

150 FERC ¶ 61,181
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Empire Pipeline, Inc.
National Fuel Gas Supply
Corporation

Docket No. CP14-112-000

ORDER ISSUING CERTIFICATES, AUTHORIZING ABANDONMENT, AND
ACCEPTING TARIFF RECORDS

(Issued March 10, 2015)

1. On March 18, 2014, Empire Pipeline, Inc. (Empire) and National Fuel Gas Supply Corporation (National Fuel) filed a joint application, pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations.² In the application, Empire seeks authority to construct and operate a 17-mile-long lateral from Tioga County, Pennsylvania, to National Fuel's Tuscarora Compressor Station in Addison, Steuben County, New York, to connect its system to National Fuel's system and to replace, if necessary, one or both centrifugal wheels at its existing Oakfield Compressor Station in Genesee County, New York (Tuscarora Lateral Project). National Fuel proposes to add a 1,380-horsepower compressor unit to its existing Tuscarora Compressor Station and to lease to Empire capacity sufficient to provide 55,000 dekatherms (Dth) per day of firm transportation service and 3,300,000 Dth of firm storage service with injection rights up to 27,500 Dth per day and withdrawal rights up to 55,000 Dth per day.

2. Subject to the conditions discussed below, the Commission will grant the requested certificate authorizations. We also, as discussed herein, direct Empire,

¹ 15 U.S.C. § 717f(b), (c) (2012).

² 18 C.F.R. Pt. 157 (2014).

pursuant to section 5 of the NGA, to make minor revisions to its existing tariff relating to the definition of “force majeure,” or to show cause why such changes should not be made.

I. Background

3. Empire is a corporation organized and existing under the laws of the State of New York. It is an interstate natural gas company subject to the jurisdiction of the Commission under the NGA. Empire owns a 249-mile bi-directional pipeline system constructed in three stages. Empire State Pipeline, Inc., predecessor to applicant Empire, constructed the Original Pipeline in the early 1990s as a Hinshaw pipeline system under a certificate from the New York Public Service Commission to import natural gas from Chippawa, Ontario, for transportation east to the system’s terminus near Syracuse, New York.³ In 2006, the Commission authorized Empire, as an NGA natural gas company, to operate the original pipeline and to construct the Empire Connector Facilities, including the Oakfield Compressor Station, to enable north-to-south deliveries of imported gas through a new pipeline extension south from a midpoint on the Original Pipeline to an interconnection with Millennium Pipeline Company, LLC (Millennium) at Corning, New York.⁴ In 2011, the Commission authorized Empire to construct the Tioga County Extension Project beyond the Corning terminus south to Jackson, Pennsylvania, which enabled bi-directional transportation of regional gas production south-to-north into Empire’s system.⁵

4. Empire is capable of moving gas either: (1) north-to-south from the interconnection with TransCanada Pipelines, Ltd., (TransCanada) at Chippawa,

³ *Empire State Pipeline*, 56 FERC ¶ 61,050 (1991), *order on reh’g*, 61 FERC ¶ 61,091 (1992).

⁴ *Millennium Pipeline Co., L.L.C.*, 117 FERC ¶ 61,319 (2006), *order on reh’g*, 119 FERC ¶ 61,173 (2007). In 1995, the Commission had authorized Empire State Pipeline, Inc., as a Hinshaw pipeline, to transport gas for two interstate pipelines—one was National Fuel—under a blanket certificate issued pursuant to section 284.224 of our regulations. *Empire State Pipeline*, 70 FERC ¶ 61,162 (1995). The 2006 order authorized Empire to operate the existing system and the proposed Connector Facilities as a section 7 jurisdictional pipeline. *Millennium Pipeline Co.*, 117 FERC ¶ 61,319 at PP 18-19, Ordering Paragraph (R).

⁵ *Empire Pipeline, Inc.*, 135 FERC ¶ 61,163 (2011).

Ontario, eastward to points on the Original Pipeline or eastward and southward on the Empire Connector Facilities to the interconnection with Millennium at Corning, New York, or to other points; or (2) south-to-north from Jackson, Pennsylvania, north to the interconnection with Millennium or farther north along the Empire Connector Facilities and Original Pipeline to TransCanada or to other points. Currently, Empire only provides firm and interruptible transportation services under its Rate Schedules FT and IT, respectively.⁶ Empire's system includes no storage facilities.

5. National Fuel is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. It is an interstate natural gas company subject to the jurisdiction of the Commission under the NGA. National Fuel owns and operates transportation and storage facilities in New York and Pennsylvania west of, but adjacent to, Empire's pipeline system.

II. Proposal

A. Overview

6. Rochester Gas and Electric Corporation (RG&E) is one of Empire's largest firm shippers, with a firm contract for the transportation of 172,500 Dth per day from TransCanada at Chippawa to RG&E's city-gate delivery point at Mendon, New York. The primary term of RG&E's current agreement expires on October 31, 2015.

7. To replace the existing firm transportation agreement, Empire and RG&E have entered into a 10-year precedent agreement for firm, no-notice transportation and storage services under Empire's proposed Rate Schedules FTNN (Firm Transportation No-Notice) and FSNN (Firm Storage No Notice), respectively. Under the new agreement, the maximum daily transportation quantity would remain at 172,500 Dth per day, but this quantity would be composed of 117,500 Dth per day of firm transportation from Chippawa to Mendon, New York, and 55,000 Dth per day of firm storage-related transportation from the proposed interconnection between Empire and National Fuel at the Tuscarora Compressor Station to the Mendon city-gate. Empire would also provide to RG&E 3,300,000 Dth of storage service.

⁶ Empire has no employees of its own. National Fuel operates Empire's pipeline system pursuant to an Operating and Maintenance Agreement dated February 6, 2003.

8. New York State Electric and Gas Corporation (NYSEG) is also a firm shipper on Empire, with a firm contract for transportation of 34,816 Dth per day from TransCanada at Chippawa to its city-gate delivery points at Arcadia (20,000 Dth per day) and Royalton, New York (14,816 Dth per day). The primary term of NYSEG's agreement also expires on October 31, 2015.

9. To replace the existing firm transportation agreement, Empire and NYSEG have entered into a five-year precedent agreement for firm, no-notice transportation service under Empire's proposed Rate Schedule FTNN. Under the new agreement, the maximum daily transportation quantity would remain at 34,816 Dth per day, with no changes to the delivery points, but the receipt point for 14,816 Dth per day of service would be moved from Chippawa to Empire's interconnection with Millennium at Corning.

B. The Proposed Facilities

10. To transport gas to and from the leased capacity on National Fuel's system for RG&E, Empire proposes to construct and operate a pipeline, to be known as the Tuscarora Lateral, from a tie-in at National Fuel's Tuscarora Compressor Station in Steuben County, New York, southeast to a tie-in at the southern end of Empire's Tioga County Extension in the Town of Jackson, Tioga County, Pennsylvania. The pipeline will consist of 0.77 miles of 16-inch-diameter pipeline and 16.23 miles of 12-inch-diameter pipeline for a combined length of approximately 17 miles. The tie-ins will include measurement and pressure control equipment and a pig launcher-receiver. Empire also proposes to construct and operate other auxiliary facilities, such as mainline valves, a drip, and cathodic protection equipment, under section 2.55(a) of the Commission's regulations. The estimated cost of the facilities is \$32.6 million.

11. To enable Empire to use the storage and transportation capacity to be leased on National Fuel's system, National Fuel requests authority to add compression and related facilities at its Tuscarora Compressor Station to fulfill its receipt and delivery obligations under the lease. Specifically, National Fuel proposes to add a 1,380-horsepower reciprocating natural gas-fired compressor unit in a sound-insulated building and to retrofit the two existing 720-horsepower compressor

engines with clean-burn technology.⁷ The estimated cost of these facilities is \$11.1 million.⁸

12. Empire also requests authority to replace, if necessary, one or both compressor wheels at its Oakfield Compressor Station in the Town of Oakfield, Genesee County, New York. Empire constructed the Oakfield Compressor Station as part of the Connector Facilities to expand north-to-south deliveries on its system.⁹ When the Tioga County Extension Project made Empire's system bi-directional,¹⁰ Empire added horsepower at the Oakfield Compressor Station to provide 350,000 Dth per day of firm south-to-north transportation service of Pennsylvania-sourced gas toward the interconnection with TransCanada. However, to date, gas has not physically moved from Empire's system into TransCanada's system because TransCanada's facilities are not yet equipped to receive gas from Empire.¹¹ The estimated cost of the replacement is \$1.5 million.

⁷ National Fuel also intends to replace an emergency generator and to add other auxiliary equipment at the Tuscarora Compressor Station under section 2.55(a) of the Commission's regulations, 18 C.F.R. § 2.55(a) (2014).

⁸ The Tuscarora Compressor Station, which sits adjacent to the small Tuscarora Storage Field, is currently a terminal node of National Fuel's system. It connects via Line Z-20 to Ellisburg Compressor Station in Potter County, Pennsylvania, as a hub for other pathways along the National Fuel system. After the Tuscarora Lateral is constructed, National Fuel's Line Z-20 would serve as the connection between National Fuel's and Empire's systems and would transport gas for use on Empire's leased capacity. Because Line Z-20 is currently functionalized as storage plant, National Fuel plans to refunctionalize Line Z-20 as transmission plant.

⁹ *Millennium Pipeline Co.*, 117 FERC ¶ 61,319 (2006).

¹⁰ *Empire Pipeline, Inc.*, 135 FERC ¶ 61,163 (2011).

¹¹ Empire states that currently it can provide the additional south-to-north transportation service represented by the RG&E and NYSEG precedent agreements without the proposed rewheeling at the Oakfield Compressor Station. If, however, TransCanada makes its interconnection facilities bi-directional, flow conditions at the Oakfield Compressor Station would likely necessitate the replacement of one or both compressor wheels. Empire notes that additional factors such as the timing of possible modifications to TransCanada's system and

(continued...)

13. After the replacement of the compressor wheels, Empire's system would have 384,500 Dth per day of firm south-to-north capacity from the terminus of the Tioga County Extension to TransCanada. This capacity would be in addition to the firm capacity required to serve RG&E and NYSEG. Empire states that depending on RG&E's and NYSEG's specific designation of receipt or delivery points and the associated volumes, Empire's sustainable firm south-to-north capacity could be somewhat higher or lower than the quantities described in Empire's application. Empire seeks clarification that its ability to provide long-term firm south-to-north transportation service requested by RG&E and NYSEG is not limited to these quantities under such circumstances.

14. In August 2013, Empire held an open season to solicit requests for service under its proposed FTNN and FSNN rate schedules for the capacity resulting from the lease of storage capacity and the proposed construction of the Tuscarora Lateral Project.¹² RG&E was the only shipper that submitted a bid in response to the open season. NYSEG subsequently requested FTNN capacity from Corning.

15. Empire proposes initial rates (1) for Rate Schedule FTNN that match those in effect under its existing Rate Schedule FT; (2) for Rate Schedule FSNN that are the sum of National Fuel's currently effective rates for Rate Schedules FSS (Firm Storage Service) and FST (Firm Storage Transportation); and (3) for Rate Schedule ISS (Interruptible Storage Service) that are derived from Empire's proposed Rate Schedule FSNN. Empire also proposes to revise its tariff to reflect the new services and related rates.

16. Empire requests a predetermination that it may roll the costs associated with the project into its system rates in a future NGA section 4 rate proceeding, absent changed circumstances. In addition, Empire proposes to retain from its FSNN and ISS customers the gas – for fuel, company use, and lost and unaccounted for (LAUF) gas – that National Fuel retains from Empire under the lease agreement.

17. The total estimated cost of Empire's Tuscarora Lateral Project (\$32,561,939), National Fuel's expansion of the Tuscarora Compressor Station

possible future expansion to Empire's system may negate the need to replace the compressor wheels.

¹² Because the turnback of capacity from other shippers could not obviate the need to construct the Tuscarora Lateral, Empire did not conduct a reverse open season.

(\$11,062,860), and the possible rewheeling at Empire's Oakfield Compressor Station (\$1,500,000) is approximately \$45,124,799.

C. Lease of Capacity from National Fuel

18. Empire does not currently own or operate storage facilities on its system. Empire states that it requires both storage capacity and associated transportation capacity to provide the proposed no notice services to RG&E and NYSEG.

19. National Fuel provides storage service on an aggregate basis from 31 storage fields in Pennsylvania and New York. National Fuel's storage customers also require transportation service to bring gas to and from these storage fields. Currently, National Fuel's storage capacity is only available as a 100-day service due to capacity limitations. However, the additional proposed compression at National Fuel's Tuscarora Compressor Station, as well as the new interconnection with Empire's system at that station, will allow National Fuel to provide a 60-day service.¹³

20. Empire seeks authorization to lease storage capacity equivalent to 3,300,000 Dth of storage service and transportation capacity to provide 55,000 Dth per day of related transportation service from National Fuel for a primary term of 10 years, commencing on the in-service date of the proposed facilities.¹⁴ The lease provides a maximum daily injection quantity of 27,500 Dth per day and a maximum daily withdrawal quantity of 55,000 Dth per day. The Capacity Lease Agreement between Empire and National Fuel provides that the lease will continue in effect until it is terminated upon the expiration of the primary term or any anniversary thereof, if either party gives nine month's advance written notice. During the term of the lease, National Fuel will continue to own and operate the storage and transmission facilities on its system. Upon termination of the lease

¹³ The terms 100-day service and 60-day service indicate rates of withdrawal from a customer's purchased storage capacity. In general, under 100-day service, a customer may withdraw one-hundredth of its purchased storage capacity per day for one hundred days. Under 60-day service a customer may withdraw one-sixtieth of its purchased storage capacity per day for sixty days.

