

146 FERC ¶ 61,170
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

WBI Energy Transmission, Inc.

Docket No. RP13-67-001

ORDER ON REHEARING

(Issued March 10, 2014)

1. On October 1, 2012, WBI Energy Transmission, Inc. (WBI) filed revised tariff records¹ to implement a non-conforming firm transportation service agreement (Rollover Agreement or Contract No. FT-01097) with Northern States Power Company (NSP). On October 31, 2012, the Commission accepted WBI's tariff records, effective November 1, 2012, reflecting the Rollover Agreement.² On November 30, 2012, NSP filed a request for rehearing arguing that Contract No. FT-01097 should have been rolled over at the maximum FT-1 rate in WBI's tariff, and not at the higher rate level in the expiring predecessor contract.

2. For the reasons discussed below, the Commission denies NSP's Request for Rehearing of the October Order.

I. Background

3. The Rollover Agreement (Contract No. FT-01097) extends expiring Contract No. FT-00532 for a term of six years and six months, and includes the same rate framework as in the expiring contract. In effect, Contract No. FT-00532 was renumbered as Contract No. FT-01097, with an extended term. Contract No. FT-00532 had its roots in Rate Schedule X-13—a contract executed between NSP and WBI on February 22,

¹ See Attachment A of WBI's October 1, 2012 Filing, 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](#).

² *WBI Energy Transmission, Inc.*, 141 FERC ¶ 61,078 (2012) (October Order).

1991, for a 20-year term.³ 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 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.⁴ 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, as the rate would have converged with the FT-1 rate.

4. Several times with each biennial rate restatement proceeding 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.⁵ However, in the context of a Natural Gas Act 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.⁶ 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.⁷ In May 2006, WBI made a filing with the Commission to cancel Rate Schedule X-13 and begin providing service to NSP under Contract

³ While 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.

⁴ *Williston Basin Interstate Pipeline Co.*, 58 FERC ¶ 61,344 (1992).

⁵ *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).

⁶ *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).

⁷ *Id.*

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.⁸ 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. 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.⁹ 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.¹⁰ Having considered the supplemental information, the Commission affirmed its prior finding that former Rate Schedule X-13 had become unjust and unreasonable.¹¹ 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.¹² At the same time, the Commission allowed WBI the option of filing a new cost-of-service rate to replace the current rate structure.

⁸ *Williston Basin*, 519 F.3d at 501-04.

⁹ *Id.* at 504.

¹⁰ *Williston Basin Interstate Pipeline Co.*, 125 FERC ¶ 61,303, at P 16 (2008).

¹¹ *Williston Basin*, 129 FERC ¶ 61,084 at P 34.

¹² *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.”)).

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-00532.¹³

8. On October 1, 2012, WBI filed the Rollover Agreement as a non-conforming contract, seeking an effective date of November 1, 2012. The Rollover Agreement provided that Contract No. FT-00532 was renumbered as Contract No. FT-01097 and extended for a term of six years and six months. WBI stated that the Rollover Agreement provides that all the terms and conditions of Contract No. FT-00532, including but not limited to, the rate structure and biennial rate restatement, would remain in full force and effect. The Rollover Agreement was thus identical to Contract No. FT-00532, except for the extended term.

9. On October 15, 2012, NSP filed a protest arguing 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 stated was 35 percent lower than the existing non-conforming contract rate. Accordingly, NSP argued that WBI's Filing was unjust and unreasonable and the non-conforming rate provision should be rejected. NSP further contended that the Commission should direct WBI to tender a revised service agreement to NSP with the rate set at the maximum FT-1 rate.

10. NSP argued that WBI's refusal to change rollover Contract No. FT-00532 into a new FT-1 service agreement at the maximum FT-1 recourse rate was contrary to Commission precedent and unsupported by WBI's tariff. NSP relies on sections 23.2.1 of WBI's General Terms & Conditions (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."¹⁴ NSP acknowledges WBI's tariff does not define "maximum rate," but argues the Commission

¹³ *Williston Basin Interstate Pipeline Co.*, 134 FERC ¶ 61,261, at P 2 (2011).

