local distribution company serving natural gas retail customers in North Dakota and Minnesota, receives transportation services from Williston in and around Fargo, North Dakota, along a pipeline facility known as the Mapleton Extension, a 49.3-mile extension of pipeline and appurtenant facilities from Valley City to Mapleton, North Dakota.

3. Prior to the Commission's initial order in this proceeding,[4] NSP took the majority of its service from Williston on the Mapleton Extension under Rate Schedule X-13, an individually-certificated service agreement under Part 157 of the Commission's regulations.[5] The parties entered into the Rate Schedule X-13 contract on February 22, 1991, for a 20-year term. On March 30, 1992, the Commission issued an order in Docket No. CP91-1897-000 granting a certificate of public convenience and necessity to Williston to construct the Mapleton Extension facilities for NSP and to provide firm transportation service on that lateral under Rate Schedule X-13 at the rate of $19.5778 per Mcf per month for 8,000 Mcf per day of contract demand.[6] The X-13 rate was to be recalculated each odd-numbered year, commencing March 1, 1995, until the rate became equal to or less than Williston's maximum FT-1 rate, including surcharges. At that time, the biennial rate restatement would cease, and the rate would converge with the FT-1 rate.

4. Several times during the restatement proceedings for Rate Schedule X-13, NSP expressed its desire to convert Rate Schedule X-13 to an open-access Part 284 service agreement under Rate Schedule FT-1. Because the biennial restatement proceedings were for the limited purpose of adjusting the rates, the Commission deferred acting on the conversion issue in the context of these biennial restatements. The parties were unable to settle the issue in the context of Williston's rate case in Docket No. RP00-107-000, and

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[3] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007, *order aff'g initial decision*, 113 FERC ¶ 61,201 (2005), *order on reh'g*, 115 FERC ¶ 61,081 (2006) (Williston Conversion Orders).

[4] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 (2005).

[5] NSP took the remainder of service on the Mapleton Extension from Williston under a Part 284 Rate Schedule FT-1 open access contract designated as Contract No. FT-00157. The instant order, however, addresses only the X-13 contract.

[6] *Williston Basin Interstate Pipeline Co.*, 58 FERC ¶ 61,344 (1992).

the administrative law judge (ALJ) issued a decision that did not address the conversion issue.[7] In reviewing the ALJ's decision, the Commission found that the ALJ should have permitted NSP to address the conversion issue, and therefore remanded the issue (and a related matter) to the ALJ for decision on the merits.[8]

5. In an April 8, 2005 Initial Decision, the ALJ found that the Commission has the authority to require conversion, that NSP's request for conversion was timely, and that the applicable burden of proof necessary to support the conversion was the "just and reasonable" standard under section 5 of the Natural Gas Act.[9] Applying that standard, the ALJ found that the Commission should grant NSP's request to convert Rate Schedule X-13 to an open-access contract. In its November 22, 2005 Order, the Commission affirmed the ALJ's Initial Decision.[10] Specifically, the Commission found that Rate Schedule X-13 was no longer just and reasonable because it denied NSP and its customers the ability to obtain the open-access benefits that are the hallmarks of the competitive natural gas market that the Commission seeks to foster.

6. The Commission found that Williston's refusal to permit NSP to convert Rate Schedule X-13 was based mainly on Williston's desire to maintain control over as much of the secondary capacity market as possible to the benefit of itself and its FT-1 customers. The Commission noted that Williston's largest FT-1 customer, Montana-Dakota Utilities Company (MDU), is an affiliate of Williston, and it accounted for more than 93 percent of Williston's FT-1 capacity.[11] The Commission also found that conversion was appropriate here because the parties' evident intent that Rate Schedule X-13 would generally mirror FT-1 service as rates for the two contracts were derived from the same cost data and were designed to eventually merge through the biennial rate adjustments. Moreover, Rate Schedule X-13 contained a "*Memphis* clause"[12] that

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[7] *Williston Basin Interstate Pipeline Co.*, 95 FERC ¶ 63,008, at 65,123 (2001).

[8] *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164, at P 99-101 (2004). The related matter pertains to a 50 percent limitation Williston placed on NSP's capacity under its open access Contract No. FT-00157.

[9] *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007, at P 68 (2005).

[10] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 (2005).

[11] Williston is a wholly-owned subsidiary of MDU Resources Group, Inc., of which MDU is a division.

[12] "*Memphis* clauses" are so-named as a result of the United States Supreme Court case, *United Gas Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

effectively permitted either party to petition the Commission to revise their contract. In light of these circumstances, the Commission found that the contract should be revised to permit capacity release, since no secondary market was likely to develop, given the pipeline's and its affiliates' control of virtually all transmission capacity within the area. Accordingly, the Commission found that the Rate Schedule X-13 had become unjust and unreasonable.