¹⁴ Empire and National Fuel have negotiated a Capacity Lease Agreement. The applicants' precedent agreement and the unexecuted lease agreement, including Service Agreements for National Fuel to store and transport gas on behalf of Empire under National Fuel's existing Firm Storage Service and Firm Transportation Service Rate Schedules, is in Exhibit U of the joint application.

agreements, all of the leased storage and transportation capacity will revert back to National Fuel.

21. In an open season in August 2013, National Fuel offered to lease capacity for 3,300,000 Dth of storage service and 55,000 Dth per day of related transportation to other interstate pipelines as 60-day service (including the proposed upgrade to the Tuscarora Compressor Station) under a long-term capacity lease with interim service to commence April 1, 2015.¹⁵ Empire was the sole bidder and it requested all of the offered storage and transportation capacity.

22. During the term of the lease, Empire will make a monthly lease payment to National Fuel for FSS storage quantity and withdrawal, which will be calculated at National Fuel's maximum rates for Rate Schedule FSS service as if Empire were an FSS customer with the Maximum Storage Quantity (MSQ) of 3,300,000 Dth and a Maximum Daily Withdrawal Quantity (MDWQ) of 55,000 Dth per day. Empire's monthly lease will also include a payment for transportation as a Rate Schedule FST shipper with a Maximum Daily Withdrawal Transportation Quantity (MDWTQ) of 55,000 Dth per day. During the first three contract years of the lease, through March 31, 2018, Empire will pay National Fuel a rate for the Rate Schedule FST service which is somewhat less than National Fuel's currently-effective maximum Rate Schedule FST reservation rate. For the remainder of the term of the lease, Empire will pay National Fuel's currently-effective maximum Rate Schedule FST rate. Applicable surcharges will be added to the maximum rates and to the rates paid from the day the lease commences through March 31, 2018.

III. Procedural Matters

23. Public notice of the applications was published in the Federal Register on April 10, 2014, with interventions and protests due April 23, 2014.¹⁶ Allegheny Defense Project (Allegheny); Consolidated Edison Company of New York, Inc.; NJR Energy Services Company; NYSEG; RG&E; Shell Energy North America (US), L.P.; and SWEPI LP, a subsidiary of Shell Oil Company, filed timely, unopposed motions to intervene. Pursuant to Rule 214 of the Commission's Rules

¹⁵ The storage and transportation capacity will become available on National Fuel's system on April 1, 2015, as a result of contract terminations by National Fuel's customers.

¹⁶ 79 Fed. Reg. 19,893 (2014).

of Practice and Procedure,¹⁷ we will grant the timely, unopposed motions to intervene.

24. National Fuel Gas Distribution Corporation and the New York Public Service Commission filed late motions to intervene. The parties filing the late motions to intervene have demonstrated an interest in this proceeding and have shown good cause for intervening out of time. The late motions will not delay or disrupt this proceeding or unfairly prejudice other parties.¹⁸ Thus, we will grant the late motions to intervene.

25. Allegheny filed a timely protest to the application. On May 23, 2014, Empire and National Fuel jointly filed an answer to Allegheny's protest. Although Rule 213(a) of the Commission's Rules of Practice and Procedure does not permit answers to protests unless otherwise ordered by the decisional authority, our rules do provide that we may, for good cause shown, waive this provision.¹⁹ We find good cause to do so in this instance because Empire and National Fuel's answer provides information that will assist in our decision-making process.

26. Allegheny alleges that the Commission has failed to satisfy the National Environmental Policy Act of 1969 by failing to compose a programmatic environmental impact statement for regional gas extraction from the Marcellus Shale and by failing to address the cumulative impacts of past proceedings. The matters raised by Allegheny will be addressed in the environmental section below.

IV. Discussion

27. Since the proposed facilities will be used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, their construction and operation, as well as the acquisition of capacity by lease, are subject to the requirements of sections 7(c) and 7(e) of the NGA. National Fuel's proposed abandonment of capacity by lease is subject to the requirements of section 7(b) of the NGA.

¹⁷ 18 C.F.R. § 385.214 (2014).

¹⁸ *Id.* § 385.214(d) (2014).

¹⁹ *Id.* § 385.213(c) (2014).

A. Certificate Policy Statement

28. The Certificate Policy Statement provides guidance for evaluating proposals for certificating new construction.²⁰ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

29. Under this policy, the threshold requirement for natural gas companies proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the location of the new facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

30. The threshold requirement is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. National Fuel's and Empire's proposal satisfies the threshold requirement. Empire has entered long-term firm transportation agreements with two shippers—NYSEG and RG&E—which have agreed to pay the maximum rates under Empire's proposed Rate Schedules FTNN and FSNN to use the full incremental capacity. As discussed in greater detail below, the revenues generated

²⁰ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

under Empire's proposed rates would exceed the associated costs of its project. The costs of National Fuel's proposals are recovered by Empire's payments to National Fuel under the lease, which will match National Fuel's existing FSS and FST rates after the first three years. Moreover, during the term of this lease with Empire, National Fuel and Empire have agreed that in any rate proceeding if costs allocated to the leased capacity are not covered by National Fuel's maximum rates for Rate Schedules FSS and FST services, or the successor service(s) as provided in paragraph 4.3 of the lease, then the parties agree to modify the lease payment as necessary to assure National Fuel's recovery of all such costs, subject to receipt of any required authorization from the Commission. Thus, the existing customers of Empire and of National Fuel will not subsidize the costs of construction.

31. As demonstrated by the flow diagrams in the application, the proposals will not degrade any service currently provided to Empire's or National Fuel's existing customers.²¹ The project would enable Empire's customers to take advantage of enhanced storage and transportation services not currently available. We are satisfied that there will be no negative impacts on other existing pipelines or their captive customers. The proposals are designed to make firm no-notice services available to RG&E and NYSEG and to increase their access to gas supply alternatives. Further, no pipeline or storage facility in Empire's market area has protested its proposal.

32. The project will have minimal impacts on landowners and surrounding communities. At the time that Empire and National Fuel filed their application, they had obtained survey permission for the entire Tuscarora Lateral corridor except for one landowner. National Fuel worked with landowners and agricultural agents to determine the locations and configuration of drain tiles and other drainage features that may need to be avoided or accommodated during construction. National Fuel adopted route variations to minimize landowner concerns. In addition, the construction of the compression and appurtenant facilities at the Tuscarora Compressor Station will take place within the fence line of National Fuel's property. Empire's re-wheeling activities, if necessary, will also take place within the existing Oakfield Compressor Station property.

33. Empire and National Fuel have demonstrated market support for the proposed construction via long-term firm transportation commitments that fully subscribe the project. We conclude that the benefits that the project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and

²¹ Application, Exhibit G and G-II.

their captive customers, and landowners and surrounding communities. Accordingly, we find, consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, that the public convenience and necessity requires approval of the proposals, subject to the conditions in this order.

34. To assist the Commission and parties in any rate filing made by National Fuel or Empire to determine the appropriate allocation of costs and prevention of subsidies, we will require National Fuel and Empire to keep separate books and accounting of costs attributable to the Tuscarora Lateral Project. The books should be maintained with applicable cross-references, as required by section 154.309 of the Commission's regulations. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case and the information must be provided consistent with Order No. 710.²² Such measures protect Empire's existing customers from cost overruns and from subsidization that might result from under-collection of the Tuscarora Lateral Project's incremental cost of service, as well as help the Commission and parties to the rate proceedings determine the costs of the project. As noted below, the Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline. For the term of the lease, National Fuel will not have any rights to use the leased capacity. Accordingly, during the term of the lease, National Fuel will not be allowed to reflect in its system rates any of the costs (i.e., the fully-allocated cost of service, including actual fuel costs) associated with the leased capacity.²³ Further, in National Fuel's next rate case,²⁴ we will require the parties to examine whether the lease arrangement allows National Fuel to over-recover the costs associated with the transferred facilities.

B. Lease of Capacity

35. Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee

²² *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. & Regs. ¶ 31,267, at P 23 (2008).

²³ *See Gulf South Pipeline Co., LP*, 120 FERC ¶ 61,291, at P 42 (2007).

²⁴ National Fuel is required to file a rate case by January 1, 2016. *National Fuel Gas Supply Corp.*, 140 FERC ¶ 61,114, at P 19 (2012).

acquires in the capacity of the lessor's pipeline.²⁵ To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity. Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.²⁶

36. The Commission's practice has been to approve a lease if it finds that: (1) there are benefits for using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease on a net present value basis; and (3) the lease arrangement does not adversely affect existing customers.²⁷ The lease agreement between Empire and National Fuel satisfies these requirements.

37. First, the Commission has found that capacity leases in general have several potential public benefits. Leases can promote efficient use of existing facilities, avoid construction of duplicative facilities, reduce the risk of overbuilding, reduce costs, and minimize environmental impacts.²⁸ In addition, leases can result in administrative efficiencies for shippers.²⁹ Here, the proposed lease arrangement will enable Empire to provide storage and enhanced no-notice transportation service to its customers, a service it currently does not offer. The proposed lease will also provide an efficient use of available capacity from expiring contracts on National Fuel's system and will avoid the need for far more costly enhancements to Empire's system. Empire's shippers will gain the benefits of new services without the administrative burdens associated with multiple-pipeline contracting and scheduling. RG&E and NYSEG will also be afforded additional transportation opportunities with the new interconnection with National Fuel.

²⁵ *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at 61,530 (2001).

²⁶ *Texas Gas Transmission, LLC*, 113 FERC ¶ 61,185, at P 10 (2005).

²⁷ *Id.*; *Islander East Pipeline Co., L.L.C.*, 100 FERC ¶ 61,276, at P 69 (2002) (*Islander East*).

²⁸ *See, e.g. Dominion Transmission, Inc.*, 104 FERC ¶ 61,267, at P 21 (2003); *Islander East*, 100 FERC ¶ 61,276 at P 70.

²⁹ *Wyoming Interstate Co., Ltd.*, 84 FERC ¶ 61,007, at 61,027 (1998), *reh'g denied*, 87 FERC ¶ 61,011 (1999).

38. The second criterion in the Commission's consideration of capacity leases is whether the lease payments will be less than, or equal to, the lessor's firm transportation rates for comparable service. Here, Empire's payments to National Fuel will be equal to, or less than, payments derived from National Fuel's maximum rates for comparable firm transportation and storage services during the lease term.

39. Third, as conditioned below, the lease arrangements will not adversely affect Empire's or National Fuel's existing customers. The compression and related facilities at the Tuscarora Compressor Station will ensure that National Fuel can meet its delivery obligations without any degradation of service to its shippers. The new interconnection at Tuscarora will also provide additional transportation paths and source opportunities to Empire's and National Fuel's shippers. National Fuel's existing customers will not subsidize the cost of leasing capacity to Empire.

40. Empire has agreed to lease payments that are close to, but not equal to, National Fuel's maximum recourse rates. Moreover, Empire is responsible for all the costs associated with the facilities under the operational lease and will pay any direct and indirect fuel costs pursuant to National Fuel's tariff,³⁰ ensuring that National Fuel customers are not adversely impacted by the lease. To the extent that there is any LAUF fuel costs under the operational lease, the Commission requires that National Fuel not pass through those costs to its existing customers. National Fuel is charging Empire less than its maximum Rate Schedule FST system rate for the lease of firm transportation capacity through March 31, 2018.³¹ During this period National Fuel is charging Empire the maximum rate under National Fuel's Rate Schedule FSS. Starting on April 1, 2018, both rates match the maximum rates under National Fuel's Rate Schedules FSS and FST. During the term of this lease with Empire, National Fuel and Empire have agreed³² that in

³⁰ Section 41 of National Fuel's FERC NGA Gas Tariff, GT&C-Tran Fuel, Loss & Company Use & Storage Retainage Adj, sets forth procedures National Fuel shall use to adjust its transportation fuel and company use retention, transportation LAUF retention, and storage operating and LAUF retention and its electric power cost rates for transportation and storage services. Amendments have been proposed for leased storage and transportation capacity.

³¹ See Application Exhibit U, Exhibit A to Precedent Agreement.

