

141 FERC ¶ 61,078  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

WBI Energy Transmission, Inc.

Docket No. RP13-67-000

ORDER ACCEPTING NON-CONFORMING SERVICE AGREEMENT

(Issued October 31, 2012)

1. On October 1, 2012, WBI Energy Transmission, Inc. (WBI) filed revised tariff records<sup>1</sup> to reflect Contract No. FT-01097—a non-conforming firm transportation service agreement (Rollover Agreement) with Northern States Power Company (NSP). WBI seeks an effective date of November 1, 2012. As discussed below, the Commission accepts the Rollover Agreement tariff records, effective November 1, 2012.

**I. Background**

2. The Rollover Agreement filed in the instant proceeding extends expiring Contract No. FT-00532 for a term of 6 years and 6 months.

**A. History of Contract No. FT-00532**

3. Contract No. FT-00532 has its roots in Rate Schedule X-13—a contract executed between NSP and WBI on February 22, 1991, for a 20-year term.<sup>2</sup> On March 30, 1992, the Commission issued an order granting a certificate of public convenience and necessity to WBI to construct the Mapleton Extension facilities for NSP and to provide

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<sup>1</sup> WBI Energy Transmission, Inc., FERC NGA Gas Tariff, Third Revised Volume No. 1; [Sheet No. 450, List of Non-Conforming Service Agreements, 4.0.0](#) and [Section 2.16, Contract No. FT-01097, 0.0.0](#).

<sup>2</sup> Although this contract was actually entered into between NSP and Williston Basin Interstate Pipeline Company (Williston), Williston subsequently changed its name to WBI Energy Transmission, Inc. (WBI). We therefore use the name WBI throughout this order to refer collectively to both Williston and WBI.

firm transportation service on that lateral under Rate Schedule X-13 at the incremental rate of \$19.5778 per Mcf per month for 8,000 Mcf per day of contract demand.<sup>3</sup> Rate Schedule X-13 was an individually certificated rate schedule executed under Part 157 of the Commission's regulations. 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 WBI'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 biennial rate 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.<sup>4</sup> However, in the context of a general section 4 rate case filed by WBI, the Commission determined 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 of the competitive natural gas market the Commission seeks to foster.<sup>5</sup> The Commission therefore directed WBI to convert Rate Schedule X-13 from a Part 157 service agreement to an open access agreement under Part 284 of the Commission's regulations.<sup>6</sup> In May 2006, WBI made a filing with the Commission to cancel Rate Schedule X-13 and begin providing service to NSP under Contract No. FT-00532, with a term extending through October 31, 2012, consistent with the Commission's order.

5. WBI appealed the Commission's decision to convert Rate Schedule X-13 to open access service to the United States Court of Appeals for the District of Columbia Circuit. The court found that further explanation was needed to support the Commission's decision to require WBI to convert Rate Schedule X-13 into a Part 284 service agreement, under which capacity could be released.<sup>7</sup> The court emphasized that the

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<sup>3</sup> *Williston Basin Interstate Pipeline Co.*, 58 FERC ¶ 61,344 (1992).

<sup>4</sup> *See, e.g., Williston Basin Interstate Pipeline Co.*, 86 FERC ¶ 61,314, at 62,128-29 (1999) (finding that NSP agreed to pay the incremental rate until such time as the X-13 rate becomes equal to or less than the FT-1 rate).

<sup>5</sup> *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007, *order aff'g initial decision*, 113 FERC ¶ 61,201, at P 27 (2005), *order on reh'g*, 115 FERC ¶ 61,081 (2006), *remanded, Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497 (D.C. Cir. 2008), *order on remand*, 129 FERC ¶ 61,084 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> *Williston Basin*, 519 F.3d at 501-04.

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. The court also 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 contract.<sup>8</sup> 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.

6. Following the court's decision, the Commission ordered supplemental proceedings in order to get a better understanding of the current and historical use of, among other things, the market for interruptible transportation service on the Mapleton Extension, and the impact of the conversion of Rate Schedule X-13 on that market.<sup>9</sup> Having considered the supplemental information, the Commission affirmed its prior finding that former Rate Schedule X-13 had become unjust and unreasonable.<sup>10</sup> However, the Commission held it appropriate to continue using the incremental Rate Schedule X-13 rate as the basis for the rate in the converted agreement, consistent with Commission policy governing voluntary Part 157 conversions.<sup>11</sup> At the same time, the Commission allowed WBI the option of filing a new cost-of-service rate to replace the current rate structure.

