147 FERC ¶ 61,196
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company, L.L.C.	Docket Nos.	CP12-490-001 RP12-887-001
Kinetica Energy Express, LLC	Docket No.	CP12-489-001

ORDER DENYING REHEARING AND RECONSIDERATION
AND GRANTING CLARIFICATION

(Issued June 10, 2014)

1. On May 31, 2013, the Commission issued an order[1] approving: (1) an application by Tennessee Gas Pipeline Company, L.L.C. (Tennessee) in Docket No. CP12-490-000 for authorization under section 7(b) of the Natural Gas Act (NGA)[2] to abandon by sale to Kinetica Energy Express, LLC (Kinetica Energy) certain facilities located onshore and offshore in the Gulf of Mexico and Louisiana, referred to as Supply Area Facilities; (2) Kinetica Energy's request in Docket No. CP12-489-000 for authorization under section 7(c) of the NGA[3] to acquire and operate the facilities found to be jurisdictional transmission facilities; and (3) Tennessee's request in Docket No. RP12-887-000 for approval of a settlement agreement with certain of its shippers regarding the proposed accounting and rate treatment for Tennessee's sale of the facilities.

[1] *Tennessee Gas Pipeline Co., L.L.C.*, 143 FERC ¶ 61,196 (2013) (May 31 Order).

[2] 15 U.S.C. § 717f(b) (2012).

[3] *Id.* § 717f(c).

2. On July 1, 2013, timely requests for rehearing of the May 31 Order were filed by Indicated Shippers,[4] Walter Oil & Gas Corporation (Walter Oil), Deep Gulf Energy LP (Deep Gulf),[5] and Kinetica Energy.[6] On July 1, 2013, Kinetica Energy also filed a separate request for clarification.[7] On July 2, 2013, Anadarko Energy Services Company, Anadarko Petroleum Corporation, and Anadarko U.S. Offshore Corporation (collectively, Anadarko) filed a request for reconsideration of the order.[8]

3. The Commission addresses these requests for rehearing, reconsideration, and clarification below.

I. Background

4. The Supply Area Facilities include over 1,300 miles of pipeline, compression facilities, offshore platforms, and appurtenant facilities that move offshore gas production to Tennessee's onshore facilities. On July 26, 2012, Tennessee and Kinetica Energy filed separate applications with the Commission seeking the necessary authorizations under section 7 of the NGA for Tennessee to abandon the Supply Area Facilities by sale to Kinetica Energy.

5. The May 31 Order found that the public convenience or necessity permitted Tennessee's abandonment of the Supply Area Facilities. In making this finding, the Commission considered the lack of opposition to the proposed abandonment by most of Tennessee's firm shippers, concluding that such lack of opposition indicated that the non-

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[4] Indicated Shippers consists of ConocoPhillips; Anadarko Energy Services Company; Anadarko Petroleum Corporation; Anadarko U.S. Offshore Corp.; Apache Corporation; BP Energy Company and BP America Production Inc.; Chevron U.S.A. Inc.; ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation; and Shell Offshore Inc. Indicated Shippers' request for rehearing was filed in Docket Nos. CP12-489-001, CP12-490-001, and RP12-887-001.

[5] Walter Oil's and Deep Gulf's Requests for Rehearing were filed in Docket Nos. CP12-489-001 and CP12-490-001.

[6] Kinetica Energy's Request for Rehearing was filed in Docket No. CP12-489-001.

[7] Kinetica Energy filed its Request for Clarification in Docket No. CP12-489-001.

[8] Anadarko's Request for Reconsideration was filed in Docket Nos. CP12-489-001, CP12-490-001, and RP12-887-001.

commenting shippers believed that they would be unharmed by the proposed abandonment and potentially could benefit from the proposals.[9] The May 31 Order rejected protesters' rate stacking concerns as a reason for denying Tennessee's and Kinetica Energy's proposals, reasoning that the change in cost responsibility did not amount to rate stacking.[10] The May 31 Order also rejected the protesters' arguments based on concerns relating to continuity of service, explaining that service on the facilities found to be jurisdictional transmission facilities will continue to be offered by Kinetica Energy subject to the Commission's NGA jurisdiction.[11] The Commission further explained that it does not believe the NGA's exemption for gathering can be reconciled with a policy of refusing to authorize an interstate pipeline company's transfer of facilities currently functioning as gathering facilities to a gathering company. Therefore, the May 31 Order also authorized Tennessee's abandonment of the certificated Supply Area Facilities found to be gathering facilities, so that they can be transferred to Kinetica Energy's affiliate, Kinetica Midstream LLC (Kinetica Midstream).[12]

6. The Commission accepted Kinetica Energy's proposed initial rates, subject to certain modifications. Relevant to the issues raised on rehearing, the Commission rejected Kinetica Energy's proposed negative salvage rate of 0.49 percent;[13] rejected Kinetica Energy's proposed cost of debt of 10 percent;[14] rejected Kinetica Energy's proposed discount transportation adjustment;[15] and required Kinetica Energy to file a three-year cost and revenue study justifying its approved cost-based recourse rates,

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[9] May 31 Order, 143 FERC ¶ 61,196 at P 58.

[10] *Id.* PP 68-70.

[11] On June 27, 2013, Kinetica Energy accepted its certificate to acquire and operate the jurisdictional Supply Area Facilities still in use. The May 31 Order found that some of the Supply Area Facilities had not flowed gas for more than one year and identified these facilities as "unutilized" facilities. Although Tennessee's abandonment authority granted by the May 31 Order included these unutilized facilities, Kinetica Energy's certificate authority granted by the May 31 Order did not include any of the unutilized facilities. May 31 Order, 143 FERC ¶ 61,196 at PP 161-69.

[12] May 31 Order, 143 FERC ¶ 61,196 PP 81-84.

[13] *Id.* P 195.

[14] *Id.* P 207

[15] *Id.* P 215.

including a requirement that Kinetica Energy project units of service for the Supply Area Facilities.

7. The Commission also accepted Kinetica Energy's *pro forma* tariff provisions, subject to certain modifications. Relevant to the issues raised on rehearing, the Commission rejected Kinetica Energy's proposed Infrastructure Investment Surcharge without prejudice to Kinetica Energy filing an appropriate hurricane tracker in a separate NGA limited section 4 proceeding;[16] rejected Kinetica Energy's reservation charge crediting provisions;[17] rejected Section 2.1 of Kinetica Energy's proposed Form of Reserve Commitment Agreement under Rate Schedules LFT-1 and IT;[18] and rejected Kinetica Energy's proposed mandatory natural gas liquids bank agreement (NGL Bank).[19]

8. The Commission accepted Tennessee's settlement agreement, providing for resolution of rate and accounting issues associated with its abandonment of the Supply Area Facilities. However, the settlement agreement was approved only for the consenting parties to the settlement.[20] The Commission severed non-consenting parties from the settlement, preserving their opportunity to litigate the merits of any rate change for which Tennessee may apply.[21]

9. On September 1, 2013, Tennessee and Kinetica Energy closed the sale of facilities authorized by the May 31 Order,[22] and Kinetica Energy commenced service on the same date.[23]

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[16] *Id.* P 225.

[17] *Id.* P 231.

[18] *Id.* P 246.

[19] *Id.* P 249.

[20] *Id.* PP 271-72.

[21] *Id.* PP 273-75.

[22] *See* Tennessee's September 13, 2013 Filing in Docket No. CP12-490-000.

[23] *See Kinetica Energy Express, LLC*, 144 FERC ¶ 61,159 (2013).

II. Discussion

A. Public Convenience or Necessity Determination

1. Rate Stacking and Effects on Competition

10. On rehearing, Indicated Shippers argues that the Commission's finding in the May 31 Order that Tennessee's abandonment of the Supply Area Facilities will not result in impermissible rate stacking was not based on substantial evidence because the Commission failed to accurately describe the structure of Tennessee's current rates and services, which Indicated Shippers asserts is demonstrated by several of the Commission's findings and statements in the order.

11. Indicated Shippers asserts the Commission incorrectly equated Tennessee's Supply Aggregation (SA) service as free transportation service for producers using the Supply Area Facilities.[24] Indicated Shippers states that it is correct that there is no charge under Tennessee's SA service for producers to schedule and nominate volumes at Tennessee's Supply Area pooling points, but that these pooling points are virtual points, not physical points, and there is no transportation service or pipeline capacity associated with them. Thus, Indicated Shippers emphasizes that producers' ability to nominate and schedule supplies at pooling points is not the equivalent of transportation service for producers, much less "free" transportation service for producers.[25] Indicated Shippers assumes the Commission's misunderstanding of the transportation on the Supply Area Facilities as being free transportation service for producers under their SA service agreements caused the Commission to incorrectly find that the rate stacking that would result from shippers having to pay separately for service on the Supply Area Facilities was acceptable.

12. Indicated Shippers also notes that some producers and marketers that rely on supplies accessed by the Supply Area Facilities have firm and interruptible transportation agreements with Tennessee, and that they pay rates under these transportation agreements reflecting fully allocated costs, including costs associated with the Supply Area Facilities. It further emphasizes that the service agreements with Kinetica Energy and/or Kinetica Midstream for service on the Supply Area Facilities will not give producers or marketers

[24] Indicated Shippers cites May 31 Order, 143 FERC ¶ 61,196 at P 92.

[25] Indicated Shippers cites *Tennessee Gas Pipeline Co.*, 71 FERC ¶ 61,102, at 61,346 (1995) ("Rate Schedule SA, as understood by the Commission, is a scheduling and nomination service which permits designated parties to act on behalf of several transportation customers."), *order on reh'g*, 73 FERC ¶ 61,278 (1995).

direct access to market areas, and that the rates charged by Tennessee for deliveries in downstream market areas will continue to reflect the costs of operating the Supply Area Facilities, notwithstanding that Tennessee is no longer incurring these costs. Hence, it claims that rate stacking is the indisputable consequence of Tennessee's abandonment on offshore gas producers and marketers.

13. Indicated Shippers is correct that we stated in the May 31 Order that "the fact producers are not paying for transportation service over Tennessee's offshore facilities does not mean that the transportation service is free."[26] However, we were not equating producers' nominations and scheduling under SA service agreements with free transportation service for the producers. We recognize that the Rate Schedule SA service agreements themselves created no rights to transportation service or pipeline capacity on the Supply Area Facilities, and that the SA service agreements merely permitted the scheduling of volumes at pooling points. Thus, when we noted that the producers were not charged for such aggregation service under their SA pooling service agreements, we did not intend to suggest that they were receiving free transportation service on the Supply Area Facilities. However, we were explaining that there are costs associated with the use of Tennessee's Supply Area Facilities to move gas produced at offshore wells to pooling points, and that those costs were included in the rates paid by Tennessee's shippers with delivery points on Tennessee's system downstream of the pooling points.[27]

14. Indicated Shippers' states that the abandonment results in rate stacking because some producers on the Supply Are Facilities have firm or interruptible service agreements with Tennessee—that are separate from their SA service agreements—for which they pay rates which currently reflect the costs of transporting gas on the Supply Area Facilities.[28] The May 31 Order recognizes that any shipper having a transportation

[26] May 31 Order, 143 FERC ¶ 61,196 at P 68.

