122 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Missouri Interstate Gas, LLC	Docket Nos. CP06-407-001
Missouri Gas Company, LLC	CP06-408-001
Missouri Pipeline Company, LLC	CP06-409-001
Missouri Interstate Gas, LLC	RP06-274-001
MoGas Pipeline LLC	CP06-407-002

ORDER ON REHEARING AND ON COMPLIANCE FILING

(Issued February 19, 2008)

1. On April 20, 2007, the Commission issued an order in this proceeding authorizing the merger of Missouri Interstate Gas, LLC (Missouri Interstate), Missouri Gas Company, LLC (Missouri Gas), and Missouri Pipeline Company, LLC (Missouri Pipeline) (collectively, the Applicants).[1] The order also terminated as moot the proceeding in Docket No. RP06-274-000 in which Missouri Interstate had filed its three-year cost and revenue study as required by the 2002 order issuing its certificate.[2] Three parties filed requests for rehearing and clarification of the April 20, 2007 Order.[3] As

[1] *Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 (2007) (*April 20,2007 Order*).

[2] *See Missouri Interstate Gas, LLC,* 100 FERC ¶ 61,312 (2002).

[3] The three parties are the Missouri Public Service Commission (MoPSC); Union Electric Co. d/b/a AmerenUE (AmerenUE), a customer of Missouri Pipeline; and the Municipal Gas Commission of Missouri and Cities of St. James, St. Roberts, Richland, and Waynesville (MuniComm/Cities), which consist of a commission operating
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discussed below, the Commission is granting rehearing, in part, and denying rehearing, in part, as well as clarifying certain aspects of the April 20, 2007 Order. In addition, this order addresses the July 5, 2007 filing made in compliance with the April 20, 2007 Order and submitted by MoGas Pipeline LLC (MoGas), the new name for the interstate pipeline that will be the result of the merger of the Applicants in this proceeding.[4]

I. **Background**

2. On June 28, 2006, Missouri Interstate, Missouri Gas, and Missouri Pipeline filed an application with the Commission seeking authority to merge these companies and become a new interstate pipeline. Missouri Gas and Missouri Pipeline are pipelines exempt from Commission jurisdiction pursuant to section 1(c) of the Natural Gas Act (NGA).[5] As such, they will continue to be regulated by the Missouri Public Service Commission (MoPSC) until MoGas is authorized to go into service by the Commission.

3. The Applicants also proposed that after the merger the existing customers of each pipeline would continue to pay the same rates they were paying and requested that the Commission accept the existing customers' contracts as negotiated rate contracts with nonconforming terms. The Applicants also proposed zoned initial recourse rates whereby the service area of Missouri Gas would be one zone, while the service areas of Missouri Pipeline and Missouri Interstate would be combined into a second zone. In addition, the Applicants submitted a pro forma tariff. Further, the Applicants made a commitment to file a general rate case 18 months after service commences on MoGas.

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distribution systems for a number of Missouri municipalities that own such systems and four separate municipalities that also operate distribution systems.

[4] The Applicants originally proposed Missouri Gas Company, LLC, as the name for the merged pipeline, which is also the name of one of the Applicants. In the compliance filing, the Applicants indicated that, instead, they will call the new interstate pipeline MoGas Pipeline LLC (MoGas). This order will refer to Missouri Gas Company, LLC (Missouri Gas) when the Commission is speaking about the Applicant with that name and will refer to MoGas when it is speaking about the new interstate pipeline.

[5] 15 U.S.C. § 717 (2005). This section provides an exemption for any person engaged in the transportation of natural gas in interstate commerce where the following conditions are met: (1) the person receives the gas within or at the boundary of a state; (2) all gas so received is consumed within such state; and (3) the rates and services of such person are subject to regulation by the state in which the gas is consumed. Such exempt pipelines are commonly known as "Hinshaw" pipelines.

4. The MoPSC, AmerenUE, and MuniComm/Cities filed protests to the Applicants' proposal. Among the issues they raised in their protests were: (1) whether the Commission should abstain from acting on the Applicants' filing until resolution of a Missouri State court proceeding in which the MoPSC was seeking to enforce Missouri law providing that the MoPSC has the authority to approve mergers of utilities and enforce certificate conditions on Missouri Pipeline and Missouri Gas requiring them, in effect, to remain Hinshaw pipelines;[6] (2) whether the Commission should deny the application because the Applicants' alleged thwarting of Missouri law and the MoPSC-imposed certificate conditions is contrary to the public interest; (3) whether the MoPSC had authority to exercise its jurisdiction to approve mergers of utilities under Missouri law to prevent Missouri Gas and Missouri Pipeline from merging with each other and their interstate affiliate; (4) whether the Commission should recognize conditions on Missouri Gas' and Missouri Pipeline's MoPSC-issued certificates which would prohibit the merger; (5) whether the Commission should reject the Applicants' filing under Rule 2001 of the Commission's Rules of Practice and Procedure, providing, *inter alia*, for rejection of filings inconsistent with "applicable" laws or orders, because the application was contrary to Missouri law or with the MoPSC-imposed certificate;[7] (6) whether the application should be denied because it constituted forum shopping by the Applicants in order to obtain better rate treatment; and (7) whether, if the Commission authorized the merger, it should reject or modify the proposed recourse and negotiated rates and tariff as inconsistent with the public convenience and necessity.

[6] Those conditions initially provided that Missouri Gas and Missouri Pipeline would not interconnect with a segment of pipeline owned by Missouri Pipeline which crossed the border between Missouri and Illinois and was not in operation at that time. Later, as a result of MoPSC proceedings in which Missouri Gas and Missouri Pipeline (including the border-crossing segment) were acquired by another party, conditions were imposed requiring that if the new owner placed the border-crossing segment into operation, a separate interstate entity would be formed to own and operate it and that if Missouri Gas or Missouri Pipeline interconnected with the affiliated interstate pipeline, no gas would flow over their systems out of Missouri over that segment of pipeline. These conditions were imposed so that the Hinshaw status of Missouri Gas and Missouri Pipeline would not be called into question.

[7] 18 C.F.R. § 385.2001 (2007). This rule provides that Commission may reject any filing that does not "comply with any applicable statute, rule, or order . . . ."

II. The April 20, 2007 Order

5. In the April 20, 2007 Order, the Commission declined to abstain from acting on the application, stating that the abstention doctrine is the exception, not the rule, and is appropriate to apply only in extraordinary circumstances. Further the Commission pointed out that the issues in the state court proceeding and those before the Commission were not the same. The Commission found that because it has exclusive jurisdiction over NGA section 7(c) applications, it did not need to refrain from acting.

6. The Commission also declined to reject the application, finding that neither the Missouri statute giving the MoPSC jurisdiction over mergers of intrastate pipelines nor the certificate conditions imposed on Missouri Gas and Missouri Pipeline was an applicable statute, rule, or order within the meaning of Rule 2001 of the Commission's regulations. Therefore, it held that any noncompliance by Missouri Gas and Missouri Pipeline with the state statute and certificate conditions did not render the application patently a nullity such that it should be rejected. Because it was denying the parties' request to reject the application under Rule 2001, the Commission determined that it did not need to reach the question of whether the preemption doctrine prevented the MoPSC from enforcing state law or the certificate conditions to block the Applicants' filing of their NGA section 7(c) application.

7. In addition, the Commission held that even if the Applicants were seeking to avoid rate regulation by the MoPSC by restructuring their businesses to become an interstate pipeline, as some parties alleged, this behavior was not inconsistent with Commission policy.[8] Likewise, the Commission was not persuaded that the Applicants' decision to change their business relationships, even if in contravention of conditions on Missouri Gas' and Missouri Pipeline's state certificates, was an action contrary to the public interest that would warrant rejection or denial of the application.[9]

[8] *Citing KN Wattenberg Transmission, LLC v. Public Service Co. of Colorado,* 83 FERC ¶ 61,285, at 62,185 n.25 (1998) (stating that "[i]t is not unusual, much less unlawful, for persons to structure their transactions either to qualify for regulation by one entity or to avoid regulation by another.").

[9] The Commission also found that the parties' contention that there had to be changed circumstances before intrastate pipelines could restructure themselves to become interstate pipelines was unclear and that as a practical matter, such pipelines could not begin interstate services, *i.e.,* change their operations, until the Commission issued a certificate authorizing them to do so.

8. Further, the Commission generally approved the Applicants' proposed initial recourse rates and pro forma tariff with various modifications which MoGas was directed to make. The Commission also imposed a condition on MoGas' certificate requiring it to file a general rate case 18 months after service begins on the new pipeline, as the Applicants had obligated themselves to do in their application. However, while the Commission agreed to the Applicants' proposal that the existing customers of the three merging pipelines could continue to pay, as negotiated rates, the rates they were paying under their existing contracts until new rates were established in the rate case, it denied the request to accept the existing contracts in their entirety as nonconforming ones. Instead the Commission directed MoGas to negotiate new contracts with the existing shippers using the standard Part 284 contract in the pro forma tariff as a starting point and to identify and justify any proposed deviations from the standard contract.

III. Procedural Matters

A. Answers

9. The Applicants filed an answer to the requests for rehearing by MoPSC, MuniComm/Cities and AmerenUE. The MoPSC and AmerenUE, in turn, filed answers to the Applicants' answer. Although the Commission's Rules of Practice and Procedure do not permit answers to protests or answers to answers,[10] we may for good cause waive this provision.[11] In this instance, we find good cause to accept these answers because they provide information that has assisted us in our decisionmaking.

B. The MoPSC's Request for Clarification

10. Although only partly procedural, we will address the MoPSC's request that the Commission clarify its statements in the April 20, 2007 Order that the issues in the then-pending proceedings before the MoPSC and the state court involved different issues than those before the Commission in this certificate proceeding, and that since it was denying the MoPSC's motion for abstention on other grounds, the Commission did not need to reach the issue of whether the NGA preempted the MoPSC's authority to decide whether

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[10] 18 C.F.R. § 213(a) (2007).

[11] *See, e.g.*, *Dominion Cove Point LNG*, 118 FERC ¶ 61,007 (2007). The Commission notes that the interventions and protests to the compliance filing in Docket No. CP06-407-002 will be described and discussed in the section of this order that addresses the compliance filing.

the Applicants could merge their systems.[12] Specifically, the MoPSC interprets these statements to mean that the Commission did not intend to preempt any action the MoPSC might take in any proceeding to prevent the Applicants from acting inconsistently with the state certificate conditions or any actions the state court might order to prevent the Applicants' merger without prior approval of the MoPSC. In the MoPSC's view, this should be the effect of the Commission's statements because, in the Commission's own words, the MoPSC or the state court would be addressing issues different from those addressed by the Commission in this proceeding.

11. The Applicants respond that the MoPSC is asking permission to punish the Applicants for applying for a certificate to operate in interstate commerce and that the requested clarification would render the April 20, 2007 Order meaningless and frustrate the Commission's ability to regulate the interstate transportation of natural gas as Congress intended under the NGA.

12. In the April 20, 2007 Order, we explained that the state proceedings were addressing the issues of whether the conditions on the Applicants' state certificates could be enforced and whether the Applicants could merge without approval from the MoPSC, whereas this proceeding was focusing on whether the Applicants' proposed merger was required by the public convenience and necessity.[13] The thrusts of the state and federal proceedings were different. However, in pursuing the issues before it, the MoPSC cannot apply Missouri law in such a way as to prevent Missouri Pipeline and Missouri Gas from availing themselves of the exclusive jurisdiction afforded the Commission by the NGA. A Missouri state court has agreed with our understanding of our jurisdiction in this matter.[14]

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[12] *See* April 20, 2007 Order, 119 FERC ¶ 61,074 at P 25 and P 31.

[13] April 20, 2007 Order, 119 FERC ¶ 61,074 at P 25.

[14] The MoPSC advises the Commission that the Circuit Court of Cole County, Missouri, wherein the MoPSC sought an injunction to prevent the Applicants from prosecuting their application before this Commission, granted the Applicants' motion to dismiss that action on May 1, 2007. *Missouri Interstate Gas, LLC, Missouri Pipeline Co., LLC, Missouri Gas Co., LLC, United Pipeline Systems, LLC; and Gateway Pipeline Co., LLC*, Case No. 06ACCC00630-1 (Cir. Court, Cole Co., Mo. May 1, 2007) (Order Granting Motion Dismiss). The court based its decision on federal preemption of state law. The MoPSC notes that it has requested the Court to reconsider its decision. That request is still pending.

13. On the other hand, we clarify that it was not our intent to preclude the MoPSC from going forward with any proceedings pending before it against Missouri Pipeline or Missouri Gas for alleged improper actions taken when they were subject to state jurisdiction, to the extent its actions do not impinge upon the exclusive jurisdiction of this Commission.

C. MoPSC's Motion to Lodge

14. On September 4, 2007, the MoPSC filed a motion to lodge an August 25, 2007 decision it rendered in a complaint proceeding against Missouri Gas and Missouri Pipeline.[15] The MoPSC asserts that this decision is relevant to the rates current customers of Missouri Gas and Missouri Pipeline will pay for interstate service on MoGas if they retain their existing rates as negotiated rates. The Applicants filed an answer to the motion to lodge on September 19, 2007, contending that the decision is not material to this proceeding. On September 27, 2007, the MoPSC filed an answer to the Applicants' answer. We will grant the motion to lodge in order to provide the Commission with information regarding what effect resolution of certain proceedings pending before the MoPSC at the time of the April 20, 2007 Order would have on the definition of Missouri Pipeline's and Missouri Gas' "existing tariff levels," *i.e.* rates. This issue was raised on rehearing and, rather than respond to a hypothetical situation, we think it will be useful to have this concrete example. Further, as noted above, while the Commission's Rules of Practice and Procedure do not permit answers to answers, we may for good cause waive our regulations. For the same reasons that we are granting the motion to lodge, we will accept the MoPSC's answer to the Applicants' answer.

15. On October 18, 2007, the MoPSC filed a supplement to its September 4, 2007 motion to lodge in order to include its order on the Applicants' request for rehearing of the MoPSC's August 25, 2007 decision in the state complaint proceeding. For the reasons we granted the motion to lodge, we will accept the supplement. The MoPSC decision denies the Applicants' request for rehearing.

D. AmerenUE's Request for Reconsideration, Remand, Hearing, and Stay

16. On September 7, 2007, AmerenUE filed a Request for Reconsideration and Remand and Request for Initiation of a Hearing and/or Request for a Settlement Judge

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[15] *Staff of the Missouri Pub. Serv.Comm'n v. Missouri Pipeline Co. LLC and Missouri Gas Co. LLC*, Case No. GC-2006-0491, Report and Order (issued Aug. 28, 2007).

(Request for Reconsideration). In addition, AmerenUE requests the Commission to stay the effectiveness of the April 20, 2007 Order.

17. AmerenUE maintains that its request for reconsideration is appropriate since there is new information and evidence of changed circumstances.[16] Specifically, AmerenUE alleges that MoGas has not been negotiating with the existing customers on Missouri Pipeline and Missouri Gas to recast their agreements into the Part 284 service agreement as directed by the April 20, 2007 Order. AmerenUE contends that MoGas has only offered service under the initial recourse rates and not the existing customers' current rates, even though the Applicants stated in their application that they would offer those customers the choice of continuing to pay their existing rates. According to AmerenUE, the Applicants' offer was the predicate for the Commission's determination that there would be no subsidization in this proceeding. Thus, in AmerenUE's view, reneging on that offer undermines the Commission's determination and reconsideration of that finding should be granted. Further, AmerenUE contends that the parties have not been able to reach any agreements on the new contracts despite repeated attempts.

18. In response, the Applicants argue that no new developments have occurred to warrant reconsideration of the April 20, 2007 Order, especially since rehearing of that order is still pending. They contend that AmerenUE is continuing to file pleadings to delay issuance of an order on the compliance filing and is also refusing to execute a new service agreement for the same reason. The Applicants assert that AmerenUE should not be allowed to hold up the commencement of interstate service by refusing to enter into a new service agreement. In addition, they point out that they have, in fact, negotiated numerous new agreements with the Applicants' other existing customers.

19. The Applicants state that their original proposal in the application was to allow existing customers to take service on MoGas under their existing contracts as nonconforming contracts and to pay their existing rates as negotiated rates if the Commission permitted MoGas to grandfather all of the terms and conditions of those agreements. However, they explain that the Commission rejected this approach in the April 20, 2007 Order and, instead, directed the Applicants to convert the existing contracts to the form of the Part 284 service agreement in the tariff. Additionally, according to the Applicants, although the Commission stated MoGas and the customers could enter into negotiated rate contracts or propose nonconforming provisions of the contract for Commission approval, it also stated that the starting point for negotiations

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[16] *Citing Enterprise Texas Pipeline L.P.*, 117 FERC ¶ 61,025, at P 7 (2006) (*citing Order No. 2001-B*, 100 FERC ¶ 61,342, at 62,556 (2002)).

with existing customers was the tariff service agreement. Therefore, the Applicants offered that contract at maximum rates as the starting point.

