

153 FERC ¶ 61,331  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Tres Palacios Gas Storage LLC

Docket No. RP15-1225-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 22, 2015)

1. On August 28, 2015, Tres Palacios Gas Storage LLC (Tres Palacios) filed a petition for declaratory order requesting that the Commission grant Tres Palacios the authority to provide firm wheeling transportation service at market-based rates. To support this request, Tres Palacios filed a market power study and *pro forma* tariff records setting forth the terms and conditions of service necessary to implement its proposed firm wheeling transportation service. On November 10, 2015, Tres Palacios filed a revised market power study (Revised Exhibit A) and exhibits in response to the Commission's October 23, 2015 data request. As discussed below, the Commission grants the market-based rate authority for firm wheeling service as requested by Tres Palacios and directs Tres Palacios to file actual tariff records to implement its proposal.

**Background**

2. Tres Palacios owns and operates certain underground natural gas storage facilities, located in Matagorda and Wharton Counties, Texas, together with an associated header system with direct interconnects with 10 interstate and intrastate pipelines.<sup>1</sup> The header system includes a 30.98-mile-long, 24-inch diameter North pipeline and a 10.74-mile-long 24-inch diameter South pipeline. Tres Palacios provides firm and interruptible

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<sup>1</sup> These pipelines included Channel Enterprise/Houston Pipe Line, Enterprise Texas Pipeline LP/Valero, Florida Gas Transmission Company, LLC, Gulf South Pipeline Company, LP (Gulf South), Kinder Morgan Houston Central Plant, Kinder Morgan Tejas Pipeline, LLC, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company, L.L.C., Texas Eastern Transmission, LP, Transcontinental Gas Pipe Line Company, LLC, and Central Texas Gathering System.

storage services and interruptible wheeling services. The Commission issued Tres Palacios certificates of public convenience and necessity to construct and operate its facilities in 2007.<sup>2</sup> Tres Palacios is wholly-owned by a joint venture between Crestwood Midstream Partners LP and Brookfield Infrastructure Fund II.

3. Tres Palacios states that the Commission has previously found that it is incapable of exercising market power as to the storage and wheeling services it provides in the relevant geographic market and has authorized Tres Palacios to charge market-based rates for all of the storage and wheeling services it currently provides under its FERC Gas Tariff.<sup>3</sup> While Tres Palacios currently only offers interruptible wheeling service, Tres Palacios states that, recently, it has received a number of inquiries from prospective customers interested in purchasing firm wheeling service. Those customers indicate that firm wheeling service would afford them valuable flexibility and reliability in transferring natural gas among the interstate and intrastate pipelines with which Tres Palacios is interconnected.

4. Tres Palacios contends that there is no reason that firm wheeling service should be treated differently from the firm storage, interruptible storage, and wheeling services it is currently authorized to provide at market-based rates. Tres Palacios further contends that it has no more market power over the provision of wheeling services than it has over the provision of storage services. Accordingly, Tres Palacios requests Commission authorization to charge market-based rates for the proposed firm wheeling service.

5. Tres Palacios states it submitted a comprehensive market power study prepared in accordance with the Commission's regulations, precedents and policies, including Order No. 678 and Part 284, Subpart M of the Commission's regulations. Tres Palacios further states that the market power study considers the same relevant geographic market as the Commission considered in the 2007 Order: eastern Texas, Louisiana, Mississippi, and Alabama (Gulf Coast Production Area).

6. On October 23, 2015, the Commission requested that Tres Palacios provide additional information concerning its bingo card analysis of alternatives to Tres Palacios. That analysis included an "anticipated Gulf South interconnect."<sup>4</sup> In response to a question asking whether the Gulf South interconnect is a current interconnect, Tres Palacios states that it and Gulf South have an interconnect agreement in place for

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<sup>2</sup> *Tres Palacios Gas Storage, LLC*, 120 FERC ¶ 61,253 (2007) (2007 Order).

<sup>3</sup> 2007 Order, 120 FERC ¶ 61,253 at P 31.

<sup>4</sup> Revised Exhibit A at 35, n.76.

development of facilities to be placed into service in less than one year for an anticipated in-service date of August 2016. Tres Palacios further states that it includes a revised market power study demonstrating that it lacks market power whether or not the anticipated Gulf South interconnect exists. Attachment 5a to that study contains a bingo card analysis including the anticipated Gulf South interconnect and Attachment 5b contains a bingo card analysis excluding the anticipated Gulf South interconnect. Similarly, Attachment 7a includes an Herfindahl-Hirschman Index (HHI) and market share analysis reflecting the anticipated Gulf South interconnect and Attachment 7b includes the same analysis with the anticipated Gulf South interconnect excluded. Tres Palacios asserts that Attachments 5a, 5b, 7a, and 7b demonstrate that Tres Palacios would: (1) be unable to exercise market power as to firm and interruptible wheeling services assuming the configuration of Tres Palacios' facilities and interconnects as they currently exist; and (2) continue to be unable to exercise market power as to firm and interruptible wheeling services upon the addition of the Gulf South interconnection to its system.