[27] *Id.*

[28] Our May 31 Order acknowledged that one of Indicated Shippers' members, ConocoPhillips Company, had been paying Tennessee's firm rate for service with both primary receipt and delivery points on the Supply Area Facilities. 143 FERC ¶ 61,196 at P 71. Indicated Shippers states on rehearing that some of its other members have firm and interruptible service agreements with Tennessee, including: Anadarko Production Inc. and Anadarko U.S. Offshore Corp., which have agreements with Tennessee for firm service under Rate Schedule FT-L; Anadarko Energy Services Company, Apache Corporation, and Chevron U.S.A. Inc., which have agreements with Tennessee for interruptible service under Rate Schedule IT; and BP Energy Company and Chevron U.S.A., which have agreements for firm service under Tennessee's Rate Schedule FT-A. While Indicated Shippers acknowledges that BP Energy's and Chevron's FT-A service

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agreement with Tennessee is currently paying a portion of the costs associated with the Supply Area Facilities. However, the fact that a few of the rate-paying shippers on Tennessee's system are producers whose production is moved to shore by the Supply Area Facilities does not change our finding in the May 31 Order that the costs associated with the Supply Area Facilities are currently allocated to the rates paid by *all* of Tennessee's shippers for service downstream of the supply area pooling points, and that very few of Tennessee's shippers still rely on the offshore gas supplies accessed by the Supply Area Facilities.[29] Thus, most of the costs to maintain and operate the Supply Area Facilities have been borne by the great majority of Tennessee's shippers whose gas supplies do not include any gas transported on the Supply Area Facilities, with minimal revenue contribution from the producers and the few other shippers that do still rely on the Supply Area Facilities.[30]

15. Further, rejecting Tennessee's abandonment proposal would not have constrained Tennessee's ability to accomplish a similar cost responsibility outcome by other means. As noted in the May 31 Order, Tennessee could have filed a section 4 of the NGA rate case to create a new, distinct offshore rate zone and proposed revised rates that would reallocate the responsibility for the risks and costs associated with the Supply Area Facilities from all of Tennessee's shippers to only those shippers whose supplies actually utilize the facilities.[31] We also noted that Tennessee could have sought a declaratory order addressing the jurisdictional status of the various Supply Area Facilities as a preparatory step to seeking approval of separately-stated transmission rates and gathering rates for services on the Supply Area Facilities.[32] If Tennessee had chosen that approach, we would have had no basis for refusing to authorize the abandonment and impeding Tennessee's sale of any facilities that were currently functioning as gathering facilities, notwithstanding the fact they had been certificated.[33] Our May 31 Order produced a

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agreements do not involve the Supply Area Facilities, Indicated Shippers asserts they would be adversely affected by the new settlement agreement filed by Tennessee for Commission approval in this proceeding. Indicated Shippers' Rehearing Request at 16, n.33.

[29] May 31 Order, 143 FERC ¶ 61,196 at P 71.

[30] As noted in our May 31 Order, there were no protests by Tennessee's shippers that account for 97 percent of its annual revenue. 143 FERC ¶ 61,196 at P 71.

[31] May 31 Order, 143 FERC ¶ 61,196 at P 72.

[32] *Id.*

result with very similar rate effects on shippers and offshore producers by authorizing Tennessee's transfer of jurisdictional Supply Area Facilities to Kinetica Energy and gathering facilities to Kinetica Midstream.[34]

16. To the extent that the Indicated Shippers argument is not rate stacking, but rather that Tennessee will over-recover its costs of service, it overlooks the fact that Tennessee's application for abandonment authorization was accompanied by a settlement agreement with many of its shippers. That settlement provided for Tennessee to immediately reduce the currently-existing rates Tennessee charges those consenting parties, significantly reducing the potential for continued recovery by Tennessee of costs associated with the Supply Area Facilities.[35] By severing the contesting parties, we ensured that the few contesting producers/shippers would have an opportunity to fully review the cost adjustments related to the abandonment of the Supply Area Facilities in Tennessee's next NGA section 4 general rate case. Further, even though some of the Indicated Shippers may be contesting parties not eligible for the rate concessions provided for under the terms of the settlement, Tennessee implemented the terms of the settlement by unilaterally offering the same rates for all shippers, not just consenting shippers.[36] As a result of the Commission's approval of the settlement and the manner in which the settlement was implemented by Tennessee, a significant amount of the Supply Area Facilities' costs will be removed from the recourse rates applicable to any shipper on the Tennessee system without limiting non-consenting parties' rights to contest Tennessee's proposed costs of service in its next NGA section 4 general rate case.

17. In summary, most of the costs associated with the transportation of gas on the Supply Area Facilities were being paid by shippers not accessing gas transported on those facilities. Requiring shippers who actually use the facilities to pay for those costs through an initial rate imposed by Kinetica Energy is not an end result different from what Tennessee could have achieved through other means. Further, shippers responsible for 97 percent of Tennessee's annual revenue did not oppose the proposed abandonment.[37] In addition, while Indicated Shippers is correct that those shippers that

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[33] *Id.* PP 84, 102. *See also High Point Gas Transmission, LLC and Southern Natural Gas Company, L.L.C.*, 143 FERC ¶ 61,207, at PP 72-81 (2013).

[34] May 31 Order, 143 FERC ¶ 61,196 at P 72.

[35] *Id.* P 69.

[36] *Tennessee Gas Pipeline Co., LLC*, 146 FERC ¶ 61,062, at P 1 (2014).

[37] May 31 Order, 143 FERC ¶ 61,196 at P 71.

do still access gas on the Supply Area Facilities may find themselves paying more than one rate, the settlement largely addresses the issue of double recovery of Supply Area Facility costs through a rate reduction on Tennessee's system. Any further relief for the non-consenting shippers can be addressed in a future section 4 or 5 rate proceeding. In view of these considerations, we affirm our rejection of Indicated Shippers' argument that we should have denied Tennessee's abandonment proposal on the grounds that it will result in impermissible rate stacking.

18. We have considered Indicated Shippers' claim that offshore producers will not have the "ability to compete directly" or "enhance" their competitive position by entering into service agreements with the Kinetica affiliates because the Supply Area Facilities "will not have access to markets" and can only be used to reach downstream pooling points on Tennessee's system.[38] It is entirely speculative whether Tennessee's sale of the Supply Area Facilities will result in reduced demand or lower prices for offshore production accessed by those facilities simply because these gas supplies can no longer reach downstream market area delivery points under a single service agreement with one rate paid to Tennessee. Tennessee's ownership and operation of the Supply Area Facilities has not prevented the steady dwindling of demand for offshore production. The delivery of offshore production accessed by the Supply Area Facilities to downstream market areas has always been dependent on the demand for offshore production by Tennessee's shippers with delivery points in those market areas. Market area shippers offered minimal opposition to Tennessee's abandonment proposal. Tennessee's abandonment of the Supply Area Facilities has not limited producer/shipper access to markets. Shippers can now receive service by Kinetica Energy on the Supply Area Facilities to access Tennessee's pooling points, provided Tennessee has capacity to receive and deliver gas to those points. Further, Kinetica Energy's shippers may use Kinetica Energy's pooling point or create their own market center.

19. Moreover, we will not deny Tennessee's abandonment proposal based on speculation that net-back prices to offshore producers that rely on the Supply Area Facilities may be adversely affected by the inconvenience of shippers having to deal with multiple transporters or the possibility of increased overall transportation costs. Such concerns do not provide an appropriate basis to deny Tennessee's abandonment proposal. As we explained in our May 31 Order, gas commodity markets and contracts for the sale of gas are excluded from our jurisdiction.[39]

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[38] Indicated Shippers' Rehearing Request at 28.

[39] May 31 Order, 143 FERC ¶ 61,196 at P 72. We note that in light of our recent orders approving proposals by other interstate pipelines to spin off their offshore facilities in the Gulf of Mexico, a denial of the Tennessee's abandonment proposal in this

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20. In view of the above considerations, we affirm our finding in the May 31 Order that approval of Tennessee's abandonment proposal is permitted by the public convenience or necessity. The transfer of the jurisdictional Supply Area Facilities to Kinetica Energy results in the cost responsibility for the facilities being squarely placed on shippers that actually use the facilities—an outcome that is consistent with basic cost-causation principles.[40]

2. Continuation of Service

21. The May 31 Order explained that Tennessee's proposed abandonment would result in the transfer of the jurisdictional Supply Area Facilities to another NGA jurisdictional entity, Kinetica Energy.[41] The jurisdictional facilities will not be taken out of service and will continue to be available for service for anyone that has relied on the facilities, including producers that did not have their own transportation service agreements with Tennessee, but may now decide that they need to enter into transportation service agreements with Kinetica Energy. Under its tariff, Kinetica Energy is offering both firm and interruptible transportation service at Commission-approved initial rates that are cost-based and found to be in the public convenience and necessity.[42] Therefore, the Commission found that Tennessee's proposal to transfer the jurisdictional facilities to Kinetica Energy presented no continuity of service issue. Further, for the particular Supply Area Facilities found to be currently performing non-jurisdictional gathering functions, we found protestors' concerns regarding continuity of service not a

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proceeding would have allowed offshore producers relying on the Supply Area Facilities to maintain a competitive advantage vis-à-vis other offshore producers in the Gulf of Mexico. *See, e.g.*, *ANR Pipeline Co.*, 139 FERC ¶ 61,238 (2012), *denying reh'g*, 143 FERC ¶ 61,225 (2013); *Trunkline Gas Co., LLC*, 139 FERC ¶ 61,239 (2012), *denying reh'g*, 142 FERC ¶ 61,133 (2013); and *Southern Natural Gas Co.*, 143 FERC ¶ 61,207 (2013).

[40] The U.S. Court of Appeals for the District of Columbia Circuit defined the cost-causation principle as follows: "[s]imply put, it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them." *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992). Our May 31 Order analyzed Kinetica Energy's proposed initial section 7 rates for service on the jurisdictional Supply Area Facilities to ensure they will appropriately reflect Kinetica Energy's cost of providing service. May 31 Order, 143 FERC ¶ 61,196 at P 183.

[41] *Id.* P 81.

[42] *Id.* PP 183-217.

sustainable basis for us to refuse to permit Tennessee's transfer of those facilities to Kinetica Energy's non-jurisdictional gathering affiliate.

22. On rehearing, Indicated Shippers argues that Tennessee must honor its contracts with firm shippers that specify receipt and/or delivery points on the Supply Area Facilities by directing Tennessee to compensate these firm shippers for any increased transportation expense they incur if they enter into service agreements with one or both of the Kinetica affiliates.[43] To support this proposition, Indicated Shippers cites S*unoco, Inv. (R&M) v. Transcontinental Gas Pipe Line Corporation* (*Sunoco v. Transco*),[44] which Indicated Shippers claims the Commission failed to adequately distinguish in the May 31 Order.

23. *Sunoco v. Transco* involved unique circumstances, as Transco entered into a Commission-approved settlement that entitled Sunoco to special firm service at a special reduced rate not available to other shippers using the same facilities on Transco's system.[45] In exchange, Sunoco withdrew a court appeal and agreed to Transco's general take-or-pay settlement, which required Sunoco to pay certain surcharges. Thereafter, Sunoco claimed that Transco had violated the terms of this settlement when it requested, and the Commission approved, Transco's abandonment of the facilities Sunoco relied upon by transferring them to an affiliate that would operate the facilities as non-jurisdictional gathering facilities.[46]

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[43] Indicated Shippers makes no distinction between the Supply Area Facilities found to be jurisdictional transmission facilities and the Supply Area Facilities found to be non-jurisdictional gathering facilities.

