

130 FERC ¶ 61,018  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer and Philip D. Moeller.

Rockies Express Shippers

v.

Docket No. RP08-29-000

Northern Natural Gas Company

OPINION NO. 504

ORDER AFFIRMING INITIAL DECISION

(Issued January 8, 2010)

1. This matter is before the Commission on exceptions filed by Rockies Express Shippers (REX Shippers)<sup>1</sup> to an Initial Decision (I.D.) issued on October 23, 2008, by Presiding Administrative Law Judge Carmen A. Cintron (ALJ or Presiding Judge).<sup>2</sup> The issue set for hearing was a complaint filed by REX Shippers against Northern Natural Gas Company (Northern). The REX Shippers allege that in Northern's open season for capacity at the new interconnection point of the Rockies Express Pipeline (REX Pipeline) and Northern (the REX Receipt Point), and in its awarding capacity pursuant to the open season, the notice, terms, and posting of the open season were unjust unreasonable, and unduly discriminatory.

2. The I.D. found that Northern's open season and the sale of transportation capacity thereunder from the REX Receipt Point to the delivery point of Demarc, did not violate Northern's Tariff or any Commission rule or policy, and was not unjust or unreasonable, or unduly discriminatory. This order affirms the I.D. without modification, and the contract awards of that capacity will not be modified or vacated.

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<sup>1</sup> REX Shippers are Ultra Resources, Inc. (Ultra), and Sempra Rockies Marketing (Sempra).

<sup>2</sup> 125 FERC ¶ 63,005 (2008).

## **Background**

3. Northern operates an interstate natural gas pipeline extending from the Permian Basin in Texas to Minnesota and Michigan in the upper Midwest. Northern's system is divided into two areas, the Field Area to the south, and the more constrained Market Area located to the north. The boundary between the Field Area and Market Area is called the demarcation point (Demarc) and is located in Clifton, Kansas. Demarc is not a physical receipt or delivery point; it is simply a paper point used for purposes of scheduling gas and is a popular point for contracting for transportation services.

4. In Order No. 637<sup>3</sup> the Commission required, *inter alia*, that to the extent operationally feasible pipelines should allow shippers to use their firm capacity by segmenting that capacity into separate parts for their own use or for release to replacement shippers. The Commission recognized that segmentation may pose operational difficulties, and in Northern's Order No. 637 compliance proceeding, the Commission found that due to Northern's web-like pipeline grid, where bi-directional gas flows occur frequently and there are no predictable flow paths on the system, physical segmentation was not operationally feasible in its Market Area.<sup>4</sup> The Commission therefore accepted Northern's Market Area virtual segmentation proposal, whereby shippers obtain rights in pooling points but no specific paths, but required physical segmentation rights in Northern's Field Area.<sup>5</sup>

5. REX Pipeline is a new pipeline that extends from the Rocky Mountain production area to eastern Ohio. The newly constructed interconnection between the REX Pipeline and Northern's system, the REX Receipt Point, is located downstream of Demarc, at Gage County, Nebraska, in the Market Area. The total available receipt point capacity at the REX interconnection is 200,000 Dth/day. The REX Pipeline funded construction of the interconnection facilities at Northern, and the shippers on the REX Pipeline pay for these facilities through their demand charge. There is also an interconnection between

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<sup>3</sup> *Regulation of Short-Term Natural Gas Transportation Service and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127, *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

<sup>4</sup> *Northern Natural Gas Co.*, 101 FERC ¶ 61,203, at P 39 (2002) (Northern Compliance Order).

<sup>5</sup> *Id.* at P 39 and 40.

Northern and the Trailblazer Pipeline Company (Trailblazer) at Beatrice, Kansas. This is located downstream of the REX interconnection and was in existence prior to construction of the REX Receipt Point.

6. Northern's peak period winter firm capacity from Demarc into Northern's Market area is fully subscribed. On July 9, 2007, Northern posted notice on its website that its agreement with REX Pipeline provided for construction of the new interconnection that would accommodate 200,000 Dth/day. Accordingly, it was posting an open season for contracted firm backhaul service from the REX receipt point to the Demarc delivery point (2007 Open Season) on its website. Northern's tariff treats backhaul service the same as forward haul service. As generally understood, a "backhaul" effectuates transportation service where a shipper's delivery point is upstream of the receipt point. It is thus non-physical transportation on a counter-flow basis, and generally is made possible when equivalent displacement volumes are put into the pipeline. The posting advised that, because of capacity constraints through Demarc, Northern anticipated that the open season would be only for firm service from the new REX receipt point to Demarc. The open season posting stated that Northern would not be accepting realignment requests at that time, although if unsold capacity remained at the close of the open season, Northern would post it as generally available for incremental requests and realignments. Northern set no minimum rate in the open season, but it advised shippers that the bid evaluation methodology would be the highest net present value (NPV) per unit of capacity for the period from January 1, 2008, through October 31, 2008.<sup>6</sup>

7. Northern posted the results of the open season on July 20, 2007. According to Northern, it received 28 bids for the capacity, seven of which totaled 630,000 Dth/day and were at Northern's maximum tariff rate for firm transportation service. Northern allocated the available 200,000 Dth/day as provided in its tariff, awarding pro rata shares of the capacity to those who bid the maximum rate. REX Shippers (Ultra and SRM) will be firm shippers on the REX Pipeline, and each has contracted for 200,000 Dth/day of firm transportation capacity on that pipeline.<sup>7</sup> The REX Shippers were not existing shippers on Northern, and neither submitted a bid, although an affiliate of SRM submitted a bid at a discounted rate, but was not awarded capacity.

8. In their complaint REX Shippers alleged that Northern (1) improperly failed to post the REX receipt point capacity as available for realignment by existing shippers with

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<sup>6</sup> NPV is the discounted cash flow of incremental revenues to Northern for the service bid on.

<sup>7</sup> REX Shippers further stated that Ultra holds 50,000 Dth/day and SRM holds 5,830 Dth/day of primary firm delivery point capacity at the REX interconnect with Northern.

firm forward-haul transportation in Northern's Market Area or for designation as a primary receipt point under Rate Schedule MPS (pooling) service; (2) improperly tied access to the new firm receipt point capacity to new firm ("phantom")<sup>8</sup> backhaul service while similarly situated gas delivered through the interconnect with Trailblazer was not subject to similar limitations; (3) had no right to offer the new backhaul capacity because doing so contravened current limits on segmentation of its system; (4) discriminated against gas deliveries to its Market Area through the REX Receipt Point by making the new firm receipt point capacity accessible only through backhaul to which similarly-situated deliveries through the Trailblazer interconnect are not subject; and (5) imposed a "phantom" backhaul charge that is unjust and unreasonable.

9. The REX Shippers argued that this "phantom" backhaul charge will disadvantage their gas supplies delivered to Northern's system on the REX Pipeline as compared to gas supplies delivered to Demarc through Northern's Field Area facilities, which will not incur the added backhaul charge. The complaint requested the Commission to vacate the results of the 2007 Open Season, and direct Northern to conduct another open season for primary point capacity at the REX Receipt Point without tying such point capacity to a requirement that the shippers subscribe to backhaul transportation service from the Rex Receipt Point to Demarc.