7. In response to a question concerning the capacities of the various interconnections, Tres Palacios states that it is unable to verify certain interconnection capacities identified in its bingo card analysis for which no known publicly available data exists. However, it has identified additional indirect interconnection capacity, reflected in an attached revised Attachment 6, which allows for replacement interconnect capacity to completely fill-in the revised bingo cards shown both in Attachment 5a (includes the anticipated Gulf South interconnect) and Attachment 5b (excludes the anticipated Gulf South interconnect). Tres Palacios asserts that the additional indirect interconnection capacity was identified utilizing publicly available interstate pipeline informational postings website data, as requested, and since similar information was not available for the previously identified intrastate pipeline interconnections, these interconnects have been removed from the bingo cards.

### **Notice and Interventions**

8. Public notice of the filing was issued on September 15, 2015. Interventions and protests were due on or before September 28, 2015. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2015)), all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

### **Discussion**

9. Tres Palacios requests authority to add a new firm transportation wheeling service to its existing storage and hub services and to charge market-based rates for up to 1,500 million cubic feet per day (MMcf/d) of its proposed service. The Commission's main concern in granting a pipeline the use of market-based rates for transportation is the

presence that the pipeline has in the relevant marketplace. In other words, if the pipeline has market power over a service in the relevant marketplace, then the Commission will not permit it to charge market-based rates for that service.

10. Pursuant to the *Alternative Rate Policy Statement*,<sup>5</sup> the Commission has developed a framework for evaluating requests for market-based rates. This framework has two principal purposes: (1) to determine whether the applicant can withhold or restrict services and, as a result, increase price by a significant amount for a significant period of time; and (2) to determine whether the applicant can discriminate unduly in price or terms and conditions of service. To find that an applicant cannot withhold or restrict services, significantly increase prices over an extended period, or unduly discriminate, the Commission must find either that there is a lack of market power<sup>6</sup> because customers have good alternatives,<sup>7</sup> or that the applicant or the Commission can mitigate the market power with specified conditions.

11. Consistent with the methodology provided by the *Alternative Rate Policy Statement*, the Commission's analysis of whether Tres Palacios has the ability to exercise market power includes three major steps. First, the Commission will review whether Tres Palacios has specifically and fully defined the relevant markets to determine which specific products or services are identified, and the suppliers of the products and services that provide good alternatives to the applicant's ability to exercise market power.<sup>8</sup>

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<sup>5</sup> *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied and dismissed sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (*Alternative Rate Policy Statement*), *criteria modified, Rate Regulation of Certain Natural Gas Storage Facilities*, FERC Stats. & Regs. ¶ 31,220, *order on clarification and reh'g*, 117 FERC ¶ 61,190 (2006).

<sup>6</sup> The Commission defines "market power" as "the ability of a pipeline to profitably maintain prices above competitive levels for a significant period of time." *Alternative Rate Policy Statement*, 74 FERC at 61,230.

<sup>7</sup> A "good alternative" is an alternative that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for an applicant's service. *Id.* at 61,231; *See also Golden Triangle Storage, Inc.*, 152 FERC ¶ 61,158, at P 10, n.7 (2015) (*Golden Triangle*).

<sup>8</sup> The relevant product market consists of the applicant's service and other services that are good alternatives to the applicant's services. *Id.*; *See also Golden Triangle*, 152 FERC ¶ 61,158 at P 11, n.8.

Additionally, as part of this first step, the Commission will identify the relevant geographic market. Second, the Commission will assess Tres Palacios' market share and market concentration. The Commission uses market share and the HHI as screens in assessing whether a pipeline has the ability to exercise market power in defined product and geographic markets. However, HHIs are just one factor the Commission may evaluate.<sup>9</sup> The *Alternative Rate Policy Statement* recognizes that having a large market share in a concentrated market does not constitute market power if ease of entry and other competitive factors can prevent the applicant from exercising significant market power.<sup>10</sup> Lastly, the Commission will evaluate other relevant factors.