7. None of Williston's customers intervened to argue that they would be adversely affected by the conversion.[13] The Commission discussed the estimated cost impact of converting Rate Schedule X-13 to open access on Williston's other FT-1 customers, noting that NSP stood to gain between $401,920 and $694,449 in additional revenue each year from capacity release and segmentation while Williston would only lose interruptible revenues from the sales of capacity on the Mapleton Extension, which amounted to $39,000 in 2003 (although the rates were designed with an assumed level of $50,000 of FT-1 revenues). Williston disputed this projected cost shift, predicting instead a range of $410,920 to $2.2 million. The Commission found Williston's assumptions in arriving at this figure to be unreasonable insofar as Williston's figures presume NSP would release and segment its entire Rate Schedule X-13 capacity for 12 months of the year and never use its capacity to serve its own markets. Accordingly, the Commission found that the benefits outweighed some small cost shifts that, in any event, would not occur until a future rate case, at which point all of Williston's cost of service would be examined.

8. To offset the *de minimis* loss of revenues to Williston, the Commission recognized that NSP would pay the FT-1 reservation charge as well as a surcharge that reflects the cost differential between the FT-1 reservation charge and what the Rate Schedule X-13 charge would have been. In addition, NSP would forgo the interruptible revenues made possible by the Mapleton Extension, and accept a 25-basis-point increase in the return on equity component of the X-13 rate. Williston argued that NSP's Rate Schedule X-13 rates did not account for non-Mapleton Extension costs and should therefore be increased under a converted service contract so that NSP would contribute to mainline costs. Noting that NSP offered to pay more than its current rates, the Commission did not permit Williston to use the remand of the X-13 issue to adjust its other rates, as the scope of the Commission's original remand order was limited to the Rate Schedule X-13 conversion issue. Furthermore, because NSP transported gas to the Mapleton Extension via other parts of Williston's mainline system, the Commission found that mainline transportation costs were arguably included in the X-13 rates.

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[13] *Id.* P 51-58.

9. In its April 20, 2006 Order on rehearing, the Commission affirmed its decision to require conversion of the Rate Schedule X-13.[14] The Commission summarized its decision as confirming the general rule that when a shipper contracts and pays for capacity on a pipeline, it is the shipper's right to release and segment the capacity for which it has paid. In explaining why the Commission required conversion of the Part 157 service agreement here, the Commission identified the following conditions:

> [T]he history of Williston's aggressive interpretation of Rate Schedule X-13, reflected in its mispricing of the rates thereunder, the unique fact of its affiliation with its largest customer and the protection from transmission competition the vestigial X-13 arrangement offered these entities, the impairment of market health resulting from this diminution of competition, and the rejection by the transporter of alternatives offered at hearing for transitioning to open-access service from X-13, which was the culmination of many years of rebuffing the shipper's request to negotiate such a transition.[15]

Having noted these elements, the Commission denied rehearing and affirmed its decision to require conversion of the Rate Schedule X-13 contract.

II. <u>Decision of the U.S. Court of Appeals for the District of Columbia</u>

10. In its remand order, the United States Court of Appeals for the District of Columbia Circuit found that the Commission was correct to decide the case under the "just and reasonable" standard, but that further explanation was needed to support converting Rate Schedule X-13 into a contract under which capacity could be released.[16] The court emphasized that the Commission needed to further articulate its policy, especially where the Commission's leading policy statement refrained from mandating the conversion of all Part 157 contracts.

11. The court addressed the Commission's identification of the "appropriate circumstances" in which it would *require* conversion of a Part 157 contract, rather than simply *favor* such conversion. Of the five reasons given by the Commission, the court found only two to be relevant: "the unique fact of [Williston's] affiliation with its largest

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[14] *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61,081 (2006).

[15] *Id.* P 45.

[16] *Williston Basin*, 519 F.3d 497.

customer and the protection from transmission competition [that] the vestigial X-13 arrangement offered these entities, [and] the impairment of market health resulting from this diminution of competition."[17] With respect to these two considerations, the court found that the Commission's reasoning did not either identify the "special characteristics" applicable to Williston, or explicitly revise its policy from favoring to requiring conversion of Part 157 contracts. Furthermore, the court stated that the Commission's interest in enhancing competition was not a sufficient reason to override the contract, absent a more compelling articulation of the two relevant considerations as they apply to Williston.

12. The court next addressed the Commission's discussion of the financial impact that conversion would have on each party, finding that the Commission did not adequately explain its assertion that converting Rate Schedule X-13 to open access would yield an annual gain to NSP of approximately $402,000 to $695,000 and an annual loss to Williston of approximately $50,000. The court noted, but took no position on, documents that indicate that Williston and NSP had a shared understanding that existing shippers would not bear the costs of the Mapleton Extension and that Williston—not NSP—would benefit from NSP's unused capacity. Additionally, the court objected to the Commission's statement that other cost reductions may offset the reallocation of Rate Schedule X-13 costs, at least to the extent that the Commission's order did not enable those specific cost reductions.

13. Finally, the court addressed the Commission's decision to continue NSP's right to biennial rate adjustments (established in the Rate Schedule X-13 contract) in the new Part 284 contract. Although the court rejected the Commission's argument that it sought to preserve as much of the original agreement as possible, the court acknowledged that the X-13 rate was intended to converge with the FT-1 rate and it invited the Commission to develop this argument more fully on remand. Accordingly, the court remanded the matter to the Commission for further explanation.