³² See *id.* Exhibit U, Exhibit A to Precedent Agreement, P 4.2.

any rate proceeding if costs allocated to the leased capacity are not covered by National Fuel's maximum rates for Rate Schedules FSS and FST services, or the successor service(s) as provided in paragraph 4.3 of the lease, then the parties agree to modify the lease payment as necessary to assure National Fuel's recovery of all such costs, subject to receipt of any required authorization from the Commission. National Fuel states that it will not propose such an allocation of costs in any rate proceeding and shall oppose any such proposal by another party, provided that nothing herein shall limit National Fuel's discretion with respect to the settlement of rate proceedings or judicial review of orders issued by the Commission. During the term of this lease with Empire, National Fuel will not be allowed to reflect in its system rates any of the costs (i.e., the fully-allocated cost of service, including actual LAUF fuel costs) associated with the leased capacity.³³ National Fuel must treat the capacity leases as operating leases for accounting purposes. Consistent with Commission precedent, the Commission directs National Fuel to record the lease payments from Empire in Account 489.2, Revenues from Transportation of Gas of Others Through Transmission Facilities.³⁴

41. Because the lessor no longer has any rights to use the leased capacity, it requires NGA Section 7(b) authority from the Commission to abandon the capacity. Accordingly, we find that the proposed abandonment is consistent with the public convenience and necessity, and we grant National Fuel authority to abandon the proposed capacity for the term of the lease. Consistent with Commission policy, we will require National Fuel to file with the Commission a notification in this docket within 10 days of the date of abandonment of the capacity leased to Empire providing the effective date of the abandonment.³⁵ We also remind the applicants that when the lease terminates, Empire is required to

³³ See *Gulf South Pipeline Co., LP*, 145 FERC ¶ 61,139 (2013); *Millennium Pipeline Co., L.P.*, 97 FERC ¶ 61,292 (2001); and *Trunkline Gas Co.*, 80 FERC ¶ 61,356 (1997).

³⁴ See *Columbia Gas Transmission Corp.*, 78 FERC ¶ 61,030, at 61,115 (1997); *Gulf South Pipeline Co., L.P.*, 119 FERC ¶ 61,281, at P 42 (2007); *Gulf South Pipeline Co., LP*, 120 FERC ¶ 61,291, at P 42 (2007); *Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100, at P 123 (2008).

³⁵ See, e.g., *Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028 at Ordering Para. (D).

obtain authority to abandon the lease capacity, and National Fuel is required to obtain certificate authorization to reacquire that capacity.³⁶

C. Empire's Proposed New Services

1. Initial Rates

42. Empire filed tariff records to establish rate schedules for three new services. We have reviewed the proposed initial rates for Rate Schedules FTNN, FSNN, and ISS and find them to be required by the public convenience and necessity, except as discussed below.

a. Proposed Firm No-Notice Transportation Service (Rate Schedule FTNN)

43. Empire filed tariff records to establish a proposed open-access firm no-notice transportation service under Rate Schedule FTNN. At present, Empire only provides firm transportation service under Rate Schedule FT. Empire proposes to use its existing Rate Schedule FT rates, including all applicable surcharges and retainage, as the initial rates for FTNN service. Rate Schedule FTNN service differs from Rate Schedule FT service in that Rate Schedule FTNN provides that Empire will adjust scheduled quantities for FTNN shippers, as necessary, to balance nominated receipts and actual deliveries, up to the maximum injection or withdrawal quantity specified in an associated firm storage agreement under Rate Schedule FSNN. Empire notes that it has not identified cost elements that are uniquely associated with providing FTNN service.

44. Empire states that rates under FTNN will include one set of annual and seasonal rates applicable for shippers solely utilizing the original Empire Pipeline,³⁷ and a higher set of annual and seasonal rates based on the cost of service associated with the Empire Connector. Since storage-related transportation under Rate Schedule FTNN will use the Tuscarora Lateral and other Empire Connector facilities, the higher Empire Connector rates are applicable to any portion of a shippers' contract maximum daily quantity associated with storage

³⁶ See, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 35 (2003).

³⁷ "Original Empire Pipeline" is defined as "Transporter's pipeline facilities as of December 21, 2006, commencing at Grand Island, New York, and terminating at Phoenix, New York." Empire Pipeline, Inc., FERC NGA Gas Tariff, Empire Tariff; [1 – Definition of Terms, 1 – Definition of Terms, 2.0.0.](#)

withdrawals. Current Rate Schedule FT reservation rates for shippers using the Empire Connector for year-round, winter period, and summer period services are \$9.9664, \$13.3838, and \$7.2063 per Dth, respectively.³⁸

45. Exhibit N, Part 1, in Empire's application demonstrates that the proposed revenue from the use of its Rate Schedule FT reservation rates will exceed the incremental cost of service of the project. Thus, we will approve Empire's request to use its current Rate Schedule FT rates as the initial recourse rates for Rate Schedule FTNN. This approval includes the use of Rate Schedule FT's fuel retention rate.

46. However, as Empire notes, the no-notice component of Rate Schedule FTNN service cannot be rendered with Empire's current transmission assets. The service requires the use of additional assets Empire will acquire from National Fuel. Further, as a no-notice service, it is clear that Rate Schedule FTNN service is superior to Rate Schedule FT service. In between rate cases, the Commission often accepts initial rates for new services based on a currently-approved cost-based rate.³⁹ Issues regarding the appropriate allocation of costs to Rate Schedule FTNN may be addressed in Empire's next general NGA section 4 rate case.

b. Proposed Firm No-Notice Storage Service (Rate Schedule FSNN)

47. Empire proposes to lease storage and related transportation capacity from National Fuel in order to provide its FSNN service. Empire explains that the leased transportation capacity involves the movement of storage gas from a paper point over National Fuel's transmission system to the proposed Tuscarora interconnection. Therefore, Empire proposes to derive its initial recourse rates for FSNN service from both National Fuel's Rate Schedule FSS and Rate Schedule FST. Empire also proposes to retain the quantities of gas—for fuel, for company use, and LAUF—equal to those retained by National Fuel under the terms of the lease, which are the same retention rates as are applicable under National Fuel's FSS and FST rate schedules. In addition, Empire proposes to track National Fuel's Rate Schedule FSS and FST rates for Empire's Rate Schedule FSNN rates. Empire states that the tracker replicates the changes in its lease costs with National Fuel under the terms of its lease. Empire supports its proposed Rate Schedule

³⁸ Empire Pipeline, Inc., FERC NGA Gas Tariff, Empire Tariff; [4 – Applicable Rates, 4 – Applicable Rates, 7.0.0](#).

³⁹ *E.g.*, *Columbia Gas Transmission Corp.*, 122 FERC ¶ 61,239 (2008).

FSNN rate design by noting that the capacity lease has a transportation component, as well as a storage component. Empire also proposes an initial maximum charge for storage balance transfers of \$3.86 per nominated transfer, which is identical to National Fuel's maximum storage balance transfer charge.⁴⁰

48. Empire proposes a four-part set of rates for Rate Schedule FSNN: a demand reservation charge, a capacity reservation charge, and separate injection and withdrawal charges. The proposed initial maximum Rate Schedule FSNN demand charge is \$6.2631 per Dth, which is equal to the sum of the maximum demand charge for National Fuel's FSS service of \$2.4826 per Dth,⁴¹ and the maximum reservation charge for National Fuel's FST service of \$3.7805 per Dth.⁴² The proposed initial maximum Rate Schedule FSNN capacity reservation charge is \$0.0381 per Dth of storage capacity, which is equal to the maximum capacity charge for National Fuel's FSS service.⁴³ In addition, Empire proposes maximum injection and withdrawal charges of \$0.0526 per Dth, which is the sum of National Fuel's maximum FSS injection and withdrawal charges of \$0.0391 per Dth,⁴⁴ and its maximum FST commodity charge of \$0.0135 per Dth.⁴⁵

49. We will approve Empire's proposed initial reservation, usage, fuel and storage balance transfer rates for Rate Schedule FSNN as cost supported.

50. As discussed above, we approved Empire's proposal to pass through National Fuel's fuel retainage charges. National Fuel's storage retainage charge

⁴⁰ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [4 – Applicable Rates, 4.020 – Part 284 Storage Rates, 7.0.0.](#)

⁴¹ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [4 – Applicable Rates, 4.020 – Part 284 Storage Rates, 7.0.0.](#)

⁴² National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [4 – Applicable Rates, 4.020 – Part 284 Storage Rates, 7.0.0.](#)

⁴³ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [4 – Applicable Rates, 4.020 – Part 284 Storage Rates, 7.0.0.](#)

⁴⁴ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [4 – Applicable Rates, 4.020 – Part 284 Storage Rates, 7.0.0.](#)

⁴⁵ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [4 - Applicable Rates, 4.010 – Transportation Rates, 10.0.0.](#)

includes losses.⁴⁶ However, in section 5 of Rate Schedules ISS and FSNN, respectively, Empire proposes separate tariff language to recover storage losses.

51. Since section 5 of Rate Schedules ISS and FSNN appears to be redundant to the gas charge approved above for fuel, company use, and LAUF gas, we will reject it. If the subject of this proposed section is extraordinary reservoir losses suffered by capacity leased by Empire as part of its system, current Commission policy permits pipelines to establish a surcharge to recover these costs only through a limited section 4 filing.⁴⁷ These cases are often complex,⁴⁸ and it is premature and speculative to determine in this proceeding whether it is just and reasonable for Empire's shippers to be responsible for such losses.

52. Empire, at section 3.4(c) of Rate Schedule FSNN and section 3.5(c) of Rate Schedule ISS, provides as follows:

Transporter's [Empire's] Tracker Filings – Transporter shall file to track any rate or retention change or filing change by Supplier [National Fuel] which affects Transporter's rates or retainages under this rate schedule no later than thirty (30) days following the

⁴⁶ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [41 - Fuel Tracker](#), [41 - Trans & Storage Retainage & EPCR Adjustments, 1.0.0](#), at Section 41.2(g): "Storage Fuel and Losses" shall include fuel used by Transporter at compressor stations identified as Underground Storage Compressors in Transporter's Form No. 2, and other fuel use, company use, surface and subsurface losses and unaccounted for gas associated with storage facilities (but not including extraordinary reservoir losses).

⁴⁷ *Sea Robin Pipeline Co., LLC*, 128 FERC ¶ 61,286, at PP 38-42 (2009), *order on reh'g*, 130 FERC ¶ 61,191, at PP 11-13 (2010) (explaining that "current Commission policy permits pipelines to establish a surcharge via a limited section 4 filing to recover extraordinary, one-time losses resulting from events outside the pipeline's control"); *Sea Robin Pipeline Co., LLC*, Opinion No. 516, 137 FERC ¶ 61,201 (2011), *order on reh'g*, Opinion No. 516-A, 143 FERC ¶ 61,129; *see also ANR Pipeline Co.*, 128 FERC ¶ 61,128 (2009); *CenterPoint Energy Gas Transmission Co.*, 127 FERC ¶ 61,096, at P 23 (2009); and *Columbia Gulf Transmission Co.*, 123 FERC ¶ 61,216 (2008).

⁴⁸ *E.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 142 FERC ¶ 61,095 (2013), *Equitrans, L.P.*, 106 FERC ¶ 61,340, at PP 21-26 (2004).

issuance date of the Commission order which accepts and makes effective Supplier's change. The effective date of such change in Transporter's rates or retainages shall coincide with the effective date of any change in rates by Supplier.

53. This provision would permit Empire to modify the rates in Rate Schedules FSNN and ISS to track any changes to the rates in National Fuel's Rate Schedule FSS and FST retroactive to the date of the rate change.

54. We will not permit Empire to include tariff language allowing it to change its stated tariff rates outside of an NGA section 4 proceeding. In the discussion of Rate Schedule FTNN above, we noted our concern with Empire's proposal to use Rate Schedule FT rates as the initial rates for Rate Schedule FTNN, as Empire readily admitted that it could not provide FTNN service without the storage and transportation assets leased from National Fuel. The implication of Empire's admission is that some of the National Fuel lease costs should be allocated to FTNN service once Empire gains actual experience with how the services will be used. It would not be appropriate, given these concerns, to approve a tracker mechanism that would recover all lease costs from only FSNN and ISS customers. Further, we are concerned that Empire's proposal is, or may become, a fixed cost and/or plant cost tracker, and it presumes that future cost allocation and rate design on National Fuel's system for its customers will have equal applicability to services provided on assets that National Fuel has abandoned. Thus, we will reject proposed sections 3.4(c) and 3.5(c) of Rate Schedules FSNN and ISS, respectively, without prejudice to Empire proposing this language in a general NGA section 4 proceeding.

c. Rate Schedule ISS

55. Empire filed tariff records to establish a proposed interruptible storage service under Rate Schedule ISS. To the extent that Empire's firm storage customers are not using the entire capacity leased from National Fuel, Empire would make the remaining capacity available on an interruptible basis. Empire states that this interruptible storage service would provide an additional means for its shippers to balance receipts and deliveries in their transportation agreements. We will approve Empire's proposed initial rates for interruptible storage service, except as discussed below.

56. Empire proposes an initial ISS storage charge of \$0.0047 per Dth and an initial ISS injection charge of \$0.9601 per Dth. Empire states that its proposed initial ISS rates are derived from its proposed initial rates for firm storage under Rate Schedule FSNN. Empire notes that in the design of these rates, 50 percent of

the fixed charges recovered under the FSNN demand and capacity charges are allocated to the calculation of the storage charge, and 50 percent are allocated to the calculation of the injection charge. Both the injection and withdrawal costs are allocated to the storage injection charge. With regard to the ISS storage rate, Empire states that it used a 50 percent load factor, which recognizes that the storage capacity used by an ISS customer will not be full every day, but must be filled and emptied over time. Empire states that the assumption that ISS capacity will be half-used, on average, is reasonable. In justifying its proposal to use a 50 percent load factor in deriving its ISS storage charge, Empire provides an example that shows that revenue generated from a rate using a 50 percent load factor basis generates revenue of \$77,296, while using a 100 percent load factor basis generated revenue of \$74,596.⁴⁹ Empire states that the under-recovery of \$2,700 is the impact of using a 100 percent load-factor-derived rate.