[44] 114 FERC ¶ 61,180 (2006), *aff'd sub nom. Transcontinental Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172 (D.C. Cir. 2007).

[45] Under the terms of the settlement agreement, Sunoco was entitled to receive firm service from offshore receipt points in the Gulf of Mexico to delivery points in Pennsylvania and pay only the maximum FT reservation rate and usage charge at the zone rate for deliveries in Pennsylvania for the entire haul, whereas other shippers with offshore receipt points and onshore mainline delivery points had to pay both Transco's interruptible rate under Rate Schedule IT-Feeder for offshore service plus Transco's FT reservation rate and usage charge for the downstream transportation service. *Sunoco v. Transco*, 114 FERC ¶ 61,180 at P 3.

[46] *Id.* PP 2-4.

24. The Commission recognized that Transco's abandonment of the gathering facilities would permit it to unilaterally terminate the portion of Sunoco's settlement-approved service that relied on the abandoned gathering facilities and thus cause Sunoco to lose the benefits of its bargain in agreeing to the settlement, as Sunoco would have to start relying on offshore service provided by a non-jurisdictional gathering company whose rates and terms of service were not subject to the Commission's NGA jurisdiction. The Commission concluded that while it "could not prevent Transco's unilateral abandonment and, therefore, could not prevent Transco from upsetting the bargain reached in the settlement, that does not mean that the Commission is powerless to provide Sunoco with a remedy for Transco's breach of the 1992 Settlement."[47] To provide Sunoco a remedy for Transco's breach of the Commission-approved settlement, the Commission required Transco to reimburse Sunoco for any additional costs it incurred as a result of the abandonment.[48] The Commission found under the circumstances that requiring Transco to make reimbursements to keep Sunoco economically whole was appropriate to promote the Commission's policy of encouraging settlements,[49] since failing to provide Sunoco with a remedy for Transco's breach of the terms of a settlement agreement that had been approved by the Commission might lead parties in other settlements to think that they also could unilaterally terminate settlements, which would result in the waste of administrative resources by forcing parties back into litigation to relitigate issues they thought had been resolved when they agreed to the breached settlements.[50]

25. As opposed to the situation in *Sunoco v. Transco*, there is no evidence that any of Tennessee's Supply Area shippers were receiving firm service requiring the use of both the abandoned and retained facilities at a special Commission-approved settlement rate. Rather, the firm service agreements between Tennessee and shippers that specified receipt/delivery points on the Supply Area Facilities provide for discounted rates mutually agreed upon by the shippers and Tennessee.[51] It is true that, like this

[47] *Id*. P 19.

[48] *Id.* P 6.

[49] *Id*. PP 19 and 55 (citations omitted).

[50] *Id.* P 58.

[51] As stated in the May 31 Order, ConocoPhillips had emphasized in its protest that it was currently receiving service by Tennessee at a discounted firm rate. May 31 Order, 143 FERC ¶ 61,196 at P 62. However, the index of firm customers filed by Tennessee on January 1, 2014, in accordance with section 284.13(c) does not reflect any current firm service agreement with ConocoPhillips. As reflected on Kinetica Energy's

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proceeding, *Sunoco v. Transco* involved a pipeline company's abandonment of offshore facilities under section 7 of the NGA, which affected shippers' service to the extent their service agreements specified receipt and/or delivery points on those facilities. More relevantly, however, *Sunoco v. Transco* involved the violation of a settlement agreement approved by the Commission under section 4 of the NGA as fair and reasonable and in the public interest, not simply the abandonment of facilities being used to provide service at discounted rates negotiated by a pipeline and its shippers. *Sunoco v. Transco* is thus inapplicable here.

26. In view of the above considerations, we find that concerns over continuity of service provide no basis or reason to require that Tennessee compensate the few protesting firm shippers with receipt and delivery points on the Supply Area Facilities for any increase in costs they may incur as a result of the Kinetica Energy's affiliates' acquisition of the facilities.

B. Rate Issues

1. Negative Salvage

27. In its certificate application, Kinetica Energy proposed a depreciation rate of 0.47 percent and a negative salvage rate of 0.49 percent.[52] Kinetica Energy stated that its proposed depreciation rate of 0.47 percent was based on data from a study prepared by Mr. Edward H. Feinstein and filed by Tennessee in its last rate case filed in Docket No. RP11-1566-000. Tennessee had relied on the study to support its proposed depreciation and salvage rates in that proceeding based on a weighted average remaining

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website, both the receipt point (the Zone L, Leg 500 Pooling Area) and the delivery point (LaFitte Lake Washington: DIP 524E-101B) specified in Tennessee's previous firm service agreement with ConocoPhillips are operated by Kinetica Energy. Thus, ConocoPhillips no longer has any demand charge obligations to Tennessee. Further, if ConocoPhillips has entered into an agreement with Tennessee for interruptible service (which Tennessee would not have been required to include in its quarterly index of firm customers), ConocoPhillips will only pay for service when it requests and receives interruptible service.

[52] Net salvage value is the salvage value of retired property less the cost of removal. 18 C.F.R. pt. 201, Definition 23. Negative net salvage refers to the cost of removal of an asset at the time of its retirement from service over the revenue realized from the sale of the retired asset. That is, when the revenue realized from the sale of the property is less than the cost of removal, the net salvage value is negative.

economic life of 15.69 years for Tennessee's offshore facilities.[53] Since two years had passed since the study was prepared, Kinetica Energy asserted it was appropriate to deduct two years, which would reduce the remaining economic life of the Supply Area Facilities to 13.69 years. However, Kinetica Energy also asserted that since the parties in Tennessee's rate case had reached a settlement agreement based on a "black box" cost of service, it should not be limited to the depreciation rate provided for in the settlement agreement.[54]

28. Protesters contended that the fact the Tennessee's negative salvage rate was approved as a component of the "black box" cost of service agreed to in the settlement and not fully litigated was not a sufficient reason to approve different depreciation and negative salvage rates that Kinetica Energy had not adequately supported. In any event, the protesters argued that the study's remaining economic life analysis could not simply be modified by deducting two years to account for elapsed time since Tennessee filed the testimony. Emphasizing that determining the weighted average economic life of facilities requires multiple data inputs, not merely the passing of time, the protestors further asserted that Kinetica Energy could not deduct two years and be said to still be relying on the analysis contained in the testimony.[55]

29. We agreed with the protesters that Kinetica Energy had not adequately supported any particular depreciation rate or negative salvage rate and, therefore, there was insufficient record evidence to justify approval of depreciation and negative salvage rates for Kinetica Energy higher than those underlying Tennessee's current rates. We noted that the cited Tennessee study was contested when first presented in Tennessee's rate case, and the settlement agreement in that proceeding makes no explicit reference indicating that the study was relied upon in any way in reaching the settled rates.[56] We also explained that Kinetica Energy had made no attempt to reconcile the set of facilities that it sought to acquire from Tennessee and those that were the subject of Tennessee's study.[57]

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[53] Kinetica Energy's Application at Exhibit O at p. 2.

[54] May 31 Order, 143 FERC ¶ 61,196 at P 192.

[55] *Id.* P 193.

[56] *Id.* P 195.

[57] *Id.*

30. Since Kinetica Energy had not provided adequate record evidence to support approval of any particular depreciation and negative salvage rates and all of the facilities that Kinetica Energy sought to acquire were currently being operated as integrated parts of Tennessee's system, we relied on Commission policy which would have required Tennessee to use its last approved offshore depreciation and negative salvage rates if, rather than proposing to abandon facilities, it had been seeking authorization to construct or acquire new facilities that would be integrated into and operated as part of its existing system.[58] Since Kinetica Energy's proposed depreciation rate of 0.47 percent was lower than the 0.80 percent offshore depreciation rate approved in Tennessee's last rate case, we approved its proposed depreciation rate. However, Kinetica Energy's proposed 0.49 percent negative salvage rate was higher than the 0.40 percent salvage rate approved in Tennessee's last rate case,[59] and we limited Kinetica Energy's negative salvage rate to 0.40 percent.

31. On rehearing, Kinetica Energy clarifies that it only relied on the study filed in Tennessee's rate case to support its proposed depreciation rate. Specifically, Kinetica Energy states:

> For the negative salvage rate, Kinetica did not rely on "the Tennessee study" … or the set of facilities covered by that study. Nor did Kinetica use that study's remaining useful life figure of 13.69 years for negative salvage.[60]

32. Rather, Kinetica Energy explains on rehearing that its proposed negative salvage rate of 0.49 percent was based solely on its need to collect at least $4 million per year, relative to its gross plant investment of approximately $821.9 million, in order to fulfill its contractual obligation to fund the negative salvage account in accordance with the terms of its Purchase and Sale Agreement (PSA) with Tennessee. Kinetica Energy claims the 0.40 percent negative salvage rate approved by the May 31 Order will result in an annual shortfall of approximately $700,000 in the amount it needs to be collecting to

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[58] *Id*. P 194 (citing *Gulf South Pipeline Co., LP*, 120 FERC ¶ 61,291 (2007); *Texas Eastern Transmission, LP*, 101 FERC ¶ 61,120 (2002)).

[59] The uncontested settlement agreement accepted by the Commission in *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,182 (2011), was filed on September 30, 2011, in Docket No. RP11-1566-000. Appendix H to the settlement agreement reflects a negative salvage rate of 0.40 percent.

[60] Kinetica Energy's July 1, 2013 Request for Rehearing in Docket No. CP12-489-001 at p. 4.

fund the negative salvage account. Kinetica Energy asserts its contractual commitment in the PSA constitutes adequate support for its proposed 0.49 percent negative salvage rate, and that we therefore erred in limiting Kinetica Energy to the negative salvage rate agreed to in Tennessee's last rate case.[61]

33. The Commission is not bound by the terms of Kinetica Energy's purchase agreement with Tennessee. Further, Kinetica Energy points to no Commission policy or precedent that provides for using purchase contract terms to establish negative salvage rates. Absent approval of a settlement like the one in Tennessee's last rate case, a pipeline company bears the burden of proof to justify a negative salvage rate and the collection of estimated future expenses to retire facilities at the end of their useful life.[62] Kinetica Energy has acquired its facilities from Tennessee, and Kinetica Energy has provided no material evidence to support its proposal to increase the 0.40 percent negative salvage rate that was being used by Tennessee to 0.49 percent.[63] While the PSA's requirement that Kinetica Energy fund a negative salvage account with at least $4,000,000 annually for 25 years shows the level of assurance that it will be shielded against potential liability desired by Tennessee, there is no record evidence to support a

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[61] *Id.* P 195. Section 5.14 of Kinetica Energy's PSA with Tennessee states "Buyer shall file for approval from FERC to establish immediately following Closing, a FERC Gas Tariff which shall contain, as part of the cost of service underlying its maximum allowable jurisdictional rates, terminal negative salvage for the Jurisdictional Assets in an amount that Buyer believes is prudent and reasonably supportable, to be recovered over a period not to exceed 25 years ("Negative Salvage Allowance")." Kinetica Energy's July 26, 2012 Application in Docket No. CP12-489-000 at Exhibit R, Section 5.14 at p. 46. Thus, the PSA did not require that Kinetica Energy seek approval in its certificate application for a specific negative salvage rate or negative salvage allowance. However, the PSA nevertheless requires Kinetica Energy to fund a negative salvage account with at least $4,000,000 annually. *Id*., Section 6.15(c)(i) at p. 59 - 60.