III. <u>Supplemental Proceedings</u>

14. Subsequent to the court's decision in *Williston Basin*, the Commission issued its Data and Comment Order, seeking the following information: (1) the amount of transportation capacity, by rate schedule, currently held by affiliates and non-affiliates of Williston; (2) for the last three years, on a monthly basis, the amount of capacity that NSP has released, the rate for the releases and the revenue generated by the releases;

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[17] *Id.* at 501 (identifying the following conditions as irrelevant: the history of Williston's aggressive interpretation of Rate Schedule X-13; Williston's rejection of alternatives offered at hearing for transitioning to open access service; and the conditions, in the aggregate, evincing obstruction of the Commission's policy favoring open access).

(3) for the last five years, on a monthly basis, the amount of capacity released, the rate for the releases and the revenue generated by the releases on Williston's system by shippers other than NSP; (4) for the last five years, on a monthly basis, Williston's interruptible transportation volumes and interruptible revenue, separately stated for both the Mapleton Extension and Williston's system as a whole; (5) the costs allocated by Williston to interruptible transportation service in its last rate case; and (6) the amount of interruptible revenue from the Mapleton Extension credited to FT-1 rates by Williston in its last rate case.[18]

15. Additionally, the Commission sought further comment in light of such supplemental information, specifically addressing the following: (1) the status of Williston's secondary market with respect to the availability of released capacity and interruptible transportation capacity; (2) the extent that Williston and its affiliates compete for the resale of unused pipeline capacity; (3) the impact of the conversion of NSP's Rate Schedule X-13 to Part 284 service on Williston's capacity release and interruptible capacity markets; and (4) the impact of the conversion of NSP's Rate Schedule X-13 to Part 284 service on Williston's ability to recover the costs Williston has allocated to interruptible transportation service in its last rate case.[19]

16. On January 16, 2009, Williston and NSP provided the requested information. Williston and NSP thereafter provided initial and reply comments, addressing the supplemental information. The comments are summarized below.

17. In its initial comments, Williston asserts that the supplemental data it provided shows that in addition to releases by NSP since the conversion of the Rate Schedule X-13, there have been a substantial number of releases on Williston's system in the last five years. Williston states that such releases, which yielded approximately $4.5 million in reservation revenues to releasing shippers, show the existence of a healthy secondary market. Williston states the majority of capacity release volumes involve releases made by MDU. Williston notes that it has no control over MDU's decisions regarding the release of capacity and states that nothing in the record shows that the affiliate relationship between Williston and MDU inhibits competition on the secondary market.

18. Williston states that NSP made two releases after the conversion of Rate Schedule X-13, both for seven-month periods at the maximum rate. Williston states that both releases displaced transportation service that Williston had previously provided, and that the acquiring shippers in those instances did not use NSP's delivery points on the Mapleton Extension; rather, they used alternate receipt/delivery points on other portions

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[18] *Williston Basin Interstate Pipeline Co.*, 125 FERC ¶ 61,303, at P 16 (2008).

[19] *Id.* P 17.

of Williston's system. Williston asserts that the NSP releases cost Williston $443,525.43 in lost interruptible revenues.

19. Williston notes the court's finding that the only relevant arguments in favor of converting Rate Schedule X-13 were the fact that Williston's affiliate, MDU, was its largest customer, and the fact that competition may be enhanced by allowing NSP to release unused capacity. Williston asserts that because MDU has released capacity and there is no evidence of impropriety with respect to dealings between Williston and MDU, the Williston-MDU affiliation is not a "unique" circumstance justifying conversion of Rate Schedule X-13. Moreover, Williston argues that there already is competition on its system without NSP's ability to release capacity and that the converted Rate Schedule X-13 does nothing but shift money from Williston to NSP.

20. Williston asserts that in negotiations over Rate Schedule X-13, NSP agreed that Williston's other customers would not be responsible for the costs of the new service, would not be harmed by the new service, and were to benefit from NSP's unused capacity. Williston argues that it relied on these commitments in deciding to build the Mapleton Extension facilities. However, as a result of the conversion, Williston contends that its customers will face increased costs allocated to them in the next rate proceeding as a result of lost interruptible transportation revenues noted above.

21. Finally, Williston addresses the biennial restatements, which the Commission decided to retain, despite the conversion of Rate Schedule X-13 to an open access service agreement. Williston asserts that the Rate Schedule X-13 rate will not converge with Williston's FT-1 rate because of the depreciation rates in Rate Schedule X-13. Additionally, Williston asserts that the biennial restatement is an undue preference for NSP.