10. In its answer Northern disputed the REX Shippers' allegations, asserting that it conducted the open season in accordance with its tariff, as well as applicable laws and regulations, and Commission policies. Northern contended that the new interconnect created new backhaul capacity, and Commission policy required that the open season be conducted to make this capacity available to shippers.

11. On January 25, 2008, the Commission issued the hearing order<sup>9</sup> stating that the REX Shippers had raised serious questions arising from Northern's open season for the additional capacity, and the existing record in this proceeding was insufficient to allow the Commission to make a reasoned decision on any of the issues that have been raised. Accordingly, the Commission set the complaint for hearing.

12. In response to the complaint, a number of shippers<sup>10</sup> that had been successful in the 2007 Open Season filed comments requesting that the Commission not vacate or

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<sup>8</sup> REX Shippers alleged, at 7, that "The gas never flows by backhaul (through displacement or otherwise) to Demarc," and thus "[t]he backhaul service Northern offered to provide through the open season is entirely a fiction."

<sup>9</sup> 122 FERC ¶ 61,055 (2008).

<sup>10</sup> The shippers were BP Canada Energy Marketing Company and ConocoPhillips Company.

modify the results of the 2007 Open Season. At the hearing the REX Shippers revised the relief they sought and requested that “the existing backhaul arrangements [should] be terminated at the end of their current term, *viz.* as of October 31, 2008.”<sup>11</sup>

13. The hearing commenced on August 12, 2008 and concluded on August 19, 2008. Pursuant to the procedural schedule Initial Briefs (IBs) were submitted on September 12, 2008 and Reply Briefs (RBs) were submitted on September 29, 2008 by Northern, REX Shippers, Commission Staff, and Indicated Shippers.<sup>12</sup>

### **The Initial Decision**

14. The ALJ concluded that construction of the REX interconnection created new backhaul capacity between the interconnection and Demarc. The ALJ found that Northern receives gas and delivers gas out of various parts of its system through the use of line pack, operational storage, displacement, backhaul and forward haul. The ALJ found that Northern performs the backhaul service by displacement and the gas does not actually flow backward.

15. The ALJ reasoned that the REX interconnection acts as an injection point onto the Northern system. The ALJ found the interconnection created new backhaul capacity because if 200,000 dth/d of gas is now being injected at the REX interconnection, 200,000 dth/d no longer needs to be transported from Demarc to the REX Receipt Point and northward in order to meet fully subscribed capacity demand in the Market Area. Thus, the ALJ explained, a quantity of gas can be removed from the fully subscribed pipeline upstream of the REX receipt point to accommodate backhaul displacement allocations.<sup>13</sup> Then, the ALJ reasoned, such gas quantities can be injected at the REX Receipt Point to meet subscribed demand downstream of that point. The ALJ cited to *Southern LNG, Inc.*<sup>14</sup> where the Commission stated “while there is no firm forward haul capacity available, whether there is or will be demand for firm backhauls or interruptible forward or backhauls is not known.”<sup>15</sup> The ALJ found that the new capacity created was

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<sup>11</sup> Exh. RES-1 at 12, ll. 17-18.

<sup>12</sup> The Indicated Shippers are shippers on Northern and consist of Anadarko Energy Services Co., Anadarko Petroleum Corp.; BP Canada Energy Marketing Corp.; Chevron Natural Gas, a division of Chevron U.S.A., Inc.; ConocoPhillips Co.; Shell Energy North America (US), L.P. (formerly Coral Energy Resources, L.P.).

<sup>13</sup> I.D. P 19.

<sup>14</sup> 122 FERC ¶ 61,137 (2008).

<sup>15</sup> *Id.* at P 35.

Northern's to sell since existing firm shippers on Northern did not have a priority preference to realign primary receipt points to the Rex Receipt Point over other shippers seeking to purchase capacity from that point to Demarc.

16. The ALJ held that the addition of the REX Receipt Point did not change the operational characteristics of Northern's Market and so Northern could sell backhaul capacity even if forward capacity is fully subscribed. Northern had this authority, the ALJ found, pursuant to the Northern Compliance Order which permitted Northern to virtually segment in its Market Area. As a result, the ALJ held that the 2007 Open Season and subsequent sale of this backhaul capacity did not violate Northern's tariff or Commission policy and the rates charged are just and reasonable.

17. The ALJ held that Northern's sale of transportation capacity from the REX Receipt Point to Demarc did not create a barrier to entry or inhibit the formation of market centers for shippers on the REX Pipeline. The ALJ concluded that REX Shippers did not establish any wrong-doing that would merit an award of damages; the rate for the backhaul transportation service that Northern sold from the REX Receipt Point to Demarc was calculated consistent with the tariff; moreover, since the ALJ found that Northern's sale of its new backhaul capacity from the receipt point to Demarc was authorized and required, Northern cannot be required to disgorge revenues realized from such service.<sup>16</sup>

18. Rex Shippers filed a Brief on Exceptions and Northern and Commission Staff filed Briefs Opposing Exceptions.

### **REX Shippers' Alleged Policy Considerations**

19. REX Shippers assert that the proceeding raises these "policy" issues for resolution:

1. Whether the Commission's Order Nos. 636 and 637, conferring on firm shippers significant capacity management rights, including capacity release, flexible point and segmentation rights, were intended to be curtailed by *Columbia Gulf Transmission Co.*, 96 FERC ¶ 61,073 (2001) (*Columbia Gulf*), or *Southern LNG, Inc.*, 122 FERC ¶ 61,137 (2008) (*Southern LNG*).

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<sup>16</sup> The ALJ also concluded that the arguments by Indicated Shippers opposing any requests to void, modify or restrict rights granted pursuant to the contracts awarded to backhaul shippers in the July 2007 Open Season were moot, Initial Decision P 117.

2. Whether the addition of a new receipt point creates new transportation capacity.
3. Whether *Northern Natural Gas Co.*, 101 FERC ¶ 61,203 (2002) (*Northern Compliance Order*), relieving Northern of its Obligation under Order No. 637 to provide “physical segmentation” rights to its firm market area shippers, and approving “virtual segmentation” in Northern’s market area, authorized Northern to sell firm backhaul capacity despite the fact that the capacity in Northern’s Market Area was fully subscribed.

20. As to the first issue REX Shippers assert that the rights the Commission accorded firm shippers under Order Nos. 636 and 637 were never curtailed by the *Columbia Gulf* and the *Southern LNG* cases. However, in the REX Shippers’ view, the Initial Decision fails to recognize that these cases never curtailed or modified Order Nos. 636 and 637.

21. As to the second issue, REX Shippers contend that resolution of this issue requires the Commission to consider the relationship between point capacity and transportation capacity, and in the context of a pipeline whose firm capacity is fully subscribed, the distinction between a service and the capacity utilized to provide that service.

22. REX Shippers assert that the third issue requires the Commission to consider the effect to be accorded previous fact-based orders when the factual premise of the order is no longer applicable. Resolution of this contention is not based on any policy but is fact dependent.

23. In its Brief Opposing Exceptions, Staff asserts that contrary to the REX Shippers’ contentions, no important policy considerations are raised by their exceptions to the Initial Decision. Rather, Staff contends that these are issues specifically dependent on the facts in this case.