7. WBI did not challenge the Commission's remand order, nor did it file a new cost-of-service rate for the Mapleton Extension. Accordingly, WBI continued to provide service on the Mapleton Extension under the terms of Contract No. FT-00532, and every two years, WBI filed revised rates under the biennial rate restatement portion of that contract. In the most recent restatement, WBI established a base tariff rate of \$11.27872 per Mcf/month, excluding applicable surcharges, for service under Contract No. FT-00532.<sup>12</sup>

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<sup>8</sup> *Id.* at 504.

<sup>9</sup> *Williston Basin Interstate Pipeline Co.*, 125 FERC ¶ 61,303, at P 16 (2008).

<sup>10</sup> *Williston Basin*, 129 FERC ¶ 61,084 at P 34.

<sup>11</sup> *Id.* (citing *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.”)).

<sup>12</sup> *Williston Basin Interstate Pipeline Co.*, 134 FERC ¶ 61,261, at P 2 (2011).

**B. Instant Filing**

8. As indicated above, WBI filed the non-conforming Rollover Agreement, seeking an effective date of November 1, 2012. WBI states that the Rollover Agreement provides that Contract No. FT-00532 is renumbered as Contract No. FT-01097 and extended for a term of 6 years and 6 months. WBI states that the Rollover Agreement provides that all the terms and conditions of Contract No. FT-00532, including but not limited to, the current rate structure and biennial rate restatement, remain in full force and effect. WBI states that the Rollover Agreement therefore includes the modified cost of service accepted by the Commission in 2011.<sup>13</sup> WBI argues that the Rollover Agreement is identical to Contract No. FT-00532, and therefore good cause exists for the Commission to accept it as a permissible non-conforming agreement.

**C. Public Notice, Interventions and Comments**

9. Public notice of WBI's Filing was issued on October 2, 2012, with interventions and protests due as provided in section 154.210 of the Commission's regulations.<sup>14</sup> Pursuant to Rule 214,<sup>15</sup> all timely-filed motions to intervene and any unopposed motions to intervene out-of-time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. NSP filed a protest.

10. NSP claims that WBI unreasonably denied NSP the right to rollover an existing long-term contract at no more than WBI's maximum FT-1 rate, which NSP states is 35 percent lower than the existing non-conforming contract rate. Accordingly, NSP argues that WBI's Filing is unjust and unreasonable and the non-conforming rate provision should be rejected. NSP further contends that the Commission should direct WBI to tender a revised service agreement to NSP with the rate set at the maximum FT-1 rate.

11. NSP describes the communications leading up to the execution of the Rollover Agreement as follows:

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<sup>13</sup> WBI Transmittal Letter at 3 (citing *Williston Basin Interstate Pipeline Co.*, 134 FERC ¶ 61,261).

<sup>14</sup> 18 C.F.R. § 154.210 (2012).

<sup>15</sup> *Id.* § 385.214.

- November 1, 2011 – WBI notified NSP that Contract No. FT-00532 would expire if NSP did not timely notify WBI that NSP desired to exercise its rollover rights under section 23.4.1 of the GT&C.
- January 23, 2012 – NSP notified WBI that NSP was exercising its rights under section 23.2.1 of the GT&C and desired to enter into a new firm service agreement under Rate Schedule FT-1, with a term of 6 years and 6 months, commencing November 1, 2012. NSP stated its understanding that the new contract would be at WBI’s maximum effective FT-1 rate, including all surcharges, under Rate Schedule FT-1, as such may be in effect from time to time, with no minimum annual payment.
- January 25, 2012 – WBI responded, stating that the rollover of the Contract No. FT-00532 would be subject to the same rate structure as Contract No. FT-00532 and will continue to be subject to a biennial rate restatement process. WBI requested that NSP confirm that it wanted to rollover the Contract No. FT-00532 under the same rate structure and biennial rate restatement process for a term of 6 years and 6 months by January 31, 2012.
- January 30, 2012 – NSP informed WBI that because it needed the capacity to serve its customers, it was exercising its right to enter a new service agreement pursuant to sections 23.2.1 and 23.4.1 of the GT&C per the terms set forth by WBI. NSP also informed WBI that, “[i]n doing so, NSP does not waive its rights under the Natural Gas Act to seek a determination from the Federal Energy Regulatory Commission as to the maximum lawful rate that [WBI] may charge for service under the new service agreement.”<sup>16</sup>
- March 9, 2012 – NSP and WBI executed the Rollover Agreement.