¹⁴ WBI Energy Transmission, Inc., FERC Natural Gas Tariff, Third Revised Volume No. 1, Sheet No. 179, Section 23: Pipeline Service Obligations, 1.0.0.

has held that the maximum rate for rollover and ROFR purposes is the maximum recourse rate.¹⁵

11. NSP argued the tariff term “maximum rate” referred to the maximum rates set forth in WBI’s Notice of Effective Rates.

12. NSP further argued that the Contract No. FT-00532 rate should not be considered a Commission-approved incremental rate, and although it agreed to certain terms as part of the original contract, it maintains that these features need not be carried through to the new agreement.

13. In the October Order, the Commission accepted the revised tariff records reflecting the Rollover Agreement, to be effective November 1, 2012. The Commission determined that the revised tariff records correctly reflected the existing incremental rate in WBI’s most recent biennial rate restatement,¹⁶ and that rate—listed in WBI’s List of Non-Conforming Service Agreements—was the just and reasonable incremental rate for service on the Mapleton Extension.¹⁷

14. The Commission noted that both WBI and NSP agree that NSP’s right to roll over expiring Contract No. FT-00532 was governed by section 23 of the GT&C of WBI’s tariff. Specifically, the rollover of expiring Contract No. FT-00532 was 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.”¹⁸ The Commission determined that the narrow issue in this proceeding was 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-00532.¹⁹

¹⁵ NSP Protest at 14 (citing *Missouri Interstate Gas Co.*, 122 FERC ¶ 61,136 (2008)).

¹⁶ *Williston Basin*, 134 FERC ¶ 61,261 at P 2.

¹⁷ October Order, 141 FERC ¶ 61,078 at P 22.

¹⁸ WBI Energy Transmission, Inc., FERC Natural Gas Tariff, Third Revised Volume No. 1, Sheet No. 179, Section 23: Pipeline Service Obligations, 1.0.0.

¹⁹ October Order, 141 FERC ¶ 61,078 at P 19.

15. The October Order determined that the term “maximum rates,” was ambiguous in the context of history leading to Rollover Contract No. FT-01097. The Commission essentially determined that in the unique context of this case, WBI was entitled to charge the specified incremental rate with biennial restatements, until such time as the rate naturally converged and became equivalent to the FT-1 tariff rate. The Commission explained that in affirming its decision to require conversion of Rate Schedule X-13, the Commission had 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.”²⁰

16. The Commission rejected NSP’s argument that because there was no separately stated Rate Schedule FT-1 setting forth an incremental rate for service on the Mapleton Extension (as there was 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. The Commission found that NSP’s arguments ignored the unique genesis of Contract No. FT-00532 and the ensuing Rollover Agreement No. FT-01097. The Commission explained NSP’s X-13 Mapleton Extension service²¹ had always been considered to be an incremental service to be priced at an incremental rate, and also found that any ambiguity in the term “maximum rate” for purposes of the Rollover Agreement should be resolved in a manner consistent with the unique genesis of Contract No. FT-00532, as a successor to the Rate Schedule X-13 incremental rate for service on the Mapleton Extension.

17. Thus, the Commission concluded that with respect to the Rollover Agreement and in light of the special circumstances presented in this case, it interpreted the term “maximum rates” in section 23.2.1 of WBI’s GT&C to mean the incremental rate for service embodied in expiring Contract No. FT-00532.²² Consequently, the Commission concluded WBI was correct to require the rollover of Contract No. FT-00532 at the existing incremental rate.²³

²⁰ *Id.* P 20 (citing *Williston Basin*, 129 FERC ¶ 61,084 at P 34 (citing *Tennessee Gas Pipeline Co.*, 89 FERC ¶ 61,051)).

²¹ In addition to the Rate Schedule X-13 contract, NSP also had a Rate Schedule FT-1 service agreement with Williston (Contract No. FT-00157). The latter is not at issue in this order on rehearing, which is solely focused on the successor contracts to the Rate Schedule X-13 agreement.

²² October Order, 141 FERC ¶ 61,078 at P 20.

²³ *Id.*

18. On November 30, 2012, NSP filed a Request for Rehearing of the October Order. The issues raised by NSP's Request for Rehearing are discussed below.