24. We find that these three alleged policy issues do not raise questions of policy but are questions whose resolution depend on the facts of the case, including the physical configuration of Northern’s system. We also find that the ALJ correctly applied the holdings of relevant orders to these facts, as discussed below.

25. We now turn to the specific contentions urged on exceptions by the REX Shippers, and the counter-arguments of Northern and the Commission’s Staff.

### **The REX Shippers' Brief on Exceptions**

26. The REX Shippers argue that the Initial Decision erroneously rejected REX Shippers' complaint, relying on the supposed reticulated, non-pathed nature of the Northern system, and in reliance on the two Commission decisions in *Columbia Gulf* and *Southern LNG*.

27. They assert that the Initial Decision erred in rejecting REX Shippers' contention that Northern's sale of backhaul capacity from the REX interconnection detracted from the alternate point and capacity release rights of Northern's existing firm Market Area shippers.

28. The REX Shippers contend that while the REX Receipt Point created new *point* capacity, it did not create additional *transportation* capacity for Northern to sell and that any existing pipeline capacity used to provide the new backhaul *service* from the REX Receipt Point to Demarc belonged to Northern's existing firm Market Area shippers. The Initial Decision rejected this argument, finding that the REX Receipt Point created additional transportation capacity that Northern could sell. REX Shippers assert this finding was erroneous because it was based on a number of factors which do not apply to the situation presented. According to REX Shippers the factors relied upon by the Presiding Judge were the reticulated, non-pathed nature of the Northern system under which capacity is sold at individual receipt and delivery points, but not along specific pipeline segments, the *Northern Compliance Order* approving virtual segmentation in Northern's Market Area, and the ruling in *Southern LNG* that pipelines must offer to provide a backhaul service if it is operationally feasible for the pipeline to do so.

29. The REX Shippers argue that the capacity release rights and flexible point rights accorded by firm shippers under Order Nos. 636<sup>17</sup> and 637, *supra* n. 3, were degraded under the Initial Decision's ruling. According to REX Shippers the capacity release rights under these orders permit firm shippers to release unneeded capacity to other shippers ("replacement shippers") and receive a credit from the pipeline of the reservation charges paid by the replacement shippers for the released capacity. According to REX Shippers the flexible point rights allows firm shippers to realign their

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<sup>17</sup> *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Preambles January 1991-June 1996 ¶ 30,939 (1992); *order on reh'g*, Order No. 636-A, FERC Stats. & Regs., Regs. Preambles January 1991-June 1996 ¶ 30,950 (1992); *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993) *aff'd in part and remanded in part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

primary receipt and delivery point rights and to utilize as “alternate points” (without “realignment” of their primary point rights) any other available receipt and delivery points on a “secondary” basis.

30. The REX Shippers assert that a substantial portion of the backhaul service was not used to backhaul gas from the REX Receipt Point to Demarc at all, but rather to deliver gas to alternate delivery points in Northern’s Market Area on a “secondary” basis, notwithstanding that at the time, Northern’s primary firm forward haul capacity in the Market Area was fully subscribed. This, REX Shippers assert, diminished the value of the alternate point and capacity release rights accorded to Northern’s firm Market Area shippers under Order No. 636. REX Shippers claim this was shown because any prorating (reduction) of the quantity nominated by Northern’s existing firm Market Area shippers for delivery to alternate delivery points due to the nomination by firm backhaul shippers of like quantities of gas for delivery on a secondary basis to the same alternate delivery points detracted from the value of the existing firm (forward haul) Market Area shippers’ flexible point and capacity release rights.

31. REX Shippers argue that Northern has not “shown that it has available unsubscribed capacity on which to perform” its new backhaul service – particularly where that firm backhaul service would entitle shippers to transport gas on a forward haul basis into Northern’s already fully subscribed Market Area (even on a “secondary” firm basis), and thus degrade the rights of the existing firm shippers. REX Shippers assert that the Initial Decision, at P 41, does not dispute this consequence; rather, the Initial Decision merely concludes that such degradation is not prohibited.

32. REX Shippers contend that Northern, consistent with *Southern LNG*, should have relied on the firm capacity entitlements of its existing firm Market Area shippers to provide that service and thus no degradation of the existing firm shippers’ capacity rights would have resulted.

33. REX Shippers assert that the Initial Decision erroneously relies on *Columbia Gulf* for the broad proposition that a pipeline may sell backhaul capacity on an otherwise fully subscribed pipeline even where the service degrades the quality of service for existing firm shippers seeking to use points on an alternate or secondary firm basis because *Columbia Gulf* predates implementation of Order No. 637 on the Columbia Gulf system. REX Shippers argue that *Columbia Gulf Transmission Co.*, 100 FERC ¶ 61,344 (2002) (*Columbia Gulf Compliance Order*), the Commission’s subsequent decision on Columbia Gulf’s Order No. 637 Compliance Filing, made clear that providing secondary transportation service to alternate points involving a change in direction of flow may not “compromise” or reduce the “value” of the alternate point rights of existing firm shippers for whom service to alternate points does not involve a change in direction of flow. In that case the Commission noted at P 91, as REX Shippers argued here, that “[t]o the extent secondary backhaul service reduces [the pipeline’s] ability to render forward haul service, forward haul secondary service would be compromised, as would its value.”

34. REX Shippers argue that the Initial Decision's attempt to distinguish *Columbia Gulf* based upon the "reticulated" nature of Northern's Market Area, which lacks defined flow paths, overlooks the difference between "transportation paths" for nomination and scheduling purposes, and the contract flow direction. It is clear, REX Shippers assert, that Northern's Market Area is subject to contractual flow-direction pathing, i.e., forward haul v. backhaul, even without designation of a specific flow route (or path) between the specific receipt point(s) and the specific delivery point(s). The contractual direction pathing is sufficient, REX Shippers maintain, for purposes of applying the principles set forth in the *Columbia Gulf Compliance Order* to conclude that the Open Season backhaul service degraded the rights of existing firm customers.

35. REX Shippers assert that the Initial Decision fails to distinguish between point capacity and transportation capacity. They state that receipt *point* capacity refers to the shipper's right to schedule natural gas into the pipeline at a specific receipt point, while *transportation* capacity refers to the right to schedule natural gas for transport between specific receipt and delivery points. REX Shippers assert that on a fully subscribed pipeline, new transportation capacity does not magically become available through the addition of a new receipt point. Here, Northern did not construct any new transportation capacity between Demarc and the REX Receipt Point. Thus, REX Shippers assert, the Initial Decision erred in concluding, at P 20, that the REX Receipt Point created new capacity because no new transportation capacity was created, only point capacity was created.

36. Next, REX Shippers contend that the capacity used to provide Northern's backhaul service was not Northern's to sell because under Order No. 637 the capacity belonged to Northern's Firm Market Area shippers. Under Order Nos. 636 and 637, REX Shippers state the reservation charges paid by firm shippers also entitled them to use that same capacity to backhaul gas on a secondary firm basis (within the original contract path for which the shippers had paid reservation charges). Thus, according to REX Shippers, under Order No. 637 it is generally firm shippers, not pipelines, who are able to segment their capacity into forward haul and backhaul segments.