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<sup>9</sup> For example, the Commission has accepted an HHI of 1,800 as the threshold indicating the potential ability for an applicant to exercise market power in cases where the HHI was higher than 1,800, the Commission has performed further review to determine whether other competitive factors nevertheless will prevent the applicant from being able to exercise market power. *See, e.g., UGI Storage Co.*, 133 FERC ¶ 61,073 (2010); *Arlington Storage Co., LLC*, 125 FERC ¶ 61,306 (2008); *Rendezvous Gas Services, L.L.C.*, 112 FERC ¶ 61,141 (2005).

<sup>10</sup> In the *Alternative Rate Policy Statement*, the Commission states that its consideration of a market based rate proposal will include an examination of market concentration. Further, it explained that:

[T]o measure market concentration, one generally considers the summary measure of market concentration known as the Herfindahl-Hirschman Index (HHI). If the HHI is small then one can generally conclude that sellers cannot exercise market power in this market. A small HHI indicates that customers have sufficiently diverse sources of supply in this market that no one firm or group of firms acting together could profitably raise market price. If the HHI is higher than additional analysis may be needed to determine if the seller can exercise market power.

The Commission will analyze the HHI calculation for the relevant markets. The HHI will be evaluated for each relevant path and/or origin market and each destination market utilizing the relevant data for each mainline receipt point (origin market) and each delivery point (destination market). If an applicant wishes to argue for either a broader or narrower market definition, it should also include calculations for its market definitions. Only sales or capacity

(continued ...)

### **Relevant Markets**

12. In its market power study, Tres Palacios identifies the relevant product market as interruptible and firm wheeling transportation service, involving the transfer of natural gas from one interconnected pipeline to another.<sup>11</sup> Tres Palacios states that wheeling services are a substitute for pipeline transportation and are a different product than the storage services Tres Palacios provides.<sup>12</sup>

13. Tres Palacios identifies the relevant geographic market for its proposed service as the Gulf Coast Production Area which Tres Palacios states extends from east Texas to Louisiana, Mississippi and Alabama. Tres Palacios states that this Gulf Coast Production Area is the same geographic area utilized and accepted by the Commission in Tres Palacios' prior applications for market-based for all firm and interruptible storage, hub and wheeling services.<sup>13</sup>

14. The Commission agrees that the relevant geographic market for Tres Palacios' proposed service is the Gulf Coast Production Area which is the same geographic area utilized and accepted by the Commission in Tres Palacios' prior applications for market-based storage rate authority. With respect to the product market, the Commission has traditionally used a matrix, referred to as a "bingo card," in evaluating whether shippers of an applicant seeking market-based rate authority for interruptible wheeling transportation service could obtain the same services from alternative providers. The bingo card identifies all possible interconnections for pipelines attached to a hub and indicates whether good alternatives exist to the subject service. In essence, the Commission relies upon the bingo card analysis to determine whether shippers can avoid the pipeline interconnections provided by the applicant by utilizing alternative interconnections available between the pipelines that are directly or indirectly connected to the applicant.

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figures associated with good alternatives should be used in calculating the HHI. In addition, applicants should aggregate the capacity of affiliated companies into one estimate for those affiliates as a single seller. *Alternative Rate Policy Statement*, 74 FERC ¶ 61,076 at 61,234 (footnote omitted); *See Golden Triangle*, 152 FERC ¶ 61,158, at P 11, n.10.

<sup>11</sup> Revised Exhibit A at 32-33.

<sup>12</sup> Petition at 6.

<sup>13</sup> 2007 Order, 120 FERC ¶ 61,253.

15. Similar to the analysis used for determining market-based interruptible transportation wheeling, the Commission finds that a bingo card analysis should be used to determine whether good alternatives exist for the firm transportation wheeling service proposed by Tres Palacios. The Commission has relied on this type of analysis to determine whether shippers can avoid the pipeline interconnections described by Tres Palacios by using alternative interconnections between the pipelines that are directly or indirectly connected to the applicant.<sup>14</sup>

16. Tres Palacios includes a bingo card analysis as a part of its market power study for firm wheeling transportation service. The bingo card analysis for the project is listed in Attachments 5a (including an anticipated Gulf South interconnect) and 5b (excluding an anticipated Gulf South interconnect) of Tres Palacios market power study and reflects direct and indirect alternative pipeline interconnections and the available capacity at each interconnection. The bingo cards as set forth by Tres Palacios in Attachments 5a and 5b are completely filled-in for each of the Tres Palacios pipeline interconnects. Under this analysis, a completely filled in “bingo card” demonstrates that shippers will not be dependent on Tres Palacios to transport natural gas in the Gulf Coast Production Area, because the area contains a number of other pipeline interconnections and alternative paths available to shippers.