20. It is also the Applicants' view that the straight fixed-variable (SFV) initial recourse rate the existing customers would pay is "less than the volumetrically equivalent MoPSC-approved maximum MFV tariff rates and that it was a reasonable starting point for renegotiating the contract."[17] They state that if what AmerenUE and MuniComm/Cities want is to "substitute into the Form of Service Agreement the state tariff rates and terms in effect and paid when the certificate was issued," they will do so.[18] The Applicants contend, however, that this is not what AmerenUE is asking. Rather, they explain that AmerenUE wants a lower rate than what it was paying at the time of the April 20, 2007 Order because it believes that rate should be lowered as a result of the MoPSC's decision in the complaint proceeding referred to above.

21. AmerenUE also asserts that just before contract negotiations began, but after AmerenUE filed its request for rehearing and its protests to the compliance filing, MoGas reduced pressure on two of AmerenUE's citygate stations on the Salem Lateral which are necessary to provide service to the Rolla area, and has refused to increase the pressure back to its previous level before the start of the winter heating season. Instead, AmerenUE avers, MoGas proposed that AmerenUE install two new meters on that lateral. AmerenUE posits that this behavior was an attempt by MoGas to obtain leverage in the contract negotiations with existing customers, to convince AmerenUE to drop its protests and to withdraw its request for rehearing or to purchase the lateral.[19] In its answer to AmerenUE's motion, MuniComm/Cities aver that Missouri Pipeline and Missouri Gas have subjected it to coercive behavior during contract negotiations. Therefore it supports AmerenUE's motion.

22. The Applicants explain that the issue of pressure for deliveries to an area on the outskirts of Rolla, and not Rolla's primary distribution system off of the Salem Lateral, is part of a longstanding dispute between one of the Applicants and AmerenUE and one that has been the subject of negotiations between the parties since at least 2004. They

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[17] Applicants' September 24, 2007 Answer at 6-7. The Applicants are referring to the initial recourse rate the Commission approved for service over MoGas.

[18] *Id.*

[19] Further, AmerenUE states that the lower pressure is not the same as the pressures in Exhibit G to the application and points to MoGas' commitment not to diminish service.

indicate that in February 2007, they agreed, at AmerenUE's request, to increase the pressure at the city gate stations for Rolla and two other cities, but not the pressure at the pressure reducing values (PRVs) for delivery to this other area in Rolla. However, they assert, an operator increased the pressure at the PRVs without permission, so it was lowered to what it had been for the previous 10 years. Thus, the Applicants argue that AmerenUE has misled the Commission and that, in any event, this issue is not relevant to the certificate proceeding.[20]

23. We will deny the request for reconsideration. We do not believe that the difficulty the petitioners are experiencing in negotiating new contracts rises to the level of changed circumstances requiring reconsideration of our decision to issue the certificate in this proceeding. We address a number of issues related to our direction to the parties to renegotiate new contracts in our discussion below on rehearing and in the discussion of the Applicants' compliance filing. This should give the parties guidance in their negotiations. In any event, we are finding that service for existing customers must continue for a period of 60 days after new rates are in effect as a result of the rate case MoGas will file in 18 months unless, of course, an existing customer wishes to terminate its service earlier. Therefore, availability of service for existing customers is not an issue.

24. Further, we agree with the Applicants that the issue of pressure reductions for deliveries off of the Salem Lateral is not an issue in the certificate proceeding. As the Applicants state, this issue has been the subject of longstanding debate between the parties and we do not think it would be appropriate to convert this certificate proceeding into a complaint proceeding in order to investigate the details of the dispute or to resolve it. Additionally, until MoGas goes into service, the Commission does not have the authority to order either Missouri Gas or Missouri Pipeline to change its operations. If AmerenUE believes there is still a problem after MoGas goes into service, it can file a complaint at that time.

25. We will deny AmerenUE's request for stay of the April 20, 2007 Order. In considering motions for a stay, the Commission applies the standard set forth in the Administrative Procedure Act (5 U.S.C. § 705) to determine whether "justice so requires" the Commission to grant a request for a stay. In determining whether the equities support a stay, the Commission generally considers: (1) whether the moving party will suffer irreparable injury in the absence of a stay; (2) whether issuing the stay will not substantially harm other parties; and (3) whether a stay is in the public interest. The

[20] The Applicants also contend that AmerenUE did not raise this issue earlier in these proceedings, which it could have done if it had concerns over the ongoing dispute between the parties.

Commission's general policy is to refrain from granting stays of its orders to assure definiteness and finality in Commission proceedings.[21] If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.[22] Here, AmerenUE and MuniComm/Cities have not demonstrated irreparable harm absent a stay. They will not lose their service even if they cannot negotiate new contracts since, as explained below, we are requiring that their service continue under interim arrangements until 60 days after new rates go into effect as a result of the rate case MoGas will file within 18 months. Further, any increase in a customer's rates from its existing rate to the Commission-approved recourse rate does not constitute irreparable harm. For the same reasons we deny AmerenUE's request to vacate our April 20, 2007 Order if we do not grant a stay of the order.

26. Regarding the petitioners' request that the Commission appoint a settlement judge to oversee the contract negotiations, we point out that Subpart F of Part 385 of the Commission's Rules of Practice and Procedure governs settlements and alternative dispute resolution. Rule 603 provides for appointment of a settlement judge in proceedings which have been set for a trial-type hearing.[23] This is not such a proceeding; therefore, this request is denied. We note that AmerenUE and/or MuniComm/Cities and the Applicants may avail themselves of the alternative dispute resolution services contemplated under Rule 604, under which the parties must voluntarily agree to submit their dispute for mediation and comply with various requirements as outlined in the rule.[24]

IV. Requests For Rehearing

A. Judicial Estoppel

27. On rehearing, AmerenUE asserts new grounds for why the Commission should have rejected or dismissed the application and why it should reverse its earlier decision on rehearing. It contends that the Commission should have applied the doctrine of judicial estoppel and declined to review the application on its merits because the Applicants allegedly made statements in the MoPSC proceeding in which Gateway

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[21] *See, e.g., Sea Robin Pipeline*, 92 FERC ¶ 61,217, at 61,710 (2000).

[22] *Id.*

[23] 18 C.F.R. § 385.603 (2007).

[24] 18 C.F.R. §385.604 (2007).

Pipeline Company (Gateway) acquired Missouri Gas and Missouri Pipeline and in the instant proceeding before the Commission that were inconsistent.

28. AmerenUE asserts that Missouri Gas, Missouri Pipeline, and Gateway made commitments before the MoPSC not to flow gas out of Missouri over the border-crossing pipeline segment that was owned, but not operated, by Missouri Pipeline and to establish a separate interstate entity to own that segment if Gateway chose to operate it to flow gas into Missouri. AmerenUE posits that the parties made these commitments to obtain the approvals they desired and to induce other parties to withdraw their opposition to the proposals and, then, before this Commission, took contrary positions in order to obtain a certificate to operate as an integrated interstate pipeline. The positions are inconsistent, according to AmerenUE, because the commitments in the MoPSC proceeding were made to address the MoPSC's concerns about jeopardizing the pipelines' Hinshaw status, but in the instant proceeding, Missouri Gas and Missouri Pipeline gave up that exempt status when they applied to become part of an interstate pipeline able to flow gas out of Missouri.[25]

29. According to AmerenUE, the purpose of the judicial estoppel doctrine is "to preserve the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment . . . ."[26] It notes that this equitable remedy applies in administrative proceedings as well as judicial ones.[27]

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[25] AmerenUE also notes that in Missouri Interstate's NGA section 7(c) certificate proceeding, in response to MoPSC's and other parties' concerns regarding whether Missouri Gas and Missouri Pipeline could lose their exemption from NGA regulation if they interconnected with the new interstate pipeline, the Commission recognized the certificate conditions imposed on Missouri Gas and Missouri Pipeline by the MoPSC and stated that since gas would only flow into Missouri, the jurisdictional status of the pipelines would not change. AmerenUE characterizes the assertions by the Applicants in Missouri Interstate's certificate proceeding as "persuad[ing] both the MoPSC and FERC to accept their position . . . that . . . they did *not* constitute an integrated interstate pipeline . . . " AmerenUE May 21, 2007 Rehearing Request at 11 (*emphasis in original*).

[26] *Citing New Hampshire v. Maine*, 532 U.S. 742 (2001) (*quoting Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (2d Cir. 1982) and *U.S. v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

[27] *Citing Mulvaney Mechanical, Inc. v. Sheet Metal Workers International Ass'n, Local 38*, 288 F.3d 491, 504 (2d Cir 2002), *vacated, remanded, cert. granted* 538 U.S. 918 (2003), *reh'g denied by* 538 U.S. 1053 (2003), *adhered to on reconsideration by* 351 F.3d 43 (2d Cir. 2003).

AmerenUE maintains that the Applicants changed their positions because Missouri Gas and Missouri Pipeline were experiencing regulatory difficulties with the MoPSC.

30. AmerenUE points out that the U.S. Supreme Court in *New Hampshire v. Maine* offered guidelines for when it is appropriate to apply the doctrine of judicial estoppel, including: (1) whether a party's position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept its earlier position such that a perception is created that either the first or second judicial forum has been misled; and (3) whether the party asserting the inconsistent position would either obtain an unfair advantage or impose an unfair detriment on the opposing party. AmerenUE maintains that all of these factors are present here and that if the Commission does not reverse its decision to consider and approve the application on rehearing, it would be reversible error.

31. The Applicants answer that AmerenUE's judicial estoppel argument is just a recasting of its previously-raised contentions that the prior proceedings before the MoPSC and the proceeding before the state court should bar the filing of the certificate application or that the instant certificate filing was a sham because the Applicants are only trying to avoid state regulation. The Applicants point out that the Commission addressed these arguments in the April 20, 2007 Order finding, among other things, that it is not illegal or improper for persons to change their jurisdictional status by restructuring their business.

32. The Applicants adamantly deny that they have abused the judicial or administrative process or perpetrated any fraud on a judicial or administrative forum. The Applicants explain that their operation as Hinshaw pipelines has been and continues to be consistent with the statements they made in the prior MoPSC proceeding and within the limitations of the Hinshaw exemption. However, according to the Applicants, those statements did not purport to preclude any further reorganization of the pipelines' business at a later date, including becoming an integrated interstate pipeline. The Applicants assert that reorganizing to become an integrated interstate pipeline is fully within the law and cannot be blocked by the state due to the doctrine of preemption.[28] In any event, they assert that judicial estoppel is an extraordinary and unfavored doctrine,

[28] *Citing Cabot Corp. v. Pub. Serv. Comm'n of W.VA.*, 332 F. Supp. 370, 373 (S.D. W.VA. 1971).

that the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has expressed that view, [29] and that the Commission has never applied the doctrine.[30]

33. The Applicants point out that the doctrine of judicial estoppel is designed to protect the integrity of the courts, not the parties to a proceeding.[31] They assert that AmerenUE and the other protestors have not suffered any unfair detriment as a result of the Applicants' seeking an NGA section 7(c) certificate, nor have the Applicants obtained an unfair advantage. In this regard, the Applicants note that Gateway could have filed with the Commission to acquire the border-crossing facilities and to operate Missouri Gas, Missouri Pipeline and the border-crossing facilities as an integrated interstate pipeline at the time Gateway sought to acquire Missouri Pipeline and Missouri Gas, instead of establishing Missouri Interstate as a separate interstate pipeline. Thus, in their view, to the extent AmerenUE contends that federal regulation of Missouri Gas and Missouri Pipeline would be detrimental to it and other customers, they are not in any worse position now than they would have been had no acquisition proceeding taken place before the MoPSC wherein the alleged inconsistent statements were made.

34. AmerenUE responds that Applicants are misguided in their contention that the Commission should not apply the judicial estoppel doctrine because the D.C. Circuit disfavors it. It states this is so because that court has not considered whether to apply the doctrine since the U.S. Supreme Court decided *New Hampshire v. Maine.* AmerenUE also notes that U.S. Courts of Appeals in every other circuit, including the Federal Circuit, have had occasion to consider application of the doctrine since *New Hampshire v. Maine* was decided and have confirmed its validity.[32] Further, AmerenUE maintains that while the Commission has not applied the doctrine, it recognized the validity of the doctrine in an order issued since *New Hampshire v. Maine.*[33]

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[29] *Citing Konstantinidis v. Chen,* 626 F.2d 933, 938 (D.C. Cir. 1980) (*parenthetical omitted*).

[30] *Citing Kentucky Utilities Co.*, Opinion No. 380, 62 FERC ¶ 61,097, at 61,705 (1993) (*parenthetical omitted).*

[31] *Citing* 28 Am. Jur. 2d *Estoppel and Waiver* § 74 30.90 (2007); *Data Gen. Corp. v. Johnson,* 78 F.3d 1556, 1565 (Fed. Cir. 1996).

[32] AmerenUE's August 1, 2007 Motion for Leave to File Reply and Reply at 13 n.37 (citing cases from each circuit).

[33] *Citing Louisiana PSC v. Entergy Corp.*, 119 FERC ¶ 61,224, at P 45 (2007).

35. AmerenUE also notes that in the cases cited by Applicants where the Commission declined to apply the doctrine, some element of the test was missing. Here, however, AmerenUE contends that there is no question that the Applicants made statements and commitments to the MoPSC and to the parties to that proceeding, and that the MoPSC and the parties relied on those representations in not opposing the authorizations requested by the Applicants. AmerenUE asserts that "[t]hey were freely offered in order to obtain state authorizations that otherwise might not have been forthcoming."[34] AmerenUE maintains that if the Commission allows the Applicants to undo the commitments they made in prior proceedings, they will gain an additional advantage, presumably by obtaining more favorable regulatory treatment from the Commission and avoiding pending MoPSC-proceedings, in addition to the advantage they gained in the state proceedings by being permitted to acquire the border-crossing facilities. Therefore, AmerenUE urges the Commission to apply the doctrine of judicial estoppel and, on rehearing, dismiss or deny the application.

Response

36. AmerenUE contends that each of the factors enumerated by the Supreme Court in *New Hampshire v. Maine*, which "typically inform the decision to apply the doctrine [of judicial estoppel] in a particular case. . . "[35] are present in this proceeding; therefore, the Commission must apply the doctrine. We disagree. The factors cited by the Court are not mandatory, but are intended to provide guidance. The Court expressly stated:

> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.[36]

37. AmerenUE misconstrues the context in which previous statements were made by the Applicants, as well as the nature of the statements. In our opinion, all of the circumstances described by AmerenUE, as discussed below, are susceptible to a different and more plausible interpretation than that urged by AmerenUE.

38. First, with regard to context, when the MoPSC issued the 1989 original certificate to Missouri Pipeline, it apparently was concerned that the pipeline's ownership of an

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[34] AmerenUE's August 1, 2007 Motion for Leave to File Reply and Reply at 15.

[35] *New Hampshire v. Maine*, 532 U.S. at 750 (2001).

[36] *Id.* at 751.

interconnected segment of pipeline that crossed the border between Missouri and Illinois would call into question the new pipeline's eligibility for exemption from federal regulation under section 1(c) of the NGA. Therefore, according to AmerenUE, the MoPSC conditioned the certificate on Missouri Pipeline's obtaining a declaration of exemption from the Commission and on maintaining a physical separation between the facilities that would be subject to state jurisdiction and the border-crossing segment.[37]

39. This concern was not unusual since, historically, Hinshaw pipelines were kept physically separate from downstream pipelines capable of transporting gas out of state to avoid even the possibility that gas transported by the Hinshaw pipeline could be consumed out of state contrary to the NGA section 1(c) exemption.[38] Although in 1989, when Missouri Pipeline received its MoPSC certificate, Hinshaw pipelines could transport gas for out of state consumption if they had a blanket certificate under section 284.224 of the Commission regulations, typically the physical interconnection did not occur until the Hinshaw pipeline received its blanket certificate.[39] It was not until 1991 that the Commission provided declarations of exemption under NGA section 1(c) where there already was a physical connection with a downstream pipeline that could move gas out of state, but where the pipeline's proposed operations, as evidenced by its contracts, did not contemplate flowing gas out of state.[40] Given this context, it is evident that

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[37] AmerenUE states that it can find no record indicating that Missouri Pipeline sought such a declaration from the Commission, but points out that since the Hinshaw exemption has been found to be self-implementing, such a declaration was unnecessary.