22. In its comments, NSP states the supplemental data filed by Williston shows that Williston's shipper community continues to be dominated by MDU, and that this domination presents the unique circumstance that fully justifies conversion of Rate Schedule X-13. NSP states that of the 640,903 Dth/day under contract under Rate Schedule FT-1, 315,133 Dth/day is under contract to MDU and 110,000 Dth/d is under contract to Prairielands Energy Marketing (Prairielands), a wholly-owned subsidiary of the same parent company as Williston. Taken together, these two affiliates hold 66.3 percent of the total FT-1 capacity under contract as of December 18, 2008. NSP also asserts that Williston's affiliates hold a significantly higher percentage of Williston's firm transportation service than do the affiliates of other interstate pipelines that serve affiliated local distribution companies.

23. NSP states that MDU releases only a small percentage of its capacity, even during the summer months, and those minimal releases are made to an affiliated marketer. NSP states that according to capacity release data available on Williston's informational postings website, MDU has not released any FT-1 capacity to a non-affiliate during the

five-year period covered by the Data and Comment Order's information request. NSP further states that during that period, MDU was engaged in only two capacity release transactions, both of which involved releases to its affiliated marketer Prairielands. In addition, NSP states that Prairielands has released no capacity over the last five years. NSP states that the 6,000 Dth/day currently released by MDU amounts to just 1.9 percent of MDU's FT-1 contract quantity. NSP contrasts this to its own releases of 50 to 60.5 percent of its capacity during the months that it has released capacity. NSP notes that while it is true that the number of Rate Schedule FT-1 shippers on Williston has grown since the Commission ordered the conversion of Rate Schedule X-13, many of the new shippers are marketers that have not released capacity. Only four shippers other than MDU and NSP released any capacity on Williston during the past five years and none of them released more than 8,000 Dth/day.

24. NSP states that Williston's sales of interruptible service continue to dominate the secondary market and that the secondary market remains impaired. NSP states that in determining whether Rate Schedule X-13 is unjust and unreasonable, the Commission may consider whether the affiliate relationship between Williston, MDU, and Prairielands has adversely affected competition between pipeline IT service and released capacity. NSP contends that the lack of a meaningful secondary market is a special characteristic applicable to Williston that would justify a Commission decision to mandate the conversion of a particular service.

25. NSP also notes that the conversion of Rate Schedule X-13 to open access service has not adversely affected Williston's ability to recover the costs that were allocated to its interruptible service in Williston's last rate case. NSP states that Williston's IT revenues have exceeded the costs that Williston calculates were allocated to IT service by $17.7 million, or more than 50 percent, over the last five years.[20] During the 2007 and 2008 calendar years, the only years during which NSP released a portion of its capacity, Williston's IT commodity revenues were $10.8 million and $7.8 million, respectively.[21] NSP argues that despite its capacity releases, Williston was still able to provide IT service along the Mapleton Extension, even during the months when NSP released capacity. Finally, NSP states the conversion has had no impact on the rates Williston charges its other firm customers because Williston has not proposed any changes in its rates since the conversion occurred, which, it states, comes as no surprise given Williston's over-recovery of the costs allocated to IT service.

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[20] NSP states that data provided by Williston shows the costs it believes are allocated to its IT service are $6,263,493 a year, while total IT revenues over the last five years averaged $9.8 million a year.

[21] NSP notes the 2008 number is understated because it does not reflect revenues for December 2008.

26. In its reply comments, Williston reiterates that its affiliation with MDU does not justify the abrogation of Rate Schedule X-13. Williston states that its system has expanded from the size it was during the test period in the underlying rate case in this proceeding, and MDU's percentage of firm capacity is now 49.17 percent[22] of Williston's total capacity of 640,903 Dth/day. Williston argues that this amount of capacity held by an affiliate is not out of the norm.

27. Williston argues that it is irrelevant to impugn MDU's releases to its own affiliate because any release by MDU will compete with Williston, regardless of the identity of the acquiring shipper. Moreover, Williston asserts that NSP's comparison between itself and MDU regarding the amount of capacity that the two entities release is out of context because NSP includes only capacity it releases on Williston. It does not include the amount of capacity NSP releases on other pipelines on which it has capacity. Williston further states that NSP ignores the fact that NSP does not take storage service from Williston, and therefore does not need to retain capacity for storage injections during the injection season and may release it instead.

28. Williston takes issue with NSP's assertion that Williston is over-recovering costs allocated to interruptible service. Williston notes that the IT throughput level found to be representative in its last rate case is now outdated insofar as Williston has placed an additional $86,000,000 of plant into service with its Grasslands Project, which represents an additional 138,000 Dth/day of capacity. Thus, Williston asserts that it is not over-recovering its costs simply because its throughput has changed and it has greater capability to provide IT service. Williston next asserts that although it has lost less than its initial estimate from converting Rate Schedule X-13 (approximately $443,000 as opposed to $1.8 million to $2.2 million), due to NSP not releasing or segmenting the capacity to the greatest extent possible, the decision to release is solely NSP's, and therefore Williston may lose additional revenue if NSP increases the amount of capacity it segments or releases in the future.

29. Finally, Williston argues that while Rate Schedule X-13 contains the costs of the Mapleton Extension, it does not contain the costs of the rest of Williston's system. Williston asserts that shippers acquiring NSP's released capacity are using non-Mapleton Extension facilities by utilizing flexible receipt/delivery points. Thus, Williston argues that while NSP continues to pay the costs of the Mapleton Extension, Williston's other customers must pay for the cost of the released capacity on the remainder of the system, contrary to the intent of the bargain embodied in Rate Schedule X-13.