12. NSP states that while it objected to WBI’s January 25 refusal to permit NSP to rollover its service at the maximum FT-1 rate, WBI took the position that rollover of Contract No. FT-00532 required continuation of all existing terms and conditions of that contract, including the minimum annual payment.<sup>17</sup> NSP states that in light of WBI’s position, NSP considered exercising its right of first refusal (ROFR). However, NSP states that WBI informed NSP that WBI would use the Contract No. FT-00532 rate as the maximum rate for bidding and matching purposes in the ROFR process.<sup>18</sup> Therefore,

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<sup>16</sup> NSP Protest at 9-10 (quoting Letter from Joni H. Zich to Rob Johnson, WBI Director of Market Services & System Planning, dated January 30, 2012 (attached as Attachment C to NSP’s protest)).

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 8-9 & n.11.

NSP explains, it determined that engaging in the ROFR process would have been a futile exercise because, at the conclusion of that process, NSP would have to either have to pay the existing Contract No. FT-00532 rate, or lose the service on WBI. NSP states that because the parties were at an impasse, it decided to execute the renumbered contract while reserving its rights to challenge that agreement when filed with the Commission.

13. NSP argues that WBI's refusal to rollover Contract No. FT-00532 under a new FT-1 service agreement at the maximum FT-1 recourse rate is contrary to Commission precedent and unsupported by WBI's tariff. NSP relies on sections 23.2.1 of WBI's GT&C, which gives shippers with contracts at least five years long a rollover right, and 23.4 of WBI's GT&C, which sets out the mechanics and timing of rollover rights. Specifically, section 23.2.1 states that "[f]or firm Service Agreements with a term of at least five (5) years: Shipper may exercise its unilateral right to rollover the Service Agreement at the maximum rates."<sup>19</sup> NSP states that while WBI's tariff does not define "maximum rate," the Commission has held that the maximum rate for rollover and ROFR purposes is the maximum recourse rate.<sup>20</sup>

14. NSP argues that the term "maximum rate" must be interpreted to refer to the maximum rates set forth in WBI's Notice of Effective Rates. NSP notes that WBI's *pro forma* FT-1 service agreement states that unless otherwise agreed to, the applicable rate for service is the effective maximum rate for Rate Schedule FT-1 on file. NSP further states that WBI's tariff assumes that the current Contract No. FT-00532 rate is distinct from the maximum rate because that service agreement makes specific reference to the maximum rate under WBI's Rate Schedule FT-1 as a part of the overall Contract No. FT-00523 rate. NSP also points to WBI's list of non-conforming contracts, noting that while a number of WBI's non-conforming contracts indicate that the base tariff rate for service is the "effective maximum rate on file with the FERC, as same may change from time to time," the base tariff rate for Contract No. FT-00532 is a stated rate—in other words, a rate other than WBI's maximum rate for FT-1 service.

15. NSP further argues that WBI takes the untenable position that the term "maximum rate" should be interpreted to mean the maximum rate applicable under any individual FT-1 service agreement. NSP notes that the implication of this position is that a shipper taking service at a discount under an expiring FT-1 contract could demand that it retain its capacity at its discounted contract rate, because that rate would be the maximum rate applicable to that service.

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<sup>19</sup> WBI Energy Transmission, Inc., FERC Natural Gas Tariff, Third Revised Volume No. 1, Sheet No. 179, Section 23: Pipeline Service Obligations, 1.0.0.

<sup>20</sup> NSP Protest at 14 (citing *Missouri Interstate Gas Co.*, 122 FERC ¶ 61,136 (2008)).

16. NSP argues that WBI mischaracterizes the Contract No. FT-00532 rate as a Commission-approved incremental rate. NSP argues that WBI never filed to implement incremental recourse rates for the Mapleton Extension.<sup>21</sup> In NSP's view, the maximum recourse rate that WBI may demand to rollover the contract is the Rate Schedule FT-1 maximum rate, as set forth on WBI's Notice of Currently Effective Rates.

17. NSP also argues that although it agreed to certain terms as part of the original contract, it does not follow that these features must be carried through to the new agreement. Moreover, NSP argues that WBI's attempt to impose additional conditions on NSP's retention of its firm capacity is unduly discriminatory because to NSP's knowledge, no other maximum rate FT-1 shipper has a similar provision. Moreover, NSP characterizes the biennial rate restatement provision as a minimum bill, which the Commission's regulations prohibit.

18. In sum, NSP argues that there is no contractual basis for continuing the Contract No. FT-00532 rate structure beyond the 20-year period of the original deal between the parties, and that WBI's tariff limits the permitted rollover to the maximum FT-1 rate in WBI's tariff.