37. REX Shippers assert that the REX Receipt Point may have made it possible for a new transportation *service* to be provided between the REX Receipt Point and Demarc, but the transportation capacity that would be used to provide that service already existed and is held by Northern's firm Market Area shippers. REX Shippers argue that the Initial Decision erred in concluding that Northern's existing Market Area shippers did not have the right to segment their capacity if operationally feasible to utilize the new receipt point capacity on a backhaul basis.

38. REX Shippers contend that the Commission's approval of Northern's reticulated segmentation in *Northern's Compliance Order* does not negate the existing Market Area shipper's segmentation rights. Thus, they argue, it was erroneous for the Initial Decision to cite to the Commission's finding in the *Northern Compliance Order* that Northern's

Market Area facilities “constitute a web-like pipeline grid where bi-directional gas flows occur frequently and there are no predictable flow paths on its system,”<sup>18</sup> because the ALJ failed to properly weigh the lack of “predictable flow paths” as the critical, indeed controlling, consideration in rejecting REX Shippers’ contention.

39. REX Shippers assert that physical segmentation is operationally feasible between the REX Receipt Point and Demarc. In support, REX Shippers refer to Exhibit No. RGS-21 which they contend establishes that on each and every day, there is always a substantial predictable forward flow of gas from Demarc toward Palmyra,<sup>19</sup> the magnitude of which varies on a seasonal basis. This predictable forward flow of gas is precisely what makes providing firm backhaul service possible, according to the REX Shippers.

40. REX Shippers argue that under these circumstances, before physically segmenting its capacity on the Demarc-Palmyra mainline to provide the backhaul service from the REX Receipt Point to Demarc, Northern should have sought clarification from the Commission whether, because physical segmentation was now operationally feasible, Northern continued to be relieved of its obligations under Order No. 637 to provide physical segmentation rights to its firm Market Area shippers.

41. REX Shippers state that the Initial Decision rejected the REX Shippers’ argument that the *Northern Compliance Order* does not apply to the changed circumstances presented by the REX Receipt Point, relying on, at P 84, Northern’s performance of a backhaul service from the Trailblazer receipt point to Demarc. REX Shippers argue this was error because the backhaul from the Trailblazer receipt point is not mentioned or discussed anywhere in *Northern’s Compliance Order* proceeding. Under these circumstances REX Shippers maintain it was improper for the Presiding Judge to assume the Commission was even aware of the existence of that service.

42. REX Shippers assert that the Commission’s approval of “virtual segmentation” in Northern’s Market Area does not mean that the right to do so was conferred on Northern, or that Northern was implicitly allowed to utilize the capacity for which Northern’s firm shippers had paid demand charges to provide an allegedly new backhaul service for Northern’s exclusive economic benefit. They contend that Northern cannot deny its firm Market Area shippers the right to segment their capacity on the mainline between Demarc and Palmyra, for which they have paid reservation charges, when at the same time Northern is claiming that it may segment this very same capacity to provide its “new” firm backhaul service for Northern’s exclusive economic benefit.

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<sup>18</sup> 101 FERC ¶ 61,203 at P 39.

<sup>19</sup> Palmyra is downstream of Demarc and the REX Receipt Point.

43. REX Shippers argue that the Initial Decision, at P 20, erroneously relied in part on *Southern LNG* to conclude that a pipeline must offer any available transmission capacity under its open-access certificate to any eligible customer, which required Northern to offer firm backhaul capacity from the REX Receipt Point to Demarc. REX Shippers assert that *Southern LNG* was read out of context and is not applicable to the facts of this case. The Initial Decision cited to the following excerpt:

[w]hile there is no firm forward haul capacity available, whether there is or will be demand for firm backhauls or interruptible forward or backhauls is not known. Elba Express must offer any available transmission capacity under its open-access certificate to any eligible customer. Therefore Elba Express' open-access tariff must accommodate and be evaluated in the context of what may reasonably be anticipated to happen.<sup>20</sup>

44. REX Shippers argue that the Initial Decision at P 69 misreads this excerpt for the proposition that Commission policy requires Northern to offer any available transmission capacity under its open-access certificate to any eligible customer. REX Shippers assert the Initial Decision confuses two separate and independent concepts – “whether there is or will be demand for firm backhauls,” a fact which was not known, with the availability of “transportation capacity” – in a manner that is not supported by the context or the issues before the Commission in that case.

45. REX Shippers contend that nowhere in *Southern LNG* did the Commission indicate that, *absent* construction of additional capacity pursuant to the Part 157 blanket construction certificate, capacity to provide a backhaul service was deemed by the Commission to already be available on the fully-subscribed pipeline, such that the pipeline would *at that time* have been required to provide a backhaul service if requested. Here, they argue, Northern has not created new transmission capacity. The pipeline capacity between Demarc and the REX Receipt Point remains fully subscribed by Northern's existing forward haul shippers with no available capacity for Northern to provide its phantom backhaul service.

46. REX Shippers conclude that nothing in *Southern LNG*, or the record before the Commission in that case, addressed the question whether a pipeline, whose capacity is fully subscribed by forward haul service, may, let alone *must*, offer firm backhaul service. Thus, they argue that the Initial Decision erred in relying on *Southern LNG* to approve Northern's conduct here.

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<sup>20</sup> *Southern LNG* at P 35.

47. Finally, REX Shippers argue the Presiding Judge repeatedly cited the reticulated, non-pathed nature of the Northern system as a critical factor to be taken into consideration when disposing of the contested issues. Accordingly, REX Shippers request that any Commission order affirming the Initial Decision should be clear that the Commission does not intend such ruling to set a precedent to be relied upon by non-reticulated pipelines that are not similarly situated to Northern.<sup>21</sup>

### **Northern's Brief Opposing Exceptions**

48. Northern asserts that REX Shippers fail to identify even a single provision of Northern's Tariff to support their argument (Exception at 21) that "[t]he capacity used to provide Northern's backhaul service was not Northern's to sell..." because no such provision exists. In fact, Northern argues REX Shippers' argument that Northern should have withheld such capacity from posting and sale is a collateral attack on the express provisions of Northern's Tariff which require Northern to post such capacity for sale. Moreover, Northern argues their claim that Northern cannot sell backhaul capacity when forward haul capacity is fully subscribed is not only contrary to Northern's Tariff but is also contrary to Commission policy, citing *Columbia Gulf*, and *Southern LNG*.

49. Northern states that REX Shippers' various contentions are premised on the erroneous claim that Northern was not authorized to sell the backhaul service because the forward haul capacity from Demarc was fully subscribed. Northern argues this claim has no merit because Northern's Tariff does not contain a separate definition for "backhaul" transportation, nor does it contain any special provisions for "backhaul" transportation.<sup>22</sup> Most significantly, Northern's Tariff does not contain any limitation whatsoever on the sale of "backhaul" capacity. Thus, Northern assert that under Northern's Tariff and Commission policy there is no limitation on the sale of backhaul capacity based on the extent to which forward haul capacity is subscribed.

50. Northern states that its 2007 Open Season for backhaul capacity from the REX Receipt Point to Demarc was conducted in the same manner as three separate open seasons conducted in 2006 for backhaul capacity from the Trailblazer interconnect (TBPL) with Northern to Demarc. Northern's witness explained that the TBPL receipt point is about 25 miles north of the REX Receipt Point and all three open seasons for

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<sup>21</sup> REX Shippers' Exceptions at 36.