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[22] Williston states that this figure includes any no-notice service that MDU takes from Williston.

30. In its reply comments, NSP reiterates that the market for secondary capacity on Williston is not working properly and that the market would be constrained even further if NSP were once again unable to release capacity in competition with Williston's IT service. NSP states that the $4.5 million in capacity release revenues to releasing shippers over the last five years cited by Williston is less than 10 percent of the $49 million of IT commodity revenues collected by Williston over the same time period. NSP asserts that this level of dominance is, standing alone, a unique circumstance sufficient to support the Commission's decision to mandate conversion of Rate Schedule X-13.

31. NSP states the issue in this case is not whether Williston and its affiliates have been acting improperly, but whether the affiliate relationship between Williston and its two largest shippers is sufficiently unusual to provide support for the Commission's decision to order the conversion of Rate Schedule X-13 to open access service. NSP explains that affiliated shippers on other pipelines rarely hold as high a percentage of the pipeline's total capacity as MDU and Prairielands hold on Williston, and Williston's affiliates release little or none of the capacity that they hold under long-term contracts.

32. NSP states that converting Rate Schedule X-13 to open access service has not resulted in harm to Williston's other customers. NSP states the rate it is paying fully compensates Williston for the costs attributable to the Mapleton Extension irrespective of whether NSP releases any or all of its capacity. In fact, NSP states that Williston's other customers benefit through NSP's willingness in the design of the X-13 rate to forego the right to share in a rate reduction resulting from the allocation of costs to Williston's IT service even though Williston's sales of IT service would make use of NSP's capacity.

33. NSP states that in response to Williston's arguments that the biennial rate adjustment should be eliminated, if the Commission elects to do so it must also eliminate the $5.26 Dth/month premium that NSP pays above the maximum FT-1 rate applicable to other shippers because NSP is the only open access customer whose rate is more than 50 percent higher than the rate charged to other Rate Schedule FT-1 shippers. NSP disagrees with Williston's argument that the Commission lacks authority to retain the biennial rate adjustments because the courts have held that the Commission cannot require rate filings under NGA section 4 and states that if Williston was unhappy with the rate structure suggested by the Commission in the Mapleton Extension certificate order it should not have filed to implement that rate structure. NSP states that Williston has not shown a nexus between the biennial rate adjustment and the conversion of Rate Schedule X-13 to open access service that would transform the adjustment into an undue preference once conversion occurred. NSP states that conversion has not adversely affected Williston's ability to recover the costs allocated to its IT service or its ability to recover the costs of the Mapleton Extension through an incremental rate and the fact that the conversion may have reduced the amount by which Williston would otherwise over-recover those costs does not taint the ongoing validity of the biennial rate adjustment as a

mechanism designed to achieve parity between NSP and other Rate Schedule FT-1 shippers.

IV. Discussion

34. Having considered the supplemental data and comments, we find that former Rate Schedule X-13 had become unjust and unreasonable, as our prior orders held. As the supplemental data show, the lack of any significant competition in the market for secondary capacity on Williston is an unusual local circumstance that allows Williston and its affiliates to maintain so dominant a position in the market for secondary capacity that it appears to impair that market. Moreover, the affiliate relationship between Williston and its two largest customers (MDU and Prairieland) results in a highly concentrated market for secondary capacity, which further exacerbates the lack of competition in the market for secondary capacity on Williston. These factors support the Commission's finding that Rate Schedule X-13, which perpetuated the highly concentrated market, had become unjust and unreasonable.

35. In affirming our prior decision to require conversion of Rate Schedule X-13, we also address the court's concern over the retention of the biennial rate adjustment process. We continue to find it appropriate to use the incremental Part 157 contract rate as the basis for the rate in a converted Part 284 service agreement, consistent with Commission policy in the context of voluntary Part 157 conversions.[23] However, in light of the court's concern with the compulsory nature of the conversion, we will allow Williston, if it so chooses, to file a new cost-of-service rate to replace the current rate structure. Any such proposal must be fully supported by Williston's cost of providing service under the converted service agreement, and it must also be consistent with Commission rate-setting policy.