57. Empire states that the ISS charge for storage balance transfers will be the same as for service under FSNN. With the exception that, as provided for in section 3.4 of Rate Schedule ISS, when an ISS shipper nominates for a transfer from the balance of an FSNN shipper, the ISS storage injection rate will be charged, and the shipper will be credited with the maximum FSNN injection charge. Empire notes that this provision, based on a similar provision contained in National Fuel's tariff,⁵⁰ recognizes that the proposed maximum ISS injection charge, \$0.9601 per Dth, is much higher than the variable cost-based maximum FSNN injection charge, \$0.0526 per Dth, and shippers could otherwise avoid the ISS injection charge and the fixed costs recovered therein by arranging an inventory transfer from an FSNN customer.

58. We will reject Empire's proposed initial ISS storage rate, because Empire's proposal to design the ISS storage rate based on a 50 percent load factor improperly increases the ISS storage rate, contrary to our long-standing policy that the rate for interruptible service should be designed on a 100 percent load factor basis.⁵¹ Our policy requires the use of a 100 percent load factor rate for

⁴⁹ Empire May 5, 2014 Data Response, Question 3.

⁵⁰ National Fuel Gas Supply Corporation, FERC NGA Gas Tariff, National Fuel Tariff; [32 – Storage Balance, 32 – Transfers of Storage Balance, 0.0.0.](#)

⁵¹ *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150, at PP 50-51 (2005); *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043, at P 200 (2005); *Southern Natural Gas Co.*, 99 FERC ¶ 61,345, at PP 85-87 (2002).

interruptible service unless there are extenuating circumstances that would require an exception.⁵² Empire has not justified such an exception here. Thus, we will direct Empire to submit a revised ISS storage rate designed on a 100 percent load factor basis no earlier than 60 days, and no later than 30 days, prior to the date the project facilities go into service. In addition, we will require Empire to include work papers, in electronic spreadsheet format and including formulas, showing its derivation of the 100 percent load factor ISS storage rate.

59. In addition, we will reject section 3.4 of Rate Schedule ISS. Empire proposes at section 3.4 to assess a different storage balance transfer charge for transfers from an FSNN service agreement to an ISS service agreement than the charge that Empire assesses all other storage balance transfers. Empire has not identified any additional costs that would be incurred by a storage balance transfer from an FSNN shipper to an ISS shipper and has not justified why a different charge for this type of storage balance transfer is reasonable. Thus, we will direct Empire to remove section 3.4 of Rate Schedule ISS.

60. Consistent with currently effective section 18.3 of its General Terms and Conditions (GT&C),⁵³ Empire proposes to allocate all ISS revenue each month, net of costs, to its FSNN shippers in proportion to the charges billed to its FSNN shippers with respect to such service during such month.⁵⁴ In its application, Empire has not proposed to revise section 18.3, which currently only references Rate Schedule IT revenues, to include references to Rate Schedule ISS revenues.⁵⁵ Empire should revise section 18.3 to provide for the crediting of ISS revenues consistent with its proposal.

2. Pre-Determination for Rolled-In Rate Treatment

61. Empire seeks a predetermination that it may roll the costs associated with the project into its existing rates for service on the Empire Connector Project. To

⁵² *Discovery Gas Transmission, LLC*, 107 FERC ¶ 61,124, at P 57 (2004).

⁵³ Empire Pipeline, Inc., FERC NGA Gas Tariff, Empire Tariff, [18 – Adjustments, 18 – Adjustments, Surcharges, Neg. Rates, IT Revenue Credits, 0.0.0.](#)

⁵⁴ Empire May 5, 2014 Data Response, Question 1.

⁵⁵ Empire states in its May 5, 2014, response that it would revise section 18.3 of its GT&C to provide for ISS revenues.

receive authorization for rolled-in rate treatment, a pipeline must demonstrate that rolling in the costs associated with the construction and operation of new facilities will not result in existing customers subsidizing the expansion. In general, this means that a pipeline must show that the revenues to be generated by an expansion project will exceed the costs of the project.

62. Empire states that revenue associated with the project exceeds the cost-of-service. Empire provides in Exhibit N a 10-year statement of revenues, expenses and income, as well as a 10-year cost-of-service analysis for the project. Based on the proposed maximum recourse rates for Rate Schedule FTNN and annual billing determinants, Empire anticipates revenue for the first year of the project to be \$21,027,312, and the cost of service for the first year to be \$6,487,943.⁵⁶ However, Empire has included projected revenues attributable to the increased capacity, which is currently unsubscribed, provided by the Oakfield Compressor Station rewheeling, for which there are currently no contracts.⁵⁷

63. For purposes of making a determination in a certificate proceeding as to whether it would be appropriate to roll the costs of a project into the pipeline's system rates in a future section 4 rate case proceeding, we will compare the cost of the project to the revenues generated using actual contract volumes and the maximum recourse rate (or the actual negotiated rate if the negotiated rate is lower than the recourse rate).⁵⁸ Here, we calculated the first year project revenue, using actual contract volumes and the maximum recourse rate, to be \$16,901,222.⁵⁹ This analysis demonstrates that Empire should recover more than its incremental cost of service, regardless whether it is able to contract the additional capacity attributable to the Oakfield Compressor Station rewheeling. Because the revenues

⁵⁶ Application at Exhibit N.

⁵⁷ Empire states that re-wheeling of the Oakfield Compressor Station would result in 369,700 Mcf of sustainable firm south-to-north transportation capacity, an increase of 33,200 Mcf per day over existing capacity. Empire notes that the additional 33,200 Mcf per day of capacity is equivalent to 34,500 Dth per day of additional firm transportation capability. Application at 23.

⁵⁸ See *Tennessee Gas Pipeline Co., L.L.C.*, 144 FERC ¶ 61,219, at P 22 (2013).

⁵⁹ This figure is the result of \$21,027,312 minus \$4,126,090. The latter figure is the revenue attributable to the Oakfield Compressor Station rewheeling: 34,500 Dth per day multiplied by \$9.9664 per Dth multiplied by twelve months.

exceed the projected costs, Empire's request for a predetermination of rolled-in rate treatment for the costs associated with the project is granted, absent any significant change in circumstances.

64. National Fuel has not requested a predetermination that it may roll into its existing rates the costs associated with the equivalent of 11,000 Dth/d of additional capacity, which will result, in excess of the leased capacity, from the modifications to its Tuscarora Compressor Station. Neither has National Fuel provided information to support such a predetermination. No contracts currently exist for this capacity. We direct National Fuel to charge its existing system-wide rates as the recourse rate for services using this capacity. National Fuel must post this capacity for bidding on its electronic bulletin board. This order does not preclude National Fuel from seeking rolled-in rate treatment in a future rate case.

3. Tariff Provisions

a. Rate Schedule FTNN

65. Section 2.19 of Rate Schedule FTNN and section 14.11 of the GT&C provide that an FTNN shipper is not required to have an associated FSNN service agreement to utilize the no-notice aspect of Rate Schedule FTNN service. As Empire claims that it is not currently able to provide no-notice service without the acquisition of additional assets, the implication of this provision is that FTNN shippers without FSNN contracts will be responsible for acquiring whatever resources are necessary to permit Empire to provide the no-notice component of FTNN service. We note that Rate Schedule FTNN shippers shall retain the right to contract for imbalance management services from a third party, as necessary.⁶⁰

b. Rate Schedule FSNN

66. As set forth above, Empire will lease storage capacity from National Fuel. Empire proposes to use this capacity to provide Rate Schedule FSNN service for shippers on its system. Because the leased capacity becomes part of Empire's system and must be used pursuant to Empire's tariff, Empire proposes language in

⁶⁰ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, *FERC Stats. & Regs.* ¶ 31,091, at 31,310 and 31,315, *clarified*, Order No. 637-A, *FERC Stats. & Regs.* ¶ 31,099, at 31,602 (2000), which explains that pipelines cannot include in their tariffs any "unnecessary restrictions that prevent third-party imbalance providers from competing with the pipeline."

section 4 of Rate Schedule FSNN creating a rate-schedule-specific reservation charge crediting mechanism, i.e., a mechanism that would provide shippers a reservation charge credit for failure to receive nominated firm service from Empire only to the extent that Empire receives a lease credit from National Fuel. We reject this proposal. When Empire acquires leased storage capacity, Empire in essence owns the capacity and the asset becomes part of Empire's transportation system.⁶¹ The capacity is subject to Empire's tariff. As such, Empire will be responsible for providing firm service to its Rate Schedule FSNN shippers. Because Empire is now the owner of the leased capacity, we find that this ownership of the facilities provides the control necessary to hold Empire responsible for events on the leased capacity. Accordingly, we find that this proposal to subject Empire's shippers to the terms of a lease agreement it made with National Fuel is merely an attempt to insulate Empire from its obligation to provide firm service, as it has agreed to provide under its tariff. The agreement between Empire and a third party may control the relationship between Empire and the capacity it has leased, but it has no bearing on the fact that Empire now owns the leased capacity and that capacity is part of Empire's system.⁶² National Fuel, as the operator of leased capacity which is owned by Empire and is part of Empire's system, cannot be considered outside of Empire's control.⁶³ Thus, we will direct Empire to remove section 4 of Rate Schedule FSNN.

67. Sections 3.3 and 3.5 of Rate Schedule FSNN and section 3.3 of Rate Schedule ISS mistakenly cross-reference section 29 of Empire's GT&C, rather than section 28. We direct Empire to revise sections 3.3 and 3.5 of Rate Schedule FSNN and section 3.3 of Rate Schedule ISS of its tariff to reference the appropriate tariff section.

⁶¹ *Texas Eastern Transmission Corp., order on remand*, 93 FERC ¶ 61,273 (2000), *reh'g denied*, 94 FERC ¶ 61,139, 95 FERC ¶ 61,056 (2001). *See also Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 31 (2008) (citing *Texas Gas Transmission, LLC*, 113 FERC ¶ 61,185, at P 10 (2005)). ("Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.")

⁶² *Chesapeake Energy Marketing, Inc. v. Midcontinent Express Pipeline LLC*, 145 FERC ¶ 61,041, at PP 38-41 (2013).

⁶³ *Id.* P 42.

c. Rate Schedule ISS

68. Section 2.5 of Empire's Rate Schedule ISS does not allow an ISS shipper to either transfer the subject quantities to another shipper or to transfer the subject quantities to an FSNN service agreement or to an off-system shipper. This provision is not consistent with section 28.1 of Empire's GT&C.⁶⁴ We direct Empire to revise section 2.5 of Rate Schedule ISS to allow an ISS shipper to transfer quantities of gas consistent with section 28.1 of the GT&C.

69. Sections 3.2(b) and 3.4 of Rate Schedule ISS contain references to non-existent sections 3.3(d) and 3.3(b) of Rate Schedule ISS, respectively. It appears that the references should be to 3.2(d) and 3.2(b), respectively. We direct Empire to correct these references to the appropriate tariff sections.

d. Miscellaneous Tariff Revisions

70. Section 2.2 of Rate Schedule FSNN limits FSNN receipts and deliveries to only Rate Schedule FTNN shippers. Section 2.3 of Rate Schedule ISS limits receipts to only those shippers that also have services provided under Empire's Rate Schedules IT, FT, or FTNN, and limits deliveries to shippers with Rate Schedule IT, FT, or FTNN contracts. These limitations are contrary to two Commission policies. First, the Commission does not allow tying between different types of service.⁶⁵ As noted above, Empire's proposed no-notice Rate Schedule FTNN transportation service has no limitation on the receipt or deliveries for transportation and/or storage service. It is the shipper's responsibility to manage their gas supply and transportation portfolios in the manner they choose. If a shipper chooses to use a premium service such as Rate Schedule FTNN rather than standard FT, that is their option. The same applies to Rate Schedule FSNN. While FSNN shippers may value the no-notice component of the service, there is no reason to limit FSNN shippers' access to gas supplies for inventory management to only that gas transported under a FTNN contract. Such gas can be delivered under other Empire rate schedules or, as discussed below,

⁶⁴ Section 28.1 of the GT&C provides that any shipper under a FSNN or ISS rate schedule may transfer all or any part of its storage balance to: (1) any other shipper that has executed a FSNN or ISS service agreement; or (2) its storage balance under a different service agreement.

⁶⁵ *Indicated Shippers v. Natural Gas Pipeline Co. of America.*, 89 FERC ¶ 61,142 (1999), *Trunkline Gas Co.*, 64 FERC ¶ 61,141, at 62,099 (1993), *ANR Pipeline Co.*, 68 FERC ¶ 61,343, at 62,386 (1994).

from supplies on other pipelines. Similarly, Rate Schedule ISS customers should not be limited to only those with Rate Schedule IT, FT, or FTNN services.

71. Second, pipelines are not permitted to inhibit the creation of market centers.⁶⁶ Market centers, as described in Order No. 636, are places where sellers or buyers of gas can make or take deliveries of gas supplies. These centers are likely to develop in areas where several pipelines come together, or where a storage field is shared by more than one pipeline, as proposed here between National Fuel and Empire. In Order No. 636, the Commission sought to foster market centers at pipeline interconnects, in which market centers at various production areas and marketing areas could form a competitive natural gas market.⁶⁷ Accordingly, our regulations prohibit any provision in a pipeline's tariff that inhibits the development of market centers.⁶⁸ Empire's proposed tariff language for both Rate Schedules FSNN and ISS would restrict the development of the gas market to only those volumes that may be transported under Rate Schedules FTNN, FT, and IT. Rate Schedule FSNN and ISS shippers are not permitted to source gas from each other through in-place title transfers⁶⁹ or from

⁶⁶ 18 C.F.R. § 284.7(b)(3) (2013): An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part may not include in its tariff any provision that inhibits the development of market centers.