<sup>22</sup> Northern states its tariff follows the definition contained in section 284.1(a) of the Commission's regulations, 18 C.F.R. § 284.1(a), which states that "Transportation includes storage, exchange, backhaul, displacement, or other means of transportation." Thus, Northern contends, backhauls are defined as transportation and are equivalent to other methods of transportation; there is no distinction.

backhaul capacity from the Trailblazer receipt point to Demarc involved the sale of backhaul capacity when the forward haul capacity was also fully subscribed.<sup>23</sup>

51. Northern argues that what REX Shippers seek is to give discriminatory preference to existing shippers, whether through their use of realignment, alternate point flexibility, or capacity release. This, Northern asserts, is contrary to Commission policy as set forth in *Tennessee Gas Pipeline Company*, 79 FERC ¶ 61,297 (1997), where the Commission stated:

The Commission has previously discussed the desirability of economic efficiency achieved by allocating capacity to parties who value it the most ... There is no reason to grant a preferential right to unsubscribed capacity to existing shippers.<sup>24</sup>

52. Northern contends that REX Shippers fail to show any error by the Presiding Judge in rejecting REX Shippers' contention, REX Shippers Brief on Exceptions at 10, that use of alternate (secondary) Market Area delivery points by the firm backhaul shippers at the REX Receipt Point "conflict[s] with, and diminishes the value of, the capacity release and flexible point rights of Northern's existing firm Market Area shippers in contravention of Order No. 636." Northern argues that the Presiding Judge correctly found that nominations on an alternate (secondary) basis by firm backhaul shippers to any Market Area delivery point, including those that involve a forward haul, are expressly authorized by Northern's tariff. (I.D. at P 31). In fact, as the Presiding Judge found (I.D. at P 37), the Commission specifically considered the exact facts present here and expressly rejected a similar argument in the *Columbia Gulf* Rehearing Order, *supra*.

53. In that case, Northern explains, the Commission expressly rejected the claim that a firm backhaul shipper's nomination of alternate (secondary) points on a forward haul basis, which could cause increased competition and possible *pro rata* allocation, constituted a "degradation of service" to existing firm shippers: "*There is no degradation of service here as a result of providing secondary forward haul service under the subject primary service contract.*"<sup>25</sup> The Commission emphasized that there is no distinction between firm shippers with forward haul transportation service and those with backhaul transportation service stating:

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<sup>23</sup> Northern cites to Exhibit No. NNG-78 at 25, ln. 19-23.

<sup>24</sup> 79 FERC ¶ 61,297 at 62,337 (footnote omitted).

<sup>25</sup> 96 FERC ¶ 61,073 at 61,322 (emphasis added).

But, if capacity is physically available on a given day, even if all the entitlements to primary point capacity have been contracted for, Section 11.3 provides that all firm shippers have secondary rights to use that available capacity, subject to the possibility of pro rata allocation. Further, just as in the case of section 11.3 of the GT&C, Section 1. of Rate Schedule FTS-1 draws no distinction between forward haul and backhaul services.<sup>26</sup>

54. REX Shippers argue (Exception at 14-15) that the Presiding Judge erred in relying on the *Columbia Gulf* Rehearing Order because it predates a subsequent decision, the *Columbia Gulf Compliance Order*, 100 FERC ¶ 61,344 (2002) involving Columbia Gulf. There the Commission found that a nomination for an alternate (secondary) point that is “within-the-path” of a shipper’s primary firm capacity would have priority over another shipper’s nomination of such alternate (secondary) point if such point is “outside-the-path” of its primary firm capacity so priority was given to existing shippers.

55. However, Northern points out, the Presiding Judge considered the facts involved in the *Columbia Gulf Compliance Order* and determined that since they were different from the facts on Northern’s system it was not applicable to the instant situation. The Presiding Judge found that Columbia Gulf’s Tariff specifies specific transportation flow paths to which the within-the-path/outside-the-path distinction can be applied. Here, no transportation flow paths are provided under Northern’s Tariff.<sup>27</sup>

56. REX Shippers conceded that “based upon the ‘reticulated’ nature of Northern’s Market Area,” Northern’s system “lacks defined flow paths,” but they sought to create a similarity to the facts in the *Columbia Gulf Compliance Order* by claiming (Exception at 18) that Northern’s Market Area “is subject to contractual flow-direction pathing, i.e., forward haul vs. backhaul” even without designation of a specific flow route (or path) between the specific receipt point(s) and the specific delivery point(s).

57. Northern’s response is that REX Shippers’ alleged “contractual flow-direction pathing” is entirely false and contrary to the fact that Northern’s Tariff treats backhauls the same as forward hauls. Northern’s Tariff does not contain a separate definition for “backhaul” transportation and does not contain any special provisions for “backhaul” transportation. Further, there is nothing in Northern’s Tariff that provides for what REX Shippers describe as “contractual flow-direction pathing” because all transportation is treated the same regardless of the direction of flow. Thus, Northern concludes, the

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<sup>26</sup> *Id.* Emphasis added.

<sup>27</sup> Initial Decision P 39.

Presiding Judge correctly rejected the within-the-path and outside-the-path distinction that was applied under the different facts considered in the *Columbia Gulf Compliance Order*.

58. Northern asserts there is no merit to REX Shippers' claim that Commission precedent in other cases, citing *Transwestern Pipeline Company*, 88 FERC ¶ 61,206 (1999), and *Northern Natural Gas Company*, 92 FERC ¶ 61,255 (2000), *reh'g denied*, 95 FERC ¶ 61,088 (2001) (*Northern LFT Order*) establishes that the backhaul service in the Open Season degraded existing firm shippers' rights. Northern explains that those cases involved pipeline proposals to implement a new type of firm transportation, limited firm transportation (LFT) service, which is different from standard firm transportation service.

59. In those cases, Northern states, the concern was whether there was available capacity to sell LFT service in the first instance, not the possibility that nominations by LFT shippers on an alternate (secondary) basis could result in *pro rata* allocations of the alternate (secondary) point nominations of the new LFT shippers and existing firm shippers. Northern asserts the concern in those cases is not present in the instant case because, as the Presiding Judge found, "the construction of the REX interconnection created new capacity which was the capacity sold in the 2007 Open Season."<sup>28</sup> Here Northern's sale of firm transportation on a backhaul basis from the REX Receipt Point to Demarc was made under Northern's existing Rate Schedule TFX, subject to the same terms and conditions that apply to existing firm shippers receiving firm transportation service under such rate schedule.

60. Indeed, Northern adds, in *Transwestern*, the Commission approved a new firm service that could lead to increased competition for alternate (secondary) points and result in *pro rata* allocation of the alternate (secondary) nominations of both LFT firm shippers and existing firm shippers. Northern asserts that in that case the Commission specifically rejected the argument REX Shippers made here that such competition degrades the right of existing firm shippers stating:

If capacity is available and is not already subscribed, offering it for the LFT service will not unduly diminish the rights of existing capacity holders, who have no right to expect a pipeline to maintain unsubscribed capacity in order to minimize the possible effects of a curtailment.<sup>29</sup>

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<sup>28</sup> *Id.* P 55.