[38] *See, e.g., Empire State Pipeline*, 56 FERC ¶ 61,050, at 61,169 (1991), *reh'g granted in part, and denied in part*, 61 FERC ¶ 61,091 (1992) ("[t]he Commission construes the Hinshaw exemption strictly to require separation of gas which will be consumed in a state, which is eligible for exemption under section 1(c), from gas moving in interstate commerce.").

[39] *See, e.g., Kansas Pipeline L.P.*, 49 FERC ¶ 61, 235, at 61,834 (1989) (Hinshaw pipeline seeking section 284.224 limited jurisdiction certificate indicated that "it anticipate[d] . . . a *new* interconnection with Riverside Pipeline Company, L.P." in order to deliver gas for consumption out of state) (*emphasis added*).

[40] *See, e.g., Empire State Pipeline*, 61 FERC ¶ 61,091, at 61,371 (1991) (affirming Hinshaw exemption for pipeline with downstream interconnection to an interstate pipeline that could transport gas out of state if it reversed its flow, and finding "these possibilities do not reflect National Fuel's usual operations" as reflected by pipelines'contracts). *See also Ohio Valley Hub, L.L.C.*, 96 FERC ¶ 61,152 (2001) (holding that Hinshaw pipeline could retain exemption even though it delivered gas to

(continued)

Missouri Gas' and Missouri Pipeline's agreement to the certificate condition requiring physical separation was not unusual and cannot be construed as a commitment never to seek to change its jurisdictional status.

40. In the 2001 MoPSC proceeding wherein Gateway sought to acquire Missouri Gas and Missouri Pipeline, Gateway, these pipelines requested the removal of the certificate conditions requiring physical separation between the pipelines and the 5.6-mile border-crossing segment of pipeline. This issue came up because the parties indicated that Gateway might seek to operate the border-crossing segment to bring gas into Missouri through an interconnection with the two pipelines. Since the concern about whether operation of the border-crossing segment might affect the pipelines' Hinshaw status again arose, the pipelines and Gateway agreed to conditions requiring Gateway to establish a separate interstate pipeline if it decided to operate the 5.6-mile border-crossing pipeline segment. Further, the acquisition by Gateway was conditioned on its and the pipelines' flowing gas only into Missouri if the interstate pipeline was established.

41. Regarding these more recently MoPSC-imposed certificate conditions, we observe that if, at the time of the acquisition proceeding before the MoPSC, Gateway planned to operate Missouri Gas, Missouri Pipeline and Missouri Interstate, then or later, in a manner that would flow gas outside of Missouri, it makes little sense that it would have brought the acquisition application before the MoPSC. Instead, Gateway could have filed an application with the Commission under NGA section 7(c) seeking authority for Gateway to acquire the two Missouri-jurisdictional pipelines and the border-crossing pipeline segment and to merge them into an integrated interstate pipeline able to transport gas into or out of Missouri.[41] It is common knowledge that prosecuting applications before state or federal administrative agencies can be time-consuming and expensive; it would have been more cost-effective and efficient to have created a single interstate pipeline at the time of the acquisition, than to have expended resources on two separate proceedings in the same year: one before the MoPSC wherein Gateway acquired

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interstate that transported the gas out of state but delivered equal contract volumes back to the Hinshaw pipeline for consumption in its state of operation).

[41] We recognize that the MoPSC believed that by imposing these conditions it could prevent Missouri Gas and Missouri Pipeline from changing their jurisdictional status at a later date, but the MoPSC lacks such authority. As noted above, the Cole County Circuit Court in Missouri granted, on preemption grounds, the defendants' motion to dismiss the MoPSC's enforcement action seeking an injunction against the pipelines to prevent them from prosecuting their application before this Commission. *See supra* note 14.

Missouri Gas and Missouri Pipeline and one before this Commission wherein Gateway filed an NGA section 7(c) application to create Missouri Interstate. Further, at a minimum, if Missouri Gas and Missouri Pipeline had the intent at that time to ultimately transport gas out of Missouri future by way of the new Missouri Interstate, they could have filed an application for a limited jurisdiction blanket certificate under section 284.224 of the Commission's regulations enabling them to flow gas out of state without losing their Hinshaw exemptions. But they did not do this.

42. In sum, we do not believe that the Applicants were attempting to deceive the MoPSC or the parties to the state certificate proceedings when they agreed to the conditions placed on those certificates. It is reasonable to assume that the agreement to continue operating Missouri Gas and Missouri Pipeline as Hinshaw pipelines reflected Gateway's business model for those pipelines at the time it acquired them.

43. However, business models change for a variety of reasons, including, among others, to obtain better tax or regulatory treatment, to expand the business into new markets, or to obtain economic efficiencies. The fact that such changes occur cannot reasonably be characterized as improper inconsistencies on the part of the business owners or managers. For these reasons, the Commission is not persuaded that the Applicants' positions in either the acquisition proceeding or in this proceeding lend themselves to the kind of inconsistencies the doctrine of judicial estoppel contemplates.[42]

44. The parties opposing the Applicants' proposal have consistently argued that there have been no changed circumstances to justify a change in business plan. However, it is our view that the Applicants did not need to specify the underlying reasons why they have decided to change their business model. As we stated in the April 20, 2007 Order, it is not unlawful for pipelines to seek to change their jurisdictional status. Generally, the

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[42] Even if Missouri Gas, Missouri Pipeline and Gateway did misrepresent their intentions regarding the future operation of the Missouri pipelines when they accepted conditions on their MoPSC-approved certificates, the Commission would not be required to apply the doctrine of equitable estoppel to either bar the Applicants in this proceeding from applying for an NGA section 7(c) certificate in the first instance, or arguing in the certificate proceeding that the Commission's authority under NGA section 7(c) preempts the MoPSC's enforcement of the certificate conditions. *See Mississippi Power v. Miss. Ex Rel. Moore*, 487 U.S. 354, 376 n.14 (1988) ("Representations in state proceedings, even ones that were false when made, cannot subvert the operation of the Supremacy Clause.")

Commission does not second guess pipelines' business decisions except in limited circumstances, for example, when it determines in a rate proceeding whether certain expenditures were prudently incurred. For all of the above reasons, we deny rehearing on the issue of judicial estoppel.

B. Forum Shopping

45. AmerenUE and the MoPSC argue that the Applicants' filing for an NGA section 7(c) certificate with the Commission constitutes forum shopping in an attempt to obtain better rate treatment than they would receive if Missouri Gas and Missouri Pipeline remained subject to the MoPSC's jurisdiction. They contend that this type of forum shopping, especially in light of the state certificate conditions and the pipelines' commitments, is inconsistent with the public interest; therefore, the Commission should have denied the application.

Response

46. The Commission denies rehearing on this issue for the same reasons discussed in our response to the judicial estoppel argument and in the April 20, 2007 Order. There we explained that a pipeline, like any other business, may seek what it perceives to be a more favorable regulatory environment by changing its legal structure to qualify for regulation under another jurisdiction. Further, we held that the conditions on Missouri Gas' and Missouri Pipeline's state certificates were unenforceable to the extent they attempted to prevent the pipelines from filing an application subject to the NGA with the Commission.

C. Evidentiary Hearing

47. AmerenUE contends that the Commission erred by not holding an evidentiary hearing on the reason and purpose of the Applicants' corporate restructuring. It asserts that this restructuring raises several material issues that could not be resolved on the written record such as whether the primary purpose of the restructuring was to evade state jurisdiction, whether there were any changed circumstances to justify the restructuring, and whether the proposal would result in the benefits to existing customers.

Response

48. We disagree. Neither the Applicants' primary purpose for restructuring nor the lack of changed circumstances in the Applicants' operations is a material issue in this proceeding and, therefore, even if the record were inadequate to determine the primary purpose of the proposal or whether there were any changed circumstances, no trial-type hearing was necessary to resolve the issues. As we indicated in the April 20, 2007 Order, the proposed restructuring is neither illegal nor contrary to our policies even if the reason behind the restructuring is the avoidance of state regulation, as some parties allege.

Additionally, as we explained in our response to AmerenUE's judicial estoppel argument, the pipelines made a business decision to restructure themselves and no showing of changed circumstances was necessary to justify that action. Finally, as demonstrated by our discussion finding that the Applicants made a sufficient showing of the benefits of their proposal, this issue did not create a material fact in dispute that could not be resolved on the existing written record.[43]

D. Initial Rates

49. The petitioners assert that the Commission's decision to grant the Applicants' initial rate proposal was arbitrary and capricious and not supported by sufficient evidence or reasoned decisionmaking. In support of these overarching contentions, the parties cite the fact that in two instances, the Commission allowed the Applicants to include items in the proposed rate base but, because the record did not contain the necessary information for the Commission to make a determination on these issues, it deferred consideration of the concerns raised by the protesters to the rate case that will be filed by the Applicants 18 months after service begins. Those issues include whether MoGas can include financing and loan fees in the rate base and what the proper level of Accumulated Deferred Income Tax (ADIT) should be.

50. In this regard, AmerenUE asserts that if the Commission had deferred action until the rate and complaint proceedings before the MoPSC were resolved, or had not terminated Missouri Interstate's cost and revenue study proceeding in Docket No. RP06-274-000, it could have used the record in those proceedings to assist it in setting initial rates. According to AmerenUE, because the Commission did not have the information that would have been provided by these pending proceedings, it should have conducted a more in-depth inquiry into the proposed initial rates.

51. The MoPSC also contends that the Commission referred to, but did not address, an issue it had raised in its protest in this proceeding regarding whether an acquisition premium, allegedly paid in 1995 by UtiliCorp United, Inc. when it acquired Missouri Gas, Missouri Pipeline, and the then non-operational border-crossing segment of pipeline, has been improperly included in MoGas' rate base. The MoPSC explains that it also raised this issue in its protest in Docket No. RP06-274-000, in which Missouri Interstate filed its cost and revenue study after three years of operation, and requested that the Commission look further into whether this acquisition premium had been included in

[43] *See Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); *Louisiana Ass'n of Independent Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992); *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993).

Missouri Interstate's rate base. On rehearing, the MoPSC reiterates its concern regarding the inclusion of the premium, since in the April 20, 2007 Order, the Commission dismissed the issue as moot when it terminated the cost and revenue study proceeding. Since the Commission's policies provide that an acquisition premium may not be included in a rate base unless there is a clear showing of quantifiable benefits to the customers, the MoPSC urges the Commission to at least grant rehearing for the purpose of requiring Missouri Interstate to provide additional information on the extent to which its rate base includes an acquisition premium. Additionally, MoPSC asserts that more information on the acquisition premium issue has become available, which should be considered, and urges the Commission to either explore this issue or exclude such amount for the purposes of calculating initial rates.[44]

52. In their answer, the Applicants maintain that the MoPSC provides no support for its position regarding the acquisition premium. They further assert that in Missouri Interstate's certificate proceeding in 2002, when the 5.6 miles of border-crossing was proposed to become operational as part of that pipeline, the rate base approved by the Commission was approximately $10,088,000, which was described as the depreciated net book value of the pipeline when Gateway acquired UtiliCorp United, Inc.'s stock. The Applicants cite language from Missouri Interstate's certificate order in which the Commission explains that the MoPSC had approved the previous sale of the facilities, including the purchase price associated with it, and that since the facilities would be "devoted to gas utility service for the first time," it was appropriate to "include the $10,088,000 purchase price as the original cost in rate base for recourse ratemaking purposes. . . ."[45] Therefore, the Applicants assert that the MoPSC's objection to costs included in MoGas' rate base attributable to Missouri Interstate's rate base is a collateral attack on the Commission's previous certificate order.

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[44] The MoPSC includes as an attachment to its rehearing request the 2001 testimony of the President of Missouri Gas and Missouri Pipeline in the MoPSC proceeding in which Gateway acquired the pipelines, which the MoPSC asserts, confirms the existence, though not the size, of an acquisition premium for the sale of the border-crossing pipeline to Gateway. The attachments also include a spreadsheet, schedule and estimated purchase price certificate which the MoPSC states support the existence of an acquisition premium.

[45] *Missouri Interstate*, 100 FERC ¶ 61,312, at P 24 and P 26 (2002).

Response

53. We do not agree with the Applicants that the MoPSC's raising the acquisition premium issue here is a collateral attack on our approval of the gross plant balance for Missouri Interstate in its certificate proceeding in 2002. The MoPSC properly raised this issue in its protest in Docket No. RP06-274-000, in response to Missouri Interstate's filing of its three-year cost and revenue study. However, the Commission terminated Missouri Interstate's cost and revenue study proceeding before making any determinations based on that study. We recognize that the petitioners do not think we should have terminated that proceeding; however, we did so because, as a result of the merger, Missouri Interstate will cease to exist and because it will be a more efficient use of our administrative resources to review the issues raised in the cost and revenue study proceeding at the same time we consider other rate issues in the rate proceeding MoGas will file in 18 months.

54. We will not transfer the subject matter of the proceeding in Docket No. RP06-274-000 into this proceeding. If that proceeding had gone forward, the Commission would have scrutinized Missouri Interstate's costs and revenues and, if necessary, would have exercised its section 5 authority to establish just and reasonable rates for Missouri Interstate. That process potentially would have involved procedures associated with trial-type hearings. In order to test the validity of the information in the cost and revenue study here, we would have to turn this certificate proceeding into a rate proceeding. We will not do that. Additionally, we are not subjecting any of the rate base information from Missouri Gas and Missouri Pipeline to the increased level of scrutiny required in rate proceedings, so it would make little sense to cherry pick one issue from Missouri Interstate's cost and revenue study and expend resources here to scrutinize information on that one issue. Further, although arguably all three pipelines have an operating history that could be adduced and evaluated, the fact is that none of those histories reflect how MoGas will operate. In this sense, the rate base for the initial rates we have approved is based on estimates, as is usually the case in a certificate proceeding.[46]

55. Further, in response to a similar allegation regarding the acquisition premium in Missouri Interstate's certificate proceeding, the Commission found that it would "permit Missouri Interstate to include the $10,088,000 purchase price of the existing facilities as the original cost in rate base for recourse ratemaking purposes because the facilities will

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[46] *See, e.g., Maritimes & Northeast Pipelines, LLC,* 81 FERC ¶ 61,166, at 61,726 (1997) (initial rates determined by public convenience and necessity, not just and reasonable standard).

be devoted to gas utility service for the first time. . ."[47] and we noted that "the MoPSC approved this arms-length sale transaction between the non-affiliated parties [Gateway and UtiliCorp United] and the purchase price in the [sale] Agreement." In the April 20, 2007 Order, we cited a fuller version of language on this issue from the Missouri Interstate certificate order. For the reasons discussed above, we will not disturb that finding for the purpose of establishing initial rates for MoGas. Instead, MoGas will have the burden of justifying any rates it proposes when it files its rate case in 18 months and the parties may challenge MoGas' rate proposal. At that time, the Commission may set for hearing any issues which it believes require more scrutiny.

56. As to the inclusion of financing and loan fees in the rate base, the MoPSC did not provide any evidence in either its protest to the application or request for rehearing to support its position or point to any specific table or schedule in MoGas' certificate filing that would suggest that MoGas' financing and loan fees are being capitalized. With respect to ADIT, MoPSC in its protest to the application requested the Commission to require the Applicants to file, in addition to what they had filed in Exhibit N, a detailed schedule to support the ADIT calculation, similar to what Missouri Interstate filed in RP06-274-000, as well as income tax returns to support the tax depreciation expense and tax rates used in these computational schedules. MoPSC has provided no valid argument why MoGas should be required to provide additional information on its ADIT calculations here. The Applicants sufficiently complied with the filing requirements for Exhibit N of the application. Indeed, there was sufficient detail in Exhibit N to allow the Commission to direct the Applicants' to use end-of-year totals for ADIT and not an average in its rate calculation. We note that in its compliance filing, MoGas complied with our direction with regard to ADIT; however, other issues have now arisen which we are addressing in the compliance section of this order.

57. Further, as we have explained, the level of the Commission scrutiny of Missouri Interstate's cost/revenue filing in Docket No. RP06-274-000 is not the same as that for initial rates; thus, we will not require the additional information on ADIT sought by the MoPSC or delve further at this time into the new material provided by the MoPSC on this issue. For all of the above reasons, we find that the Commission had a sufficient record upon which to base its determinations in the April 20, 2007 Order and that, therefore, our determinations were not, on that account, arbitrary and capricious, or not the result of reasoned decisionmaking, and we deny rehearing on this issue.

[47] *Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312, at P 26 (2002).