[62] *See, e.g., Pacific Offshore Pipeline Company*, 62 FERC ¶ 61,248, at 62,634 (1993).

[63] Kinetica Energy has not demonstrated that a higher negative salvage value would be justified under any of the Commission's three criteria for approving a negative net salvage allowance: (1) the pipeline has a clearly discernable end-of-life; (2) the evidence is persuasive that interim retirements have been taken into account in computing negative salvage costs; and (3) sales and salvage values of abandoned or retired equipment are fully proven. *See Portland Natural Gas Transmission System*, 142 FERC ¶ 61,197, at P 151 (2013).

finding that $100,000,000 is a reasonable estimate of how much Kinetica Energy may need to retire the Supply Area Facilities at the end of their economic life.

34. Further, as the protesters argued, assessing the weighted average economic life of facilities requires consideration of more than just how much time has passed since the last time the issue was examined. The projected remaining economic life of offshore facilities can change based on, *inter alia*, the discovery of new reserves, the effects of current economic conditions on the drilling of exploratory wells, and whether there have been unanticipated drops in production as the result of hurricane damage to offshore facilities.[64] The analysis also needs to look at particular facilities.[65] These are matters that can be best explored in a rate proceeding with the opportunity for full evidentiary discovery. Therefore, consistent with Commission policy, we affirm our decision in the May 31 Order to require that Kinetica Energy use the 0.40 percent rate stipulated in the settlement approved in Tennessee's last rate case, without prejudice to Kinetica Energy filing a general NGA section 4 rate case to propose a higher negative salvage rate and any other changes to its initial rates.[66]

2. Cost of Debt

35. In a section 7(c) certificate proceeding, the applicant pipeline has the burden of providing support for and demonstrating that its proposal, including its estimated costs and proposed initial rates, are required by the present or future public convenience and necessity.[67] Protesters argued that Kinetica Energy had not provided support for its proposed 10 percent cost of debt. The Commission issued a data request to obtain additional information and documentation from Kinetica Energy on how it had arrived at the proposed 10 percent cost of debt,[68] but Kinetica Energy provided no additional

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[64] *See, e.g., Sea Robin Pipeline Company, LLC,* 133 FERC ¶ 63,009, at 66,116-17 (2010).

[65] *See, e.g., ANR Pipeline Company*, 78 FERC ¶ 63,003, at 65,045-46 (1997).

[66] May 31 Order, 143 FERC ¶ 61,196 at P 195 and n.175. *See Northern Natural Gas Co.*, 135 FERC ¶ 61,048, at P 43 (2011) (stating the section 4 process is the forum to best examine costs, billing determinants, cost allocations among services, and rate designs), *reh'g denied*, 137 FERC ¶ 61,091, at P 22 (2011).

[67] *Transcontinental Gas Pipe Line Corp*, 22 FERC ¶ 61,029, at 61,052 (1983) (citation omitted).

[68] December 18, 2013 Data Request in Docket Nos. CP12-489-000, CP12-490-000, and RP12-887-000 at 11.

support. Thus, in our May 31 Order, we required Kinetica Energy to file its actual cost of debt with supporting documents in a compliance filing thirty to sixty days before the in-service date of the Supply Area Facilities.[69]

36. In its request for rehearing of our May 31 Order, Kinetica Energy argued it would be "very likely impossible for it to have and file its actual cost of debt and supporting documents by 30 days prior to the in-service date of the facilities" because deliberations with banks occur right up to the closing of the transaction, which will be within hours or days of the in-service date.[70] Further, it claimed that *Kern River Gas Transmission Company* (*Kern River*),[71] cited by the Commission as support for its requirement that Kinetica Energy use its actual cost of debt when it makes its compliance filing, is distinguishable because at the time of the *Kern River* proceeding, markets were experiencing special volatility and the facilities approved by the Commission would take up to two years to construct. Kinetica Energy argued that it should have been given the opportunity, consistent with Commission precedent,[72] to file a cost and revenue study with its compliance filing to support its best estimate of its cost of debt and base its revised rates on that estimate. In addition, it argued the Commission should have allowed it to delay filing its actual cost of debt and supporting documentation until it files the cost and revenue study, required to be filed by the May 31 Order, after three years of operating experience.

37. After filing its request for rehearing of the May 31 Order, Kinetica Energy made its compliance filing on July 29, 2013 (July 29 Compliance Filing), in Docket No. RP13-1116-000, proposing to place its initial rates into effect September 1, 2013, and commence service on that date. In the July 29 Compliance Filing, Kinetica Energy recalculated its initial rates utilizing a cost of debt of six percent, rather than the rejected 10 percent cost of debt, stating that six percent was its "best estimate" of its actual cost of debt as of that time, and that it would provide its actual cost of debt with documentation when it files its three-year cost and revenue study and recalculates its rates as necessary.

[69] May 31 Order, 143 FERC ¶ 61,196 at P 207.

[70] Kinetica Energy's July 1, 2013 Rehearing Request in Docket No. CP12-489-001 at p. 5.

[71] 98 FERC ¶ 61,205, at 61,722-23 (2002).

[72] Kinetica Energy cites *ANR Pipeline Co.*, 143 FERC ¶ 61,225, at P 72 (2013), and *Maritimes & Northeast Pipeline, LLC*, 81 FERC ¶ 61,166, at 61,726 (1997).

38. On August 28, 2013, we accepted Kinetica Energy's tariff records, subject to certain conditions (August 28 Order).[73] In addition to making Kinetica Energy's rates subject to refund and requiring it to revise its rates using the projected Operation and Maintenance (O&M) and Administrative and General (A&G) expenses it had proposed in the underlying certificate proceeding,[74] the August 28 Order required Kinetica Energy to recalculate its rates to use actual debt costs and provide support for those costs, as required by the May 31 Order, or, if those costs still were not available, provide adequate support for the six percent cost of debt it used in its July 29 Compliance Filing.

39. On September 27, 2013, Kinetica Energy filed a request for rehearing of our August 28 Order's refund condition and condition relating to O&M expenses and A&G expenses. However, Kinetica Energy did not request rehearing of the August 28 Order's condition relating to cost of debt. Rather, whereas Kinetica Energy had stated in its July 29 Compliance Filing that the six percent used in it that filing was its "best estimate" of its actual cost of debt as of that time, it stated in its September 27, 2013 compliance filing that its actual debt cost is six percent, as projected in its July 29 Compliance Filing. Thus, Kinetica Energy has provided actual debt costs and recalculated its initial rates reflecting those costs, mooting its request for rehearing of the May 31 Order's condition that it file its actual cost of debt. The Commission will issue an order in Docket No. RP13-1116 to address Kinetica Energy's request for rehearing in that docket of our August 28 Order's refund condition and condition relating to O&M and A&G expenses.

3. <u>Discount Transportation Adjustment</u>

40. In the May 31 Order, we accepted Kinetica Energy's projected annual throughput of 237,767,130 Dth based on actual historical throughput, adjusted to reflect projected declines in the production supplying current throughput and current drilling activities to bring new production on-line. However, we rejected its proposal to establish billing determinants of 138,533,406 Dth per year by reducing the projected annual throughput of 237,767,130 by the 99,223,723 Dth that it projected it will transport at discounted rates.[75]

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[73] *Kinetica Energy Express, LLC*, 144 FERC ¶ 61,159 (2013).

[74] Kinetica Energy's July 29 Compliance Filing made unexplained and unsupported upward adjustments to the amounts it had proposed in a January 31, 2013 Data Response in its certificate proceeding in Docket No. CP12-490-000. The amounts included in its July 29 Compliance Filing increased Operation and Maintenance expenses by $2,998,554 and Administrative and General expenses by $985,873.

[75] May 31 Order, 143 FERC ¶ 61,196 at PP 208-15.

41. In rejecting Kinetica Energy's proposed discount transportation adjustment to its initial rate calculation, the May 31 Order explained that when a pipeline proposes to recover cost of service not recovered due to its discounting of rates, Commission policy requires the pipeline to "show that such discounts were given to meet competition, that there was no undue preference, and that the market conditions require it to continue giving the same level discounts into the future."[76] We determined that Kinetica Energy could not meet this standard, since it was not yet a functioning pipeline company.[77] Thus, the May 31 Order required Kinetica Energy to recalculate its rates without the discount adjustment, and stated Kinetica Energy may seek recovery of costs related to future discounts in a future section 4 rate case.[78]

42. On rehearing, Kinetica Energy and Anadarko, which filed in support of Kinetica Energy's request for rehearing, explain that although they had not yet finished their negotiations when they filed their rehearing requests, the proposed adjustment to Kinetica Energy's initial rates was based on an estimate of the discount that Kinetica Energy would give Anadarko, which Kinetica Energy thought would be the largest shipper on the Supply Area Facilities and expected to provide 40 percent of Kinetica Energy's projected throughput. Kinetica Energy argues that its representation that discounting its rate for Anadarko is necessary and market-driven satisfies Kinetica Energy's burden of proof since it is not affiliated with Anadarko.[79] Kinetica Energy further argues the historic operation of the Supply Area Facilities by Tennessee, including its historic discounting of Anadarko's rate, satisfies the Commission's requirement for an operating history demonstrating a need for discounting. In addition, Kinetica Energy and Anadarko argue

[76] *Id.* P 214 (citing *Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309, at PP 59-66 (2005)).

[77] *Id.*

[78] *Id.* PP 214-15.

[79] Kinetica Energy asserts its discounts will be consistent with the Commission's discounting policies, which are set forth in *Policy for Selective Discounting by Natural Gas Pipelines*, Order Reaffirming Discount Policy and Terminating Rulemaking Proceeding, 111 FERC ¶ 61,309 (2005). Kinetica Energy quotes the Commission's Notice of Inquiry in that proceeding: "[O]nce the pipeline has explained generally that it gives discounts to non-affiliates to meet competition, parties opposing the discount adjustment have the burden of producing evidence that discounts to non-affiliates were not justified by competition." *Policy for Selective Discounting by Natural Gas Pipelines*, Notice of Inquiry, FERC Stats. & Regs. ¶ 35,547, at P 7 (2004).

that Anadarko's discount will have a strong influence on Anadarko's decisions regarding drilling and development activities and keeping marginal wells in operation.[80]

43. While Kinetica Energy acknowledges that the original basis for the Commission's policy on discount adjustments was to address situations where an existing pipeline company with rates approved in a prior rate case under section 4 of the NGA finds it necessary to give discounts, Kinetica Energy argues that the Commission should also allow discount adjustments in certificate proceedings under section 7 of the NGA when the initial rates approved for a new pipeline company acquiring existing, underutilized facilities need to reflect the fact that it will have to discount its rates to maintain adequate throughput levels. Kinetica Energy cites the Commission's decision in *Empire State* as precedent for granting approval in a section 7 certificate proceeding to provide a discount adjustment to a new pipeline company's initial rates.[81]

44. We deny Kinetica Energy's and Anadarko's requests for rehearing of the May 31 Order's rejection of Kinetica Energy's proposed adjustment of its initial rates to include full recovery of its cost of service associated with discounted transportation volumes. We do not dispute Anadarko's assertion that Kinetica Energy's proposal could encourage offshore production activities because Kinetica Energy likely would agree to larger transportation discounts if assured of full cost recovery, or that discounted transportation rates could allow some offshore producers to price their gas more competitively. Further, we recognize that increased offshore production could increase throughput on Kinetica Energy's facilities, which could serve the same goal as the Commission's discounting policies by spreading Kinetica Energy's fixed costs over greater service volumes and thus benefit all of its shippers.