⁶⁷ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, at 30,427-30,428, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186, at 62,012 (1997).

⁶⁸ *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,095 (1993); *Gulf South Pipeline Co., LP and Petal Gas Storage, L.L.C.*, 146 FERC ¶ 61,149, at PP 92-93 (2014).

⁶⁹ Open access pipelines, such as Empire, are required to support in-place title transfers using the same nomination and confirmation procedures used to process other transportation nominations under the North American Energy Board Standards. *Standards for Business Practices of Interstate Natural Gas Pipelines*, Order No. 587-O, FERC Stats. and Regs., ¶ 31,129, *order denying reh'g*, Order No. 587-Q, 100 FERC ¶ 61,105, at P 13 (2002).

points of interconnection with other pipelines (National Fuel in this case). We direct Empire to remove the language from its pro forma tariff records that limits FSNN and ISS services to only service in conjunction with Empire's Rate Schedules IT, FT, or FTNN services.

72. In section 29 of its GT&C, Empire proposes to include provisions regarding permissible types of discounts that currently appear at section 3.2 of Rate Schedules FT and IT. Empire notes that rather than include identical language in Rate Schedules FTNN, FSNN, and ISS, Empire proposes to remove section 3.2 of Rate Schedules FT and IT and include the language in section 29 of its GT&C to be applicable to all of Empire's Rate Schedules. This proposed tariff revision may affect not only project customers, but other Empire customers as well. As a result, we reject Empire's proposed section 29 of its GT&C. Our decision here is without prejudice to Empire proposing such tariff language in an NGA section 4 tariff proceeding.

73. In new section 13(c) of its GT&C, Empire proposes a tariff revision, regarding jointly-owned facilities. This tariff revision, however, does not apply to the facilities at issue in this proceeding. As a result, we will reject Empire's proposed tariff revision to add section 13(c) to the GT&C. Our decision here is without prejudice to Empire proposing such tariff language in an NGA section 4 tariff proceeding.

74. Empire's proposed Annual Charge Adjustment (ACA) language in Part 4 of its Tariff—Applicable Rates of its Pro Forma Tariff Records—may allow Empire to assess the ACA multiple times for the same transaction. Further, section 19 of the GT&C, "Annual Charges Adjustment Clause," does not exclude multiple assessments. We will require Empire to include language in section 19 of its GT&C that prohibits Empire from assessing the ACA multiple times to a shipper for the same transaction.

4. Compliance

75. We direct Empire to file actual tariff records with its proposed rates and revised Rate Schedule ISS rates no earlier than 60 days, and no later than 30 days, prior to the date the project facilities go into service. We also approve Empire's pro forma tariff language, except as discussed above, and direct Empire to file actual tariff records in the same compliance filing.

5. Existing Tariff Provisions

a. Reservation Charge Crediting Policy

76. The Commission has created its reservation charge crediting policy through a series of adjudications concerning the reservation charge crediting tariff provisions of particular pipelines. The policy requires that all interstate pipelines provide reservation charge credits to their firm shippers during both force majeure and non-force majeure outages.⁷⁰ For outages of primary firm service due to force majeure events the Commission requires partial reservation charge credits as a means to share the risk of such events for which neither party is responsible. For outages due to non-force majeure events the Commission requires full reservation charge credits. Partial credits may be provided pursuant to: (1) the No-Profit method under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1, or (2) the Safe Harbor method under which the pipeline provides full credits after a short grace period when no credit is due (i.e., 10 days or less).⁷¹ The Commission has defined force majeure outages as events that are both unexpected and uncontrollable.⁷² The Commission has held that routine, scheduled maintenance is not a force majeure event, and this policy is not dependent on the specific operational conditions of the pipeline.⁷³ That is because, even if such outages are not considered to be reasonably within the pipeline's control, they are expected. In the 2007 decision of *North Baja Pipeline, LLC v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit

⁷⁰ See, e.g., *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011); *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224 (2012), *order on reh'g*, 144 FERC ¶ 61,215 (2013) (*Gulf South*).

⁷¹ See, e.g., *Tennessee Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), (Opinion No. 406), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by, Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006). The Commission has also stated that pipelines may use some other method which achieves equitable sharing in the same ball park as the first two methods.

⁷² See, e.g., Opinion No. 406, 76 FERC ¶ 61,022 at 61,088.

⁷³ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at P 14 (2003).

affirmed the major elements of the Commission's reservation charge crediting policies.⁷⁴

b. Empire's Tariff and Reservation Charge Crediting Policy

77. The reservation charge crediting provisions that Empire proposes to include in sections 3.7 and 3.8 of Rate Schedule FTNN are identical to the same-numbered sections currently included in its existing Rate Schedule FT and are generally consistent with Commission policy. However, one aspect of proposed section 3.7 of Rate Schedule FTNN and section 3.7 of existing Rate Schedule FT is inconsistent with Commission policy. Specifically, section 3.7 of both rate schedules list the circumstances of non-force majeure events for which Empire will provide full reservation charge credits:

If Transporter fails to tender Gas for redelivery at the Point(s) of Delivery for the account of a Shipper during any Day, *due to Transporter's scheduling of necessary maintenance and repair of pipeline facilities, necessary maintenance and repair of compression facilities, and/or facility outages for tie-in of new facilities*, but not including any incidence of force majeure, as defined in Section 28.6 of the General Terms and Conditions.⁷⁵

78. Commission policy requires that the pipeline provide full reservation charge credits for all outages not caused by force majeure events. However, section 3.7 can be interpreted as only providing full reservation charge credits for the specified non-*force majeure* events, rather than for all events that do not satisfy the definition of *force majeure*.

79. In addition, the reservation charge crediting provisions in both proposed Rate Schedule FTNN and existing Rate Schedule FT refer to Empire's existing definition of "*force majeure*" in section 28.6(a) of Empire's currently effective tariff. Existing section 28.6(a) includes as an instance of *force majeure* "the

⁷⁴ *N. Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *aff'd*, *N. Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005).

⁷⁵ Emphasis added.

necessity for testing (as required by *governmental authority or as deemed necessary* by Transporter for the safe operation thereof).”⁷⁶ We have considered similar tariff provisions included in the definition of force majeure and explained that outages may be treated as resulting from a *force majeure* event only if they are due to events that are both not reasonably in the pipeline’s control and are unexpected.⁷⁷ Specifically, with respect to the language referring to governmental authority, we have found that to the extent this existing tariff language treats all outages for testing, repair, and maintenance to comply with governmental orders as force majeure events, the language is over-inclusive and in conflict with Commission policy.⁷⁸

⁷⁶ Emphasis added.

⁷⁷ See, e.g., *Algonquin Gas Transmission, LLC*, 143 FERC ¶ 61,082, at PP 24-25 (2013); *Texas Eastern Transmission, LP*, 140 FERC ¶ 61,216, at PP 82-88 (2012) (*Texas Eastern*); *Gas Transmission Northwest LLC*, 141 FERC ¶ 61,101, at PP 47-49 (2012) (*GTN*). See also *TransColorado Gas Transmission Co. LLC*, 144 FERC ¶ 61,175, at PP 35-44 (2013) and *Gulf South*, 144 FERC ¶ 61,215, at PP 31-34 (clarifying the distinction between government actions that may be treated as *force majeure* events and those which may not).

⁷⁸ *GTN*, 141 FERC ¶ 61,101 at P 49; *Texas Eastern*, 140 FERC ¶ 61,216 at P 88. Consistent with *Panhandle Eastern Pipeline Co. LP*, 143 FERC ¶ 61,041, at P 68 (2013) (*Panhandle*), if Empire files revised tariff language in compliance with this order, it may include in that filing a provision permitting partial reservation charge crediting for a transitional period of two years for outages resulting from orders issued by the Pipeline and Hazardous Safety Administration (PHMSA) of the United States Department of Transportation pursuant to section 23 of the Pipeline Safety, Regulatory and Job Creation Act of 2011, codified at 49 U.S.C. § 60139(c) (2012). The Commission has found that such outages are comparable to those for which partial crediting is allowed for force majeure events. *Gulf South Pipeline Co. LP*, 141 FERC ¶ 61,224, at P 40 (2012), *order den. reh’g*, 144 FERC ¶ 61,215 (2013); *Gulf Crossing Pipeline Co. LLC*, 141 FERC ¶ 61,222, at P 40 (2012), *order den. reh’g*, 145 FERC ¶ 61,021 (2013); and *Texas Gas Transmission, LLC*, 141 FERC ¶ 61,223, at P 39 (2012). In addition, our holdings in this order are without prejudice to Empire’s filing a proposal to allow equitable sharing of credits resulting from other new safety requirements PHMSA may adopt, after the nature and timing of such new requirements becomes sufficiently clear to allow consideration of whether such a proposal is just and reasonable. *Panhandle*, 143 FERC ¶ 61,041 at P 69.

80. Thus, pursuant to section 5 of the NGA, Empire is directed, within 30 days of the date of this order, either to (1) remove the provision in section 3.7 of existing Rate Schedule FT limiting credits for non-*force majeure* outages “due to Transporter’s scheduling of necessary maintenance and repair of pipeline facilities, necessary maintenance and repair of compression facilities, and/or facility outages for tie-in of new facilities,” and modify existing section 28.6(a) of its GT&C, which Empire proposes to renumber as section 30.6(a), to exclude outages resulting from “the necessity for testing (as required by governmental authority or as deemed necessary by Transporter for the safe operation thereof)” or revise its definition of force majeure to only include outages which are both outside the pipeline’s control and are unexpected; or (2) show cause why it should not be required to do so. Empire must submit this filing through the eTariff portal using a Type of Filing Code 580. The filing will be assigned an RP docket and will be processed separately from this certificate proceeding. When Empire files to commence the services that are the subject of this proceeding, it must revise proposed section 3.7 of Rate Schedule FTNN to conform to the outcome of the section 5 proceeding concerning Empire’s existing Rate Schedule FT.

c. Right of First Refusal Policy

81. Section 15.6 of Empire’s GT&C provides that:

In order to exercise its [right of first refusal], Shipper must agree to a rate equal to or greater to the rate set forth in the Best Bid(s) and agree to execute a service agreement for a contract term equal to the contract term set forth in the Best Bid(s).

82. The Commission has determined that where a pipeline uses the Net Present Value (NPV) method to determine the value of a new customer’s bid, the pipeline must also use the NPV method to determine the value of the existing customer’s bid in the right of first refusal process in order to ensure that an existing customer can match the bid of the new customer by bidding any combination of rate, up to the applicable maximum rate under section 284.10 of our regulations,⁷⁹ and term that has the same NPV as the bid of the new customer.⁸⁰

⁷⁹ 18 C.F.R. § 284.221(d)(2)(ii) (2014).

⁸⁰ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, 106 FERC ¶ 61,088, at P 19 (2004).

83. We find that section 15.6 of Empire's GT&C is contrary to Commission policy because it unreasonably requires the existing customer to bid the same rate and term as in the new customer's bid, rather than permitting it to bid any combination of rate, up to the applicable maximum rate under section 284.10, and term that matches the NPV of the bid of the new customer. For this reason, pursuant to section 5 of the NGA, we will direct Empire, within 30 days of the date of this order, either to (1) revise section 15.6 of its GT&C to provide that when an existing shipper exercises its right of first refusal, it must agree to a combination of rate, up to the applicable maximum rate under section 284.10 of our regulations, and term that is equivalent to the Best Bid(s) on an NPV basis or (2) show cause why it should not be required to do so. As noted above, Empire must submit this filing through the eTariff portal using a Type of Filing Code 580.

D. Engineering Review

84. Empire states that, depending on RG&E's and NYSEG's specific designation of receipt or delivery points and the associated volumes, Empire's sustainable firm south-to-north capacity could be somewhat higher or lower than the quantities described in Exhibit G of its application. A review of information provided by Empire confirms this fact. We will grant Empire's requested clarification that its ability to provide long-term firm south-to-north transportation service requested by RG&E and NYSEG is not limited to these quantities under such circumstances. Empire must post additional capacity for bidding on its electronic bulletin board.

E. Environmental Review

85. For the discussion of environmental review we refer to the joint applicants collectively as National Fuel. On April 12, 2013, the Commission staff began the environmental review of the project after granting National Fuel's request to use the pre-filing process and assigning Docket No. PF13-12-000. As part of the pre-filing review, on April 23, 2013, staff participated in an open house sponsored by National Fuel in Lawrenceville, Pennsylvania, to explain our environmental review process to interested stakeholders.

86. On October 3, 2013, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Tuscarora Lateral Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting* (NOI). The NOI was mailed to interested parties on the Commission staff's environmental mailing list including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

87. On October 16, 2013, staff conducted a public scoping meeting in Addison, New York, to provide an opportunity for agencies and the general public to learn more about the environmental review process, to provide comments on the project, and to identify issues to be addressed in the environmental assessment. The scoping meeting was attended by approximately twenty people, five of whom provided verbal comments on the project.