E. Inconsistencies with Commission Policies

58. The petitioners maintain that the Commission's approval of the Applicants' proposal is inconsistent with several of the Commission's policies, including: (1) its practice of basing billing determinants for initial rates on the capacity of facilities, whereas here, the recourse rates were calculated on the amount of capacity subscribed by the existing customers; (2) the Tax Policy Statement,[48] because the Commission allowed a tax allowance when there was not sufficient evidence to support one; (3) the Certificate Policy Statement,[49] because Missouri Pipeline's existing customers will subsidize the customers on Missouri Interstate and *vice versa* since one of the approved rate zones includes the cost of service of both pipelines; (4) its requirement that applicants demonstrate benefits from a project and eliminate or minimize adverse effects on existing customers; and (5) its requirement that new pipelines file a cost and revenue study after setting initial rates, whereas here the Commission required the filing of a section 4 rate case.

1. Initial Rates Based on Contracted Capacity

59. AmerenUE and MuniComm/Cities contend that the Commission did not provide an adequate explanation for why it permitted the Applicants to base their initial recourse rates on subscribed capacity as opposed to the design capacity of the Applicants' facilities which, they assert, is the Commission's usual policy. AmerenUE states that the Commission accepted Applicants' assertion that there is no established design capacity available for the Missouri Pipeline and Missouri Gas facilities and that the capacity is determined by the available pressure on upstream pipelines which changes and is beyond the Applicants' control. However, AmerenUE points to an exhibit to the MoPSC's motion for abstention which indicates that when Missouri Pipeline and Missouri Gas were certificated by the MoPSC, the peak capacity of their systems was stated as 85,000 Mcf per day and 22,000 Mcf per day, respectively, and that in Missouri Interstate's certificate proceeding before this Commission, that pipeline's design capacity was stated as 20,000 Dth per day.

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[48] *Policy Statement on Income Tax Allowances*, 111 FERC ¶ 61,139 (2005).

[49] *Certification of New Interstate Natural Gas Pipeline* Facilities, 88 FERC ¶ 61,227 (1999), *Order Clarifying Statement of* Policy, 90 FERC ¶ 61,128 (2000), *Order Further Clarifying Statement of* Policy, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

60. The MoPSC also asserts that using subscribed capacity exacerbates the problems with the rolled-in rate design for Zone 1, as discussed further below, because no separate billing determinants for Missouri Interstate are included in the rate design. The MoPSC asserts that these factors have the effect of removing an at-risk condition that the Commission placed on Missouri Interstate when that pipeline was certificated by the Commission. In this regard, MuniComm/Cities posit that the filing of the application is a collateral attack on the Missouri Interstate certificate order because the proposal eliminates the at-risk condition. Petitioners contend that the Commission gave no explanation for why it is appropriate to eliminate the at-risk provision imposed on Missouri Interstate

61. In the explanatory material to its compliance filing, the Applicants respond to the petitioners' concerns about basing the initial rates on subscribed capacity as opposed to design capacity. The Applicants assert that their use of contract demand as billing determinants was appropriate and consistent with Commission precedent. They state that it is the Commission's practice to allow pipelines to calculate their initial rates for new facilities on design capacity, but that pipelines may calculate their rates for existing facilities based on contract demand.[50] The Applicants argue that it is particularly appropriate for the initial rates for MoGas to be based on contract demand rather than design capacity because the facilities have no compression and the capacity is dependent on delivery pressure from Panhandle Eastern Pipe Line Company (Panhandle). Therefore, the Applicants maintain that the 22,000 Mcf per day which petitioners cite as the appropriate design capacity for Zone 2 (the Missouri Gas facilities) is higher than the normal operating capacity. Further, they contend that using an 85,000 Mcf per day design capacity for Zone 1 would be inappropriate because the pipeline system is no longer configured as it was 15 years ago when it was first certificated. Specifically, they explain that as the system has expanded, delivery points have moved farther and farther from the Panhandle receipt point.

Response

62. The policy requiring rates to be based on design capacity is intended to deter pipelines from overbuilding pipeline facilities; thus, the Commission generally requires rates for service over new construction to be calculated on design capacity. Further, if pipelines that have oversized their facilities could design their rates on subscribed capacity, they would recover the costs of the excess capacity from customers who do not need or use that capacity. Where, as here, no construction is involved, however, there is

[50] *Citing Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074, at P 105 (2006).

no risk of overbuilding. In *Crossroads Pipeline Co.*,[51] for example, the Commission found that there was no possibility of overbuilding, since the Crossroads facilities had been previously constructed as an oil pipeline; therefore, it permitted the pipeline to base its rates on projected demand for capacity rather than actual physical capacity.[52] Further, in that proceeding, the Commission noted that over-recovery of costs could be addressed when the pipeline filed its required cost and revenue study, pursuant to NGA section 4. Similarly, the Commission recently approved rates based on contract demand and projections of future gas supply development in the area for a new interstate pipeline which had acquired pipeline facilities in the production area from Northern Natural Gas Company.[53]

63. Because Missouri Pipeline's and Missouri Gas' facilities were previously constructed or converted from an oil pipeline by other parties, no construction is involved in the merger. Additionally, these pipelines have never functioned before as interstate pipelines subject the Commission's jurisdiction. Therefore, we will treat them as we did the pipelines referred to above and permit MoGas to use the level of capacity these pipelines have under contract as billing determinants in their respective zones. We also note that, although the MoPSC apparently stated a capacity figure for Missouri Pipeline and Missouri Gas when it certificated these pipelines, the Commission does not know how those figures were derived nor, assuming their accuracy, the extent to which circumstances have changed their validity. Therefore, we deny rehearing on the issue of whether MoGas may use contract volumes for billing determinants attributable to Missouri Pipeline and Missouri Gas in order to calculate rates for the new pipeline.

64. Missouri Interstate's situation is somewhat different, however, because it already appeared before the Commission and was issued a certificate authorizing it to convert a segment of the former oil pipeline to interstate natural gas service. In its certificate proceeding, Missouri Interstate also sought authority to construct and operate a one-mile, 12-inch diameter pipeline to connect the oil pipeline to another interstate pipeline in Illinois. Missouri Interstate stated that the capacity of the converted pipeline and the

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[51] *Crossroads Pipeline Co.*, 73 FERC ¶61,138 (1995).

[52] *Id.* at 61,396.

[53] *Northern Natural Gas Company* and *WTG Hugoton, LP*, 119 FERC ¶ 61,035, PP 38-41 (2007) (finding that billing determinants were appropriate basis for initial rates where the subject facilities had been in service for years, so there was no danger of overbuilding and any over-recovery of costs could be reviewed when a cost and revenue study was filed after three years of operation to justify the initial recourse rates).

extension was 20,000 Mcf per day and, as the petitioners point out, it proposed that it would be at-risk for any unsubscribed capacity. But, as the petitioners also note, because in this proceeding no billing determinants for service over Missouri Interstate were included in the rate base for Zone 1, which includes service over both Missouri Pipeline's and Missouri Interstate's facilities, the pipeline would no longer bear the risk of underutilization of the Missouri Interstate facilities. In the section below on subsidization, we are addressing the issue of whether billing determinants for Missouri Interstate should be included in the Zone 1 rates and what those determinants should be if they are included.

2. Income Tax Allowance

65. In its request for rehearing, the MoPSC contends that the Commission erred by finding that if MoGas could provide sufficient information regarding its ownership structure, it would be entitled to an allowance for federal and state income taxes under the Commission's Tax Policy Statement even though MoGas will be a limited liability company. According to the MoPSC, the Commission's Tax Policy Statement in this regard is inconsistent with *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1228-93 (D.C. Cir. 2004), wherein the court held that an oil pipeline operator that was a limited partnership paid no income taxes and, therefore, was not entitled to an allowance to pass through to its rate payers income taxes paid by the limited partnership's owners.

Response

66. On May 29, 2007, the U.S. Court of Appeals for the District of Columbia Circuit in *ExxonMobil Oil Corp. v. FERC*, 487 F.3d (D.C. Cir. May 29, 2007) found that the Commission's decision in its Tax Policy Statement to allow a limited partnership an income tax allowance on all of its partnership interests to the extent the owners of such interests incurred actual or potential tax liability was neither arbitrary or capricious.[54] In its compliance filing, the Applicants provided information to support their contention that entities higher up in the ownership structure paid such income taxes, as directed by the Commission in the April 20, 2007 Order. That information is discussed in more detail in the compliance section of this order. Under these circumstances, we will deny the MoPSC's rehearing request on this issue.

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[54] We note that the MoPSC's request for rehearing was filed with the Commission on May 21, 2007, so it would have been unaware of this case.

3. Improper Subsidy by Existing Customers

67. The petitioners contend that the Commission's determination in the April 20, 2007 Order that there would be no subsidy on the part of existing shippers is incorrect and assert that there will be a subsidy, contrary to the Certificate Policy Statement. They explain that the cost-of-service for both Missouri Pipeline's and Missouri Interstate's facilities are rolled into MoGas' Zone 1 initial recourse rate, even though not all existing shippers on Missouri Pipeline use Missouri Interstate's facilities. Further, they point out that the Zone 1 rate does not include billing determinates for Missouri Interstate, which exacerbates the subsidy that will occur and results in removing an at-risk condition placed on Missouri Interstate in its certificate proceeding. AmerenUE also posits that Missouri Interstate was consistently underused in its first three years of operation and that combining Missouri Pipeline's and Missouri Interstate's cost of service into one rate will shift the costs of this underuse to Missouri Pipeline's existing customers. The petitioners claim that the Commission's finding that there will be no subsidy by existing shippers because they would continue to pay the rates they are currently paying is not a sufficient response to the subsidization concerns raised by the parties since some shippers may, in fact, take service under the recourse rates. The petitioners urge the Commission to require on rehearing that the Applicants create three zones for the recourse rates, one zone for each of the pre-existing pipelines.

68. In their answer, the Applications maintain that AmerenUE overstates any adverse rate impact it might experience as a result of the combining of the cost of service of Missouri Pipeline and Missouri Interstate into Zone 1 of the new rates because AmerenUE fails to take into consideration the corresponding rate reduction for the Zone 2 facilities. They also contend that underutilization of Missouri Interstate's facilities is irrelevant to the proposed rate design because under the straight fixed-variable approach, a pipeline's cost responsibility is not contingent on actual throughput but on contract demand. The Applicants note the statement in the April 20, 2007 Order that the subsidy issue is of limited applicability in this proceeding because no new facilities will be constructed and if the current customers choose to pay the rates they are paying now as negotiated rates, they are unlikely to subsidize any other customers.

69. Regarding the MoPSC's and the MuniComm/Cities' suggestion that the Commission should create three zones instead of two, the Applicants assert that a three zone system would create an imbalance in the size of the zones, and deprive the customers of their ability to provide access to the interstate points in Zone 1 without an additional charge if they release capacity. They further argue that the two zone rate design is consistent with Commission precedent and policy.

70. In response, AmerenUE states that the Applicants do not dispute that there will be subsidization on the part of some customers as a result of the Zone 1 rates and they have

not reconciled how the possibility of former Missouri Pipeline customers' subsidizing Missouri Interstate's former customers is consistent with the Certificate Policy Statement, wherein a finding of no subsidy is a threshold issue such that benefits cannot offset any subsidy. AmerenUE also points out that any decrease in Zone 2 rates that might benefit customers who also transport gas in Zone 1 does not offset the subsidization of former Missouri Interstate customers by such customers. Further, it argues that the ability of the former customers to negotiate new rates with MoGas does not diminish any concerns regarding subsidization because there could only be an offsetting rate decrease if the pipeline agrees.

Response

71. The thrust of the Certificate Policy Statement is to prevent a pipeline's existing customers from subsidizing the construction of new capacity they will not use or from which they will receive no benefit.[55] As explained in the April 20, 2007 Order, however, the Certificate Policy Statement had limited applicability in this case because the merger of the three pipelines is not an expansion of an existing system and no construction of facilities is involved. Therefore, the existing customers cannot subsidize the new project in the traditional sense. Nevertheless, since the underlying principles of the Certificate Policy Statement are grounded in a consideration of whether a project is consistent with the public interest in general, we may look to the Certificate Policy Statement for guidance.[56]

72. On review of the Applicants' rate proposal, we agree with petitioners that the design of the Zone 1 rates will result in Missouri Pipeline's existing customers who do not subscribe to service over Missouri Interstate's facilities subsidizing those customers who do. This will be the case because, although the cost of service associated with Missouri Interstate's facilities is included in the rate base for Zone 1, no billing determinants are included for service over them. By transferring cost recovery for Missouri Interstate's capacity to Missouri Pipeline's customers, the bulk of whom have no receipt point rights on Missouri Interstate and are not able to utilize Missouri Interstate's system on a primary basis, Missouri Pipeline's customers will subsidize Missouri Interstate's current customers. We are not persuaded by Applicants' argument that any subsidy that customers paying Zone 1 rates may pay would be offset by a decrease in the Zone 2 rates because customers of Missouri Gas and Missouri Pipeline

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[55] *See Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074 at P 115.

[56] *Id.*

currently pay separate rates and only those customers with delivery points off of Missouri Gas' system pay rates for service on both systems. Therefore, we will grant rehearing on this issue and require the Applicants either to include billing determinants for Missouri Interstate in calculating the Zone 1 rates or create a separate rate zone for service over Missouri Interstate's facilities.

73. This determination brings us back to the issue of what the proper billing determinants for Missouri Interstate. As explained above, we are treating Missouri Pipeline and Missouri Gas as existing facilities being converted for interstate use and have concluded that it is appropriate to base their billing determinates for service over these facilities on contract demand. There is also precedent for allowing initial rates to be based on projected demand for capacity, instead of design capacity, where a new pipeline acquired facilities already used to transport gas in interstate commerce.[57] As noted, recently we found that because there would be no new construction and the Commission could address issues of over-recovery in response to the cost and revenue study which the new pipeline would be required to file, this approach was warranted. The situation regarding Missouri Interstate is similar because, by way of the merger, MoGas, in effect, is acquiring the existing interstate pipeline as well as Missouri Gas and Missouri Pipeline.[58] Therefore, the Commission finds that billing determinants attributable to Missouri Interstate may be based on its current contract demand of 18,430 Dth.[59]

74. We also do not think that using different billing determinants here than were used in Missouri Interstate's certificate proceeding is unreasonable or will pose an undue burden on customers in Zone 1 who currently do not use the border-crossing facilities because the former Missouri Interstate facilities are now likely to be utilized in an entirely different way from that proposed in Missouri Interstate's certificate proceeding. Part of the purpose of this project is to meet a growing demand for transportation from west to east, for example, to move gas from the Rocky Mountain basin to markets in

[57] *Northern Natural Gas Co.*, 119 FERC ¶ 61,035, at PP 38-41 (2007).

[58] We note that in this case, MoGas will file a section 4 rate case in 18 months, or as discussed below, a cost/revenue study in the event that rate case is not filed.

[59] Including Missouri Interstate's billing determinants of 18,430 Dth in Zone 1 results in a revised overall rate for Zone 1 (22.5 cents/Dth), which is lower than the rate determined using only Missouri Pipeline's cost of service and billing determinants (23.5 cents/Dth), thereby eliminating subsidization of Missouri Interstate's customers by Missouri Pipeline's shippers.

other parts of the country. We also note that MoGas has proposed to install compression for the first time on the merged facilities to meet new demand.[60]

75. Setting initial rates is not an exact science as such rates must usually be based on estimates of construction and other costs. If Missouri Pipeline's existing customers who heretofore have not used Missouri Interstate's service choose to continue paying their current rates, the billing determinants chosen for Missouri Interstate will have no effect on their rates. On the other hand, if these customers choose to pay the initial recourse rates, we think that requiring the inclusion of billing determinants for the Missouri Interstate facilities in calculation of the Zone 1 rates will significantly reduce any adverse effects on such customers.[61]

4. <u>Benefits/Adverse Effects</u>

76. The petitioners argue that the Commission's approval of the Applicants' proposal is inconsistent with the Commission's policy requiring the Applicants to demonstrate benefits from their project and to eliminate or minimize adverse effects on existing customers. With respect to whether the proposed merger will provide any benefits, AmerenUE stresses that the Applicants propose no change in operations that would create any benefits for them and that the only changed circumstance that the Applicants rely on to justify the merger is that they wish to change their corporate structure.[62] The MoPSC

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[60] MoGas has made a prior notice filing under its Part 157, subpart F, blanket construction certificate in Docket No. CP07-450-000 and in that filing states that it has precedent agreements with customers for the new capacity.