II. Rehearing Request

A. Interpretation of "Maximum Rate" in WBI's FERC Gas Tariff

19. On rehearing, NSP argues the Commission erred when interpreting the phrase "maximum rate" in section 23.2.1 of WBI's tariff.²⁴ NSP notes that its right to retain service on the Mapleton Extension is governed by section 23.2.1 of WBI's tariff which provides, "[f]or firm Service Agreements with a term of one year or longer ... a Shipper who chooses to retain its firm capacity must so notify Transporter of its desire to execute a new firm Service Agreement for the maximum rate and for a term at least as long as the term of the expiring firm Service Agreement."²⁵ NSP contends that the only reasonable interpretation of the term "maximum rate" as used in Section 23.2.1 is that it refers to the maximum recourse rate under WBI's Rate Schedule FT-1.²⁶ NSP argues several other WBI tariff references, including one in Contract No. FT-00532 itself, support the conclusion that the term "maximum rate" as used in Section 23.2.1 could only mean the maximum recourse FT-1 rate. Specifically, NSP states that Section 3.1 of Rate Schedule FT-1 provides that the applicable maximum and minimum rates for service are set for on Sheet Nos. 12, 13, or 14 of WBI's tariff.²⁷

20. NSP states that Sheet Nos. 12-13 set forth the minimum and maximum cost based rates for FT-1 service over all of WBI's system except for the Sheyenne Expansion capacity, while Sheet No. 14 contains the minimum and maximum rates applicable to the Sheyenne Expansion capacity. None of these tariff sheets, NSP contends, sets forth a specific rate for the Mapleton Extension; nor do they contain the Contract FT-00532 rate.

21. NSP argues the only exception for an FT-1 shipper paying rates in excess of the maximum rate set forth on Sheet Nos. 12-13 is provided by section 48 of the GT&C of WBI's Tariff which permits WBI and a shipper "to negotiate a rate for service under the applicable Rate Schedules contained in this Tariff. The rate or rates to be charged may be negotiated in form and/or level from the maximum-to-minimum ranges set forth on

²⁴ NSP Request for Rehearing at 2.

²⁵ WBI Tariff, Section 23.2.1.

²⁶ NSP Request for Rehearing at 2.

²⁷ *Id.* at 3.

the Notice of Currently Effective Rates of this Tariff.” NSP maintains the rate for the contract at issue is not a negotiated rate. Thus, NSP argues, once the 2006 contract expired, the only maximum rate that WBI may charge for FT-1 service on the Mapleton Extension is that set forth on Sheet Nos. 12-13.²⁸

22. NSP argues that other WBI Tariff provisions support the conclusion that the term “maximum rate” as used throughout WBI’s Tariff means the maximum FT-1 recourse rate. NSP notes the term appears in WBI’s *pro forma* FT-1 service agreement which provides: “Unless otherwise agreed to, the applicable rate for service hereunder is the effective maximum rate for Rate Schedule FT-1 service on file with the FERC, as same may change from time to time.” NSP contends similar “maximum rate” references appear in the ROFR and capacity release provisions of WBI’s Tariff.²⁹

23. NSP further argues Contract No. FT-00532 similarly contains language consistent with reading the term “maximum rate” to mean WBI’s FT-1 maximum recourse rate. Specifically, Article V of Contract No. FT-00532 provides:

The restated rate to become effective March 1 of each odd numbered year ... shall be equivalent to the applicable Total Cost of Service, as defined in Exhibit A, for the year of such restatement, until the rate calculated in the manner prescribed herein becomes equal to or less than the effective maximum rate, including all surcharges, under WBI’s Rate Schedule FT-1, as such may be in effect at that time. At such time, the biennial rate restatement shall cease. The rate in effect from that point forward shall be equivalent to the effective maximum rate, including all surcharges, under WBI’s Rate Schedule FT-1, as such may be in effect from time to time.

²⁸ *Id.* at 4.

²⁹ *Id.* at 4 (citing GT&C Section 1.57 (“The term ‘Recourse Rate’ means the maximum rate for a specific Rate Schedule under the Notice of Currently Effective Rates contained in this Tariff.”); 16.3.2.5 (“Releases for a term greater than one (1) year may be released without bidding if the release is at the applicable maximum rate.”); and Section 23.3 (“The right of first refusal shall be applicable only to service at the maximum rate under a firm Service Agreement with a term of at least 12 months of consecutive service, except that a maximum rate contract for more than one year, for a service which is not available for 12 consecutive months, would be subject to the right of first refusal.”)).