## II. Discussion

19. For the reasons discussed below, we accept the revised tariff records reflecting the Rollover Agreement, to be effective November 1, 2012. Both WBI and NSP agree that NSP's right to roll over expiring Contract No. FT-00532 is governed by section 23 of the GT&C of WBI's tariff. Specifically, the rollover of expiring Contract No. FT-00532 is governed by section 23.2.1, which states that "[f]or firm Service Agreements with a term of at least five (5) years: Shipper may exercise its unilateral right to rollover the Service Agreement at the maximum rates."<sup>22</sup> The issue here is limited to the proper interpretation of this tariff provision—specifically, the meaning of the term "maximum rates" in connection with the rollover of expiring Contract No. FT-00532.

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<sup>21</sup> *Id.* at 12-13. NSP highlights a recent Commission order addressing WBI's Sheyenne Expansion explicitly stated that absent Commission acceptance of incremental rates, the generally applicable Rate Schedule FT-1 rate is the maximum recourse rate for expansion service upon the expiration of service agreements where the pipeline and the shipper have agreed to a different rate. *Williston Basin Interstate Pipeline Co.*, 124 FERC ¶ 62,072, at 64,174 (delegated letter order) (issued July 25, 2008).

<sup>22</sup> WBI Energy Transmission, Inc., FERC Natural Gas Tariff, Third Revised Volume No. 1, Sheet No. 179, Section 23: Pipeline Service Obligations, 1.0.0.

20. The term “maximum rates,” as used in section 23.2.1 of the GT&C is not specifically defined in WBI’s tariff, and as such, it could be viewed as ambiguous. However, the ambiguity may be resolved by the unique context of this case, and the Commission’s determination that the Mapleton Extension is an incremental facility, for which WBI is entitled to earn an incremental rate. At its inception, the Commission considered the rate for Rate Schedule X-13 to be incremental and that rate schedule was accepted and made part of WBI’s tariff.<sup>23</sup> Almost two decades later, the Commission’s position has not changed. In affirming its decision to require conversion of Rate Schedule X-13, the Commission also affirmed its finding that it is “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.”<sup>24</sup>

21. NSP believes that it is being unfairly treated by WBI’s insistence that the Rollover Agreement maintain the incremental rate structure that has been in place for the previous twenty years. The thrust of NSP’s argument is that because there is no separately stated Rate Schedule FT-1 setting forth an incremental rate for service on the Mapleton Extension (as there is for service on WBI’s incrementally priced Sheyenne Extension), the Commission must interpret WBI’s tariff to require WBI to provide service on the Mapleton Extension at the general system rate for Rate Schedule FT-1. NSP’s arguments, however, would elevate form over substance, and ignore the unique genesis of Contract No. FT-00532. The Commission has always considered and described service on the Mapleton Extension as incremental service to be priced at an incremental rate. We therefore find that any ambiguity in the term “maximum rate” should be resolved in a manner consistent with the Commission’s confirmation of the incremental nature of the Mapleton Extension.

22. The Commission accepted the existing incremental rate in WBI’s most recent biennial rate restatement,<sup>25</sup> and that rate—listed in WBI’s List of Non-Conforming Service Agreements—is the just and reasonable incremental rate for service on the Mapleton Extension. Therefore, with respect to the Rollover Agreement and in light of the special circumstances presented in this case, we interpret the term “maximum rates” in section 23.2.1 of WBI’s GT&C to mean the incremental rate for service embodied in

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<sup>23</sup> *Williston Basin*, 58 FERC at 62,119 (conditioning WBI’s certificate authorization on an alternate incremental rate that results in the same revenue collection as the original incremental charge proposed by WBI).

<sup>24</sup> *Williston Basin*, 129 FERC ¶ 61,084 at P 34 (citing *Tennessee Gas Pipeline Co.*, 89 FERC ¶ 61,051).

<sup>25</sup> *Williston Basin*, 134 FERC ¶ 61,261.

expiring Contract No. FT-00523. WBI is correct to require the rollover of Contract No. FT-00532 at the existing incremental rate.

23. Given our determination that WBI properly included in the Rollover Agreement the same incremental rates and terms from expiring Contract No. FT-00523 that the Commission required of WBI, we find that such rates and terms are permissible material deviations from the *pro forma* Rate Schedule FT-1 Service Agreement. We therefore accept the tariff records filed by WBI, effective November 1, 2012.

The Commission orders:

The tariff records listed in footnote 1 are accepted, effective November 1, 2012.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.