[61] The MoPSC requests clarification on whether MoGas, in its upcoming section 4 rate case, will be entitled to a presumption that the two rate zones, as an "existing practice," are just and reasonable for the purposes of allocating the burden of proof in that proceeding. We clarify that the pipeline has the initial burden of demonstrating that a proposed *change* in rates is just and reasonable, but not a rate or practice that it is not proposing to change. *See* 18 C.F.R. § 154.301(c). The proponent of a change has the burden of justifying it. *See Algonquin Gas Transmission Co.*, 948 F.2d 1305, 1312 n.11 (D.C. Cir. 1991) (*quoting ANR Pipeline Co.*, 771 F.2d 507, 514 (D.C. Cir. 1985)). This is the same situation that would exist were MoGas to file a cost and revenue study after a period of initial operation.

[62] AmerenUE distinguishes the situation in *Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074, at P 115 (2006), where a Hinshaw pipeline was acquired by a new entity that would operate that pipeline as an interstate pipeline and, in addition to continuing to provide existing service, the new pipeline had precedent

(continued)

also asserts that there will be no benefits to existing customers. It cites the fact that the Applicants sought waiver of the electronic bulletin board (EBB) requirements as casting doubt on the Applicants' claim that its proposal would benefit customers because it would increase access to the secondary market.

Response

77. We disagree that there will be no benefits to existing customers. With respect to access to secondary markets, none of the waivers that were granted would inhibit the new pipeline's ability to enhance secondary market access since the Commission required MoGas to put into place a means of making capacity release and other information available to the public in a manner consistent with the North American Energy Standards Board's (NAESB) business and electronic communications standards. Further, customers will obtain greater flexibility on the integrated system, including access to capacity release and secondary point rights. Moreover, although the petitioners deny they will avail themselves of the additional flexibility afforded by the requirements of Part 284 of the Commission's regulations, that does not mean that they may not be able to do so in the future or that new customers coming onto the system should be denied those benefits on that account.

78. In the April 20, 2007 Order we accepted Applicants' contention that combining the three pipelines into one would result in administrative efficiencies. The MoPSC challenges that conclusion, noting that the pipelines are already run by the same parties. However, the merger should result in eliminating costs associated with keeping three sets of books, making three sets of tariff filings when they are necessary, paying professional fees, for example for legal or accounting work associated with three separate entities rather than one, preparing three sets of tax returns, and so forth. Any such savings ultimately will flow to existing customers when those savings are factored into MoGas' cost of service in its rate proceeding.

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agreements for new service. MoGas has no new agreements. However, it is not necessary to have precedent agreements to demonstrate a market for services. *See* Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748. In any event, as we have discussed, the Applicants are seeking to attract customers who wish to transport gas from the Rocky Mountain Basin and MoGas expects to construct facilities and add compression as those customers emerge.

79. Further, benefits are not defined only by the needs of existing customers, but also by national needs. MoGas will be able to operate in an entirely different manner than the three separate pipelines could. Specifically, MoGas will be able to flow gas out of Missouri and attract customers from the market for west-to-east natural gas transportation. At this time, with recent development of new gas supplies in the Rocky Mountain basin, additional west-to-east pipeline capacity will allow more consumers anywhere east of that area, including the existing customers of the three Missouri pipelines, to access these supplies.[63] For all of these reasons, we conclude that the Applicants' adequately demonstrated that benefits will flow from the merger and we deny rehearing on the issue.

80. Finally, we point out that in the Certificate Policy Statement the Commission identified three groups that may be adversely affected on economic grounds by a proposal even if there is no subsidization. In its analysis under the Certificate Policy Statement, the Commission must determine whether the benefits of a project outweigh the adverse effects on members of these groups. The groups include a pipelines' existing customers in an expansion project involving construction, competing pipelines, and captive customers of competing pipelines. Missouri Gas' and Missouri Pipeline's existing customers are not included in these groups.

81. As discussed above, we have found that the project will provide benefits that support a determination that it is required by the public convenience and necessity. We do not find that the potential adverse effects on the pipelines' existing customers require us to reverse that determination. In addition, the Applicants endeavored to minimize possible effects by offering to permit customers to continue paying their existing rates and to file a section 4 rate proceeding at a considerably earlier date than they would have been required to file a cost/revenue study. For all of these reasons, we deny rehearing on the issue of whether the Commission was required to eliminate all adverse effects on existing customers and whether the adverse effects outweigh the benefits.

5. <u>Section 4 Rate Case v. Cost/Revenue Study</u>

82. MuniComm/Cities and AmerenUE contend that the Commission improperly conditioned the certificate such that MoGas must file a rate case in 18 months, as opposed to requiring a cost and revenue study as is usual when certificating new interstate pipelines. These parties assert that the Commission is not permitted to require a

[63] *See, e.g., Entrega Gas Pipeline Inc*., 112 FERC ¶ 61,177, at P 28 (2005).

pipeline to file a section 4 rate case when acting under NGA section 7.[64] They also contend that even though the Applicants, themselves, proposed the filing of a rate case within 18 months, the Commission's approval of this proposal leaves open the possibility that the rate case may be filed, but that the rates will not go into effect until much later. MuniComm/Cities point out that in most certificate proceedings, the Commission states that the Applicants must file a cost and revenue study within three years or file a rate case with rates to be effective no later than three years after the initiation of service.[65]

83. The parties also are concerned that if MoGas does not file the rate case as promised, the Commission would have to exercise its authority under NGA section 5 to establish a proceeding in which it would establish new rates for the pipeline. The parties maintain that this procedure could also result in a significant delay before just and reasonable rates were placed into effect. On rehearing, the parties request the Commission to require the filing of a cost and revenue study within 18 months after the commencement of service or a section 4 rate case with rates to be effective within 18 months after service commences.

84. In their answer, the Applicants maintain that AmerenUE's and MuniComm/Cities' concerns are misplaced regarding whether the condition in the April 20, 2007 Order requiring MoGas to file a section 4 rate case 18 months after services commences is enforceable. The Applicants stress that they committed to make such a rate filing and that the Commission expressly incorporated that obligation as a condition to the certificate. Moreover, they note, if the Commission had included the condition it normally imposes on new pipelines, it would have required a cost and revenue study to be filed within three years after service begins, rather than the 18-month rate case requirement. In response to AmerenUE's contention that the Commission did not impose a date certain for when a rate review must occur, the Applicants state that their commitment to file a section 4 rate case within 18 months establishes such a date.

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[64] MuniComm/Cities cite *Public Service Commission of N.Y. v. FERC*, 866 F.2d 487 (D.C. Cir. 1989). AmerenUE cites, among other cases, *Pacific Gas Transmission Co.*, 65 FERC ¶ 61,005, at 61,040 (1993) (stating that the Commission lacked authority to require an applicant to file a section 4 rate case).

[65] *Citing Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312, at P 52 (2002). Missouri Interstate filed its cost and revenue study in Docket No. RP06-274-000 and the April 20, 2007 Order terminated that proceeding contingent upon the Applicants accepting the certificate for the new pipeline and the implementation of the merger. Applicants did accept the certificate and they anticipate going into service once their compliance filing is approved.

85. In response, AmerenUE clarifies that it did not request the Commission to require that MoGas file a cost and revenue study in three years, as the Applicants suggest in their answer. Rather, they expect the Commission to require the 18-month rate review that the Applicants obligated MoGas to make, but to require the filing of a cost and revenue study at that time if a section 4 rate case is not filed.

Response

86. The Commission is of the opinion that it has authority to enforce commitments made by applicants as assertions of fact in section 7 applications. While it is true that the Commission does not have authority to require pipelines to file section 4 rate cases, we think the situation is different where an applicant undertakes to make such a filing. However, in an abundance of caution, we will require MoGas to file a cost and revenue study 18 months after the commencement of service in the event it does not make the section 4 rate filing that the applicants have committed MoGas to do. This will afford the existing customers the protection they seek.

F. Rate and Contract Negotiation Issues

87. The petitioners contend that the Commission erred by not providing sufficient guidance on its direction to the Applicants to negotiate new contracts with the existing customers that are consistent with the form of service agreement in the tariff.[66] MuniComm/Cities assert that the Commission's requirements were flawed because they did not set out how long the new contracts must remain in force (for example, until the section 4 proceeding is completed), whether it was intended that the rates be frozen at what the customers are currently paying until just and reasonable rates are established, whether the ongoing proceedings before the MoPSC, which might result in lower rates, should be taken into consideration when defining what is the existing rate, whether the existing rate would include any discounts a customer might have, and whether the existing shippers could elect to pay the initial recourse rates if those rates are lower. In addition, MuniComm/Cities explain that if an existing contract has a provision permitting either party to terminate the agreement upon six months notice, then arguably MoGas could terminate the contract under this provision which would force the customer to pay the possibly higher recourse rate. MuniComm/Cities also contend that the Commission

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[66] We note that the April 20, 2007 Order also explained that if there are provisions in the existing contracts that the parties agree to grandfather into the new contract, the Applicants may submit the agreements reflecting such deviations or nonconforming provisions with an explanation of the basis for them.

should clarify how existing customers will be protected from adverse effects and grant rehearing where necessary to accomplish that end.

88. Like MuniComm/Cities, AmerenUE also maintains that the Commission failed to address what rate existing customers should pay if the initial recourse rates are lower than those being paid by a shipper. We note that in the responsive pleadings relating to the Applicants' compliance filing, issues related to the applicability of discount provisions in the existing customers' contracts have been raised. We will address those issues in our discussion below addressing the rehearing requests, to the extent they are relevant.

Response

89. The Commission will clarify its intent regarding the direction to the Applicants to negotiate new contracts with their existing customers that are in the form of the Part 284 contract in the pro forma tariff and the decision allowing the existing customers to pay the rates they are paying under their current contracts, as proposed by the Applicants. In the April 20, 2007 Order, we did not approve the Applicants' request to use the existing customers' current, MoPSC-approved contracts as negotiated rate contracts for service over MoGas because the pipeline will be subject to the Commission's jurisdiction. We explained that for the negotiated rate contracts, i.e., those negotiated contracts designed to preserve the rates being paid by existing customers, the parties should use the standard Part 284 service agreement in the tariff as the starting point for negotiations. However, we intended that the existing customers could opt to take service under the initial recourse rates if they so chose. It would be inconsistent with our policies to restrict potential customers of an interstate pipeline to taking service only under negotiated rate contracts. For example, in our Alternative Rate Policy Statement,[67] we explained:

> [T]he Commission is willing to entertain, on a shipper-by-shipper basis, requests to implement negotiated rates where customers retain the ability to choose a cost-of-service based tariff rate.
>
> . . . The recourse rate will be available for existing capacity holders that do not negotiate a rate with the pipeline, thereby ensuring that existing customers will

[67] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996), *reh'g and clarification denied*, 75 FERC ¶ 61,024 *reh'g denied*, 75 FERC ¶ 61,066 (1996); *petition for review denied*, *Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

always have a cost-of-service based rate available for capacity they have under contract.[68]

90. Further, when we approved the Applicants' proposal to allow the existing customers to pay their current contract rates, we intended to preserve the status quo, to the extent practicable, until the Applicants file their rate case 18 months after service commences over MoGas. MuniComm/Cities contend that the contracts should stay in force at least until the new rates go into effect because some rate proceedings last for years. We agree and clarify that we contemplate that the interim contracts, whether for recourse or negotiated rates, should remain in force at least until 60 days after the new rates go into effect, as discussed below. To the extent necessary, rehearing on this issue is granted.

91. Under this approach, existing customers will be able to negotiate with MoGas and enter into new contracts for service during the rate proceeding, or within 60 days thereafter, when actual operational and cost and revenue information is available and where the existing customers may fully participate in the proceeding and challenge any new rates proposed by MoGas. In such a situation, MoGas' customers should have a reasonable amount of leverage in negotiating the rates and the length of contract they desire.[69] These new contracts should establish the term of service, the rate for service (either negotiated or maximum/discounted recourse rates), type and levels of service, and other terms that the customers and pipeline may agree upon consistent with the Commission's policies and regulations, such as rights of first refusal or evergreen clauses. Further, if the parties agree, they may continue service under the interim contracts that were negotiated to comply with the April 20, 2007 Order. However, they would need to specify a new term of service since the interim agreements are only intended to remain in force until at least 60 days after new rates go into effect. Of course, MoGas and the existing customers need not wait for the filing of the rate case to negotiate new contracts for service. Accordingly, the existing customers will have maximum flexibility to secure capacity on a longer term basis on MoGas and to receive service at acceptable rates and under terms and conditions that best suit their operational needs.

92. Regarding the interim service agreements, MuniComm/Cities ask in their rehearing request:

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[68] Alternative Rate Policy Statement, 74 FERC ¶61,024 at 61,241.

[69] This will allow customers the opportunity to know exactly what the new rates will be if they are not set by settlement.

> [d]o the Applicants propose (and the Commission implicitly accept) that they can simply freeze the last effective Missouri tariff rate and leave it in effect for some indefinite period, without customers having recourse at the Missouri PSC if they believe the rate to be unjust and unreasonable?[70]

We must answer "yes" to this question for customers choosing not to pay the initial recourse rates we approved, although the time period referred to will not be indefinite. As the Applicants point out, they agreed to provide service to existing customers under the same rates and terms in those customers' existing contracts, not to provide better terms and conditions or lower rates.[71] Moreover, once service commences on MoGas, the Commission will have jurisdiction over the rates MoGas charges, not the MoPSC, so the customers would have no recourse at the MoPSC regarding MoGas' rates.

93. We recognize that the existing customers contend that Missouri Gas' and Missouri Pipeline's effective rates are only MoPSC-approved initial rates that were never tested under the just and reasonable standard, as applied in MoPSC rate proceedings, because the pipelines did not file general rate cases with the MoPSC.[72] Thus, MuniComm/Cities and AmerenUE aver that the existing Missouri Gas and Missouri Pipeline rates are too high and the Commission's allowing the existing customers to continue to pay those rates would not eliminate the adverse effects of this merger on them because they will have to wait until MoGas files its rate case to challenge the existing rates. However, the existing customers have the option of taking service under the initial recourse rates we have approved in this proceeding and have found to be required by the public convenience and necessity. Those rates may be higher for some customers and lower for others, but they nevertheless have been approved by the Commission.

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[70] MuniComm/Cities May 21, 2007 Request for Rehearing at 9.

[71] *See* Applicants' September 14, 2007 Answerat 6-7 & n.6 (responsive pleading relating to the compliance filing).

[72] We note that the MoPSC states that on June 25, 2007, it dismissed without prejudice another pending complaint at the request of its staff, which had filed the complaint. That complaint, filed on March 3, 2006, alleged that Missouri Gas' and Missouri Pipeline's rates were too high. The MoPSC could have established new tariff rates in that proceeding. However, it did not act in that proceeding and, therefore, no new tariff rates were established by the MoPSC prior to the issuance of the April 20, 2007 Order.

94. As we have explained, the Commission reviewed the Applicants' initial rate proposal and directed them to make certain modifications to the rate base underlying the initial rates.[73] We did not rely solely on the fact that the Applicants' were proposing to permit the customers to pay their current rates in reaching our decision to approve the recourse rates. Rather, we found that if the recourse rates resulted in any subsidization between existing customers, those customers who continue to pay their current rates would not be affected. On rehearing, we have remedied the subsidy in the Zone 1 rate that petitioners identified. Thus, the fact that the initial recourse rates may be higher than the rates currently being paid by a particular existing customer does not by itself amount to an adverse effect that would require the Commission to find that this proposal, including the recourse rates as modified, is not required by the public convenience and necessity. Rehearing, therefore, is denied on the issue of whether the Commission was required to provide the existing customers with lower rates then they were paying under their existing contracts in order to eliminate any adverse effects of the merger on them.

95. The petitioners request the Commission to confirm that the rates the existing customers were paying would be lowered if the MoPSC took any action in proceedings pending before it that would result in the lowering of their rates. As indicated above, the MoPSC filed a motion to lodge its August 28, 2007 decision in a complaint proceeding, filed on June 21, 2006, in which it found, among other things, that Missouri Gas and Missouri Pipeline had violated provisions in their MoPSC-approved tariff relating to discounts of rates for affiliated customers. Under those provisions, if the pipelines do not offer non-affiliated customers the same discounts offered to affiliated customers, the lower discounted rates may become the maximum rates the pipelines can charge for service for non-affiliated customers. In its August 28, 2007 decision, the MoPSC found that the lower rates charged to an affiliate became the highest rates Missouri Gas and Missouri Pipeline could charge, effective June 21, 2006.[74] The MoPSC asserts that in light of this decision, the rates the existing customers are paying under their current contracts are now the lower rates and those are the rates those customers should continue to pay if they opt to continue receiving service under negotiated rate contracts pursuant to the Applicants' offer in the application and the Commission's April 20, 2007 Order.

96. The Applicants argue, in their September 19, 2007 opposition to the motion to lodge, that the MoPSC decision is not material to this proceeding. They contend that

[73] April 20, 2007 Order, 119 FERC ¶61,074 at P 52-74.