24. NSP further argues that for the majority of WBI's non-conforming contracts, WBI's Tariff identifies the Base Tariff Rate by reference to Note A, which states: "Unless noted otherwise the applicable rate for service hereunder is the effective *maximum rate* on file with the FERC, as same may change from time to time."³⁰ For Contract FT-00532, however, NSP states, the Base Tariff Rate is stated as "\$11.27872," in other words, a rate *other than* WBI's maximum rate for FT-1 service.

25. NSP cites *Missouri Interstate Gas Co., et al.*, 122 FERC ¶ 61,136 (2008) for the proposition that the maximum rate for rollover and ROFR purposes is the maximum recourse rate, i.e., the maximum FT-1 rate set forth on WBI's Notice of Currently Effective Rates, Sheet 12.³¹ In *Missouri*, the Commission addressed tariff provisions proposed by a new interstate pipeline. Shippers expressed concern that the pipeline's proposed tariff language could be read to permit the pipeline to demand that an existing shipper pay more than the maximum recourse rates and agree to non-rate terms as a condition to retaining its firm capacity in a rollover or a ROFR situation. In response to this shipper's concerns, the pipeline revised and clarified its tariff language and intentions, but did not completely ameliorate the shipper's concerns. NSP argues the Commission left no question that, for a long term firm shipper to retain its existing capacity, it need only match the maximum recourse rate, and further, cannot be required to accede to non-standard contract terms. To support its argument, NSP references *Missouri* Paragraphs 142 and 143:³²

142. The Commission finds that section 22.3, as currently written, does not require a customer to match a negotiated rate bid that is above the maximum rate. The first sentence of section 22.3 makes clear that in exercising its ROFR a customer is required to only agree to match the rate up to the maximum recourse rate. Section 22.3 also provides the shipper with flexibility in matching a negotiated rate bid if that is the highest bid on either a negotiated rate basis or a recourse rate basis. As noted, the Applicants deleted the language in section 22.3 requiring a customer exercising its ROFR to agree to match all the other terms and conditions to which a prospective shipper agrees.

³⁰ *Id.* at 5 (citing WBI FERC Gas Tariff, Third Revised Volume No. 1, Third Revised Sheet No. 450, included in Exhibit A hereto (emphasis added)).

³¹ *Id.* at 5-6.

³² *Id.* at 6 (quoting *Missouri*, 122 FERC ¶ 61,136 at PP 142-143 (internal citations omitted)).

143. The Commission agrees with AmerenUE, however, that previous section 22.4 (new section 22.5) can be interpreted to require an existing customer to match a bid that is above the maximum rate and/or agree to other conditions offered by a competing bidder which may provide “economic value” to MoGas. Since economic value is not defined, it is ambiguous. Section 284.221(d) of the Commission’s regulations clearly provides that customers exercising their ROFR are required only to match the highest rate for firm service, up to the applicable maximum rate....

26. NSP also argues *Williston Basin Interstate Pipeline Co.*, 124 FERC ¶ 62,072 (2008) (*Sheyenne Expansion Order*) supports the conclusion that “maximum rate” on WBI’s system means the maximum FT-1 recourse rate.³³ NSP states that in the *Sheyenne Expansion* case, WBI proposed to initiate service at negotiated rates that were higher than its FT-1 rate, and based its request for a predetermination of rolled-in rates on those negotiated rates. In rejecting this approach, NSP notes, the Commission stated as follows: “The maximum reservation rate under its Rate Schedule FT-1 will be the initial recourse rate for services using the expansion capacity. . . .”³⁴

27. NSP argues the Commission’s October Order made no attempt to explain why the references in WBI’s Tariff should be given no weight when interpreting the phrase “maximum rate” in Section 23.2.1, nor did the Commission attempt to explain why the *Missouri* precedent and the *Sheyenne Expansion Order* could simply be disregarded when interpreting WBI’s tariff rollover provision.³⁵

28. NSP argues that the Commission’s emphasis on the “unique context of this case” to guide its interpretation of the phrase “maximum rate” is not reasoned decision-making.³⁶ NSP states that notwithstanding the uniqueness of the situation, the Commission must articulate a rational basis, grounded in logic and the record, for concluding that the maximum rate for purposes of NSP’s rollover is something other than WBI’s maximum FT-1 recourse rate.