17. The bingo card analysis also demonstrates that customers can avoid the Tres Palacios header system entirely by using other interconnections readily available between the pipelines that are connected to the Tres Palacios header system. The transportation alternatives available to potential shippers through the network of pipelines in the Gulf Coast Production Area mandate that the rates charged by Tres Palacios for firm wheeling service will remain at fully competitive levels. The Commission concludes that the market definition set forth by Tres Palacios properly identifies numerous good alternatives to the service proposed by Tres Palacios as reflected by the completely filled-in bingo cards presented by Tres Palacios in Attachments 5a and 5b.

### **Market Share and Market Concentration**

18. Tres Palacios states Attachments 7a (including an anticipated Gulf South interconnect) and 7b (excluding an anticipated Gulf South interconnect) shows the 23 Gulf Production Area hubs that compete with Tres Palacios in firm and interruptible wheeling services. Tres Palacios states the total receipt and delivery capacity in the market is 63,207 MMcf/d and 73,477 MMcf/d, respectively. Tres Palacios concludes it

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<sup>14</sup> See *UGI Storage Co.*, 138 FERC ¶ 61,051, at P 12 (2012). See also *Golden Triangle*, 152 FERC ¶ 61,158 at P 15.

has a market share of 6.80 percent of receipt capacity and 5.44 percent of delivery capacity in Attachment 7a and 6.43 percent of receipt capacity and 5.12 percent of delivery capacity in Attachment 7b. Tres Palacios contends that such a small market indicates that there are numerous good hub alternatives and enough capacity to replace Tres Palacios' receipt capacity approximately 15 times and delivery capacity 18 times. Therefore, Tres Palacios states competition from hubs is sufficient to prevent Tres Palacios from exercising market power acting alone.<sup>15</sup>

19. To evaluate whether Tres Palacios could act together with competing hubs to exercise market power, Tres Palacios analyzed the HHI for market centers and hubs in the Gulf Coast Production Area. Tres Palacios states the HHI for receipt capacity is 545 and the HHI for delivery capacity is 652 in Attachment 7a and 544 for receipt capacity and 656 for delivery capacity in Attachment 7b. Tres Palacios states these HHIs are well below the 1800 HHI threshold used by the Commission to indicate a possible market power concern.<sup>16</sup> Therefore, Tres Palacios concludes it cannot exercise market power acting together with competing hubs in the Gulf Coast Production Area.

20. Tres Palacios has satisfactorily shown that, within the relevant market, its prospective market share is low and that the market's concentration is below the threshold the Commission would require before it would need to undertake closer scrutiny. As set forth above, in order to ascertain whether additional scrutiny is needed, the Commission examines concentration in the relevant market using the HHI. The *Alternative Rate Policy Statement* states that a HHI of less than 1,800 indicates that sellers cannot exert market power because customers have sufficiently diverse alternatives in the relevant market.<sup>17</sup> If the HHI is above 1,800, the Commission will give the applicant more scrutiny in order to make a determination about a seller's ability to exercise market power because the market is more concentrated. Here, the HHI for delivery capacity is 652 and for receipt capacity is 545 in Attachment 7a and 544 and 656, respectively, in Attachment 7b. Tres Palacios also states that its market share receipt capacity is 6.80 percent and delivery capacity is 5.44 percent in Attachment 7a and 6.43 percent and 5.12 percent, respectively, in Attachment 7b of the Gulf Coast Production market.

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<sup>15</sup> Revised Exhibit A at 40.

<sup>16</sup> *Id.*

<sup>17</sup> *Alternative Rate Policy Statement*, 74 FERC at 61,235.

21. This low market share and market concentration levels demonstrate that Tres Palacios lacks market power. The HHI reflected by Tres Palacios' study reflects that it is less likely to be able to exert market power because customers have sufficiently diverse alternatives in the relevant market. Tres Palacios' HHI levels of market concentration are well below the 1,800 threshold level, which demonstrates that it will not be able to exercise market power in the relevant market area. Furthermore, Tres Palacios' market share supports a finding that it lacks market power.

### **Other Relevant Factors Mitigating Potential Market Power**

22. In addition to market share and concentration, Tres Palacios asserts that other factors support the conclusion that it will not be able to exercise market power in the Gulf Coast Production Area. For example, ease of entry into a market inhibits the potential for any given participant to exercise market power.<sup>18</sup> Tres Palacios asserts there are many other relevant factors that mitigate any remaining market power concerns. Tres Palacios provides additional evidence on other relevant factors that are barriers to entry as follows: (1) Tres Palacios is a new entrant in the provision of firm wheeling; (2) there are no affiliate issues; (3) this is a conservative analysis; (4) there is additional competition from market center operations; (5) low basis differentials limit the price of wheeling service; and (6) Tres Palacios wheeling capacity is small.