88. We received a protest in response to the NOI from the Allegheny Defense Project (Allegheny) and comments from the Pennsylvania Bureau for Historic Preservation; the Pennsylvania Game Commission; the New York State Historic Preservation Office; Stockbridge Munsee Tribal Historic Preservation Office; U.S. Department of Agriculture, Farm Service Agency; U.S. Environmental Protection Agency; and six individual landowners. The primary issues raised during the public scoping review concerned impacts on agricultural lands, impacts on wells and springs, noise and vibration, public safety, impacts on historic properties, cumulative impacts, route alternatives, and land use impacts. Based on public comments and environmental analyses conducted during the pre-filing process, National Fuel adopted seventeen route variations.

89. To satisfy the requirements of the National Environmental Policy Act (NEPA),⁸¹ our staff prepared an environmental assessment (EA) for National Fuel's proposal. The EA was prepared with the cooperation of the New York Department of Agriculture and Markets. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise and vibration, safety, and alternatives. All substantive comments received in response to the NOI were addressed in the EA.

90. Commission staff mailed the EA to all stakeholders on its environmental mailing list and placed the EA into the public record on October 31, 2014,⁸² initiating a 30-day comment period. The Commission received timely comments on the EA from Allegheny, Jill Hall, David Morseman, and National Fuel. The Commission also received comments out of time from the U.S. Fish and Wildlife Service and a response from National Fuel addressing Allegheny's comments on the EA.

⁸¹ 42 U.S.C. §§ 4321–4370h (2012).

⁸² See also *Notice of Availability of the Environmental Assessment for the Proposed Tuscarora Lateral Project*, 79 Fed. Reg. 65,929 (Nov. 6, 2014).

91. National Fuel's comments, filed December 1, 2014, clarify and update minor points in the EA regarding land use, miscellaneous permits and consultation, construction methods, groundwater resources, air quality, noise mitigation, locations of different U.S. Department of Transportation Classes of pipe, and nearby pipeline and highway projects. The Commission's review finds that none of these clarifications or updates alter conclusions in the EA regarding environmental impacts resulting from the project. We summarize the most important information below:

- By decreasing the construction right-of-way width by 10 feet in forested areas, the applicants will decrease project construction impacts on forests from 230.8 acres, as indicated in the EA to 220.0 acres.
- The NYSDEC issued a section 401 Water Quality Certification (WQC) for the project on October 3, 2014.
- The NYSDEC issued a minor facility air source registration certificate on August 11, 2014.
- The value for GHG emissions from the compressor station has been updated to 16,467 tons per year of carbon dioxide equivalent (tpy CO₂e) based on refined information in the air registration application to NYSDEC, rather than 16,794 tpy CO₂e reported in the EA.
- Applicants identify 4 additional water wells within 150 feet of the right-of-way that were not identified in the EA. As indicated in the EA,⁸³ applicants propose to test all water wells within 150 feet of the construction right-of-way prior to and after construction to confirm that the wells are not affected; they commit to make any repairs to affected wells.
- Applicants plan to use timber matting as the required low-ground-pressure equipment if standing water or saturated soils are present in the project path.
- Noise barriers will be 16 feet high, rather than 6 feet high as reported in the EA.
- The applicants note that the Tioga County Extension Project was placed into service on November 29, 2011. It is not currently under construction as reported in the EA.

⁸³ October 31, 2014 Environmental Assessment at 24 (EA).

1. Programmatic NEPA Review

92. Allegheny requests that the Commission postpone action on National Fuel's application and on all other projects "related to natural gas drilling infrastructure in the northeastern United States" until the Commission prepares a regional programmatic environmental impact statement (EIS) examining the direct, indirect, and cumulative effects of shale gas extraction and transportation in the Marcellus Shale region.⁸⁴ Allegheny asserts that the Commission, and the federal government more broadly, are acting on large-scale plans for regional development "to aggressively promote and actively facilitate the extraction of shale gas in the Marcellus Shale region."⁸⁵ Allegheny marshals an array of alleged indicia of a Commission program of large-scale regional development.⁸⁶

⁸⁴ Allegheny April 23, 2014 Protest at 1-2, 11 (Protest); Allegheny December 1, 2014 Comments at 1-8 (Comments).

⁸⁵ *Id.* at 5; Comments at 7.

⁸⁶ These include statements and an order from the President; excerpts and lists of previous certificate proceedings related to the Marcellus Shale region; a list of pending major pipeline project proceedings; statements of Commission staff quoted in the trade press; statements of individual Commissioners; Commission staff documents depicting the Marcellus Shale resource and grouping approved, pending, and potential projects by state and region; an excerpt from our *Strategic Plan for FY2014-2018*; and statements from industry actors and the Energy Information Administration. Allegheny offers this as evidence that the Commission is aware that shale gas production is increasing, Protest at 9-10; that natural gas companies plan to increase infrastructure capacity "to accommodate and facilitate" this shale gas production, *id.* at 11; that the Commission is coordinating with industry to rapidly expand natural gas infrastructure in the Marcellus Shale region, *id.* at 15; that the Commission has been assisting the industry in piecemeal projects to ensure that gas infrastructure is in place to support the nation's growing reliance on gas for generation, *id.* at 16-17; that the Commission is aware of both pending and potential projects and considers the scope of these projects at a national and regional level, *id.* at 19, 21, 28; that the gas industry has a regional plan of development for the Marcellus Shale region, *id.* at 29; that the Commission is actively seeking to foster more of a reliance on natural gas for electric generation, *id.* at 35; and that the Commission is pursuing a program to approve natural gas infrastructure as a "critical link" to serve increasing gas-fired electricity generation, Comments at 7.

93. The Commission has addressed Allegheny's request that we prepare a programmatic impact statement on Appalachian shale infrastructure in several other orders.⁸⁷ The Council on Environmental Quality's (CEQ) NEPA-implementing regulations state that major federal actions for which an EIS may be required include "programs, such as a group of concerted actions to implement a specific policy or plan; [and] systematic and connected agency decisions allocating agency resources to implement a specific statutory program."⁸⁸ As the Commission has found in *Texas Eastern Transmission, LP*, and other orders, there is no Commission plan or policy to promote the unconventional production of, or increase reliance on, natural gas. Rather, interstate natural gas infrastructure is proposed and developed by private industry, as reflected in applications filed with the Commission by natural gas companies.⁸⁹ Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities "is or will be required by the present or future public convenience and necessity."⁹⁰ In reaching this determination, the Commission performs a flexible, balancing process in which it weighs the criteria enumerated in the Commission's Certificate Policy Statement, as detailed above, as well as analyzes and balances the potential environmental impacts of the proposed project.

94. Nor do the Commission's efforts to coordinate natural gas-based electric generation and natural gas provide a basis for requiring a programmatic environmental review. As explained in the Notice of Proposed Rulemaking for natural gas and electric coordination, new rules to address scheduling practices of the natural gas transportation and electricity markets do not involve any construction and qualify for a categorical exemption from environmental review under the Commission's NEPA-implementing regulations.

95. Further, Allegheny has not shown any interrelationship or connectedness between the various referenced pipeline projects proposed to provide capacity to

⁸⁷ See, e.g., *Texas Eastern Transmission, LP (Texas Eastern)*, 149 FERC ¶ 61,259 (2014), *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 (2014), *Tennessee Gas Pipeline Company, L.L.C.*, 150 FERC ¶ 61,160 (2015), *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 (2015).

⁸⁸ 40 C.F.R. § 1508.18(b)(3) (2014).

⁸⁹ See *Texas Eastern*, 149 FERC ¶ 61,259, at PP 44-45 (2014).

⁹⁰ 15 U.S.C. § 717f(e) (2012).

accommodate additional supply sourced in the northeastern U.S. beyond the fact that they might share a general regional proximity to the Marcellus Shale region. None of these projects' utility is shown to be functionally or financially dependent upon any other project; nor are any proposals shown, or claimed to be, dependent upon the timing of another project's approval or service date. Based on this independent utility, these projects would not trigger one another and could proceed on their own. Accordingly, the proposed projects described by Allegheny are not interdependent or otherwise interrelated or connected, either physically or in purpose.

96. For all of the above reasons, the Commission concludes that no program exists upon which the Commission must undertake a programmatic EIS.

2. Segmentation

97. Allegheny contends⁹¹ that the Commission has improperly segmented its review of the Tuscarora Lateral Project from (a) National Fuel's Tioga County Extension Project (Tioga Project),⁹² Central Tioga County Extension Project (Central Tioga Project), and Northern Access 2015 Expansion,⁹³ and from (b) Tennessee Gas Pipeline Company's "Mercer Compressor Station Project"⁹⁴ and Rose Lake Expansion Project.⁹⁵

98. When assessing a proposed project's scope under NEPA, an agency must examine both connected and cumulative actions, and may examine similar actions.⁹⁶ An agency impermissibly "segments" NEPA review when it divides these federal actions "into separate projects and thereby fails to address the true

⁹¹ Protest at 33-34; Comments at 8.

⁹² See *Empire Pipeline, Inc.*, 135 FERC ¶ 61,163 (2011).

⁹³ Pending in Docket No. CP14-100-000.

⁹⁴ Modification of Tennessee's Compressor Station 219 in Mercer County, Pennsylvania is proposed as part of Tennessee's Niagara Expansion Project pending in Docket No. CP14-88-000.

⁹⁵ See *Tennessee Gas Pipeline Company, L.L.C.*, 144 FERC ¶ 61,219 (2013).

⁹⁶ 40 C.F.R. § 1508.25(a)(2014).

scope and impact of the activities that should be under consideration.”⁹⁷ Only by comprehensively considering “pending proposals can the agency evaluate different courses of action.”⁹⁸

99. Actions are “connected” if they: “[a]utomatically trigger other actions which may require environmental impact statements;” “[c]annot or will not proceed unless other actions are taken previously or simultaneously;” or “[a]re interdependent parts of a larger action and depend on the larger action for their justification.”⁹⁹ Actions are not “connected” if they have “independent utility”¹⁰⁰ or if other actions have yet to be proposed.¹⁰¹ A proposal occurs when: (1) agency action subject to NEPA has a goal; (2) the agency is actively preparing to make a decision on one or more alternative means of accomplishing that goal; and (3) the effects can be meaningfully evaluated.¹⁰² A proposal may exist in fact as well as by agency declaration that one exists.¹⁰³

100. Actions are “cumulative” if they, when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the

⁹⁷ *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

⁹⁸ *Id.* (quoting *Kleppe v Sierra Club*, 427 U.S. 390, 410 (1976)).

⁹⁹ *Id.* § 1508.25(a)(1)(i)-(iii) (2014).

¹⁰⁰ See *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988); *Hudson River Sloop Clearwater, Inc. v. Dep’t of Navy*, 836 F.2d 760, 764 (2d Cir. 1988); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

¹⁰¹ Connected actions must be “proposed.” *Delaware Riverkeeper Network*, 753 F.3d at 1317 (citing *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (1981)).

¹⁰² 40 C.F.R. § 1508.23 (2014).

¹⁰³ *Id.*

same impact statement.¹⁰⁴ Similar to connected actions, cumulative actions must be proposed.¹⁰⁵

101. Actions are “similar” if they, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.”¹⁰⁶ Unlike connected and cumulative actions, analyzing similar actions is not always mandatory.¹⁰⁷ An agency *may* wish to analyze these actions in the same impact statement, but it should do so when “the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.”¹⁰⁸

102. Allegheny contends that the Tuscarora Lateral Project, Tioga Project, and Central Tioga Project are like spokes extending from a shared hub at the Jackson Interconnection.¹⁰⁹ Allegheny argues that the EA resembles the one remanded by the D.C. Circuit Court of Appeals in *Delaware Riverkeeper v. FERC* for illegally segmenting four pipeline construction projects into separate NEPA reviews.¹¹⁰

103. Allegheny also appears to argue that the modifications to Tennessee’s Compressor Station 219 must be reviewed with the Tuscarora Lateral Project because National Fuel created a map of “Infrastructure Expansions” on its website which depicts both the future Central Tioga Project and the “Mercer Compressor Station” on the same page.¹¹¹ Allegheny then seems to argue that the Northern

¹⁰⁴ 40 C.F.R. § 1508.25(a)(2).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 1508.25(a)(3).

¹⁰⁷ *San Juan Citizens' Alliance v. Salazar*, CIV.A.00CV00379REBCB, 2009 WL 824410, at *13 (D. Colo. Mar. 30, 2009) (citing 40 C.F.R. § 1508.25(a)(3) for the proposition that “nothing in the relevant regulations compels the preparation of a single EIS for ‘similar actions’”).

¹⁰⁸ 40 C.F.R. § 1508.25(a)(3).

¹⁰⁹ Comments at 8.

¹¹⁰ 753 F.3d 1304 (2014).

¹¹¹ Protest at 32-34, attach. 5.