³³ *Id.* at 7.

³⁴ *Sheyenne Expansion Order*, 124 FERC at 64,174.

³⁵ NSP Request for Rehearing at 7-8.

³⁶ *Id.* at 8 (quoting the October Order, 141 FERC ¶ 61,078 at P 20).

29. Finally, NSP argues the Commission erred by approving WBI's requirement that NSP agree to non-rate conditions in order to retain its firm service.³⁷ NSP contends WBI demanded that NSP not only agree to the maximum rate and term of its expiring contract, but also to all of the special provisions of the expired Contract No. FT-00532.

Commission Determination

30. The Commission finds the October Order properly required the rollover of Contract No. FT-00532 at the existing incremental rate and therefore properly accepted the tariff records filed by WBI. NSP's arguments do not change this conclusion. In reaching its conclusion, the October Order correctly interpreted Section 23.2.1 of WBI's Tariff and specifically the meaning of the term "maximum rates" in connection with the rollover of expiring Contract No. FT-00532. As the Commission explained, the term "maximum rates" as used in Section 23.2.1 is not specifically defined in WBI's tariff, and as such, could be viewed as ambiguous. The Commission further explained that the ambiguity of the term "maximum rates" is resolved by the unique context of this case, specifically the fact that the Mapleton Extension is an incremental facility for which WBI is entitled to earn an incremental rate.³⁸ The Commission clearly stated that at its inception, the Commission considered the rate for the Rate Schedule X-13 to be incremental and noted that rate schedule was accepted and incorporated into WBI's tariff.³⁹ "Almost two decades later," the Commission stated, its position "has not changed."⁴⁰ The Commission further stated in the October Order "[i]n 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.'"⁴¹

31. The fact that 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

³⁷ *Id.* at 12.

³⁸ October Order, 141 FERC ¶ 61,078 at P 20.

³⁹ *Id.* P 20 (citing *Williston Basin Interstate Pipeline Co.*, 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)).

⁴⁰ *Id.*

⁴¹ *Id.* (citing *Williston Basin Interstate Pipeline Co.*, 129 FERC ¶ 61,084 at P 34)).

incrementally priced Sheyenne Extension does not lead to the conclusion that the Commission must interpret WBI's tariff to require WBI to provide service on the Mapleton Extension at the lower, general system rate for Rate Schedule FT-1. As the Commission explained in the October Order, such a conclusion would "elevate form over substance, and ignore the unique genesis of Contract No. FT-00532."⁴² Thus, the Commission's October Order appropriately found that any ambiguity in the term "maximum rate" should be resolved in a manner consistent with the Commission's confirmation of the nature of the parties' arrangement and of the incremental pricing of the Mapleton Extension.⁴³

32. Moreover, NSP's reliance on *Missouri* is misplaced. The *Missouri* order concerned the pipeline's application of the Commission's ROFR policy that shippers exercising their ROFR are only required to match the highest rate for firm service, up to the maximum rate. In the October Order the Commission followed this policy, determining, however, that the appropriate maximum tariff rate for the contract extension was the incremental rate for the Mapleton Extension stated in the non-conforming provision, not the Rate Schedule FT-1 maximum rate.

33. NSP's reliance on the *Sheyenne Expansion Order* is also misdirected. The *Sheyenne Expansion Order* concerned a different set of expansion facilities that were constructed to provide service under Part 284 of the Commission's regulations, not Part 157 and have none of the history of the Mapleton Extension's X-13 Rate Schedule's transformation into a hybrid contract with negotiated FT elements that differed from the generally offered pro forma FT service on the pipeline.

B. Whether the Contract No. FT-00532 Rate Should be Treated as an Incremental, Negotiated, or Open-Access FT Rate, or as a Combination Thereof

34. NSP further argues that the Commission erred in treating the Contract No. FT-00532 rate as an incremental rate. Rather, NSP argues that Commission precedent establishes that when an incremental rate is established, that rate: (1) is established for a particular facility or particular capacity; (2) applies to any shipper seeking service over the facility or capacity; (3) is included in the pipeline's Notice of Currently Effective rates, set forth in Volume 1 of the tariff; and (4) is specifically included in the tariff index for informational postings.⁴⁴ In contrast, NSP notes,

⁴² *Id.* P 21.