<sup>29</sup> 90 FERC at 61,201.

61. Northern emphasizes that the Commission made the same ruling in the *Northern LFT Order* where the Commission approved Northern's proposal to treat an LFT firm shipper on the same basis as any other firm shipper once the LFT shipper had no more remaining Limited Days in a month:

An LFT shipper is paying a reservation charge to guarantee service during days in the month other than Limited Days. Therefore, once it has no more remaining Limited Days in a month, its service should be treated like any other firm service and be curtailed only on a *pro rata* basis with other firm services.<sup>30</sup>

62. Northern argues that REX Shippers' attempt to rely on the Commission's LFT orders in *Transwestern* and *Northern* for the proposition that the Commission has held that backhaul service degrades existing rights of firm shippers is refuted by the *Columbia Gulf Rehearing Order*. In that case the Commission specifically rejected the objector's reliance on those cases as supporting that proposition.<sup>31</sup>

63. Northern argues that the Initial Decision properly found that construction of the REX Receipt Point created new capacity and that, under *Columbia Gulf* and *Southern LNG*, Northern was obligated to sell such capacity. Northern also rebuts REX Shippers' assertion, see P 36 *supra*, that new capacity can only be created only through construction of new forward haul capacity and not through construction of a new receipt point downstream of a delivery point.

64. Northern responds that the Presiding Judge correctly rejected that argument in finding (I.D. at P 55) that "construction of the REX interconnect did, in fact, create new backhaul capacity...." The Presiding Judge explained that backhaul capacity exists only if there is a receipt point downstream of a delivery point and here on Northern's system forward haul volumes physically flow north, with the volumes received at the REX Receipt Point delivered at the Demarc delivery point downstream of the REX receipt point through displacement. Northern cited to the Commission regulation that specifically defines transportation to include displacement: Transportation includes storage, exchange, backhaul, displacement, or other methods of transportation. (18 C.F.R. § 284.1(a)). Thus, argues Northern, REX Shippers' position that construction of the REX Receipt Point did not create new transportation capacity from that point to Demarc has no merit.

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<sup>30</sup> 105 FERC ¶ 61,172 P 38.

<sup>31</sup> 96 FERC ¶ 61,073 at 61,322 n.4.

65. Moreover, Northern points out, REX Shippers' argument is a collateral attack on the Commission's orders that recognize that backhaul capacity is separate from forward haul capacity, and that pipelines may sell such backhaul capacity, even if at that time forward haul capacity is fully subscribed, citing *Columbia Gulf Rehearing Order, supra*, and *Southern LNG, supra*.

66. Northern also rebuts REX Shippers' contention that even if new capacity was created by construction of the REX Receipt Point, the capacity was not Northern's to sell because it had already been sold to existing Market Area shippers. Northern asserts there is no merit to this argument because it is based on a fallacy that existing shippers had the right to realign to a receipt point that did not exist, segment capacity from a receipt point that did not exist, and release capacity from a receipt point that did not exist. Such rights did not exist because the REX Receipt Point, and backhaul capacity from that point did not exist until after construction of the REX Receipt Point, and Northern could not have sold something that did not exist prior to construction of the REX Receipt Point. Thus, existing shippers did not have any pre-existing rights to the new capacity created by construction of the new REX Receipt Point.

67. Northern states that prior to construction of the REX Receipt Point, Northern could not receive gas from the REX pipeline, and since there was no REX Receipt Point downstream of Demarc, Northern had no backhaul capacity from the non-existent REX Receipt Point to Demarc. Thus, REX Shippers' claim that Northern "already sold to Firm Market Area Shippers" something that did not exist – backhaul capacity from the REX Receipt Point to Demarc – was properly rejected by the Presiding Judge as contrary to the facts.

68. Northern asserts there is no merit to REX Shippers' position that Order No. 637 prohibits all pipelines from selling backhaul capacity if forward haul capacity is fully subscribed because the right to physically segment capacity allegedly was given by Order No. 637 to firm shippers on all interstate pipelines, and not to the pipelines, including pipelines with no physical segmentation on some parts of their system, such as Northern. Northern explains that in the *Northern Compliance Order*, the Commission approved Northern's proposal for virtual segmentation in Northern's Market Area, so there is no physical segmentation in the Market Area. Thus, even if there were an "implicit" Order No. 637 prohibition against the sale of backhaul capacity where forward haul capacity is fully subscribed, Northern argues that any discussion of physical segmentation in Order No. 637 is simply irrelevant to Northern's Market Area, which is subject to virtual segmentation. Further, Northern states, in approving Northern's proposal for virtual segmentation, the Commission did not impose any prohibition against the sale of backhaul capacity if forward haul capacity were fully subscribed.

69. Northern argues that REX Shippers' claim that Order No. 637, while not specifically including such a prohibition, implicitly provided for such prohibition, is also without any basis since REX Shippers failed to identify any facts in Order No. 637 to

support this argument. To show that there is no merit to REX Shippers' claim, Northern cites *Southern LNG*, issued subsequent to Order No. 637, where the Commission did not find that a pipeline was prohibited from selling backhaul capacity if all forward haul capacity was fully subscribed. To the contrary, Northern contends, in *Southern LNG*, under facts similar to the facts in this proceeding, where there is "no firm forward haul capacity available," the Commission found that the pipeline must offer to all shippers "any available capacity," including "firm backhauls," cited by the Presiding Judge at P 55.

70. Northern also responds to REX Shippers' allegation that in considering evidence as to the web-like, reticulated nature of Northern's Market Area, the Presiding Judge did not acknowledge allegedly 'predictable flow paths' as a critical consideration.

71. Northern asserts there is nothing in the *Northern Compliance Order* that requires the Presiding Judge to ignore evidence of the reticulated nature of Northern's Market Area, and no "admonition" in *Southern Natural Gas Company*, 99 FERC ¶ 61,042, at 61,158 (2002), to ignore evidence of the Market Area's web-like system, with bi-directional flows of gas, and to place "controlling" weight on the general lack of predictable flow paths.

72. Northern argues that the ALJ properly rejected REX Shippers' claim (Exceptions at 25) that the mainline between Demarc and Palmyra allegedly is not subject to bi-directional flows in any meaningful sense, and does not have null points. Northern asserts the Presiding Judge, relying on the evidence rejected the claim, Initial Decision at 84, since REX Shippers' own evidence shows that bi-directional gas flow patterns between Demarc and Palmyra have not changed from those that existed at the time of the *Northern Compliance Order*. Northern states that while REX Shippers allege (at 25) that "[t]he mainline between Demarc and Palmyra is not 'reticulated'" they offered no evidence to support their allegation. Moreover, the Initial Decision found (at P 82), that based on the evidence, such portion of the Market Area has a reticulated nature similar to the rest of the Market Area:

The evidence in this case shows that there are intersecting lines and interconnecting pipelines from Demarc to Palmyra similar to the rest of Northern's Market Area. Ex. NNG-28 through NNG-30. This supports the reticulated nature of this portion of the pipeline.

73. In sum, Northern asserts that while REX Shippers allege that there has been a change in circumstances since *Northern's Compliance Order*, they offered no evidence to support their allegation.