[74] In its supplement to its motion to lodge the earlier decision, the MoPSC explained that on rehearing of that decision it determined that the effective dates of the lower rates should be earlier than June 21, 2006.

MoGas will be not be subject to the MoPSC's jurisdiction and, therefore, decisions it makes regarding Missouri Gas' and Missouri Pipeline's rates cannot bind the Commission. The Applicants explain that when they committed MoGas to allowing existing customers to take interstate service under their existing tariff rates, they contemplated the straightforward meaning of "existing tariff levels," and did not qualify the term to mean that the existing rates would be subject to the outcome of any proceeding pending before the MoPSC. They also point out that since the MoPSC could have raised the definition of "existing tariff levels" in the certificate proceeding, because the complaint proceeding already was pending, it should be barred from raising it at this late date. Further, it is the Applicants' view that the MoPSC's action in the complaint proceeding was a remedy for a tariff violation and not an exercise of the MoPSC's ratemaking authority. They note that the MoPSC stated in its order that: "this is not a rate case and the [MoPSC] is not attempting to determine an appropriate rate for the companies."[75]

97. In its September 27, 2007 answer to the Applicants' opposition to the motion to lodge, the MoPSC asserts that the Applicants knew when they filed their application with the Commission that their tariffs contained the provision that would require them to charge lower than the tariff rates if it was determined by the MoPSC in a pending complaint proceeding that they had charged an affiliate lower rates than they were charging non-affiliates. The MoPSC also avers that the Applicants acknowledged in this proceeding that Missouri Gas and Missouri Pipeline are currently subject to the jurisdiction of the MoPSC and that they will be bound by any lawful rulings of the MoPSC, related to their actions during the time they operated subject to the MoPSC's jurisdiction, if those rulings are confirmed on judicial review.[76] We have explained

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[75] *Staff of the Missouri Pub. Serv.Comm'n v. Missouri Pipeline Co. LLC and Missouri Gas Co. LLC*, Case No. GC-2006-0491, Report and Order at 40. (MoPSC Aug. 28, 2007) at 40.

[76] *Citing* Applicants' October 30, 2006 letter responding to an October 25, 2006 filing by the MoPSC which clarified that there were two complaint proceedings pending before it involving Missouri Gas and Missouri Pipeline and not just the one referred to by the Applicants in their October 3, 2006 response to staff data request No. 39. That request asked the Applicants to explain how refunds that might be ordered by the MoPSC in a pending proceeding before it would be disbursed and what effect, if any, refunds would have on MoGas' interstate rates. The Applicants stated in response to request No. 39 that the equivalent of the NGA section 5 proceeding pending before the MoPSC could result in a prospective change in Missouri Gas' and Missouri Pipeline' rates, not refunds, so there would be no effect on the new interstate pipeline's rates.

above that in the April 20, 2007 Order, when we approved the Applicants' proposal permitting the existing customers to continue paying their current rates as negotiated rates, our intent was to preserve the status quo at least until 60 days after new rates went into effect as a result of MoGas' filing its section 4 rate case. We did not contemplate that the status quo when we issued our certificate order would be subject to change due to action by the MoPSC after that point. That would, in effect, blur the line between federal and state jurisdiction by allowing another regulatory body to dictate what rates customers of an interstate pipeline subject to the Commission's jurisdiction should pay.

98. Further, the underlying purpose of preserving the status quo was to allow existing customers paying lower rates than the initial recourse rates we approved to have rate stability until new rates were established in a section 4 proceeding. We determined that this course would minimize the adverse effect of requiring them to pay higher rates than they were paying if the recourse rates were higher. We were not obligated to assure that those rates would be lower than they were when we issued the certificate nor were we required to establish just and reasonable rates in this proceeding. Similarly, the Applicants were not obligated to offer existing customers the option of continuing to pay the same rates they were paying instead of the initial recourse rates as a prerequisite to either filing their Application or having the Commission approve it. While continuity of service and effects on existing customers are relevant factors the Commission would consider in a merger proceeding, it is the totality of the circumstances in a particular case that informs the Commission's decision.

99. We also do not think the Applicants' acknowledgment that they would continue to be bound by the MoPSC's lawful rulings made while they were/are subject to the MoPSC's jurisdiction is inconsistent with their contention that they offered existing customers the opportunity to continue paying the rates they were paying at the time they filed the Application. Missouri Gas and Missouri Pipeline, in fact, have continued to be subject to the MoPSC's jurisdiction since we issued the April 20, 2007 Order, as well as since the August 28, 2007 decision in the complaint proceeding was issued, and they will continue to be subject to its jurisdiction until MoGas is permitted by the Commission to go into service under its new tariff and initial rates. Therefore, the Applicants' statement in their September 27, 2007 pleading is accurate in so far as it reflects the fact that Missouri Gas and Missouri Pipeline are bound to provide nonjurisdicitonal service to their customers consistent with the MoPSC's authority to regulate them.

100. MuniComm/Cities indicate that Missouri Pipeline disputes some customers' contentions that the rates charged by Missouri Gas and Missouri Interstate since August 28, 2007, should be the lower rate based on the MoPSC's decision in the

complaint proceeding and has refused to accept lower payments from those customers.[77] Even if Missouri Pipeline still maintains that it does not have to charge existing customers the lower rates, we do not need to address here what recourse the MoPSC might have to enforce its decision. Nevertheless, the Commission observes that is not appropriate for the interim negotiated rates we implicitly approved, i.e., the rates customers were paying on April 20, 2007, to include a penalty imposed by the MoPSC on Missouri Gas and Missouri Pipeline because only the merged pipeline, MoGas, and its principals, in their capacity as owners of a jurisdictional pipeline, will be subject to our jurisdiction. This is not to say, however, that the owners of MoGas, in their capacity as former principals of Missouri Gas and Missouri Pipeline, may not be liable for the penalties triggered by the MoPSC's decision and required to compensate the affected customers. That is for the state courts, not the Commission, to decide. For all of the above reasons, rehearing is denied on the issue of whether it was necessary for the Commission to assure that customers who opt to pay interim negotiated rates for interstate service would have the negotiated rates lowered if the MoPSC lowered Missouri Gas' and Missouri Pipeline's rates.

101. MuniComm/Cities also raise the issue of whether discounted rates will be preserved for customers electing to continue to pay their existing rates if they were paying discounted rates prior to the merger. The Applicants contend that any such discounts were offered on a month-to-month basis[78] and that if the Commission locks in such discounts from the maximum rates in the MoPSC-approved contracts, the customers' existing contractual rights would be expanded with the result that MuniComm/Cities would obtain "overwhelming bargaining power in renegotiating their contracts."[79] MuniComm/Cities assert in an October 1, 2007 answer in the compliance proceeding that Missouri Pipeline has not only terminated discounts the Cities of St. James, St. Robert and Waynesville had been receiving, but also has refused to include in any draft contracts it has proffered to the existing customers provisions allowing for any

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[77] *See* MuniComm/Cities' October 1, 2007 Answer (responsive pleading on compliance filing wherein Attachment B includes a September 17, 2007 letter from Missouri Pipeline contending that the lower rates are not yet in effect because, at that time, the MoPSC had not yet issued an order on rehearing of its August 28, 2007 Order in the complaint proceeding).

[78] The Applicants indicate that discounts on a month-to-month basis were offered by letters dated June 6, 2006, attached to existing customers' contracts and that the contracts and letters were filed as privileged information in volume 4 of the application.

[79] *See* Applicants' September 14, 2007 Answer at 6-7 & n.6.

existing discounting of rates to continue. While MuniComm/Cities acknowledge that Missouri Gas and Missouri Pipeline have the contractual right to terminate discounts, the timing of the termination of the discounts suggests to MuniComm/Cities that the pipeline is attempting to gain the upper hand in contract negotiations.

102. In response, we clarify that if an existing customer opts to continue taking service under an interim negotiated rate agreement for the purpose of continuing to pay its existing rates instead of the recourse rates, any provision for discounts in the existing contract, whether on a month-to-month or on any other basis, should be retained in the new negotiated rate contract, assuming the provisions are consistent with the Commission's policies on discounting. To avoid confusion, we note that the term "negotiated rates," as used in this discussion, refers to the form of contract in the tariff where service will not be at the recourse rate or a newly agreed upon discounted recourse rate, but at the rate the customer was previously paying, as defined and discussed further below. Thus, if a discount applied to the existing rate, the terms for that discount should be provided as a term of the new interim negotiated rate agreement. This is appropriate since the Commission's policies and MoGas' tariff permit discounted rates.

103. We agree with the Applicants, however, that to convert month-to-month discounts to discounts that stay in effect during the entire interim period would expand the contractual rights of the existing customers. Hence, we are not finding that existing customers paying discounted rates under their MoPSC-approved contracts on April 20, 2007, must be permitted to continue paying those discounted rates after Missouri Gas, Missouri Pipeline, or MoGas terminates a discount consistent with the contractual provisions. On the other hand, as noted, MoGas' pro forma tariff does permit it to discount rates, although it does not outline the circumstances under which such discounts might be offered. Therefore, we caution the Applicants that the Commission's discounting policies require that this practice be undertaken in a not unduly discriminatory manner.[80] Thus, when MoGas goes into service, if it continues to offer certain customers discounts on the rate in the MoPSC-approved contracts as of April 20, 2007, on whatever basis the interim negotiated rate contracts provide, but denies to offer discounts to similarly situated customers, i.e., customers who also have discounting provisions in their negotiated rate contracts, it leaves itself open to allegations that its selective discounting policies are unduly discriminatory. Accordingly, rehearing is granted regarding whether discount rate clauses in the existing contracts must be included in the interim negotiated rate contracts, but is denied on whether any discounted rates

[80] *See e.g.*, *Order Reaffirming Discount Policy and Terminating Rulemaking Proceeding*, 111 FERC ¶ 61,309, at P 3 (2005).

being paid prior to the issuance of the April 20, 2007 Order must stay in force even if Missouri Gas and Missouri Pipeline have contractual rights to terminate the discounts.[81]

104. Regarding other provisions in the existing customers' contract, the Commission's view of preserving the status quo anticipates that when drafting the interim negotiated service agreements, the Applicants would endeavor to provide the existing customers with the same quality and type of service they currently receive under their state-approved contracts to the extent those conditions are consistent with the Commission's regulations and policies. For example, we explained that although the new tariff's provisions for priority and interruption of service were different from the provisions on this subject in the existing contracts, the new tariff provisions were an accurate reflection of the Commission's policies in Order Nos. 636 and 637 and should provide shippers with greater certainty.[82] Further, we indicated that to the extent the parties believe it is necessary to grandfather any terms or conditions in customers' existing contracts which are inconsistent with those in the Part 284 service agreement, the Applicants should file for approval of such nonconforming provision and explain why it is necessary to maintain the provisions. This approach should provide the pipeline and the customers the flexibility to continue providing service on similar, though not necessarily the same, terms and conditions that the existing customers were receiving service.

105. In sum, the petitioners and the Applicants have made the process of negotiating interim agreements much more difficult than it needs to be by reading either too much or too little, respectively, into the Commission's approval in the April 20, 2007 Order of the Applicants' proposal to permit the existing customers to continue paying the rates in their MoPSC-approved contracts for service from MoGas. As we have clarified, new negotiated rate agreements providing for service at the rates the customers were paying on April 20, 2007 are only intended to be interim agreements to preserve the status quo, where practicable, until 60 days after new rates for MoGas go into effect. We did not intend to guarantee that the existing customers' rates would not be increased in the rate proceeding, nor did we contemplate that the Applicants would be relieved of their commitment to allow the existing customers to take service under their existing rates during the interim period simply because we directed the parties to conform the interim negotiated rate agreements to the format of the Part 284 agreement in MoGas' tariff.

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[81] We note that, again, we are referring to negotiated rate agreements entered into to permit existing customers to pay their previous rate. The parties may at any time enter into traditional negotiated rate agreements where the issue of discounts would be a subject for negotiation.

[82] *Id.* P 88.

106. Additionally, we did not expect that every term or condition in the current service agreements should be renegotiated for inclusion in the interim agreements. Instead, provisions in the existing contracts that are consistent with Commission policies should be included in the interim negotiated rate agreements. Negotiations should focus on provisions that are inconsistent with our policies and on finding ways to modify such provisions to bring them into conformity with the Part 284 agreement in the tariff. Where this cannot be done because of the unique nature of a provision, for example, the term providing for a full-requirements-type service, either the tariff should be revised to offer that unique aspect of service to all customers or, if that is not practicable, the provision should be submitted to the Commission as a nonconforming term with an explanation of why the nonconforming provision is necessary. As we discuss further in the compliance section of this order, there is no reason why the parties cannot comply with the April 20, 2007 Order, as clarified here, by entering into new interim agreements in a timely manner so that the new pipeline can go into service.

G. Right of First Refusal

107. AmerenUE, seeking rehearing, and the MoPSC, requesting clarification or in the alternative rehearing, fault the Commission for not making clear whether customers who continue to pay the rates they were paying on April 20, 2007, which Applicants propose to consider negotiated rates, will be entitled to the right of first refusal (ROFR), since under the Commission's policies the ROFR is only guaranteed to those paying the maximum rates for a term of at least one year. Specifically, the MoPSC contends that if the existing customers lose their ROFR because they elect to pay the rates they are paying as negotiated rates under new contracts, the protection the Commission presumably tried to provide for existing customers, on which the MoPSC maintains the Commission's public interest finding was predicated, will be undermined. The MoPSC states that if the Commission does not clarify that the ROFR will be available to the existing shippers, it requests rehearing on this issue. AmerenUE takes issue with various provisions in sections 22 and 24 of the General Terms and Conditions of the pro forma tariff which relate to the ROFR.

Response

108. In our discussion below on the compliance filing, the Commission is addressing the specific tariff issues AmerenUE has raised regarding the ROFR customers will have and we are requiring additional modifications, to the extent we conclude that they are warranted, to bring any provision into compliance with our regulations. If we believe a clarification offered by MoGas in its compliance filing should be incorporated into the tariff, we will direct it to make that change. However, we will address in this section of this order whether we intended in the April 20, 2007 Order to extend to Missouri Gas' and Missouri Pipeline's existing customers ROFR rights that are different from those

provided for in the tariff. For example, MoGas' tariff provides that customers taking service under negotiated rate agreements may have a ROFR if the parties include such a provision in their contracts.

109. To a large extent, the petitioners' concerns about whether the ROFR provisions in MoGas' tariff will apply to customers who opt to take service under negotiated rate contracts to preserve the rates they were paying when we issued the certificate in this proceeding are moot. This is because we have clarified that the negotiated rate contracts entered into to preserve existing rates are interim contracts that only will stay in force for at least 60 days after new rates go into effect as a result of MoGas' rate proceeding. We have explained that during that rate proceeding all of Missouri Gas' and Missouri Pipeline's existing customers, whether they are taking service under negotiated rate agreements or under the initial recourse rates, will have an opportunity to negotiate with MoGas for continued service and to enter into new service agreements. This means that we are, in essence, providing all existing shippers with rights of first refusal at the end of the interim period so that these customers can secure continued service at the levels of service they currently have.

110. However, consistent with the provisions of section 284.221(d) of the Commission's regulations, the existing customers may have to pay the new maximum recourse rates in order to continue to receive service if MoGas and a customer cannot agree to new negotiated rates or a discount on the maximum rates. In other words, the existing customer will be entitled to service at the maximum rate for a term of service it wants. After the interim period, a customer will have an ROFR if MoGas and the customer agree to include such a right in the new service agreement or if the customer is eligible under section 284.221(d)(2) for an ROFR without such a contractual provision.[83] For these reasons, we deny rehearing on whether the Commission erred by not providing the existing customers with rights of first refusal in order to eliminate or minimize adverse effects on them.

V. Compliance Filing

111. On July 5, 2007, in Docket No. CP06-407-002, the Applicants filed MoGas' proposed FERC Gas Tariff, First Revised Volume No. 1, as well as a recalculation of its

[83] A customer without a contractual right to an ROFR is eligible for an ROFR under section 284.221(d)(2) if it has a maximum rate firm contract of one year or more, gives notice that it wants to continue its transportation arrangement, and will match the longest term and highest rate for its firm service, up to the maximum rate, offered to the pipeline by any other person desiring such capacity.

rates and clarifications, to comply with the Commission's April 20, 2007 Order. As explained in more detail below, the Commission is accepting the tariff filing, as modified herein, as well as the initial rates, subject to our discussion regarding the extent to which MoGas must have new agreements with all of the Applicants' existing customers before it may commence operations. As discussed below, MoGas may file to place its tariff and rates into effect 30 days before it proposed to go into service. However, MoGas may not file to place the tariff and rates into effect until it files certain information related to agreements with customers, as discussed below.