45. However, providing an incentive for increased offshore production is not the purpose of the Commission's discounting policy. Rather, it is intended to provide a tool for pipeline companies to meet competition.[82] While increased offshore production could result in increased throughput on Kinetica Energy's system, there is no basis for finding

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[80] These parties quote the Commission's order on rehearing of its *Policy for Selective Discounting By Natural Gas Pipelines*, 113 FERC ¶ 61,173, at P 12 (2005): "[P]ipeline discounts may enable natural gas producers to keep marginal wells in operation for a longer period and affect their decisions on whether to explore and drill for gas in certain areas with high production costs."

[81] *Empire State Pipeline and Empire Pipeline, Inc*., 116 FERC ¶ 61,074 (2006) (*Empire State*).

[82] *El Paso Natural Gas Co.*, 145 FERC ¶ 61,040, at P 393 (2013).

that the levels of any discounts that Kinetica Energy might agree to in order to obtain that increased throughput would be necessary to meet competition. Kinetica Energy argues that the Commission should accept the fact that it was still in the process of negotiating a discounted contract with Anadarko subsequent to the May 31 Order as adequate documentation for its requested discount adjustment.[83] However, this is not an argument in support of a request for rehearing, as the May 31 Order could not have relied upon facts that were not in the record. Further, the Commission rejects Kinetica Energy's request to recognize its post-May 31 Order efforts to negotiate with Anadarko as a supplement to the record. We will not change our findings on rehearing based on the result of contract negotiations that were still a matter of speculation at the time we issued the May 31 Order. Because the record in this proceeding did not contain sufficient information for us to find that discounting Anadarko's or any other shippers' rates is necessary to meet competition, we must reject Kinetica Energy's proposed discount adjustment.

46. When Tennessee owned the Supply Area Facilities, they were part of a single Tennessee rate zone; thus there is no billing or contract history that identifies the rates paid for transportation solely on these facilities. The May 31 Order noted on several occasions that producers had gas transported on the Supply Area Facilities at no cost to the producers. However, those services to producers provide no basis for approving a discount adjustment, as Tennessee received its compensation for those services from its downstream customers. No party in this proceeding, and certainly not Kinetica Energy, has made any attempt to allocate the rates paid by the downstream customers for transportation service within different parts of the zone. Kinetica Energy's acquisition of the Supply Area Facilities has made it necessary for shippers that need service on the facilities to enter into separate service agreements with Kinetica Energy for transportation to Tennessee's system. The market value of separately-priced transportation service on the Supply Area Facilities cannot reasonably be assessed until Kinetica Energy has some contract and operating history. Since Tennessee did not charge its shippers with downstream delivery points a separate, additional rate for service on the Supply Area Facilities, we reject Kinetica Energy's argument that Tennessee's history of discounting Anadarko's rate is sufficient to demonstrate that it is necessary for Kinetica Energy to continue discounting for Anadarko.

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[83] Kinetica Energy's request for rehearing at 8, wherein it states that "[i]f it is executed prior to Kinetica's compliance filing, Kinetica will also provide the actual rate in its alternate compliance filing (showing the rate effect of the discount adjustment if the Commission grants this rehearing request on this issue)."

47. Finally, the *Empire State* proceeding cited by Kinetica Energy is not apposite. Kinetica Energy is correct that Empire Pipeline, Inc. (EPI) would be a newly jurisdictional company, and that the Commission gave EPI the opportunity to justify its proposed adjustment to its initial rates based on its projected discounted transportation volumes. However, in that proceeding, Empire State Pipeline, an existing, non-jurisdictional Hinshaw pipeline in New York, would merge into EPI, a newly incorporated entity, to form a single NGA-jurisdictional company. Following the merger, customers currently being served by Empire State Pipeline's Hinshaw pipeline system would continue to need service. The applicants explained that Empire State Pipeline had been forced to substantially discount its firm rates under the jurisdiction of the New York Public Service Commission.[84] Because Empire State Pipeline was being merged into EPI, the Commission found it appropriate to recognize that some of EPI's services would be a continuation of services that Empire State Pipeline had been providing under past contracts at discounted rates.[85]

48. Here, Kinetica Energy was unable to likewise provide support that its proposed discount adjustment is necessary as it had no history of what rate is required to meet competition, it had no existing customers, and it had no existing discounts. However, as explained in the May 31 Order,[86] the Commission's finding is without prejudice to Kinetica Energy proposing a discounted transportation adjustment in a section 4 rate case to seek recovery of costs related to any properly supported discounts it actually provides to customers.[87]

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[84] *Empire State*, 116 FERC ¶ 61,074 at P 96.

[85] *Id*. P 106. The Commission, while permitting EPI to recognize Empire State Pipeline's past contracts as potentially eligible discounted contracts, found the discount documentation deficient and required that EPI demonstrate that Empire State Pipeline's discounts satisfied all of the other requirements of the Commission's discounting policy. Thus, the Commission required the applicants to provide a complete list of shippers, actual discounted rate and throughput information, affiliate relationship, and exclusion of negotiated rate contracts. In addition, EPI was required to support each discount as required to meet competition and to use the iterative method of determining the proper discount rate adjustment. Finally, the Commission noted that parties would have an opportunity to comment upon EPI's presentation. *Id.*

[86] May 31 Order, 143 FERC ¶ 61,196 at P 214.

[87] The Commission generally requires discount adjustments to be requested in section 4 rate cases because in such proceedings all parties are free to present evidence and argue whether a pipeline has adequately protected recourse rate customers. This

(continued…)

4. **Cost and Revenue Study**

49. The May 31 Order required Kinetica Energy to file a cost and revenue study three years after it commences operations.[88] As part of the cost and revenue study, the Commission required Kinetica Energy to project units of service for the Supply Area Facilities, which the Commission stated should be no lower than the units of service on which Kinetica Energy's initial rates are based.[89] Kinetica Energy requests the Commission remove the requirement that its cost and revenue study project units of service. It states that the purpose of the requirement to file a cost and revenue study is to report actual experience, and that it would therefore not make sense to force Kinetica Energy to use the same estimated throughput that it used in its initial rates in the study.

50. We deny Kinetica Energy's request for rehearing of the requirement that its three-year cost and revenue study project units of service for the Supply Area Facilities that are no lower than the billing determinants approved by the May 31 Order for use in calculating Kinetica Energy's initial rates. The purpose of the three-year study is for the Commission and the public to review Kinetica Energy's original estimates, upon which its initial rates are based, to determine whether Kinetica Energy is over-recovering its cost of service with its approved initial rates, and whether the Commission should exercise its authority under section 5 of the NGA to establish just and reasonable rates.[90]

51. If Kinetica Energy believes it can support its burden of proof to show that the units of service upon which its initial rates are based should be lowered, Kinetica Energy may make a filing under section 4 of the NGA to propose alternative rates in lieu of filing the three-year study required by the May 31 Order.[91]

process enables the Commission to examine all of the facts about relevant transactions in order to make reasoned decisions on whether the discount adjustment would cause unreasonable cost-shifting, and it best serves the ends of just and reasonable rates and practices. *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 208 (2011) (citing *Southern Natural Gas Co.*, 95 FERC ¶ 61,364, at 62,379 (2001)).

[88] May 31 Order, 143 FERC ¶ 61,196 at P 216.

[89] *Id.*

[90] *See Maritimes & Northeast Pipeline, LLC*, 81 FERC ¶ 61,166, at 61,726 (1997).

[91] *See, e.g.*, *Trans-Union Interstate Pipeline*, 104 FERC ¶ 61,315, at P 28 (2003).

C. Pro Forma Tariff Provisions

1. Infrastructure Investment Surcharge

52. The May 31 Order found that Kinetica Energy's proposed tariff language for an Infrastructure Investment Surcharge was overly broad and provided for recovery of costs outside those caused by a hurricane, storm, or other such natural disaster typically approved by the Commission.[92] In particular, the proposed tariff language provided for recovery of pipeline safety and environmental compliance costs through the tracker mechanism, which would be inconsistent with Commission policy. As the May 31 Order explained, cost-of-service tracking provisions related to regulatory obligations are contrary to the requirement that rates be designed on estimated units of service to give a pipeline company an incentive both to be efficient and to provide effective service by putting it at risk for under-recovery of its costs between rate cases, but allowing it to retain any over-recovery.[93] Cost trackers undercut these incentives by guaranteeing the pipeline a set revenue recovery.[94] In view of these considerations, the May 31 Order required Kinetica Energy to remove the surcharge from its tariff. However, the Commission stated Kinetica Energy was free to file for an appropriate hurricane tracker mechanism in a separate NGA limited section 4 proceeding.[95]

53. On rehearing, Kinetica Energy requests that, rather than filing under section 4 of the NGA to seek approval for a hurricane tracker mechanism, it be allowed to file a compliance filing in this section 7 certificate proceeding to cure the concerns regarding its proposed surcharge by deleting all references to costs that the Commission disallowed in the May 31 Order because they are outside those caused by a hurricane, storm, or other such natural disaster typically approved by the Commission. Kinetica Energy requests

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[92] *Id.* P 223.

[93] *Id.* P 224 (citing *Florida Gas Transmission Co., (Florida Gas)*, 105 FERC ¶ 61,171, at P 47 (2003), and *Granite State Gas Transmission (Granite State)*, 132 FERC ¶ 61,089, at P 111 (2010)). We noted, however, that the Commission has approved surcharges for pipeline safety costs in uncontested settlements, and that our rejection of Kinetica Energy's proposed Infrastructure Investment Surcharge was without prejudice to such a future settlement. May 31 Order, 143, 143 FERC ¶ 61,196 at n.28 (citing *Florida Gas*, 109 FERC ¶ 61,320, at P 18 (2004), and *Granite State Gas Transmission*, 136 FERC ¶61,153 (2001)).

[94] May 31 Order, 143 FERC ¶ 61,196 at P 224.

[95] May 31 Order, 143 FERC ¶ 61,196 at PP 223-25.

this option based on concerns that having to initiate even a limited section 4 proceeding will cause significant delay, which it states could negatively affect it in the event a hurricane or other natural disaster occurs before it has an approved tracker mechanism in place.

54. As we acknowledged in the May 31 Order, pipeline companies are entitled to seek recovery of costs related to pipeline safety, environmental compliance, and other regulatory requirements, along with a just and reasonable return. However, we affirm our decision that a separate limited section 4 proceeding is a more appropriate forum for the Commission and interested parties to thoroughly examine and identify any inconsistencies with Commission policy in any further proposal by Kinetica Energy to establish a hurricane tracker mechanism.[96] While Kinetica Energy expresses concern that a natural disaster could occur before a limited section 4 proceeding can be completed, Kinetica Energy has not yet incurred costs for the repair and replacement of facilities damaged as the result of a natural disaster.[97] Further, a limited section 4 proceeding will not necessarily take appreciably more time to process than another compliance filing by Kinetica Energy in this proceeding, because in either forum parties would be given an opportunity to comment and Kinetica Energy would need to be prepared to provide the same level of support for its proposed hurricane tracker mechanism. Kinetica Energy could have initiated such a proceeding at any time after it closed on its purchase of the Supply Area facilities and commenced service on September 1, 2013.