Access 2015 Project must be reviewed with the Tuscarora Lateral Project because the “Mercer Compressor Station Project” on the map is part of Tennessee Gas Pipeline’s Niagara Expansion Project, which the Commission reviewed in the same EA with National Fuel’s Northern Access 2015 project.¹¹²

104. In evaluating whether actions are improperly segmented courts typically employ an “independent utility” test, which “asks whether each project would have taken place in the other’s absence. If so, they have independent utility and are not considered connected actions.”¹¹³

105. The Tioga Project, Tuscarora Lateral Project and the contemplated Central Tioga Project have substantial independent utility. The Tioga Project extended Empire’s pipeline system beyond the Corning terminus south to Jackson, Pennsylvania, to enable bi-directional transportation of gas from south to north.¹¹⁴ The Tioga Project was placed into service in November 2011, approximately four years before the Tuscarora Lateral Project’s anticipated in-service date.¹¹⁵ The Tuscarora Lateral Project, by connecting the pipeline at Jackson to National Fuel’s available storage and transportation capacity, will allow Empire to offer new no-notice services to two existing shippers and to provide a new receipt point. The contemplated Central Tioga Project, which is not before the Commission in any form, would potentially extend Empire’s pipeline system south from Jackson into Tioga County Pennsylvania with the purpose to provide an outlet for additional gas production in the area.¹¹⁶ There are no firm market commitments for the Central Tioga Project, and its probable timetable, according to National Fuel, is at

¹¹² *Id.* Commission staff filed the EA on July 16, 2014, in Docket Nos. CP14-88-000 and CP14-100-000.

¹¹³ See e.g., *Delaware Riverkeeper*, 753 F.3d at 1316-17 (assessing independent utility as one of four factors articulated in *Taxpayers Watchdog v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987)); *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411, 426 (4th Cir. 2012); *Wilderness Workshop*, 531 F.3d 1220, 229 (10th Cir. 2008); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

¹¹⁴ *Empire Pipeline, Inc.*, 135 FERC ¶ 61,163 (2011) (Docket No. CP10-493-000).

¹¹⁵ National Fuel December 5 Response at 1.

¹¹⁶ National Fuel December 5 Response at 1-2.

least two years later than the timetable for the Tuscarora Lateral Project. Each project is or will be financially supported by separate customer contracts.

106. The Tuscarora Lateral Project situation is factually and legally distinct from *Delaware Riverkeeper Network*. That case considered four pipeline upgrades on a single mainline simultaneously under construction or pending before the Commission for environmental review.¹¹⁷ The court described the combined projects to constitute “a complete overhaul and upgrade that was physically, functionally, and financially connected and interdependent.”¹¹⁸ The court found “a clear physical, functional, and temporal nexus between the projects,”¹¹⁹ which, if approved, would result in a single pipeline carrying gas between the same start and end points without spurs, interchanges, or corridors.¹²⁰ Here, however, the Tioga, Tuscarora Lateral, and Central Tioga Projects have no common temporal nexus. Though they share the Jackson interconnection as a hub, they have separate logical termini—at Corning, at the Tuscarora Compressor Station, and in Tioga County, respectively—related to their distinct purposes. Commission staff did, in fact, consider the Tioga Project in the EA’s cumulative impacts analysis.¹²¹ The comparison to *Delaware Riverkeeper Network* is inapposite.

107. National Fuel’s Northern Access 2015 Expansion,¹²² and Tennessee Gas Pipe Line Company’s Niagara Expansion Project and Rose Lake Expansion Project are not connected actions with the Tuscarora Lateral Project. While true that Commission staff reviewed in the same environmental assessment both the Northern Access 2015 Project and the Niagara Expansion Project, of which modifications to Compressor Station 219 are a component, joint review was logical because the service proposed by Tennessee in its Niagara Expansion Project was dependent in part upon the facilities proposed by National Fuel in its

¹¹⁷ 753 F.3d at 1314.

¹¹⁸ *Id.* at 1308.

¹¹⁹ *Id.* at 1308.

¹²⁰ 753 F.3d at 1316.

¹²¹ EA at 58.

¹²² Pending in Docket No. CP14-88-000.

Northern Access 2015 Expansion Project.¹²³ Other than Allegheny's claim of loosely shared proximity, neither of these projects are directly related to the Tuscarora Lateral Project, and they are not contingent on its success or failure. Tennessee's Rose Lake Expansion Project similarly has no functional or financial interdependence with the Tuscarora Lateral Project. Because the Rose Lake Expansion Project is currently under construction in the Tuscarora Lateral Project area, it was considered in the EA's cumulative impacts analysis.¹²⁴

3. Indirect Impacts

108. Allegheny also asserts that the Commission must analyze the indirect impacts of induced shale gas development, especially impacts to the Allegheny National Forest and to Pennsylvania's state forests and parks.¹²⁵

109. Indirect impacts are "caused by the proposed action" and occur later in time or farther removed in distance than direct project impacts, but are still "reasonably foreseeable."¹²⁶ Indirect impacts may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water.¹²⁷ For an agency to include consideration of an impact in its NEPA analysis as an indirect effect, approval of the proposed project and the related secondary effect must be causally related, i.e., the agency action and the effect must be "two links of a single chain."¹²⁸

110. Contrary to Allegheny's assertions, the potential environmental effects associated with shale gas development are neither sufficiently causally related to the Tuscarora Lateral Project to warrant a detailed analysis nor are the potential

¹²³ Commission staff filed the EA on July 16, 2014, in Docket Nos. CP14-88-000 and CP14-100-000.

¹²⁴ EA at 58.

¹²⁵ Protest at 55-57; Comments at 9.

¹²⁶ 40 C.F.R. § 1508.8(b) (2014).

¹²⁷ *Id.*

¹²⁸ *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394 (9th Cir. 1989).

environmental impacts reasonably foreseeable, as contemplated by the CEQ regulations.¹²⁹

111. The proposed project is not creating the growth in the development of unconventional gas resources in the Marcellus region. Rather, the preexisting natural gas production in that region has been identified by the market as a potentially desirable alternative supply source. The purpose of the Tuscarora Lateral Project is to enable Empire to offer its customers new no-notice services using available storage and transportation capacity on National Fuel's system. While it is possible that gas received by Empire at the interconnection with Millennium at Corning could include Marcellus Shale-sourced gas, the proposed project will operate for decades and can draw on multiple sources of gas. Whether or how much gas from any specific source will travel through the project cannot be known. However, additional development of unconventional gas resources in the Marcellus regions will likely continue regardless of the Tuscarora Lateral Project is approved because multiple existing and proposed transportation alternatives for production from the region are available,¹³⁰ Any such production would take place pursuant to the regulatory authority of state and local governments. There is an insufficient causal link between the proposed project and additional development in the region for such development to be considered an indirect impact under NEPA and CEQ's regulations.

112. The Commission staff's environmental review in the EA focused on the impact of constructing and operating the project. Where gas production and consumption activities lie within the project's region of influence, the EA has included those facilities in the cumulative impact analysis.¹³¹ We agree with this approach.

¹²⁹ See *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed, sub nom., Coalition for Responsible Growth v. FERC*, 485 F. Appx. 472, 474-75 (2012) (upholding FERC analysis of the development of Marcellus Shale natural gas reserves where FERC reasonably concluded that the impacts of that development were not sufficiently causally-related to the projects to warrant a more in-depth analysis).

¹³⁰ *Id.*

¹³¹ EA at 56-65.

113. Moreover, even if a sufficient causal relationship between the project and natural gas production were shown, the scope of the *impacts* from any such induced production is not reasonably foreseeable as contemplated by CEQ's regulations and case law. An impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."¹³² Courts have noted that the starting point of any NEPA analysis is a "rule of reason," under which NEPA documents "need not address remote and highly speculative consequences."¹³³ While courts have held that NEPA requires "reasonable forecasting," an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."¹³⁴

114. Knowing the general region from which gas to be shipped on a particular pipeline might be sourced does not enable the Commission to forecast (as opposed to speculate about) the number, location, or timing of the development of the new or existing wells that might produce the gas which will be transported on the project facilities over their lifespans. In the absence of such information, the Commission in turn cannot forecast and analyze the specific impacts which might be associated with any additional production. No party has presented or referenced any accepted, detailed information that quantifies the environmental impacts of producing natural gas in the various areas from which the proposed project might be supplied. Accordingly, we find that even if we were to find the required causal relation, which we do not, there is not sufficient information available regarding potential upstream impacts to develop an analysis which would assist the Commission in either choosing between alternatives or developing mitigation measures.

4. Cumulative Impacts

115. Allegheny argues that the Commission's analysis of cumulative impacts is deficient. A cumulative impact is defined by CEQ as the "impact on the

¹³² *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

¹³³ *Hammond v. Norton*, 370 F.Supp.2d 226, 245–46 (D.D.C. 2005) (quoting *Potomac Alliance v. U.S. Nuclear Reg'y Comm'n*, 682 F.2d 1030, 1035 (D.C. Cir. 1982) and *Deukmejian v. U.S. Nuclear Reg'y Comm'n*, 751 F.2d 1287, 1300, 1300 n.63 (D.C. Cir. 1984)).

¹³⁴ *N. Plains Res. Council v. Surface Transp. Board.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”¹³⁵ A cumulative impacts analysis may require an analysis of actions unrelated to the proposed project if they occur in the project area or the region of influence of the project being analyzed.¹³⁶ CEQ states that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”¹³⁷ An agency is only required to include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.”¹³⁸

116. Allegheny argues that the EA’s cumulative impact analysis does not adequately discuss cumulative impacts to land use, groundwater, waterbodies, wetlands, fisheries, wildlife, the Allegheny National Forest, and Pennsylvania state forests and parks because Commission staff assumes that the Tuscarora Lateral Project will have a small footprint.

117. CEQ’s guidance on cumulative impacts assessments advises that agencies have substantial discretion in determining the appropriate level of the cumulative impacts assessments.¹³⁹ CEQ further states that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.¹⁴⁰ Accordingly, proposed actions that result in a finding of no significant

¹³⁵ 40 C.F.R. §1508.7 (2014).

¹³⁶ CEQ Guidance, *Considering Cumulative Effects Under the National Environmental Policy Act*, (January 1997).

¹³⁷ *Id.* at 8.

¹³⁸ *New York Natural Resource Defense Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976) (citing *Natural Resource Defense Council v. Calloway*, 524 F.2d 79, 88 (2d. Cir. 1975)).

¹³⁹ The Supreme Court has similarly held that “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.” *Kleppe*, 427 U.S. 390 at 413.

¹⁴⁰ *CEQ Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis at 2-3*, (*CEQ Guidance on Past Effects*); *See also, El Paso Natural Gas Co.*, 136 FERC ¶ 61,175, at P 5 (2011).

impact usually involve only a limited cumulative impact analysis to confirm that the proposed action would not, in fact, have a significant impact on the environment.¹⁴¹

118. The EA defines the Tuscarora Lateral Project's region of influence, or the area affected by the proposed action in which existing and reasonably foreseeable future projects may also result in cumulative impacts, as a half-mile radius from proposed facilities, explaining that this area would include most resources affected and noting that the analysis includes some impacts beyond this region if the Tuscarora Lateral Project's impacts could go beyond this region.¹⁴² The EA identifies fourteen other known projects, and also Marcellus Shale development in one Pennsylvania county and three New York townships, as being within the same space and time as the Tuscarora Lateral Project's region of influence.

119. For Marcellus Shale development, the EA notes the number of well permits in Tioga County, Pennsylvania, and in the Towns of Tuscarora, Lindley, and Caton, New York, despite the fact that New York has a statewide moratorium on shale development. The EA explains that the construction footprints at well sites are variable and may include different types of affected environmental resources. This makes impacts impossible to quantify. The EA instead discusses the cumulative impacts in general, qualitative terms.

120. We conclude that staff appropriately considered the cumulative impacts for the Tuscarora Lateral Project.

121. Allegheny also objects that the EA found no significant direct, indirect, or cumulative adverse air impacts from the project, but failed to consider recent studies suggesting that potentially large methane emissions from shale gas development may exacerbate climate change.¹⁴³ Allegheny asserts that the Commission may not rely on the project's purported benefits to air quality—i.e., EA noted that the project could contribute to a net improvement in regional air quality if a portion of the carried natural gas displaces more-polluting fuels—if the Commission ignores detriments to air quality like methane emissions from gas extraction activities.

¹⁴¹ *Id.*

¹⁴² EA at 57.

¹⁴³ Protest at 58-59; Comments at 10-11.

122. We disagree. First, the construction of the Tuscarora Lateral Project will move quickly through a large geographic area, thus rarely overlapping with construction of nearby projects, and the cumulative air emissions from both construction and operation will be intermittent and short-term.¹⁴⁴ We accept the EA's conclusion that significant adverse impacts to air quality in the region are unlikely. Long-term air impacts, including methane emissions, related to Marcellus Shale development, are too speculative to estimate. Better information is emerging about fugitive methane emissions from natural gas production, both conventional and unconventional. When the quality of this information and its nexus with a proposed project allow for meaningful consideration, we will modify our analysis accordingly. Further, though the EA notes the potential for benefits to regional air quality, it does not rely on these benefits to conclude that adverse impacts to air quality will not be significant.

5. Roadway Obstruction

123. Ms. Jill Hall indicates concern over the use of an open cut method to cross a road near her home to install the pipeline. She warns that portions of the road are impassable during the winter season and that project construction must not obstruct emergency vehicles on the road.

124. National Fuel clarifies in its December 1, 2014 comments that its standard road crossing specifications and construction procedures require the pipeline contractor to leave at least half of the roadway undisturbed or to place steel plates over the pipeline trench to maintain emergency vehicle access. We conclude that this commitment satisfactorily addresses Ms. Hall's concern.

6. Vegetation and Wildlife

125. The U.S. Fish and Wildlife Service recommends that the applicant identify invasive species in the project's work areas using preconstruction surveys and prepare a plan to control invasive species. The U.S. Fish and Wildlife Service recommends that the plan specify the removal and proper disposal of invasive plants prior to construction, that control methods be identified in the environmental document, and that monitoring be included as part of post-construction surveys.