74. Northern urges the Commission to disregard REX Shippers' allegation (REX Shippers' Exceptions at 27) that the Presiding Judge erred by placing "improper

emphasis” on the fact that Northern was conducting backhaul transportation from the Trailblazer receipt point to Demarc at the time the Commission issued the *Northern Compliance Order*, because such backhaul transportation was not specifically mentioned in the Commission’s order nor in any filing in such docket.

75. Northern urges the Commission to also disregard the exception since REX Shippers’ contention that “had the Commission been made aware of the service, it is possible the Commission would have ruled differently” is simply speculation, and does not show any error by the Presiding Judge. Moreover, the speculation ignores the fact that at the time of *Northern’s Compliance Order* backhaul transportation through displacement existed in other locations in the Market Area, not just from the Trailblazer receipt point to Demarc. Thus, the Presiding Judge did not err in finding that REX Shippers had failed to show any change in circumstances given the fact that backhaul transportation through displacement was not new, but part of Northern’s Market Area operational characteristics when the Commission issued *Northern’s Compliance Order*. As to REX Shippers’ claim (Exceptions at 28) that their position is somehow supported by the fact that the Commission approved physical segmentation for Northern’s Field Area, Northern responds that such action was limited to the Field Area and based on facts with respect to the Field Area, which are totally irrelevant to the Market Area.

76. Northern asserts that there are a number of false premises in REX Shippers’ contention that “the Commission granted Northern a waiver of its obligations under Order No. 637 to offer full segmentation rights to its shippers...”, and since there was a waiver, when circumstances made segmentation purportedly feasible, “Northern should have sought clarification from the Commission whether, because physical segmentation was now operationally feasible, Northern continued to be relieved of its obligations under Order No. 637 to provide physical segmentation...”, and the Initial Decision correctly rejected the argument. First, there was no “waiver” and there was no requirement to seek “clarification” if circumstances changed. More importantly, argues Northern, there has been no “change” from the operational circumstances that existed when the Commission approved virtual segmentation for Northern’s Market Area in the *Northern Compliance Order*, and the flow path between Demarc and Palmyra is no different now than when the Commission approved Northern’s proposal for virtual segmentation.

77. Northern argues that there is no merit to REX Shippers’ contention that the Presiding Judge’s reliance on *Southern LNG* for the proposition that a pipeline that is fully subscribed on a forward haul basis is not prohibited from selling backhaul capacity is misplaced. Northern asserts the Presiding Judge correctly found (Initial Decision at P 20) that *Southern LNG* contains no such limitation on the selling of backhaul capacity. Moreover the Presiding Judge properly recognized, at P 20, that REX Shippers’ *Southern LNG* argument was based on their mistaken view that “Northern has not created new

transmission capacity” since construction of the REX Receipt Point created such new backhaul capacity.<sup>32</sup>

78. Finally, Northern notes the REX Shippers do not list the Presiding Judge’s denial of their damage claim or their disgorgement claim as part of their specific exceptions to the Initial Decision. Northern asserts that pursuant to Rule 711(d)(2) of the Commission’s Rules of Practice and Procedure, any objections to this part of the Initial Decision have been waived.<sup>33</sup>

79. However, Northern argues, even if review of the Presiding Judge’s ruling was necessary, that ruling was correct. REX Shippers’ claim was that Ultra was “injured by receiving less for its gas sold to backhaul shippers that Ultra would have received from selling its gas to Market Area customers not burdened by the backhaul charges imposed by Northern.” (Joint Statement of Issues at 9). Northern’s response is that there is no merit to such claim because the price for sales of gas at the REX Receipt Point are “determined by opportunity cost—the sellers’ and buyers’ next-best options, not the type of transportation contract used by the buyers.”<sup>34</sup>

### **Staff’s Brief Opposing Exceptions**

80. Before addressing REX Shippers’ brief, Staff noted that the REX Shippers are not shippers on the Northern system and have not contracted for firm capacity anywhere on the Northern system. Therefore, to deliver gas onto Northern’s system, the REX Shippers must sell it to a shipper with capacity rights on Northern’s system. Staff also asserts that the REX Shippers’ Brief on Exceptions did not follow the Commission’s Rules of Practice and Procedure which require that any briefs on exceptions must include “a list of numbered exceptions, including a specification of each error of fact or law asserted.”<sup>35</sup> Thus, Staff contends, it is not entirely clear to which findings in the Initial Decision that REX Shippers are taking an exception or what error is claimed.

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<sup>32</sup> The Presiding Judge noted that the fact that new capacity was created at that point was recognized by REX Shippers’ witness who agreed that “REX Receipt Point capacity and revenues will have to be taken into account at Northern’s next rate case.” I.D. at P 20.

<sup>33</sup> Rule 711(d)(2) of the Commission’s Regulations provides: Partial waiver. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

<sup>34</sup> Northern Brief Opposing Exceptions at 75, citing Exhibit No. NNG-48 at 24.

<sup>35</sup> 18 C.F.R. § 385.711(b)(ii) (2009).

81. Staff asserts that in light of the approach in the REX Shippers Brief on Exceptions there appear to be two general exceptions, with subparts, taken by the REX Shippers to the following determinations made by the Presiding Judge:

1. The capacity release and alternate point rights of Northern's existing firm Market Area shippers were not compromised, and
2. The REX Receipt Point created additional transportation capacity that may be sold by Northern.

82. Staff opposes exceptions to these findings, and asserts that contrary to REX Shippers' exceptions, Northern's sale of backhaul capacity from the REX interconnection did not detract from the alternate point and capacity release rights of Northern's existing Market Area shippers. Staff's position is generally consistent with that of Northern.

83. Staff argues that REX Shippers assert in their exceptions that in Order No. 636, the Commission mandated capacity release and flexible point rights, while true, the REX Shippers do not explain how these rights were curtailed by Northern's open season here. Staff notes that there are about 40 existing firm forward haul Market Area shippers on Northern who have their primary receipt point at Demarc and have delivery points in Northern's Market Area,<sup>36</sup> yet none of these existing firm Market Area shippers filed testimony or briefs in this proceeding to challenge Northern's Open Season procedure. In fact, some filed briefs opposing REX Shippers' contention.

84. Staff argues that the failure to make such a contention by the parties whose rights the REX Shippers contend were compromised by Northern's action indicate that the rights the REX Shippers purport to protect were not endangered by Northern's Open Season. Staff argues that while in Order No. 637 the Commission clarified that interstate pipelines are required to permit shippers to segment the firm capacity for which they had contracted to the extent such segmentation is operationally feasible, the REX Shippers do not identify any specific text in Order Nos. 637, 637-A or 637-B establishing a general prohibition on selling backhaul capacity when forward haul capacity is fully subscribed. Thus, Staff asserts, the Presiding Judge correctly determined that the sale of backhaul capacity in the 2007 Open Season did not degrade existing shippers' rights under Order No. 636, and did not contravene Commission policy.