A. Description of the Compliance Filing

112. In their explanation of the compliance filing, the Applicants state that they made adjustments to the proposed rate base consistent with the directives in the April 20, 2007 Order. They also indicate that they have revised the tariff as required in the order, proposed additional revisions to provide contract flexibility for their existing customers because the Commission rejected their proposal to use the existing contracts as nonconforming negotiated rate agreements, and made certain "housekeeping" revisions for internal consistency, clarity or to correct repetitions and editorial errors. We have listed the latter revisions in Appendix A to this order and will accept these modifications.

113. The Applicants also requested a waiver of Ordering Paragraph (J) of the April 20, 2007 Order, which required MoGas to file the newly negotiated rate agreements or a tariff sheet fully describing the transactions no less then 30 days or more than 60 days prior to commencement of service. The Applicants state that they have been conducting negotiations with the customers, but they would like to file each agreement as it is finalized rather than having to file each one at least 30 days before MoGas can go into service. They indicate, however, that they will file the agreements before service commences. They contend that this approach will allow the customers the opportunity to consider whether they wish to pay the initial recourse rates, once the rates, as revised in the compliance filing, are accepted. The Commission will address each issue raised by the compliance filing, including the waiver request, and the comments and protests below.

B. Interventions

114. Notice of the Applicants' compliance filing was published in the *Federal Register* on July 25, 2007 (72 Fed. Reg. 40846). MuniComm/Cities filed a timely motion to intervene and a limited protest. The MoPSC filed a motion to reject the filing or, in the alternative, a protest to it. AmerenUE filed a request to reject the waiver requests and the compliance filing or, in the alternative, a protest and comments.

115. On August 16, 2007, the Applicants filed an opposition to the MoPSC's motion to reject and a motion for leave to answer the MoPSC's protest. On September 14, 2007, the Applicants filed a motion for leave to answer MuniComm/Cities' protest. On October 1, 2007, MuniComm/Cities filed a motion for leave to answer Applicants' answer. As noted above, the Commission's regulations do not provide for answers to protests or answers to answers; however, we may waive our regulations and accept answers for good cause shown. In this instance, the answers provide information which will assist the Commission in reaching its determinations on the issues raised in the compliance filing. Therefore, we will accept the answers. The substance of the pleadings filed in response to the compliance filing will be addressed below in the discussion.

116. However, the Commission will address the motions to reject the compliance filing here. Both the MoPSC and MuniComm/Cities urge the Commission to reject the compliance filing because the Applicants have provided clarifications and made revisions to the tariff which they were not directed to do in the April 20, 2007 Order. The petitioners point to section 154.203(b) of the Commission's regulations,[84] which provides that compliance filings must include only those changes required to comply with a Commission order. Further, that section provides that compliance filings may not be combined with other rate or tariff changes, and that compliance filings that include other changes or that do not comply with the applicable order in every respect may be rejected.

117. The Applicants requested a waiver of this requirement with regard to four revisions to its tariff. Although they state they recognize that the Commission generally requires compliance filings to be limited only to the changes required by the Commission, they nevertheless contend that these proposed revisions should be accepted since the revisions are to MoGas' new tariff and it makes sense to incorporate as much as possible in the initial filing rather than burdening the customers and the Commission with additional filings. The revisions are to section 3.2 of Rate Schedule FT and section 23 of the General Terms and Conditions (GT&C), both of which relate to the construction of new facilities, revisions to section 6.4 of the GT&C regarding the reservation of capacity for new service or expansion projects and section 22 of the GT&C relating to the ROFR. The Applicants state that in light of the Commission's requirement that it renegotiate the existing contracts with Missouri Gas' and Missouri Pipeline's existing customers, the changes are being proposed to provide additional flexibility for the customers under the tariff.

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[84] 18 C.F.R. §154.203(b). The MoPSC also cites *El Paso Natural Gas. Co.*, 115 FERC ¶ 61,395, at P 13 (2006).

118. We find that three of these revisions are not necessary to allow MoGas to go into service nor are they required to comply with the April 20, 2007 Order. Therefore, they should not have been included in the compliance filing. However, we will grant the requested waiver with regard to revisions to section 22 of the tariff relating to the ROFR because issues concerning the ROFR are raised in the rehearing requests. Therefore, the Applicants' waiver request is granted, in part, and denied, in part. Further, the petitioners request that the Commission reject the revisions to the tariff that were not required by the April 20, 2007 Order are granted, in part, and rejected in part.

C. Discussion

1. Rate Base Issues

119. In the April 20, 2007 Order, in addition to requiring the Applicants to file a revised tariff and negotiated rate agreements sixty (60) to ninety (90) days before their anticipated in-service date, the Commission also required the Applicants to recalculate their rates after making changes to rate base and addressing several issues related to the cost of service consistent with the Commission's directives. The Applicants' filed revised rates and indicated that they had complied with the April 20, 2007 Order in the following respects:

- Removed depreciation for Land and Land Rights, which was erroneously included in the rate calculation;

- Removed a combined $2,916,586 acquisition adjustment from Missouri Gas' and Missouri Pipeline's rate base;

- Used depreciation balances as of December 31, 2005;

- Used end of the year totals for Accumulated Deferred Income Tax (ADIT), not an average.

- Used the Staff proxy group, 50.8 percent debt and 49.2 percent equity, for its capital structure; instead of 50 percent and 50 percent, respectively;[85]

[85] This capital structure was approved in *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043, *order on reh'g and compliance filing*, 112 FERC ¶ 61,280 (2005) and *Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077 (2006).

- Used a return on equity of 11.20 percent, instead of the proposed 13.3 percent;[86]

120. The Applicants' also provided an explanation, in response to rehearing requests, for why they continue to believe that using contract billing determinants is appropriate in calculating initial rates for MoGas. In the Commission's discussion on the rehearing requests, we approved that approach, except we required the Applicants' to include billing determinants for Missouri Interstate's cost of service in the Zone 1 rate. The Applicants also provided additional information, as directed in the April 20, 2007 Order, as to why MoGas' owners would be eligible for an income tax allowance.

121. The Commission finds that the Applicants complied with the directives in the April 20, 2007 Order which required them to use: depreciation balances as of December 31, 2005, end-of-the-year totals for ADIT, the Staff proxy group 50.8 percent debt and 49.2 percent equity for its capital structure; and a return on equity of 11.20 percent to calculate MoGas' rate base. However, the following issues require additional discussion.

a. <u>Elimination of Acquisition Adjustment Premium</u>

122. The April 20, 2007 Order required the removal of a combined $2,916,586 acquisition adjustment from the rate base for Missouri Pipeline and Missouri Gas. The MoPSC identifies a $210,984 discrepancy between the $2,916,586 acquisition adjustment the Commission instructed the Applicants to eliminate from the rate base and the amount the Applicants actually eliminated, $2,705,602. The MoPSC contends that the Applicants should be required to address this discrepancy.

123. In their August 16, 2007 answer, the Applicants explain that the $210,984 difference represents one-half of the increase in plant investment made by the Applicants for both Zone 1 and Zone 2 between the years 2004 and 2005. They state that in the information provided in the certificate application and related filings, the rate base was calculated by using an average of plant balances from 2004 and 2005. However, the April 20, 2007 Order required the use of 2005 year-end balances. Therefore, the Applicants assert, the elimination of the averaging of the two years investment as required by the order results in an increase to plant of $210,984.

[86] *Id.*

Response

124. The Commission finds that MoGas has correctly calculated the amount of the Missouri Pipeline and Missouri Gas acquisition adjustments to be removed from the rate base.

b. Accumulated Deferred Income Tax

125. As noted, the April 20, 2007 Order required the Applicants to use end-of-the-year totals for ADIT in calculating the rate base. The MoPSC states, however, that the ADIT attributable to Missouri Interstate as reflected in the compliance filing, $925,731, is different from the $737,463 identified in Missouri Interstate's March 17, 2006 cost and revenue study filed in Docket No. RP06-274-000. Although MoPSC recognizes that, all else being equal, a higher ADIT for Missouri Interstate will result in a lower overall cost of service for MoGas, MoPSC contends that the Applicants' should be required to provide complete workpapers showing the basis for the revised ADIT figures, as well as workpapers showing the effect on ADIT from the removal of the acquisition adjustment amounts from the rate bases of Missouri Gas and Missouri Pipeline. Finally, MoPSC asserts that in order to properly support its ADIT calculations, the Applicants' should be required to provide workpapers detailing the calculation of ADIT for each year since 2001. The MoPSC states this is necessary because the pipelines changed corporate form over this time period and the use of corporate tax rates to calculate ADIT for prior years, while these entities were all limited liability companies, would be overstated.

126. In their August 16 answer, the Applicants explain that the alleged discrepancy in ADIT amounts is easily explained and there is no basis for requiring the additional documentation that MoPSC requests. According to MoGas, when the Missouri Interstate cost and revenue study was prepared, Missouri Interstate did not formally record deferred taxes on its books. Thus the cost and revenue study included a workpaper that calculated the deferred taxes in the amount of $737,463. Subsequently MoGas formally recorded deferred taxes beginning on the date of acquisition through Missouri Interstate's in-service date of December 2002. According to MoGas, the amount recorded on Missouri Interstate's books for December 31, 2005 is $925,731, which is a more complete and accurate number than the number included in the March 2006 filing.

127. With respect to MoPSC's other concerns, the Applicants aver that the removal of the acquisition adjustments has no effect upon ADIT because no ADIT was recorded on the acquisition adjustment. In addition, the Applicants do not disagree with the MoPSC's argument that the use of corporate tax rates to calculate ADIT in any year when the pipelines were limited liability companies would overstate ADIT. According to the Applicants, ADIT has been calculated for the Missouri Interstate facilities using corporate tax rates for the entire period that those facilities have been subject to the

Commission's jurisdiction and that this is the appropriate approach because the Applicants' underlying rates were calculated by their previous owner using a corporate income tax rate and does not lead to any overstatement of ADIT.

Response

128. The Commission finds that the Applicants have satisfactorily explained the discrepancy between the ADIT amount in Missouri Interstate's cost/revenue study and the amount used in the compliance filing. However, the Applicants do not adequately explain why there is no ADIT associated with the acquisition adjustments. As a result, the Commission is unable to determine the impact on ADIT, if any, resulting from the elimination of acquisition adjustments for Missouri Pipeline and Missouri Gas. Likewise, the Applicants' explanation does not provide sufficient information for the Commission to determine the impact on ADIT, if any, as a result of the change in corporate form as described by MoPSC. Therefore, we direct the Applicants to provide additional detail to support its calculation of ADIT within the timeframe discussed below.

c. Depreciation of Land and Land Rights in General Plant

129. The April 20, 2007 Order required the Applicants to remove from rate base any depreciation claimed for Land and Land Rights. As noted, the Applicants complied with that requirement. However, the MoPSC maintains that the Applicants should clarify whether the cost-of-service includes any depreciation expense associated with Land and Land Rights in General Plant and, if so, any such expense should be eliminated from the cost of service. In their August 16, 2007 answer, the Applicants clarify that the cost of service includes no depreciation expense associated with Land and Land Rights. The Applicants indicate that in their revised Exhibits N-1 and N-2, filed as part of the compliance filing, no depreciation amount for Land and Land Rights is reflected and none is included in General Plant in either revised Exhibit N-1 or N-2.

Response

130. In reviewing the Applicants' compliance filing, the Commission noted that both Missouri Pipeline and Missouri Gas include a small amount for Land and Land Rights in the General Plant in the Gas Plant in Service schedule in the Form Nos. 2 provided as Appendix D to the Applicants' August 16 answer[87] and in the depreciation schedules in the Applicants' Exhibit N-1 and N-2, which show that General Plant is being depreciated

[87] For Missouri Pipeline, the dollar amount is $4,042 and for Missouri Gas it is $2,656.

at 2.5 percent. Therefore, the Applicants are directed to remove the amounts associated with this expense from the General Plant category for the purpose of calculating depreciation.

d. Gross Plant Discrepancies

131. The MoPSC has identified discrepancies between the Gross Plant balances filed in the compliance filing and those contained in the Applicants' October 3, 2006 response to a data request. These discrepancies result in a net increase to gross plant of $644,062. The MoPSC requests that we require the Applicants to explain and justify the discrepancy. In their August 16 answer, the Applicants state that the gross plant amounts identified in response to the data request were inadvertently taken from older FERC Form Nos. 2 in error and do not reflect recent plant additions. They assert, the amounts in the compliance filing correspond to the numbers on the financial books for MoGas and accurately reflect its gross plant investment.

Response

132. The Commission has examined the information in the compliance filing and is satisfied with the explanation provided for the discrepancies in gross plant amounts.

e. Income Taxes

133. In the April 20, 2007 Order, the Commission stated that its policy is to permit an income tax allowance for entities or individuals owning public utility assets if an entity or an individual claiming the allowance has an actual or potential income tax liability which would be paid on the income from the assets. However, the Commission could not discern from the information provided by the Applicants whether MoGas was entitled to an income tax allowance; therefore, we required the Applicants to demonstrate in their compliance filing that they meet the standards for an income tax allowance as set out in the Commission's Tax Policy Statement.[88]

134. In the explanatory material of its compliance filing, the Applicants state that on February 22, 2007, they filed a revised Exhibit D to their application to reflect a change in the MoGas' ownership structure. They explain that EIF Gateway, Inc. acquired a 100 percent interest in DES Energy, Ltd., the latter of which is one of MoGas' owners further up in the corporate structure. The Applicants also note the recent affirmation by the United States Court of Appeals for the District of Columbia Circuit of several

[88] *Policy Statement on Income Tax Allowances,* 111 FERC ¶ 61,139 (2005).

Commission orders implementing its Tax Policy Statement in a manner which allows an entity to claim the allowance even if it does not actually pay the income taxes itself.[89] The Applicants urge that MoGas meets the standards for the allowance, consistent with the Commission's decision in *Kern River*.[90] Specifically, the Applicants aver that MoGas will be entirely owned by tax-paying subchapter C corporations when the Applicants implement the corporate restructuring as authorized by the April 20, 2007 Order. They explain that MoGas' owner will be a partnership consisting of EIF Gateway, Inc., a Delaware Subchapter C Corporation, and Ries Holdings, Inc., a Colorado Subchapter C corporation. The Applicants stress that both of the corporate partners will have an actual or potential liability for corporate income tax based on the operation of MoGas as an interstate pipeline and these corporations will file consolidated federal income tax returns for 100 percent of MoGas' utility income. Under these circumstances, the Applicants contend MoGas is entitled to the income tax allowance.

135. MoPSC contends that the Applicants' response regarding MoGas' prospective ownership structure is insufficient to support an income tax allowance and that the revised Exhibit D to the Application filed on February 22, 2007, suggests that the upstream ownership structure of MoGas will be more complex than MoGas' description indicates. At a minimum, MoPSC believes the Commission should continue to reserve judgment on the issue and require MoGas to provide the expected final MoGas ownership structure, including upstream owners, as well as a detailed narrative explaining how income will flow from MoGas to its upstream owners and the tax treatment of such income at each level of ownership.

Response

136. The Commission concludes that the Applicants have adequately demonstrated that MoGas will be entitled to an income tax allowance based on its corporate structure consistent with the Tax Policy Statement. Accordingly, the Commission accepts MoGas' proposal to include an income tax allowance in its cost of service.

2. Rights of First Refusal

137. As discussed above, AmerenUE requests rehearing of the Commission's tacit approval of sections 22.3, 22.4 and 22.5 of the General Terms and Conditions of the pro forma tariff because, it asserts, these provisions are inconsistent with Commission

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[89] *See supra* P 66.

[90] *Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077 (2006) (*Kern River*).

regulations, precedent and policy regarding rights of first refusal.[91] Specifically, AmerenUE maintains that section 22.3 requires shippers to match the higher of the maximum rate or a negotiated rate offered by a competing shipper. AmerenUE opines that this provision violates the Commission policy that a customer should not have to pay more than the pipeline's maximum rate in order to retain its capacity, because a negotiated rate can be higher than the maximum recourse rate. In addition, AmerenUE avers that section 22.3 is not consistent with Commission policy because it requires shippers to match not only the rate and term of a competing bid, but other terms and conditions to which the competing customer is willing to agree or such other terms and conditions which the pipeline finds acceptable.