A. Commission Policy on Conversion of Part 157 Service Agreements

36. In *Williston Basin*, the court sought further explanation for the Commission's decision to require the conversion of Rate Schedule X-13 in light of the fact that this case

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[23] *See, e.g., Tennessee Gas Pipeline Co.*, 89 FERC ¶ 61,051, at 61,156 (1999) ("[T]he Commission has previously permitted pipelines to effectuate Part 157 conversions to Part 284 service under which the converting customer pays the currently existing Part 284 firm transportation commodity and reservation rates plus a reservation surcharge, if necessary, to equalize the Part 284 reservation rate with the previous Part 157 rate." (citing *Transcontinental Gas Pipe Line Corp.*, 73 FERC ¶ 61,024, at 61,052 (1995); *Transcontinental Gas Pipe Line Corp.*, 77 FERC ¶ 61,253, at 62,037 (1996); *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,093, *aff'd*, 63 FERC ¶ 61,100, at 61,445 (1993)).

represented the first time the Commission exercised its authority to require conversion of a Part 157 service agreement.[24]

37. In Order No. 636-B, the Commission refrained from articulating a universal method by which shippers and pipelines could convert Part 157 service to open-access service, and instead encouraged pipelines to convert such contracts, explicitly stating the expectation that pipelines will implement such conversions to the "maximum extent feasible."[25] This approach, undertaken in a period of rapid restructuring of interstate pipeline services and regulations, left it to the Commission to evaluate individual requests to convert Part 157 service agreements not previously converted as part of the Order No. 636 restructuring process based on their own merits. Thus, while a situation has not previously arisen in which it was necessary to require conversion of a Part 157 service agreement over the objection of a pipeline, the special circumstances here support requiring the conversion of Rate Schedule X-13.[26] Those circumstances are borne out by the supplemental data provided to the Commission, and include (1) the lack of significant competition for released capacity; (2) the lack of any significant competition resulting from the affiliate relationship among Williston and its affiliates, MDU and Prairielands; (3) the fact that Williston has recovered and will likely continue to recover costs allocated to interruptible service; (4) the fact that conversion has not led to operational impairments to the pipeline and/or services provided by the pipeline; and (5) the fact that Rate Schedule X-13 expressly allowed NSP (or Williston) to seek a change in the arrangement from the Commission.

B. Special Characteristics Meriting Conversion of Rate Schedule X-13

38. As mentioned above, Williston's system currently has a limited market for released capacity, and conversion of Rate Schedule X-13 serves to increase competition, by increasing both the volume of releasable capacity as well as the number of parties

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[24] *Williston Basin*, 519 F.3d at 502.

[25] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636**,** FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A**,** FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272, at 61,944 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[26] It has not been necessary to require conversion of a Part 157 agreement because pipelines have previously allowed such conversions to be undertaken on a voluntary basis. *See, e.g., Tennessee Gas Pipeline Co.*, 89 FERC ¶ 61,051, at 61,155 (1999).

actively seeking to release capacity. As shown in the data submitted by Williston, in the five years preceding December 2008, the amount of released firm capacity on Williston by shippers other than NSP has averaged roughly between 5,000 Dth/day and 15,000 Dth/day out a total firm capacity held under Rate Schedule FT-1 of 640,903 Dth/day. Data provided by Williston also shows that sales of interruptible capacity on Williston generally range between 30,000 Dth/day and 250,000 Dth/day. Thus, not only do capacity release volumes represent a small portion of Williston's total firm capacity (0.8 to 2.3 percent on average), they also generally represent a relatively small portion of overall market for secondary capacity (released capacity plus interruptible capacity) sold on Williston. Moreover, as NSP notes in its comments, the universe of those shippers actually releasing capacity on Williston is small.[27] Thus, the current state of the capacity release market on Williston generally lacks the traditional hallmarks of a competitive market, i.e., numerous buyers and sellers and a significant level of liquidity. Where the Commission has the opportunity to make such a market more competitive by changing a Part 157 service agreement to allow release of unused capacity, it will do so.

39. Furthermore, in the two years of available data during which NSP released capacity, NSP released between 50 percent and 62.5 percent of its contract quantity (4,000 Dth/day or 5,000 Dth/day) in the off-peak months between April and October. These volumes represent an increase of 60 percent (in 2007) and 31 percent (in 2008) in the total amount of capacity released on Williston's system during those months. Additionally, NSP's ability to release firm capacity adds another potential seller from whom shippers can purchase released capacity.

40. Another unique circumstance here is the extreme concentration of firm capacity in the hands of Williston's affiliates. As the court recognized, the affiliate relationship between Williston and its largest customers "enhances the argument for shifting NSP to open access."[28] In Order No. 712-A, the Commission noted that the high concentration of Williston's firm capacity held by its affiliate, MDU, is not typical among natural gas pipelines.[29] Although the Commission's determination in Order No. 712-A was made

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[27] *See* NSP, February 17, 2009, Initial Comments at 9 (noting that only four shippers other than MDU and NSP released any capacity during the five-year period in which data was provided).

[28] *See Williston Basin*, 519 F.3d at 502 ("At the margin, [the affiliation between a pipeline and its largest customer] presumably enhances the argument for shifting NSP to open access, as it means that the competitive capacity resale market is smaller than one would otherwise expect.")

[29] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284, at P 25 (2008), *order on reh'g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009).

(continued…)

based on data from 2000 (which demonstrated an even more concentrated market on Williston), the more current data submitted in this proceeding confirms that firm capacity on Williston continues to be highly concentrated in the hands of Williston's affiliates. Two of Williston's affiliates—MDU (a local distribution company) and Prairielands (a marketer) hold a majority of firm capacity on Williston (49.17 percent and 17.16 percent, respectively). Accordingly, they control roughly two-thirds (66.3 percent) of Rate Schedule FT-1 capacity, and thus dominate the market of released capacity.