2. <u>Reservation Charge Credits</u>

55. The May 31 Order rejected Kinetica Energy's proposed language in its reservation charge crediting provisions that would have allowed Kinetica Energy to avoid providing reservation charge credits to shippers for service outages if the shippers are not paying

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[96] *Id.* P 225. *See, e.g.*, *Sea Robin Pipeline, LLC*, 128 FERC ¶ 61,286 (2009) (approving a proposed Hurricane Surcharge in a limited section 4 proceeding), *order on reh'g*, 130 FERC ¶ 61,191 (2010).

[97] *Cf. Trunkline Gas Company, LLC and Sea Robin Pipeline Company, LLC,* 139 FERC ¶ 61,239, at PP 128-29 (2012) (rejecting Sea Robin's proposal in a certificate case to impose its existing hurricane surcharge on the initial section 7 rates of customers served on newly-acquired offshore facilities that had not yet experienced any hurricane damage, without prejudice to Sea Robin filing under section 4 of the NGA to recover actual costs incurred as the result of future hurricane damage to the facilities or proposing in a future section 4 proceeding to apply the existing hurricane surcharge to all of its customers).

Kinetica Energy's maximum rate.[98] We intended to also reject Kinetica Energy's proposed tariff language that would have allowed it to avoid providing reservation charge credits when it is unable to deliver gas to a primary delivery point nominated by a shipper if Kinetica Energy delivers the gas to one of the shipper's secondary delivery points, regardless of whether the shipper has re-nominated to receive delivery at a secondary delivery point or whether the delivery to its secondary delivery point meets the shipper's needs. In its separate request for clarification filed on July 1, 2013, Kinetica Energy states it accepts the May 31 Order's finding that it should remove the provision that would exempt it from providing reservation charge credits to shippers that are not paying its maximum rate, as well as the Commission's intent regarding deliveries to shippers' secondary points.

56. As Kinetica Energy points out in its request for clarification, the May 31 Order stated in two places[99] that we were rejecting Kinetica Energy's proposed tariff language relating to secondary delivery points as "inconsistent with Commission requirements because Kinetica Energy would not provide revenue credits if . . . Kinetica Energy is *not* able to schedule deliveries to a shipper's secondary point(s) of delivery."[100] We clarify, as requested, that the second "not" was inadvertent.[101]

3. **Form of Reserve Commitment**

57. The May 31 Order rejected Section 2.1 of Kinetica Energy's proposed Form of Reserve Commitment Agreement (pro forma Sheet No. 21) for long-term firm transportation service under Rate Schedule LFT-1 and for interruptible transportation service under Rate Schedule IT (pro forma Sheet No. 69) because section 2.1 included a

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[98] May 31 Order, 143 FERC ¶ 61,196 at P 231.

[99] *Id.* at PP 227, 231.

[100] *Id.* (italics added).

[101] We note that Kinetica Energy complied in its July 29, 2013 Compliance Filing in Docket No. RP13-1116 with our intended requirement in the May 31 Order by removing the following language from its tariff: "In addition, the applicable Reservation Charge shall not be credited (i) if Transporter is able to schedule deliveries to Shipper's secondary Point(s) of Delivery, but is unable to schedule deliveries at Shipper's primary Point(s) of Delivery." *See* Kinetica Energy Express LLC - FERC Gas Tariff, Rate Schedule LFT, Sheet Number 010, 1.0.0 filed July 29, 2013, in Docket No. RP13-1116.

blank space providing for "further agreement," which is contrary to the Commission's policies governing forms of service agreements.[102]

58. In their respective requests for rehearing, Deep Gulf and Walter Oil restate their position that an interruptible shipper should not be required to commit reserves to Kinetica Energy under any circumstances unless, and only to the extent, the shipper voluntarily chooses to do so. They assert the May 31 Order's requirement that Kinetica Energy remove Section 2.1 of the Commitment Agreement fails to adequately address their concerns. They request that the Commission also require Kinetica Energy to: (1) remove Article XI, "Further Agreement," from the pro forma IT transportation agreement, which Deep Gulf and Water Oil are concerned Kinetica Energy could use to require that IT shippers agree to commit reserves; and (2) insert language in Rate Schedule IT explicitly stating that an IT shipper shall not be required to execute a Commitment Agreement as a condition for receiving IT service. In addition, these parties state the Commission should clarify that all interruptible transportation services performed by Kinetica Energy must receive the same level of priority, regardless of whether an interruptible shipper has elected to commit reserves to Kinetica Energy.

59. The May 31 Order required removal of section 2.1 in the Form of Reserve Commitment Agreement because allowing blanks in pro forma service agreements can lead to the inclusion of impermissible terms and conditions of service, result in a lack of transparency, and make it more difficult to detect undue discrimination by inhibiting interested customers from easily tracking and understanding all agreement provisions.[103]

60. Kinetica Energy pointed out in its request for clarification that it was actually Article XI of the pro forma transportation agreement that was titled "Further Agreement" and intended for the description of any additional agreed-upon terms and conditions. Kinetica Energy clarified that section 2.1 in the Form of Reserve Commitment Agreement merely stated that the reserve commitment agreement was subject to any further agreement described in Article XI of the IT transportation agreement and that the blank in section 2.1 of the Form of Reserve Commitment Agreement was simply for inclusion of the date of execution of the transportation agreement. In its request for clarification, Kinetica Energy speculated that the Commission's concern was with the "further agreement" language, and that this concern would be addressed by deleting Article XI of the transportation agreement, not by deleting section 2.1 of the Form of

[102] May 31 Order, 143 FERC ¶ 61,196 at P 246 (citing *Northern Natural Gas Co.*, 102 FERC ¶ 61,171, at PP 14-18 (2003), which rejected a blank labeled "Other" in a pro forma service agreement).

[103] *Id.*

Reserve Commitment Agreement. Therefore, when Kinetica Energy made its July 29 Compliance Filing, it removed Article XI, "Further Agreement," from its tariff's Forms of Transportation Agreement, as well as the introductory phrase of section 2.1 in the Forms of Reserve Commitment Agreement that referenced Article XI of the Forms of Transportation Agreements.[104]

61. In our August 28 Order, we found that the compliance filing's revisions to Kinetica Energy's pro forma tariff provision adequately addressed our concerns, except for failing to provide for a clear statement in Kinetica Energy's tariff of its representation in this proceeding that an interruptible shipper's agreement to commit reserves is entirely voluntary and optional.[105] Therefore, our August 28 Order required Kinetica Energy to refile revised tariff records stating that a shipper will not be required to execute a reserves commitment agreement as a condition for receiving interruptible service.[106] The August 28 Order's requirement adequately addresses Deep Gulf's and Water Oil's concern that Kinetica Energy might pressure customers to commit reserves as a condition of receiving interruptible service.

4. NGL (Natural Gas Liquids) Bank

62. Kinetica Energy's pro forma tariff included a service agreement for a mandatory NGL Bank – a mechanism to balance economic imbalances that occur as the result of the comingling of shippers' gas supplies containing different compositions of natural gas liquids.[107] Kinetica Energy proposed that a third party be the administrator of

[104] *See* July 29 Compliance Filing in Docket No. RP13-1116-000: Original Sheet No. 9, LFT-1 Form of Transportation Agreement; Original Sheet No. 21, LFT-1 Form of Reserve Commitment Agreement; Original Sheet No. 32, SFT-2 Form of Transportation Agreement; Original Sheet No. 49, FFT-3 Form of Transportation Agreement; Original Sheet No. 59, FFT-3 Form of Reserve Commitment Agreement; Original Sheet No. 66, IT Form of Transportation Agreement; Original Sheet No. 69, IT Form of Reserve Commitment Agreement.

[105] August 28 Order, 144 FERC ¶ 61,159 at P 20. As discussed in our May 31 Order, 143 FERC ¶ 61,196 at P 245, Kinetica Energy stated in its September 13, 2012 answer that its proposed tariff language would not alter an IT shipper's service priority and that association of a reserve commitment with IT service would be entirely voluntary as an option, perhaps in connection with obtaining a discounted IT rate.

[106] August 28 Order, 144 FERC ¶ 61,159 at P 20.

[107] Natural gas and liquid hydrocarbons are often produced simultaneously from a single well. The economics of natural gas production typically preclude having

(continued…)

the NGL Bank. The administrator would credit or bill all shippers whose gas is transported on Kinetica Energy's system for the differences in value based on the quantities and types of natural gas liquids (NGLs) extracted from each shippers' gas at processing plants downstream of Kinetica Energy's system. The administrator would also charge an administrative fee, which would be billed to all shippers. In the May 31 Order, the Commission directed Kinetica Energy to remove the NGL Bank agreement from its pro forma tariff on the grounds that the transportation and processing of NGLs are non-jurisdictional, notwithstanding that the NGLs remain in the gas stream transported by jurisdictional pipelines until the NGLs are extracted.[108]

63. Indicated Shippers requests rehearing of the Commission's determination that Kinetica Energy's proposed NGL Bank is non-jurisdictional. It is concerned that the Commission's rationale could allow Kinetica Energy to make service contingent on shippers having their gas processed under terms and conditions that would not be in its tariff (i.e., that Kinetica Energy would still establish a mandatory NGL Bank, but that the terms and conditions under which the bank would operate would not be in Kinetica Energy's tariff or subject to the Commission's approval). Indicated Shippers believes that we should find that, while processing is not jurisdictional, we have jurisdiction to approve Kinetica Energy's pro forma tariff provision to establish an NGL Bank. This would insure that Kinetica Energy cannot make transportation service contingent on a shipper having its gas processed at downstream plants in accordance with terms and conditions that are acceptable to Kinetica Energy, but not stated in its tariff. In support of its position that the Commission has jurisdiction to approve Kinetica Energy's NGL Bank, Indicated Shippers emphasizes that Kinetica Energy's proposed NGL Bank is similar to that approved by the Commission in *High Island Offshore System, L.L.C.*[109] Indicated Shippers further asserts that our rejection of Kinetica Energy's pro forma tariff provisions for the NGL Bank on the grounds that processing is non-jurisdictional is inconsistent with Commission precedent since the "Commission has required interstate pipelines to permit shippers either to exercise the right to process their gas stream and

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separation facilities at each well to separate the products for individual transportation. Hence, natural gas pipelines often transport liquids and liquefiables through a single pipeline. *See Mobile Oil Corp. v. FERC*, 483 F.2d 1238, at 1241 (1973) (describing the background of the Federal Power Commission's attempt to set minimum rates to be charged by natural gas pipelines for the transportation of liquid and liquefiable hydrocarbons).

[108] May 31 Order, 143 FERC ¶ 61,196 at P 249.