23. The Commission agrees with Tres Palacios that barriers to entry are likely to be low in the relevant market and that alternative products are available to shippers in the relevant geographic area. Furthermore, the Commission agrees the other factors support Tres Palacios' conclusion that it will not be able to exercise market power. Accordingly, upon examination of the material and studies presented by Tres Palacios, the Commission finds that Tres Palacios lacks significant market power in the relevant geographic area for the proposed market-based firm transportation service. Further, for the reasons discussed above and given the fact that the Tres Palacios proposal for market-based rates is unopposed, the Commission accepts Tres Palacios' request to charge market-based rates for firm wheeling transportation service.

24. Nevertheless, the Commission will require Tres Palacios to notify the Commission if future changes in circumstances significantly affect its present market power status. Any event which would affect Tres Palacios' ability to withhold or restrict services or increase its ability to discriminate unduly in price or terms of service must be reported to the Commission within 10 days of acquiring knowledge of any such changes. For example, significant changes would include, but are not limited to: (1) an expansion of capacity; (2) the acquisition of additional transportation facilities; (3) an affiliate

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<sup>18</sup> *Alternative Rate Policy Statement*, 74 FERC at 61,234.

providing transportation services in the same market area; and (4) Tres Palacios or an affiliate acquiring an interest in or being acquired by an interstate pipeline. Failure to timely file a change in circumstance report or failure to comply with the reporting requirements would constitute a violation of the Commission's regulations. The Commission also reserves the right to require an updated market power analysis at any time.<sup>19</sup>

### **Tariff Provisions**

25. Tres Palacios proposes *pro forma* tariff records to incorporate its proposed firm wheeling service pursuant to Rate Schedule FWS and the corresponding FWS Service Agreement. Tres Palacios also proposes numerous conforming changes to its existing tariff sections for Rate Schedule FWS service that refer to additional or modified defined terms that describe the services provided by Tres Palacios or reference the individual rate schedules. Finally, Tres Palacios proposes minor housekeeping revisions.

26. The Commission finds the language in the *pro forma* tariff records is acceptable and directs Tres Palacios to file actual tariff records reflecting such language not less than 30 days before the firm wheeling service at market-based rates is to commence. Tres Palacios is directed to comply with the Commission's electronic filing requirements set forth in Order No. 714<sup>20</sup> and Part 154 of the Commission's regulations.<sup>21</sup>

### **Waiver of Cost-Based Regulations**

27. Tres Palacios states that in authorizing market-based rates for storage and interruptible wheeling services, the Commission granted Tres Palacios certain waivers of various Commission regulations which are generally intended to ensure the availability of information necessary to determine cost-based rates.<sup>22</sup> Tres Palacios states if the Commission issues the declaratory order requested herein then the underlying premise of the waivers, *i.e.*, that all service Tres Palacios is authorized to offer will be provided at market-based rates, would remain unchanged. In the instant proceeding Tres Palacios

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<sup>19</sup> See *Arlington Gas Storage Co., LLC*, 147 FERC ¶ 61,120, at P 39 (2014). See also *Golden Triangle*, 152 FERC ¶ 61,158 at P 24.

<sup>20</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

<sup>21</sup> 18 C.F.R. § 154.4 (2015).

<sup>22</sup> 2007 Order, 120 FERC ¶ 61,253 at PP 33-34.

requests the Commission continue the waivers granted to Tres Palacios under the 2007 Order.

28. The Commission's action in the instant proceeding does not affect its previous waiver of the cost-based rate regulations granted to Tres Palacios.<sup>23</sup> Accordingly, the Commission will permit the continuation of the previously granted waivers and, for good cause shown, will also allow the cost-based regulations to be waived for the new market based rate transportation service accepted herein for the Tres Palacios system.

The Commission orders:

(A) The petition for declaratory order by Tres Palacios requesting authority to provide firm wheeling transportation service at market-based rates is granted subject to the conditions in this order.

(B) The language proposed in the *pro forma* tariff records is accepted subject to Tres Palacios filing actual tariff records reflecting the approved language at least 30 days prior to the date the firm wheeling transportation service is to commence.

(C) Waiver of certain cost-based regulations is granted as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>23</sup> See *Golden Triangle*, 152 FERC ¶ 61,158 at P 27.