⁴³ *Id.*

⁴⁴ NSP Request for Rehearing at 10 (citations omitted).

Contract No. FT-00532 establishes a contract-specific, formula rate applicable to NSP and NSP alone. NSP states the formula rate under Contract No. FT-00532 is not specific to any particular facility or capacity.⁴⁵ Rather, it is a rate specific to a contract with a single shipper, NSP. Stated differently, NSP states that no other shipper is subject to the rate set forth in Contract No. FT-00532, even if they use the Mapleton Extension. NSP also states that the Contract No. FT-00532 rate is but one of four different rates for firm service over the Mapleton Extension. NSP argues that if NSP had elected not to rollover Contract No. FT-00532, WBI would not have a rate in its tariff formulated specifically to recover its remaining investment in the Mapleton Extension.⁴⁶

Commission Determination

35. NSP's rate for service on the Mapleton Extension commenced as an incremental rate. Indeed, when the Commission authorized construction of the Mapleton Extension facilities in 1992, it conditioned WBI's NGA section 7 certificate authorization on WBI's filing an incremental rate schedule for an "alternative incremental rate."⁴⁷ Again, in 1999, when NSP requested that it be afforded rolled-in rate treatment for the X-13 facilities, whereby NSP would pay the Part 284 FT-1 rate for its service as opposed to the incremental rate for Rate Schedule X-13, the Commission found "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."⁴⁸ Following the conversion⁴⁹ of NSP's contract to Part 284 service in 2006, the Commission found that NSP had been paying "the costs of the Mapleton Extension facilities through its incremental rate, which it will continue to do."⁵⁰ In effect, the open-access rate that ensued after the Commission's conversion of the contract to FT service, was a uniquely Commission-encouraged negotiated rate arrangement arising

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 11.

⁴⁷ *Williston Basin*, 58 FERC at 61,120. Specifically, the Commission approved an incremental rate under Rate Schedule X-13 of \$19.5778 per Mcf per month for 8,000 Mcf per day of contract demand, using an annual cost of service of \$1,879,471 and an overall rate of return of 12.06 percent. *Id.* at 61,120.

⁴⁸ *Williston Basin*, 86 FERC at 62,129.

⁴⁹ The Commission's purpose in requiring the conversion was to enable NSP to engage in capacity release, not to change the basic form and rate structure of the service agreement.

⁵⁰ *Williston Basin*, 115 FERC ¶ 61,081 at P 26.

from WBI's last rate case. Thus, the rate has elements of all three contract types: incremental, negotiated, and open-access FT. This, and the ambiguity in the tariff that allows for differing interpretations of what the "maximum rate" for rollover purposes of Contract No, FT-00532 should be, is what makes deciding the appropriate rollover rate challenging.

36. NSP nevertheless argues that equitable considerations weigh in favor of finding that the maximum effective rate for NSP's service on the Mapleton Extension going forward is solely WBI's maximum FT-1 recourse rate.⁵¹ Specifically, NSP states, "[a]lthough not expressly articulated by the Commission, NSP is concerned that the Commission's decision to allow WBI the benefit of continuing the rate and terms of Contract No. FT-00532 is based upon the belief that this result is required to ensure that WBI recovers its investment in the Mapleton Extension." NSP argues that after the Commission rejected the parties' depreciation rate based on a 20-year facility life, and rejected the parties' agreed cost-recovery mechanism, instead directing that the facility costs be recovered through rates designed on a straight-fixed-variable method, WBI did not take any steps to protect itself against potential cost underrecovery. NSP argues the fact that WBI stood by the parties' original 20-year contract term notwithstanding the fact that the Commission's order ensured that the depreciation expense of the Mapleton Extension would not be recovered over that 20-year term, makes NSP wonder whether, in fact, WBI had any concern that under the parties' 20-year contract, it would fall short on recovery of its investment in the Mapleton Extension over time.⁵² Finally, NSP argues that given the additional load and associated revenues that WBI has been able to add to its system using the Mapleton Extension, serious questions exist as to whether WBI has under-recovery exposure with respect to its original investment in the Mapleton Extension.⁵³ NSP argues it is inequitable to require NSP to continue to shoulder the costs of the Mapleton Extension, given that this facility is now being used to serve additional customers.⁵⁴