[109] 107 FERC ¶ 61,047 (2004) (HIOS).

retain the revenues, or to have the transporter process the gas and credit a portion of the revenues to the shipper."[110]

64. Deep Gulf and Walter Oil also are concerned that the Commission's rejection of the NGL Bank on the grounds that it does not have jurisdiction over processing will enable Kinetica Energy to make service contingent on processing-related terms and conditions not set forth in its tariff. They assert that just as the Commission approves the gas quality specifications allowing pipelines to refuse to transport gas supplies that do not meet those specifications, the Commission has a basis for asserting jurisdiction and accepting Kinetica Energy's pro forma provisions to establish its proposed NGL Bank.

65. We disagree and affirm our decision that Kinetica Energy's proposed pro forma tariff provision to establish an NGL Bank is inappropriate for inclusion in its tariff setting forth its terms and conditions for jurisdictional service. Historically, the Commission has found that the only processing activities over which it has jurisdiction under the NGA are those necessary for the safe and efficient transportation of natural gas, and that such jurisdiction does not extend to processing that is not essential to make gas fit for pipeline transportation.[111] While the transportation of NGLs is incidental to transportation of gas on a wet gas system and may either enhance or detract from the marketability or value of gas, the extraction of NGLs is not generally necessary for the safe and efficient transportation of gas.[112]

66. Aside from the fact that offshore extraction of NGLs before gas enters the Supply Area Facilities would not be economical, extraction of NGLs clearly also is not necessary for the safe and efficient operation of the Supply Area Facilities. The Supply Area Facilities were designed to operate as a wet system. Thus, approval of Kinetica Energy's proposed NGL Bank is not necessary to meet gas quality specifications for gas entering the Supply Area Facilities. Also, there is no need for Kinetica Energy's tariff to contain mandatory conditions to ensure the proper allocation of revenues from the extraction of NGLs at downstream processing plants, as the allocation of costs among the gas

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[110] Indicated Shippers cites *Williams Natural Gas Co.*, 56 FERC ¶ 61,089, at 61,311-12 (1991).

[111] *Questar Pipeline Co.*, 67 FERC ¶ 61,197, at 61,622 (1994).

[112] *Id*. *See also ANR Pipeline Co.*, 139 FERC ¶ 61,238, at P 150 (2012) (ANR). While the Commission can ensure that costs are allocated to liquids transportation to insure that such costs are not included in pipelines' jurisdictional transportation rates, the Commission cannot set the rates for liquids transportation. *Id.*

components transported on the Supply Area Facilities has been accomplished through the use of heat value billing determinants.

67. Deep Gulf's and Walter Oil's concerns that Kinetica Energy may be able to refuse service to shippers that have not entered into an agreement requiring them to have their gas processed under terms and conditions not contained in Kinetica Energy's tariff or require shippers to pay a third party to handle crediting and billing of shippers based on the differences in value of the NGLs in their gas are misguided. We have rejected Kinetica Energy's pro forma tariff provisions that would have allowed it to refuse service based on such conditions, and it has no authority to impose any conditions relating to the non-jurisdictional processing of its shippers' gas. If a potential shipper has reason to believe Kinetica Energy has refused service for reasons relating to the processing of a shipper's gas or for any other reason not supportable based on conditions in Kinetica Energy's its tariff, the shipper may file a complaint with the Commission.[113]

68. The parties are correct that the Commission accepted a nearly identical NGL Bank in HIOS's tariff. However, that proposal was unopposed,[114] whereas protesters in this proceeding questioned whether Kinetica Energy's proposed NGL Bank was appropriate. We have concluded that in view of the non-jurisdictional status of processing activities, it generally is not appropriate for jurisdictional pipeline companies' tariffs to include provisions allowing them to place processing-related conditions on shippers that are not necessary for the safe and efficient operation of their pipeline systems.

69. Indicated Shippers argues that there is Commission precedent for approving pipeline companies' processing-related conditions for transportation service. Indicated Shippers cites *Williams Natural Gas Company* (*Williams*)[115] and *Northern Natural Gas Company* (*Northern Natural*),[116] in which the pipeline companies proposed tariff provisions which would have allowed them to have shippers' gas processed to meet

[113] *See* 18 C.F.R. § 154.109 (2013) (requiring all conditions of service applicable to all or any of the rate schedules to be included in the general terms and conditions section of *pro forma* tariffs).

[114] 107 FERC ¶ 61,047 (2004). The Commission suspended HIOS's proposed NGL Bank proposal and established a technical conference. After the technical conference, HIOS returned to the Commission with a consensus proposal that the Commission accepted.

[115] *Williams*, 56 FERC ¶ 61,089 (1991), *order on reh'g*, 60 FERC ¶ 61,142 (1992).

[116] *Northern Natural*, 59 FERC ¶ 61,143 (1992).

pipeline standards and retain the revenues from the sale of NGLs and other products removed from the gas stream and sold. The Commission required modification of the tariff provisions to give shippers the option of contracting themselves with third parties for processing and assurance that the shippers would receive compensation for products removed from their gas, regardless whether the pipeline or the shipper arranged for the processing.

70. The Commission's concern in *Williams* and *Northern Natural* was that the pipelines proposed tariff provisions to require that shippers assign gas processing rights to the pipeline companies as a condition to receiving transportation service that would allow the pipeline companies to retain the revenues from valuable products removed from their shippers' gas and not provide the shippers with appropriate credits.[117] There is no reason for such concern here, since no processing of gas transported by Kinetica Energy occurs either before gas enters the Supply Area Facilities or at straddle plants before Kinetica Energy delivers gas to the downstream pooling points on Tennessee's system; Kinetica Energy has no third-party arrangements for the processing of its shippers' gas; and Kinetica Energy is not generating revenue from the sale of any of its shippers' products. Neither Williams nor Northern Natural currently have NGL Bank-type provisions in their tariffs.

71. Deep Gulf and Walter Oil also cite *Tennessee Gas Pipeline Co.* (*Tennessee*)[118] in support of their position that approval of Kinetica Energy's proposed NGL Bank would be an appropriate exercise of Commission jurisdiction. *Tennessee* involved an attempt by the pipeline company to tie its jurisdictional transportation service to non-jurisdictional processing by an affiliate. Tennessee proposed to convert one of four parallel mainline pipes in the Utica Shale production area to transport rich gas. Before the gas could be delivered to a dry gas system, the gas had to be processed. Tennessee had an agreement with an affiliate to provide that affiliate exclusive rights to process gas on the converted line. The Commission held that Tennessee's agreement with its affiliate would violate the Commission's interconnection policy and Tennessee's tariff provisions regarding requests for interconnection by giving only one processor exclusive rights to construct one or more straddle plants.[119] Kinetica Energy's proposed NGL Bank does not present the interconnection concerns that was the basis for the Commission's decision in *Tennessee*.

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[117] *Williams Natural Gas Co.*, 60 FERC ¶ 61,142 at 61,525, and *Northern Natural*, 59 FERC ¶ 61,143 at 61,529.

[118] 143 FERC ¶ 61,128 (2013).

[119] *Id.* P 47.

72. For the above reasons, we deny the requests for rehearing of the May 31 Order's rejection of Kinetica Energy's proposed NGL Bank.

D. Tennessee's Settlement

73. The May 31 Order approved a settlement agreement Tennessee negotiated with certain of its shippers regarding the proposed rate treatment and rate relief upon the sale of the Supply Area Facilities. Certain parties contested the settlement. The May 31 Order stated that because "the settlement was filed in lieu of Tennessee making a rate change filing under section 4 of the NGA, there is no record that would permit the Commission to find, based on substantial evidence, that the settlement rates are just and reasonable as they relate to contesting parties."[120] Thus, we did not approve the settlement for contesting parties; the contesting parties were severed from the settlement and we required Tennessee to continue providing service for contesting shippers pursuant to its currently filed rates.[121]

74. On rehearing, Indicated Shippers states that its members include several shippers on Tennessee's system as well as non-shippers that have an interest because their production is transported on the Supply Area Facilities. Indicated Shippers reiterates its objection to Tennessee's exclusion of Indicated Shippers' members from the negotiations that led to Tennessee's settlement. Indicated Shippers points out that the settlement agreement is essentially the same settlement agreement that Tennessee filed in the previous proceeding, in which Tennessee sought authorization to abandon the Supply Area Facilities by sale to a Kinetica affiliate.[122] Indicated Shippers further emphasizes

[120] May 31 Order, 143 FERC ¶ 61,196 at P 273.

[121] *Id.* P 274.

[122] In the previous proceeding, Tennessee filed the settlement agreement in Docket RP11-1597-000 in conjunction with its previous application in Docket No. CP11-44-000 for abandonment authority. The Commission dismissed the settlement agreement as moot in that proceeding because it was contingent on Tennessee receiving approval to abandon all the Supply Area Facilities, and the Commission's order only approved Tennessee's abandonment of the facilities found to be non-jurisdictional gathering facilities because, inter alia, the Kinetica affiliate did not file an application in that proceeding for a certificate to acquire and operate the jurisdictional facilities. *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,105, at P 102 (2011). Since Kinetica Energy filed a certificate application in this proceeding and we have approved Tennessee's abandonment of all the facilities at issue, the new Docket No. RP12-887 settlement agreement's contingency provision is satisfied. *See* May 31 Order, 143 FERC ¶ 61,196 at P 20 (describing contingency provision).

that the settlement agreement was originally filed in the previous abandonment proceeding in Docket RP11-1597-000 on December 3, 2010, only four days after Tennessee filed a general rate case in Docket No. RP11-1566 on November 30, 2010.[123] Under the circumstances, Indicated Shippers objects to the May 31 Order's statement that Tennessee filed the settlement agreement "in lieu of" filing a rate case. It argues non-consenting parties should be given the opportunity to litigate the terms of the settlement agreement that they would have had if the settlement agreement had been filed in Tennessee's general rate case. Indicated Shippers asserts our approval of the settlement agreement, rather than requiring Tennessee to file a new rate case to implement its terms, has deprived non-consenting shippers of an opportunity to litigate in order to receive immediate rate concessions.

75. Indicated Shippers states that severing the non-consenting shippers disqualifies them from the rate reductions that the consenting shippers are already receiving under the terms of the settlement agreement. It further emphasizes that non-consenting parties are precluded by the rate moratorium agreed to in Tennessee's last rate case from seeking rate changes before April 1, 2014,[124] and that any rate relief under section 5 of the NGA will be prospective only.

76. In view of these considerations, Indicated Shippers argues that severing non-consenting parties fails to fully protect its members' interests,[125] and that approval of Tennessee's settlement was not in the public interest and contrary to Commission precedent. It also asserts our approval of the settlement agreement has condoned Tennessee's violation of the prohibition in sections 4 and 5 of the NGA against undue discrimination and undue preferences since it permits Tennessee to give rate concessions only to shippers that consented to the settlement agreement.

77. In view of Tennessee's earlier attempt to abandon some of the Supply Area Facilities, Indicated Shippers argues that the cost and rate consequences of the

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[123] *See Tennessee Gas Pipeline Co., LLC*, 133 FERC ¶ 61,266 (2010).

[124] A settlement agreement approved in 2011 in Tennessee's rate case in Docket No. RP11-1566-000 includes a two-way rate moratorium prohibiting Tennessee or other parties to that settlement agreement from seeking rate changes under section 4 or 5 of the NGA before April 1, 2014. *Tennessee Gas Pipeline Co., LLC*, 137 FERC ¶ 61,182, at P 14 (2011).