41. As illustrated in the comments, neither MDU nor Prairielands releases a significant amount of capacity. Thus, what little releasable capacity does exist on Williston's system, other than through the releases by NSP or the occasional release by another shipper, is kept primarily in the hands of Williston's affiliates. The fact that Williston's affiliates do not release a significant amount of capacity enhances the saleability of Williston's interruptible transmission service, and it also limits the secondary capacity market on Williston.

42. Williston contends that such facts are irrelevant in the absence of specific allegations of impropriety or violations of Commission rules. We disagree. In *Southern California Edison Company*, the court found the Commission's responsibility under section 5 of the Natural Gas Act to be not so constrained.[30] In that case, the Commission dismissed a complaint alleging that a shipper inappropriately exercised market power by releasing capacity at below market rates to certain customers and not to others.[31] The Commission found that because the rates charged for the releases were below the maximum tariff rate, no rules were violated and thus the complaint should be dismissed.[32] The court disagreed, finding that the Commission's duties under section 5 of the Natural Gas Act are not so limited, and that they extend not only to unjust and unreasonable rates, but to unjust and unreasonable practices as well.[33] Similarly here, Rate Schedule X-13, on its face, does not violate any specific Commission regulations. However, when viewed in light of the limited competition on Williston's system and the high concentration of firm capacity in the hands of its affiliates, we find that Rate

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(noting that the high level of firm capacity held by Williston's affiliate, MDU, reflects that the pipeline holds a significant amount of market power and that a competitive market does not exist).

[30] *Southern California Edison Co.*, 172 F.3d 74 (D.C. Cir. 1999).

[31] *Id.* at 75.

[32] *Id.*

[33] *Id.*

Schedule X-

13 has become unjust and unreasonable, requiring the Commission to exercise its authority to require conversion under section 5 of the Natural Gas Act.

43. Additionally, the data submitted by Williston shows that Williston continues to recover the costs allocated in its last rate case to system-wide interruptible service, even in years where NSP has released capacity under its Part 284 agreement. Williston states that Rate Schedule IT-1 rates are designed to recover $6,263,493 of costs. In 2007, Williston indicates that it had IT-1 commodity revenues of $10,844,745.55. Through the first eleven months of 2008, Williston recovered IT-1 commodity revenues of $7,846,331.09. Thus, even when NSP was releasing its capacity under the converted service agreement, Williston continued to recover revenues above the costs allocated to interruptible service. Williston claims that such revenues are the result of additional throughput enabled by the new Grasslands Project, recently put into service and therefore not reflected in Williston's current rates. This argument misses the mark. Williston is free to file a rate case under section 4 of the Natural Gas Act to recover any such Grasslands costs. To the extent that Williston chooses not to do so, its rate design continues to allocate $6,263,493 to Rate Schedule IT-1, and as discussed above, Williston continues to recover revenues in excess of that amount.

44. Moreover, the data do not support Williston's argument that capacity released by NSP displaces Williston's interruptible revenues. Williston has made no showing that, either now or in the future, the revenue allocated to Rate Schedule IT-1 will be diminished as a result of the converted Rate Schedule X-13. The Commission's decision to require the conversion of Rate Schedule X-13 has enabled NSP to garner additional revenues through its newfound ability to release capacity. Yet it is impossible to discern with any certainty any substantial reduction in revenues to Williston through the loss of interruptible sales, as capacity released by NSP now competes not only with interruptible capacity sold by Williston, but also with released firm capacity sold by shippers. Regardless of whether, as Williston alleges, some capacity released by NSP may have displaced interruptible capacity that Williston would have sold, no persuasive quantification for this assertion has been offered that takes into account the fact that capacity released by NSP competes directly with the releases of other shippers. Such increased competition is precisely the reason for requiring the conversion. Even if Williston may experience some financial impact from the conversion, it appears to be *de minimis* on the record before us, since Williston remains fully able to recover the costs allocated to interruptible service after the conversion.[34]

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[34] As mentioned above, the court took note of certain documents that may have suggested a shared understanding that Williston's existing shippers would not bear any costs of the Mapleton Extension and that Williston would benefit from NSP's unused

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45. The Commission's next consideration in determining whether to require conversion of a Part 157 contract looks to whether such a conversion will result in operational difficulties for the pipeline. In *Williston Basin*, the court noted that the Commission has previously declined to require conversion of a Part 157 service agreement where the conversion would compromise the pipeline's ability to provide no-notice service and present operational difficulties to the pipeline.[35] However, while such operational problems may counsel against requiring conversion of a Part 157 agreement, the absence of such problems presents no bar to requiring conversion in the appropriate circumstances, such as here.

46. Finally, as noted above, Rate Schedule X-13 was drafted to permit parties to seek revision of the agreement from the Commission. Accordingly, under the factors set forth above, Rate Schedule X-13 had become unjust and unreasonable, such that the Commission reasonably exercised its authority under section 5 of the Natural Gas Act to require conversion of that service agreement.