37. NSP's argument misses the point. WBI likely understood that the Commission had confirmed WBI would be entitled to its pre-conversion terms and revenues as part of the conversion of Rate Schedule X-13 to open-access service. As discussed in the October Order, requiring the rollover of Contract No. FT-00532 at the existing

⁵¹ NSP Request for Rehearing at 13.

⁵² *Id.* at 15.

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 18.

incremental rate was based on Contract No. FT-00532's unique genesis from a Commission-directed conversion to Part 284 service to enable the shipper to engage in capacity release. There was no intent to change the contract's rate structure.⁵⁵ The October Order appropriately found 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 at the time of the original X-13 rate agreement.⁵⁶ The fact that events after the conversion of the agreement to open-access service favor one or another of the parties does not compel the Commission to change the arrangement. Absent a compelling reason, the Commission does not second-guess the business and economic decisions between knowledgeable business entities when they enter into contracts.⁵⁷ The Commission felt a compelling need to convert the old X-13 arrangement to open access service to allow capacity release, but did not intend to change the biennial rate restatements under the original contract until such time as the rate converged on the tariff's maximum FT-1 rate. NSP and WBI are both knowledgeable business entities, and they both appear to the Commission to have entered upon the execution of Contract No. FT-01097 in good faith, each from the point of view of its respective business interests and obligations, with NSP reserving its right to protest the rate issue later. Having carefully considered NSP's protest to the rate element, the Commission here confirms the efficacy and enforceability of the Rollover Contract.⁵⁸ Given the prior history surrounding the series of contracts that preceded the Rollover

⁵⁵ See, e.g., *Williston Basin*, 115 FERC ¶ 61,081 at P 26 (finding that because Rate Schedule X-13 restrains capacity release, Commission's decision to order conversion to Part 284 affords NSP flexibility in managing that capacity, but NSP is required to continue paying the X-13 rate when it is higher than the maximum FT-1 rate).

⁵⁶ *Id.*

⁵⁷ *Marathon Oil Co. v. Trailblazer Pipeline Co.*, 111 FERC ¶ 61,236, at P 64 (2005), *reh'g denied*, 114 FERC ¶ 61,048, at P 37 (2006).

⁵⁸ When WBI insisted the rollover of Contract No. FT-00532 should be under the existing biennial rate arrangement, and declined to change the rate structure to a new FT-1 service agreement at the maximum FT-1 recourse rate, NSP nevertheless agreed to execute Contract No. FT-01097 under protest. We find that NSP reserved its right to protest but signed the contract to ensure service to its customers. Although NSP, having reserved its right to raise an objection later, is not improperly attempting to impose a change to the contract *ex post facto*, the Commission nevertheless rejects NSP's protest to the rate elements of the Rollover Contract as discussed above, and will not order such a change.

Contract, as well as the WBI tariff language governing rollover rates, the Commission affirms the order below and denies rehearing. The facts surrounding the Sheyenne Expansion and other precedents cited by NSP are not relevant to the Commission-ordered conversion of NSP's Rate Schedule X-13 service agreement to Part 284 service, which was *sui generis*. In sum, the conversion of the X-13 service agreement to Part 284 service in order to enable the shipper to utilize capacity release was not intended to change the agreed-upon rate mechanism for NSP's Mapleton Extension service under Rate Schedule X-13 or the subsequent successor contracts.⁵⁹

38. Accordingly, the Commission finds the October Order properly accepted the rollover of Contract No. FT-00532 with the pre-existing rate mechanism and properly accepted the tariff records filed by WBI to implement the Rollover Agreement Contract No. FT-01097.

The Commission orders:

NSP's request for rehearing in this proceeding is denied as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁹ See *Williston Basin*, 115 FERC ¶ 61,081 at P 43 (Commission's intent was to preserve as much of the parties' original agreement as possible with respect to rate mechanism, while affording NSP the ability to release capacity).