138. AmerenUE avers that section 22.4 can be read to require an existing shipper to match a bid that is higher than the maximum rate and/or agree to other conditions offered by a competing bidder which provide "economic value" to the pipeline, but that the term "economic value" is not defined in the tariff. AmerenUE also contends that section 22.5 is written to allow the pipeline to demand more than the maximum rate in order for a customer to exercise its ROFR. We note that section 22.5 provides that if there are no creditworthy bids for the capacity that is subject to a ROFR, the existing customer will be able to retain its capacity for any term desired, if the pipeline and customer agree to mutually acceptable rates for the service at a level within the posted maximum and minimum tariff rates or at a negotiated rate for the applicable service. AmerenUE states that under the Commission's current regulations, the highest rate a shipper is required to match under an ROFR is the pipeline's maximum cost-based rate, not a negotiated rate, and that the Commission has also made clear that rate and term are the only regulatory requirements a shipper is required to match in order to retain its capacity.

139. In response to the concerns raised on rehearing, the Applicants in the compliance filing state that they have modified the provisions in the tariff relating to the ROFR and that such provisions are now consistent with section 284.221(d)(2)(ii) of the Commission's regulations. Specifically, they note that they changed section 22.1 to provide that customers with contracts of two years or longer would not only be entitled to an evergreen provision, but to other types of contract extensions such as rollovers. The Applicants also indicate that they deleted the last sentence of section 22.3, which had required customers to agree to other terms and conditions acceptable to the pipeline when matching a competing bid for capacity. The Applicants maintain that ROFR provisions may be negotiated with the customers when contract negotiations are undertaken as

[91] In the April 20, 2007 Order, the Commission did not specifically require the Applicants to modify any of the tariff provisions in section 22 relating to the ROFR.

directed by the April 20, 2007 Order and that the negotiations will be conducted in a not unduly discriminatory manner.

140. AmerenUE states that the above tariff modification referred to by Applicants rectified only one of the problems with the ROFR which it had identified in its rehearing. Specifically, AmerenUE explains that although the Applicants removed the part of section 22.3 which provided that to exercise its ROFR rights the shipper would have to agree to all of the terms and conditions which the competing shippers was willing to accept, it did not change language in that section requiring the shipper exercising a ROFR to match the higher of the maximum recourse rate or "rates then applicable," which might mean a higher negotiated rate, offered by the competing bidder. Further, AmerenUE states that section 22.5 in the compliance filing (formerly section 22.4) still can be read to require an existing customer not only to match a bid that is higher than the maximum recourse rates, but also terms and conditions offered by the competing bidder which provide economic value to the pipeline. Also, it points out, section 22.6 (formerly 22.5) still permits the pipeline to demand more than the maximum rate in order for a shipper to exercise its ROFR.

141. In their August 16, 2007 answer to AmerenUE's protest of the compliance filing, the Applicants clarify that with regard to section 22.3, the phrase "maximum rates or rates then applicable" means the maximum recourse rate, i.e., not a higher negotiated rate. The Applicants state they will revise the tariff language to make this clarification if the Commission requires. They also explain that the term "economic value" in section 22.5, read in light of section 22.3, means that no bid would be higher than the maximum recourse rates. With regard to section 22.6, the Applicants explain that if there are no creditworthy customers for available capacity, the pipeline and a customer can agree on a negotiated rate for service that is higher than the maximum recourse rate, which is consistent with the Commission policies on negotiated rates.

<u>Response</u>

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

143. The Commission agrees with AmerenUE, however, that previous section 22.4 (new section 22.5) can be interpreted to require an existing customer to match a bid that

is above the maximum rate and/or agree to other conditions offered by a competing bidder which may provide “economic value” to MoGas. Since economic value is not defined, it is ambiguous. Section 284.221(d) of the Commission’s regulations clearly provides that customers exercising their ROFR are required only to match the highest rate for firm service, up to the applicable maximum rate.[92] Therefore, new section 22.5 of the tariff should be revised to make it consistent with the Commission’s regulations. Previous section 22.5 (new section 22.6) provides the process whereby an existing customer can elect to continue its service when no creditworthy bidders have submitted bids for that customer’s capacity. Under the proposed new section 22.6, an existing customer is entitled to continue its current service, for any term desired, provided the customer and MoGas agree to a rate between MoGas’ maximum and minimum rates or the parties agree to a negotiated rate. To address AmerenUE’s concerns that this section could still require a customer to pay more than the maximum rate to continue its service, we clarify that the Commission’s long standing policy permits “pipelines to withhold capacity in order to maximize the value of their services but only if the shipper is unwilling to pay the maximum rate, . . . and [p]ipelines cannot withhold capacity at the maximum rate.”[93] section 22.6 is consistent with this policy as long as the section is not read to allow MoGas to require a customer to enter into a negotiated rate agreement in order to continue its service. In other words, section 22.6 may properly be interpreted as providing the customer with alternative pricing options; however, that customer may obtain the capacity if it is willing to pay the maximum recourse rates.

144. For the reasons explained, rehearing is granted, in part, and denied, in part, regarding the ROFR tariff provisions proposed by the Applicants in their compliance filing, and new section 22.5 should be revised as directed.

3. <u>Negotiated Rate Agreements</u>

145. The Applicants request a waiver of Ordering Paragraph (J) of the April 20, 2007 Order which requires them to file the newly negotiated rate agreements or a tariff sheet fully describing the transactions no less then 60 days or more than 90 days prior to commencement of service. The Applicants state that they have been conducting negotiations with their customers, but they would like to file each agreement as it is finalized rather than having to file each one at least 60 days before MoGas can go into service. They indicate, however, that they will file the agreements before service commences. They contend that this approach will allow the customers the opportunity to

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[92] 18 C.F.R. § 284.221(d)(2)(ii) (2007).

[93] *See e.g., El Paso Natural Gas Co.,* 90 FERC ¶ 61,050, at 61,216 (2000).

consider whether they wish to pay the initial recourse rates, once the rates, as revised in the compliance filing, are accepted.

146. The MoPSC in its answer does not object to the waiver of the filing time for the negotiated agreements as long as there is enough time to enable the parties to finalize their agreements and for MoGas to file them with the Commission before it goes into service. Additionally, the MoPSC urges that MoGas should not be permitted to go into service and charge customers a higher rate than their existing rate if new agreements have not been finalized by MoGas' in-service date. It is the MoPSC's view that the latter scenario would allow MoGas to circumvent the commitment it made to allow existing customers to pay their current rates.

147. AmerenUE opposes the waiver request because it contends that the Applicants delayed beginning negotiations with customers and granting the waiver would place MoGas in the position of "holding over its customers' heads the requirement that they pay the initial recourse rates if a contract cannot be renegotiated and filed" prior to the commencement of service and to put pressure on the customers to accept contract terms that may be unfair. MuniComm/Cities request the Commission not to allow MoGas to go into service until it enters into contracts with the existing customers.

148. The Applicants' state in their August 16, 2007 answer that they have commenced the renegotiation process with all of the customers and have reached agreements, at least in principle, on the major terms, with approximately half of them. However, they are concerned that a single shipper that is not willing to negotiate could delay the start of interstate service. Therefore, the Applicants proposes that in the event they have not been able to renegotiate all of their contracts with existing customers prior to the proposed in-service date, the existing contracts would be filed as non-conforming service agreements for any existing customers with whom they have not finalized new negotiated rate agreements, rather than delay the commencement of interstate service. These customers will then continue to receive service under their pre-existing contracts. MoGas believes this will address MoPSC's concerns without unnecessarily delaying the commencement of interstate service.

Response

149. In responding to the Applicants' waiver request, the Commission must balance the Applicants' desire to commence service as soon as possible and AmerenUE's, MuniComm/Cities' and the MoPSC's concerns about customers' having sufficient time to enter into negotiated rate agreements consistent with the April 20, 2007 Order and this order. In their pleadings, the Applicants, AmerenUE and MuniComm/Cities complain that negotiations have either been delayed by one of the negotiating parties or that the negotiations have not been undertaken in good faith. The Commission trusts, however,

that the guidance it is providing in this order will expedite the process of finalizing contracts between AmerenUE and MuniComm/Cities and MoGas.

150. We do not think MoGas should be able to go into service unless new agreements have been entered into with their former customers. On the other hand, it would not be in the public interest to allow the opponents of the proposal in this proceeding to delay MoGas' in-service date indefinitely by refusing to enter into new service agreements for negotiated or recourse rates. In their August 16, 2007 opposition to the MoPSC's motion to reject the compliance filing, the Applicants stated they had agreements in principle with almost half of the customers, that several customers had executed new agreements and others were pending internal customer approvals.[94] In their September 24, 2007 answer opposing AmerenUE's request for reconsideration, the Applicants indicated that they had entered into new contracts with "many of its customers and contracts are in the process of being executed."[95] The record does not reflect whether more contracts have been entered into since these filings were made and no negotiated rate agreements or related tariff sheets have been filed.

151. Since we are requiring some modifications to the Applicants' rate proposal, necessitating the recalculation of rates, and some revisions to the tariff, we will require, as we typically do, that the Applications make these modifications and revisions and file to place the rates and tariff into effect no more than 60 days nor less than 30 days before they intend MoGas to commence service. However, to assure that the Applicants have entered into agreements with a significant number of the former customers, the Commission will require the Applicants to file a list of all of the existing customers, specifying those that have entered into new service agreements and whether each service will be provided under negotiated or recourse rates 15 days prior to filing to place the rates and tariff into effect. In this filing, the Applicants should describe the status of negotiations with those customers that have not entered into new agreements and provide support for that description, including, for example, a list of dates and times of discussions or meetings with customers and/or letters and memos between the parties regarding ongoing contract negotiations. If a review of this filing indicates that the Applicants have entered into new agreements with a sufficient number of their former customers and that they have been making efforts to negotiate in good faith with those remaining customers, then the Commission will allow MoGas to go into service, subject to our issuance of an order accepting the revised tariff and rates and an order or orders approving any negotiated rate filings.

[94] Applicants' August 16, 2007 Opposition at 7-8 and n.11.

[95] Applicants' September 24, 2007 Answer at 2.

152. Regarding negotiated rate agreements, MoGas should file those agreements or a tariff sheet, consistent with the Commission's filing requirements for negotiated rates, at least 30 days before it intends to commence service under negotiated rates. Of course, if service will be pursuant to the recourse rates and there are no nonconforming provisions in the standard Part 284 service agreement in the tariff, then MoGas need not file such agreements. To the extent the Applicants have been unable to finalize new interim negotiated rate agreements or Commission-approval of such agreements has not issued prior to MoGas' proposed in-service date, we will accept MuniComm/Cities' "safe harbor" proposal, to which the Applicants agreed. Specifically, MuniComm/Cities proposed that if the Applicants were unable to reach agreements with the former customers before MoGas' proposed in-service date and the Commission was to let MoGas go into service without having finalized agreements in place, the Commission could establish a safe harbor so that service could commence while good faith negotiations continued.[96] The safe harbor proposed by MuniComm/Cities was a negotiated rate agreement in the standard form of service agreement in the tariff with the existing rate a customer was paying as the rate.[97] The Applicants in a September 14, 2007 responsive pleading on the compliance filing stated that they were willing to substitute the MoPSC-approved rates, as of April 20, 2007, for the recourse rates in the standard form of the service agreement if that was what MuniComm/Cities wanted.

153. After service commences under the safe harbor agreements, at the option of the existing customers who have not yet entered into interim negotiated rate agreements, MoGas and those customers should continue to negotiate to finalize negotiated rate agreements for the interim period to supersede the safe harbor agreements. Further, to the extent MoGas has entered into a negotiated interim agreement for which it is seeking approval for a nonconforming term, it may file a safe harbor agreement at the same time it files the interim negotiated rate agreement so that service may commence for that customer under the safe harbor agreement, upon approval by the Commission, if the

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[96] *See* MuniComm/Cities' August 31, 2007 Answer at 6-7.

[97] MuniComm/Cities qualify this suggestion by noting that the existing rate should include any discount in the existing contract and that "non-rate terms in the existing agreements that are not inconsistent with Commission policy may only be changed in a manner that is consistent with the terms of the existing agreements." *Id*. We have already explained that if an existing contract provides for discounts, on whatever basis, that provision should be included in the new contract even if the discount was not, by its terms, in force at this time, and that any terms in the existing contracts that were consistent with Commission's policies should be included in the new contracts.

Commission has not yet approved the nonconforming provision when MoGas goes into service.

154. In sum, as a condition to MoGas' going into service, we will require MoGas to file the status report on agreements with existing customers 15 days before it files to place its tariff and rates into effect. Further, when MoGas files to place its tariff and rates into effect, it shall file all interim negotiated rate agreements, or appropriate tariff sheets, that it has not already filed and any safe harbor agreements. The safe harbor agreements will provide the terms, conditions and rates for the interim service until the parties complete their negotiations and finalize alternative interim negotiated rate agreements.[98] MoGas should then file those negotiated rate agreements, or the appropriate tariff sheet, for Commission approval. This is a reasonable approach since it is consistent with proposals made by both the MuniComm/Cities and the Applicants in this proceeding and balances the pipeline's interest in going into service as soon as possible and the customers' need for rate certainty.

155. The safe harbor agreements should include all terms and conditions in the existing agreements that do not require significant revisions to make them consistent with Commission policies or need approval from the Commission as a nonconforming provision. Since these agreements will not necessarily be executed by the customers whose service they cover, they technically are not negotiated rate agreements. Nevertheless we will treat them as such; therefore, these agreements, or tariff sheets summarizing them, should be otherwise consistent with all requirements related to negotiated rate contracts.

The Commission orders:

(A) Rehearing of the Commission's April 20, 2007 Order issuing a certificate to MoGas is granted, in part, and denied, in part, as more particularly described herein.

(B) The tariff sheets contained in MoGas Pipeline LLC's FERC Tariff, First Revised Volume No. 1, as identified in the Appendix B, are accepted to be effective 30 days after MoGas files to place the tariff, as revised according to this order, and its rates, as recalculated consistent with this order, into effect.

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[98] If MoGas and any existing customer are unable to enter into a new interim negotiated rate agreement within 30 days after service commences on the pipeline, either party may advise the Commission of the circumstances surrounding the negotiations. We stress that the purpose of the safe harbor agreement is not to provide any party with an excuse not to negotiate in good faith to finalize an interim agreement.

(C) Consistent with the discussion in this order, MoGas shall file a status report on its negotiations with existing customers for interim services agreements 15 days before it files to place its revised tariff and rates into effect, and it shall file any negotiated interim rate agreements or safe harbor agreements at least 30 days before it proposes to go into service.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

HOUSEKEEPING CHANGES

Although not required for compliance with the Certificate Order, MoGas also proposes the following housekeeping changes to its pro forma tariff:

• MoGas has eliminated all references in the tariff to "Missouri Gas Company, LLC" and replaced these references with "MoGas Pipeline LLC";

• MoGas has eliminated any references to "Customer" and replaced those references with "Shipper" throughout the tariff for consistency;

• MoGas has eliminated any references to "Fuel Reimbursement" and replaced them with "Fuel and Gas Loss Retention" to be consistent with the Schedule of Rates for Transportation, at Original Sheet No. 5. MoGas also has clarified the fuel and gas loss provisions at section 3.6 of Rate Schedule FT (Original Sheet No. 8), section 3.5 of Rate Schedule IT (Original Sheet No. 12), and section 2.15 of the GT&C (Original Sheet No. 51) to state that the retention amount will be a percentage of actual quantities received at the receipt points, rather than a percentage of quantities scheduled for delivery;

• MoGas has redesignated the second subsection 22.3 as 22.4, existing subsection 22.4 as 22.5, and existing subsection 22.5 as 22.6 (Original Sheet No. 81) to correct the duplicate designations of subsection 22.3.

• MoGas has revised the heading on its Form of Service Agreements on Original Sheet Nos. 100 through 125 for consistency with the titles used in the Table of Contents; and

• MoGas has eliminated Appendix B to each of the Form of Service Agreements for FT and IT, on Original Sheet Nos. 110 and 115 respectively, and moved the pertinent delivery point headings to Appendix A, on Original Sheet Nos. 109 and 114, to eliminate the additional signature page.

APPENDIX B

ACCEPTED TARIFF SHEETS TO FERC GAS TARIFF, FIRST REVISED VOLUME NO. 1

Original Sheet No. 1
Original Sheet No. 2
Original Sheet No. 3
Original Sheet No. 4
Original Sheet No. 5
Sheet Nos. 6-9
Original Sheet No. 10
Original Sheet No. 11
Original Sheet No. 12
Original Sheet No. 13
Original Sheet No. 14
Original Sheet No. 15
Original Sheet No. 16
Original Sheet No. 17
Original Sheet No. 18
Original Sheet No. 19
Sheet Nos. 20-49
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Original Sheet No. 54
Original Sheet No. 55
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Original Sheet No. 58
Original Sheet No. 59
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Original Sheet No. 91
Original Sheet No. 92
Sheet Nos. 93-99
Original Sheet No. 100
Original Sheet No. 101
Original Sheet No. 62
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Original Sheet No. 65
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