C. Rate for Converted Part 284 Service Agreement

47. In requiring conversion of Rate Schedule X-13, the Commission based the new rate on the rate structure and substance embodied in the original Rate Schedule X-13 to the extent possible, thus attempting to preserve as much of the parties' original agreement as possible.[36] In *Williston Basin*, the court expressed concern as to the Commission's reasoning for retaining some elements of the original Rate Schedule X-13 while at the same time converting the agreement to an open access service agreement, thereby changing other elements of the original bargain.[37] However, the Commission's intent in retaining the rate structure as set forth in the original agreement was not to arbitrarily pick and choose certain elements from the old agreement while discarding others. Rather, it reflected a presumption that, in large part, the cost of service employed in both scenarios would be essentially the same. Moreover, basing the new Part 284 rate on an old Part 157 rate is essentially the policy used by the Commission in the context of

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capacity. We find that the possible existence of any such understandings, insofar as they were not memorialized in the original February 22, 1991 contract between the parties or Rate Schedule X-13, to be irrelevant to our determination to require conversion of Rate Schedule X-13 to open access.

[35] *Williston Basin*, 519 F.3d at 502 (citing *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299, at P 44 (2004) (*Transco*)).

[36] *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61,081 at P 42-44.

[37] *Williston Basin*, 519 F.3d at 504.

voluntary conversions.[38] Although the Commission earlier assumed that each biennial adjustment would lower the rate slightly, in fact, the rate has also increased pursuant to these proceedings. Nonetheless, if Williston wishes to establish a different Part 284 rate for the converted Part 284 service agreement, we will allow Williston, if it so chooses, to file a new cost-of-service rate to replace the current rate structure. Any such proposal must be fully supported by Williston's cost of providing service, and it must also be consistent with general Commission rate-setting policy under Part 284 of our regulations.

48. In situations involving voluntary conversions, shippers converting to Part 284 service on incremental facilities have taken such service under a rate reflecting an equivalent incremental rate, fuel provisions, surcharges applicable to Part 284 services, and the appropriate terms and conditions of service.[39] Of course, in this case, the pipeline is being required to convert a Part 157 service agreement, rather than voluntarily doing so. Nonetheless, the general principle that it is just and reasonable to base the new Part 284 contract rate on the incremental rate under the old Part 157 rate applies here as well because there should be little, if any, difference between the two rates, both of which reflect the cost of providing service on the incremental facilities.

49. The main point of contention with respect to this issue has been the inclusion of the biennial rate adjustment in the new rate. Although the biennial adjustment was expected to make the higher Part 157 rate converge with the lower rate under Williston's Rate Schedule FT-1, it has not functioned simply to lower the applicable rate.[40] Thus, rather than providing an undue preference to NSP, the biennial rate adjustment is a mechanism by which a rate consistent with the parties' original intent, which could benefit either Williston or NSP, was to be maintained for the remainder of the contract term. Moreover, the rate structure carried forth to the Part 284 service agreement resulted in a slightly higher rate than was present under the Part 157 contract, due to a 25 basis

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[38] *See, e.g., Tennessee Gas Pipeline Co.*, 89 FERC ¶ 61,051, at 61,156 (1999) ("[T]he Commission has previously permitted pipelines to effectuate Part 157 conversions to Part 284 service under which the converting customer pays the currently existing Part 284 firm transportation commodity and reservation rates plus a reservation surcharge, if necessary, to equalize the Part 284 reservation rate with the previous Part 157 rate." (citing *Transcontinental Gas Pipe Line Corp.*, 73 FERC ¶ 61,024, at 61,052 (1995); *Transcontinental Gas Pipe Line Corp.*, 77 FERC ¶ 61,253, at 62,037 (1996); *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,093, *aff'd*, 63 FERC ¶ 61,100, at 61,445 (1993)).

[39] *See, e.g., Dominion Transmission, Inc.*, 111 FERC ¶ 61,135, at P 76 (2005).

[40] *See Williston Basin Interstate Pipeline Co.*, 127 FERC ¶ 61,071, at P 4 and n.5 (2009) (reflecting a rate increase in the most recent biennial rate adjustment process).

point adder contained therein and the agreement by NSP to forego interruptible revenues earned on the Mapleton Extension.[41]

50. However, whereas voluntary conversions result in a Part 284 contract, agreed to by the parties, such agreement has not been achieved here. Although a new cost-based rate for the converted contract may not be substantially different from the original rate, we will nonetheless permit Williston to file a proposed rate for the Part 284 service agreement, consistent with Commission's Part 284 regulations. Any such filing must be made within 30 days of the date of this order, and provide full cost-of-service support for service under the converted agreement.

The Commission orders:

(A) The Commission affirms its decision to require conversion of Rate Schedule X-13, as explained above.

(B) The Commission will permit Williston, if it so chooses, to propose a new rate for the converted Part 284 service agreement within thirty (30) days of the date this order issues, consistent with Commission regulations and the above discussion.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[41] *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 at P 55.