¹⁴⁴ *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121 at PP 183-84; *Tennessee Gas Pipeline*, 142 FERC ¶ 61,025, at P 87 (2013).

126. The EA notes that four common invasive and nuisance plants have been observed in the project area and that any clearing of forest vegetation would increase the potential for erosion and the spread of invasive and nuisance plant species¹⁴⁵ However, National Fuel has committed to implement several measures in its Erosion and Sediment Control and Agricultural Mitigation Plan (ESCAMP) to reduce clearing of forested vegetation, to revegetate cleared lands, to monitor revegetation success, to minimize and control erosion, and to reduce vegetation maintenance in wetlands.¹⁴⁶ National Fuel has also developed an Invasive Species Control Plan, which it submitted with its application.¹⁴⁷ National Fuel has committed to perform monitoring under both of these plans to confirm post-construction conditions.

127. We conclude that the measures in National Fuel's ESCAMP and Invasive Species Control Plan, as well as the Commission's Upland Erosion Control Maintenance and Revegetation Plan, in combination with our environmental conditions, will adequately promote the re-establishment of vegetation and prevent the spread of invasive species.

128. The U.S. Fish and Wildlife Service also recommends that we request data on operating noise levels at the modified Tuscarora Compressor Station and identify mitigation measures to protect wildlife if noise levels will exceed background levels. The EA notes that the additional compressor unit will be installed in a sound-insulated building, and National Fuel will install new, high-performance exhaust and intake system silencers on both existing compressor units.¹⁴⁸ National Fuel conducted a detailed noise assessment for the facility which estimated that sound levels at full load at the modified station will be lower than sound levels at the existing facility. Further, Environmental Condition 15 requires a noise survey at the Tuscarora Compressor Station after modification to verify that the noise from all the equipment operated at full power load does not exceed the EPA's public health and welfare standard of 55 decibels on the A-weighted scale (dBA) for the day-night sound level (Ldn), or does not exceed previously existing noise levels that were above the EPA standard. If the prescribed noise levels are exceeded, National Fuel must mitigate the noise and

¹⁴⁵ EA at 29.

¹⁴⁶ *Id.* at 30.

¹⁴⁷ Application vol. II, Ex. F-I, Res. Rep. 3 at 10; *id.* at Appendix 2-D.

¹⁴⁸ EA at 48.

file a second noise survey. Commission staff found that through National Fuel's proposed measures and the environmental condition, noise impacts from the Tuscarora Compressor Station would be reduced. We accept this conclusion and find that it satisfies the U.S. Fish and Wildlife Service's recommendations.

129. The U.S. Fish and Wildlife Service concurs with the Commission's determination that the project, as conditioned, would result in no jeopardy to the northern long-eared bat. This species is proposed for listing under the Endangered Species Act, and a decision is expected on or about April 2, 2015.

130. The U.S. Fish and Wildlife Service recommends that National Fuel confirm whether active bald eagle nests occur within the project vicinity and implement the U.S. Fish and Wildlife Service's recommended mitigation measures if they do. The EA notes that the project is located within the North American Bird Conservation Initiative – Bird Conservation Region 28, which lists bald eagles among the 25 birds of conservation concern potentially occurring in the project area.¹⁴⁹ The EA explains that conducting tree clearing outside of the migratory bird nesting season, April 15 to August 1, would avoid most or all direct impacts on migratory birds. National Fuel has committed to reduce impacts to migratory birds by, among other measures, conducting clearing and other construction activities during the winter, if possible; reducing construction right-of-way by 10 feet in forested tracts; implementing its ESCAMP; and restricting routine right-of-way maintenance clearing during the nesting season. National Fuel initiated consultation with the U.S. Fish and Wildlife Service's regional office on April 25, 2013. We understand this consultation to be pending.

131. Based on the characteristics and habitat of migratory birds, the type and amount of impacts to wildlife habitat, the presence of similar habitats in the vicinity of the project, and National Fuel's proposed construction methods, the EA determines that constructing and operating the project would not result in significant measureable negative impacts on birds of conservation concern or migratory birds, which include the bald eagle.¹⁵⁰ We accept this conclusion and find that it satisfies the U.S. Fish and Wildlife Service's concerns.

132. Mr. David Morseman indicates concern about hydrostatic test water for the project that may be withdrawn from and discharged near Elk Creek. He notes that the EA does not provide the location of Additional Temporary Workspace for

¹⁴⁹ *Id.* at 31-32.

¹⁵⁰ *Id.* at 32-33.

testing; the location of the upland vegetated area for return discharge of water after testing; the specific volume of test water to be withdrawn from Elk Creek; the federal, state, or local permit conditions applicable to the withdrawal; or the possible impacts to downstream Eastern Hellbender salamander from both withdrawal and return discharge of water.

133. National Fuel indicates in its December 1, 2014 comments that additional temporary workspace for the hydrostatic water discharge will be on National Fuel's property next to County Route 100. National Fuel will not discharge hydrostatic test water near Elk Creek, and discharge locations will be permitted through the New York State Department of Environmental Conservation at locations near the Tioga River, away from Elk Creek. Regarding volume, if National Fuel withdraws water from Elk Creek then less than 50,000 gallons of water from Elk Creek would augment the anticipated maximum of 1.5 million gallons of water for hydrostatic testing and horizontal directional drill (HDD) construction. National Fuel will complete the withdrawal and discharge in accordance with the mitigation measures in the Commission's Wetland and Waterbody Construction and Mitigation Procedures. Regarding the Eastern Hellbender salamander, National Fuel indicates that it will restrict withdrawals from the bottom of the creek, will require screens on the intake apparatus, and will control velocity consistent with USEPA guidance. These measures will reduce or avoid sedimentation, thus mitigating risks to the salamander and its habitat. Because return discharges will be located away from Elk Creek, they will not cause sedimentation or erosion in Elk Creek. Based on National Fuel's proposed mitigation, the Commission concludes that the withdrawal and discharge of hydrostatic test water will have minimal effect on Elk Creek.

134. Based on the analysis in the EA, and as further discussed in this order, we conclude that if constructed and operated in accordance with the application and supplement(s), and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

135. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through

application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁵¹

136. The Commission on its own motion, received and made a part of the record all evidence, including the application, as supplemented, and exhibits thereto, submitted in this proceeding and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Empire authorizing it to construct and operate the Tuscarora lateral pipeline, related interconnection facilities, appurtenant facilities, and the capacity lease, as more fully described in the application and this order.

(B) A certificate of public convenience and necessity is issued to National Fuel authorizing it to increase compression at its Tuscarora Compressor Station, as more fully described in the application and this order.

(C) A certificate of public convenience and necessity is issued to Empire authorizing it to re-wheel the Oakfield Compressor Station, as more fully described in the application and this order.

(D) A certificate of public convenience and necessity is issued to Empire authorizing it to lease the subject capacity from National Fuel, as more fully described in the application and this order.

(E) The certificate authority issued in Ordering Paragraphs (A) to (D) shall be conditioned on the following:

(1) Applicants' completion of the authorized construction of the proposed facilities and making them available for service within 24 months from the date of this order, pursuant to section 157.20(b) of the Commission's regulations;

¹⁵¹ See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Nat'l Fuel Gas Supply v. Pub. Serv. Comm'n*, 894 F.2d 571 (2d Cir. 1990); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

- (2) Applicants' compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154 and 284, and section 157.20 of the regulations;
- (3) Applicants' compliance with the environmental conditions listed in the appendix to this order.
- (F) National Fuel shall notify the Commission's environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies National Fuel. National Fuel shall file written confirmation of such notification with the Secretary of the Commission within 24 hours. National Fuel is authorized to abandon by lease to Empire the subject capacity on National Fuel's system, as more fully described in the application and this order.
- (G) National Fuel shall notify the Commission within 10 days of the date of abandonment of the capacity leased to Empire.
- (H) Empire shall execute firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.
- (I) National Fuel shall execute the Capacity Lease Agreement with Empire prior to commencing construction and file the agreement with the Commission at least 30 days prior to its effective date.
- (J) Empire must record the lease payments in Account 858, Transmission and Compression of Gas by Others. National Fuel must record the monthly receipts in Account 489.2, Revenues from Transportation of Gas of Others Through Transmission Facilities.
- (K) Empire must file revised tariff records to reflect the holdings of this order no earlier than 60 days, and no later than 30 days, prior to the date that project facilities go into service.
- (L) Pursuant to section 5 of the NGA, Empire must, within 30 days of the date of this order, revise the reservation charge crediting provisions in its tariff to comply with Commission policy or show cause why it should not be required to do so, as discussed above. If Empire makes this revision, the filing will be assigned an RP docket and will be processed separately from this certificate proceeding. When Empire files to commence the services that are the subject of this proceeding, it must revise proposed section 3.7 of Rate Schedule FTNN to conform to the outcome of the section 5 proceeding concerning Empire's existing Rate Schedule FT.

(M) Pursuant to section 5 of the NGA, Empire must, within 30 days of the date of this order, revise the right of first refusal provisions in its tariff to comply with Commission policy or show cause why it should not be required to do so, as discussed above.

(N) The late, unopposed motions to intervene filed before issuance of the order in this docket are granted.

(O) The protest filed by the Allegheny Defense Project is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix Environmental Conditions

As recommended in the environmental assessment (EA), this authorization includes the following conditions:

1. National Fuel shall follow the construction procedures and mitigation measures described in its application and supplements, including responses to staff data requests and as identified in the EA, unless modified by the Order. National Fuel must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the Project. This authority shall allow:
 - a. the modification of conditions of the Order; and
 - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, National Fuel shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, National Fuel shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not

smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

National Fuel's exercise of eminent domain authority granted under the Natural Gas Act section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. National Fuel's right of eminent domain granted under Natural Gas Act section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. National Fuel shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by our *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
- b. implementation of endangered, threatened, or special concern species mitigation measures;
- c. recommendations by state regulatory authorities; and
- d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the authorization and before construction begins**, National Fuel shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. National Fuel must file revisions to the plan as schedules change. The plan shall identify:
- a. how National Fuel will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
 - b. how National Fuel will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions National Fuel will give to all personnel involved with construction and restoration (initial and refresher training, as the project progresses and personnel changes);
 - f. the company personnel (if known) and specific portion of National Fuel's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) National Fuel will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) the completion of all required surveys and reports;
 - (2) the environmental compliance training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. National Fuel shall employ a team of two or more EIs for the Project. The EIs shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;

- b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, National Fuel shall file updated status reports with the Secretary **on biweekly basis until all construction and restoration activities are complete**. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
 - a. an update on National Fuel's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by National Fuel from other federal, state, or local permitting agencies concerning instances of noncompliance, and National Fuel's response.
9. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, National Fuel shall file with the Secretary documentation that it has received

- all applicable authorizations required under federal law (or evidence of waiver thereof).
10. National Fuel must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
 11. **Within 30 days of placing the authorized facilities in service**, National Fuel shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the conditions in the Order National Fuel has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
 12. National Fuel shall file a Winter Construction Plan with its Implementation Plan. The plan shall address:
 - a. winter construction procedures (e.g., snow handling and removal, access road construction and maintenance, soil handling under saturated or frozen conditions, topsoil stripping);
 - b. stabilization and monitoring procedures if ground conditions would delay restoration until the following fall (e.g., mulching, and erosion controls, inspection and reporting, stormwater control during spring thaw conditions); and
 - c. final restoration procedures (e.g., subsidence and compaction repair, topsoil replacement, seeding).
 13. National Fuel shall not begin construction activities **until**:
 - a. the FERC staff receives comments from the U.S. Fish and Wildlife Service regarding the proposed action, including completion of any necessary Section 7 conference; and
 - b. National Fuel has received written notification from the Director of OEP that construction or use of mitigation may begin.

14. National Fuel shall not begin implementation of any treatment plans/measures (including archaeological data recovery); construction of facilities; or use of staging, storage, or temporary work areas and new or to-be-improved access roads (in the horizontal directional drill [HDD] work area) **until**:
- a. National Fuel files with the Secretary the New York State Historic Preservation Officer's comments on the HDD Contingency Plan;
 - b. the Advisory Council on Historic Preservation is provided an opportunity to comment on the undertaking if historic properties would be adversely affected; and
 - c. the FERC staff reviews and the Director of OEP approves the HDD Contingency Plan, and notify National Fuel in writing that treatment plans/mitigation measures may be implemented or construction may proceed.

All material filed with the Secretary containing location, character, and ownership information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CONTAINS PRIVILEGED INFORMATION - DO NOT RELEASE.**"

15. National Fuel shall conduct a noise survey at the Tuscarora Compressor Station to verify that the noise from all the equipment operated at full power load does not exceed the previously existing noise levels that are at or above an day-night averaged (L_{dn}) noise level of 55 A-weighted decibels (dBA) at the nearby noise sensitive areas (NSA) nor exceed an L_{dn} of 55 dBA at NSAs currently below an L_{dn} of 55 dBA. The results of this noise survey shall be filed with the Secretary **no later than 60 days** after placing the modified units in service. If any of these noise levels are exceeded, National Fuel shall, **within 1 year** of the in-service date, implement additional noise control measures to reduce the operating noise level at the NSAs to meet the above-listed criteria. National Fuel shall confirm compliance with this requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.