[125] Indicated Shippers cite *Southern California Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998) (stating that severance must "fully protect the objecting party's interests.").

abandonment of the Supply Area Facilities could have been addressed in Tennessee's then on-going general section 4 rate case in Docket No. RP11-1566-000. However, Indicated Shippers ignores the fact that Tennessee did not accept the abandonment authorization that the Commission granted in that proceeding, and it therefore would have been speculative to predict in the rate case in Docket No. RP11-1566-000 what facilities, if any, that Tennessee eventually would abandon, the financial terms of any abandonment that might actually occur, and the timing of the abandonment. Eventually Tennessee did return to the Commission with a new application for abandonment authority, and it included additional facilities that were not included in the earlier proposal to abandon the Supply Area Facilities. Furthermore, Tennessee's second abandonment application not only was not filed with the Commission within the test period for Tennessee's rate case in Docket No. RP11-1566-000,[126] it was filed after the parties to the Docket No. RP11-1566 proceeding agreed to a settlement of that proceeding.[127] Tennessee was not obligated to address the abandonment of the Supply Area Facilities in Docket No. RP11-1566-000, and Indicated Shippers has not identified any procedural error that requires the May 31 Order to be reconsidered.

78. Notwithstanding the fact that the Docket No. RP11-1566 proceedings predate Tennessee's initiation of this proceeding, we note that the settlement in Docket No. RP11-1566 did address the possibility that Tennessee would abandon supply area facilities and the impact such a spin-off would have on Tennessee's Docket No. RP11-1566 settlement rates during the rate moratorium.[128] While several members of Indicated Shippers in the instant proceeding were also parties to the Docket No. RP11-1566-000 proceeding,[129] none of those parties filed adverse comments to the

[126] Tennessee filed its application to abandon the Supply Area Facilities in this proceeding on July 26, 2012, and Tennessee's sale of the facilities to Kinetica Energy was executed on September 1, 2013. The Test Period for the proceeding in Docket No. RP11-1566-000 Test Period ended April 30, 2011. *Tennessee Gas Pipeline Co.*, 133 FERC ¶ 61,266, at P 8 (2010).

[127] The settlement in Docket No. RP11-1566-000 was filed with the Commission on September 30, 2011.

[128] Article XII, Rate Adjustment for Spin-downs or Spin-offs, approved at *Tennessee Gas Pipeline Co., LLC*, 137 FERC ¶ 61,182 (2011).

[129] ConocoPhillips Company; Anadarko Energy Services Company; Apache Corporation; BP Energy Company and BP America Production Inc.; Chevron U.S.A. Inc.; ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation; and Shell Offshore Inc. were parties to the proceeding in Docket

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Docket No. RP11-1566 settlement. Indicated Shippers has not claimed either in its initial comments or on rehearing that the Docket No. RP12-887-000 settlement is inconsistent with the Docket No. RP11-1566-000 settlement with regard to the recognition of the spin-off of supply area facilities in Tennessee's rates. Although Tennessee, like other parties to the Docket No. RP11-1566 settlement, is precluded from proposing rate changes that would be effective before April 1, 2014, Tennessee is required by the terms of that settlement to file a rate case no later than November 1, 2015.[130] Thus, if the non-consenting shippers do not file to seek action under section 5 of the NGA, they will have the opportunity to present their arguments in the rate case that Tennessee will have to file by November 1, 2015.

79. We also reject Indicated Shippers' argument in its request for rehearing of the May 31 Order that our approval of the settlement allowed Tennessee to unduly discriminate against non-consenting shippers because they would not receive the same rate concessions as Tennessee's shippers that consented to the settlement agreement. Tennessee, in its compliance filing implementing the Docket No. RP12-887 settlement, proposed to apply the settlement rates to all shippers, and we accepted that proposal.[131] Therefore, for this issue, the Indicated Shippers request for rehearing is moot.

80. Further, we are not persuaded by Indicated Shippers' argument that the May 31 Order's severance of its members that are contesting shippers on Tennessee's system does not fully protect their interests and preserve their ability to seek rate relief. Under the terms of the Docket No. RP11-1566 settlement, any party will have a full opportunity to present their arguments in Tennessee's next rate proceeding regarding any rate concessions they believe are necessary to ensure that their rates are just and reasonable following Tennessee's sale of the Supply Area Facilities.

81. Finally, we reject Indicated Shippers' assertion that our approval of Tennessee's settlement was contrary to Commission precedent because Tennessee did not attempt to involve all of its shippers in its settlement negotiations and we therefore should require Tennessee to reopen negotiations to include these missing parties.[132] In the cited *Texas*

No. RP11-1566. Anadarko Petroleum Corporation and Anadarko U.S. Offshore Corp. were not parties to the proceeding in Docket No. RP11-1566.

[130] *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,182, at P 14 (2011).

[131] *Tennessee Gas Pipeline Co., LLC*, 146 FERC ¶ 61,062 (2014).

[132] Indicated Shippers cite *Texas Eastern Transmission Corp.*, 83 FERC ¶ 61,325, at 62,319 (1998) (Texas Eastern); *Kansas Pipeline Co.*, 81 FERC ¶ 61,005, at 61,033-34 (1997) (*Kansas Pipeline*); *Carolina Gas Transmission Corp.*, 116 FERC ¶ 61,049 (2006)

(continued…)

Eastern proceeding, several parties asserted they had not been able to make informed decisions concerning aspects of the proposed settlement because Texas Eastern had not made adequate information available during settlement negotiations and had not fully explained certain of its assumptions underlying its offer of settlement. The Commission referred the settlement to a settlement judge because it agreed with the parties that Texas Eastern had not provided sufficient information to determine the impact that the settlement agreement's roll-in of costs associated with incrementally-priced capacity would have on existing customers and whether construction of the incremental capacity had had sufficient system-wide benefits to justify rolled-in rate treatment or whether the settlement proposal's provisions for lowered depreciation rates would result in a rational allocation of the costs of Texas Eastern's assets.

82. The Commission also agreed, based on its initial review of the available information, that it needed additional information in order to evaluate Texas Eastern's current rate of return on equity.[133] Thus, despite Indicated Shipper's contention, the cited *Texas Eastern* order does not stand for the proposition that the Commission must require a pipeline to reopen negotiations if a party with an interest in a proposed settlement is not included in settlement negotiations. Rather, *Texas Eastern* is an example of where the Commission found that the terms of the settlement affected shippers other than those involved in the settlement, and that there was a lack of information to determine whether the resulting rates were fair and reasonable and in the public interest. Severance of the non-consenting parties in the *Texas Eastern* proceeding would not have enabled the Commission to find that the proposed settlement agreement was fair and reasonable for the consenting parties. Here, severance of the contesting parties allows us to find that the settlement is fair and reasonable for the consenting parties and in the public interest, since severance permits the non-consenting parties to continue to receive transportation service on the Tennessee system at their current rates, which were found to be just and reasonable. Therefore, we affirm our decision not to require Tennessee to reopen settlement negotiations in order to permit participation by the contesting parties that were excluded from the negotiations that led to Tennessee's settlement agreement with other shippers.

83. In *Kansas Pipeline*, the Commission rejected a filing styled as a settlement because it was simply a unilateral filing by Kansas Pipeline that was opposed by all other

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(*Carolina Gas*); and *High Island Offshore System, L.L.C* (*High Island*), 110 FERC ¶ 61,043 (2005), *order on reh'g*, 112 FERC ¶ 61,050 (2005), *order on reh'g*, 113 FERC ¶ 61,280 (2005), *rev'd and rem'd in part sub nom. Petal Gas Storage, L.L.C. v. FERC,* 496 F.3d 695 (D.C. Cir. 2007).

[133] *Texas Eastern*, 83 FERC at 62,319-20.

parties and prepared without the participation of any of the pipeline's customers, which is clearly not the case here.[134] In *Carolina Gas*, the Commission approved a settlement resolving issues of a proposed merger and did not need to sever any contesting parties from it.[135] Simply because the applicants in *Carolina Gas* developed a settlement that was acceptable to all interested parties does not mean, as Indicated Shippers seems to suggest, that the Commission is precluded from approving a contested settlement for the consenting parties and severing the contesting parties when, as in this case, those parties' rights are fully protected and preserved.

84. We also reject Indicated Shippers' assertion that our approval of Tennessee's settlement runs counter to our decision in *High Island*. In that proceeding, the Commission rejected a settlement offer attempting to resolve all issues of an ongoing NGA section 4 rate case. The Commission explained that it must make its own independent judgment—even when a proposed settlement agreement is uncontested—that the settlement is in the public interest, which always includes the interests of consumers in having access to a reasonable supply of gas at a reasonable price.[136] The Commission rejected the settlement for two reasons: (1) the settlement rates were substantially higher than just and reasonable rates;[137] and (2) the settlement provided for a three-million-dollar payout (i.e., special consideration) by High Island to ExxonMobil Gas & Power Marketing Company and the companies represented by Indicated Shippers,[138] while other shippers would receive no refunds or compensation for the period of about a year and half that High Island would be able to collect rates substantially in excess of just and reasonable levels.

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[134] *Kansas Pipeline*, 81 FERC at 61,033 (citing *Transcontinental Gas Pipe Line Corp.*, 37 FERC ¶ 61,288, at 61,869 (1986), in which the Commission stated that "[t]he instant case is a rate filing which is a unilateral act on Transco's part, not a settlement in which all parties have had an opportunity to participate and have their views considered. A settlement, by definition, implies that there has been some sort of give-and-take and opportunity for customer participation.").

[135] *Carolina Gas*, 116 FERC ¶ 61,049 at PP 43-44.

[136] *High Island*, 110 FERC ¶ 61,043 at P 30.

[137] *Id*. P 32.

[138] In the *High Island* proceeding, Indicated Shippers consisted of BP America Production, Inc.; BP Energy Company; ChevronTexaco Exploration & Production Company, a division of Chevron U.S.A., Inc.; and Shell Offshore, Inc. *High Island*, 107 FERC ¶ 63,019, at P 3 (2004).

85. The Commission also explained that while it generally assumes that the interests of a pipeline's shippers actively supporting a settlement are similar to the interests of parties that do not file pleadings to either support or oppose a proposed settlement, the basis for that assumption was undermined by the fact that the only affirmative support for the settlement filed by High Island was by shippers that would receive the payout.[139] In any event, since the Commission did not sever any parties and the proposed settlement included terms that were against the public interest, *High Island* has little, if any, relevance to the situation at hand.

86. For these reasons, we affirm our severance of the contesting parties from Tennessee's settlement agreement, which allows us to approve the settlement as uncontested.

<u>The Commission orders</u>:

The requests for rehearing and reconsideration of the May 31 Order are denied, and Kinetica Energy's request for clarification is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[139] *Id.* P 33. We note that it would have been impractical to sever parties that had not affirmatively supported the proposed settlement agreement in the *High Island* proceeding since it would have been necessary to sever all but a few of High Island's customers. Further, while the Commission acknowledged on rehearing that it could have considered approving the settlement for Indicated Shippers' members and severing other parties, High Island stated such severance would constitute an unacceptable modification of the settlement offer. *High Island Offshore System, L.L.C.*, 112 FERC ¶ 61,050, at P 14 (2005).