85. Staff asserts that REX Shippers' contention conflicts with basic operation of the interstate pipeline system because under that position any sale of backhaul service capacity would conflict with, and thereby diminish, the value of the capacity release and

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<sup>36</sup> Staff Brief Opposing Exceptions, pp 15-16, citing Exh. RES-26 (Foster Direct Testimony) at 7.

flexible point rights of existing shippers. This is obviously not the case because pipelines can routinely add forward haul or backhaul capacity through new interconnects. Staff cites to *Columbia Gulf*,<sup>37</sup> where the Commission specifically confirmed that there is no degradation of service as a result of providing secondary forward haul service under a primary backhaul service contract. Further, as previously noted, no existing firm shipper on Northern's system alleged such a diminution of its rights because of the Open Season for new backhaul service at Demarc.

86. Staff argues that the REX Shippers' reliance on the *Northern LFT* case, *supra* P 58, that a pipeline must demonstrate it has sufficient capacity before it can offer a new service, such as the backhaul service here, is not relevant for a number of reasons.<sup>38</sup> First, in that case the existing firm shippers objected to the new services, while here none of the existing firm shippers objected to the Open Season. Only Ultra and Sempra, who are not shippers on the Northern system, claimed that the existing firm service would be degraded by the new backhaul service. Second, here the Presiding Judge found (I.D. at P 40) that the construction of the REX interconnection created new capacity, the capacity sold in the 2007 Open Season. Therefore, as the Presiding Judge stated, the concerns that the Commission addressed in the *Northern LFT* order are not present here. Moreover, here the Presiding Judge found that the service is not a new service under a new tariff, as was true in the *Northern LFT* order, but rather was a "firm transportation service under an existing firm rate schedule provided to backhaul shippers on the same basis as all other shippers." I.D. at P 40.

87. Staff asserts that the Initial Decision correctly understood the Commission's determination in the *Columbia Gulf* order, that existing shippers' service is not degraded by an increase in the pool of possible secondary shippers. Staff explains that in *Columbia Gulf* an existing customer complained that the pipeline that offered a backhaul service did not have unsold forward-haul capacity. The customer maintained that allowing this service to continue would permit any pipeline to sell a primary backhaul service of dubious utility, which would then be accompanied by a valuable secondary forward haul service that would be able to compete unfairly with the secondary forward haul service provided to firm customers that have primary forward haul rights. The Commission rejected the argument stating that where the tariff makes no distinction between forward haul and backhaul services, which is true for Northern's tariff here, the right to make

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<sup>37</sup> *Columbia Gulf*, 96 FERC ¶ 61,037 at 61,322.

<sup>38</sup> As discussed earlier, REX Shippers claimed that there, the Commission rejected Northern's proposal to offer a new Limited Firm Throughput (LFT) service, and the Commission expressed concern that Northern was unable to demonstrate that it had sufficient available capacity to make commitments for firm service, which could lead to degradation of service to existing firm shippers, *Northern LFT*, 95 FERC at 61,266.

Presiding Judge's secondary forward hauls does not only accompany a primary forward haul contract, but it also properly accompanies backhaul service.<sup>39</sup>

88. Staff asserts that the Commission made the same ruling in *Southern LNG*. In that case, the Commission specifically stated: “[w]hile there is no firm forward haul capacity available, whether there is or will be demand for firm backhauls or interruptible forward or backhauls is not known. Elba Express must offer any available transmission capacity under its open-access certificate to any eligible customer.”<sup>40</sup> Staff states that the Commission could not have been any clearer, even though there is no firm forward capacity available, any available transmission capacity, including backhauls must be offered.

89. Staff contends that there is no merit to REX Shippers' exception that since *Columbia Gulf* predates implementation of Order No. 637 on the Columbia system the Presiding Judge's reliance on it was misplaced. Staff responds that the Initial Decision cited *Columbia Gulf* for the ruling that existing shippers' service is not degraded by an increase in the pool of possible secondary shippers. Since Order No. 637 did not change the fact that the service is not degraded, that *Columbia Gulf* predates Order No. 637 is not relevant.

90. Similarly, Staff asserts REX Shippers' argument that the subsequent *Columbia Gulf Order No. 637 Compliance Order, supra*, P 33 supports their position on change in direction of flow has no merit because it involved a specific transportation flow path between receipt and delivery points. Here, Staff states, shippers on Northern's system contract for a receipt point and a delivery point without specification of the path taken. Thus, the Presiding Judge correctly held that within-the-path/outside-the-path distinction, and the Commission's concern about the relative priorities between them expressed in the *Columbia Gulf Compliance Order* is not applicable in this proceeding.<sup>41</sup>

91. Staff argues that the Presiding Judge properly rejected REX Shippers' contention that the Initial Decision erroneously held that the REX Receipt Point created additional transportation capacity for Northern to sell because the Initial Decision failed to distinguish between point capacity and transportation capacity. Staff responds this is wrong since the Presiding Judge specifically addressed this issue. Staff explains, as did the Initial Decision, that when the REX Receipt Point was built, 200,000 Dth/day of the gas necessary to utilize that fully subscribed capacity could be injected onto Northern's

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<sup>39</sup> *Columbia Gulf*, 96 FERC ¶ 61,073 at 61,323.

<sup>40</sup> *Southern LNG, Inc.*, 122 FERC ¶ 61,137, at P 35 (2008).

<sup>41</sup> Initial Decision at P 39.

system at the REX interconnection point downstream of Demarc, rather than at Demarc. This shortened the distance that 200,000 Dth had to travel to reach Northern's Market Area. Since 200,000 Dth could now be injected at the REX Receipt Point, this meant that 200,000 Dth did not need to travel from Demarc to the REX Receipt Point at Palmyra to meet the fully subscribed capacity demand. As a result, 200,000 Dth of actual, unused backhaul transportation capacity from the REX Receipt Point at Demarc was created. Thus, the Presiding Judge correctly determined that construction of the REX Receipt Point created new transportation capacity from the REX Receipt Point to Demarc on a backhaul basis.<sup>42</sup>

92. Staff also supports the Presiding Judge's rejection of REX Shippers' contention that if construction of the REX Receipt Point created new capacity on the Northern system, that capacity was Northern's firm Market Area shippers to sell, and not Northern's to sell.<sup>43</sup> Staff answers that the general grant of rights to firm shippers under Order No. 636 does not support this claim, or undermine the Presiding Judge's ruling on this issue since REX Shippers never explained what in Order No. 636 supports this contention.

93. Staff asserts that there is a false premise to REX Shippers' argument that while the Commission in the *Northern Compliance Order* did not require Northern to give physical segmentation rights to its shippers, on the basis that segmentation was not operationally feasible in the Market Area, those segmentation rights did not revert back to Northern for its own use if physical segmentation became operationally feasible, when, as REX Shippers contend, the Open Season was held. Staff attacks this line of argument as based on a false premise: that the operational characteristics of Northern's system now are not the same as they were when the *Northern Compliance Order* was issued. The Initial Decision noted that at the time of the *Northern Compliance Order*, Northern was performing backhaul service at the Trailblazer receipt point, so there has not been a significant change in operational conditions by adding the REX Receipt Point. The REX Shippers' argument that the Commission was not aware of that backhaul service and that had it known of the service it would have ruled differently viewing the service as evidence that at least on the Demarc-Palmyra mainline physical segmentation was feasible, is speculative at best. Although the addition of the REX Receipt Point did make new capacity available, it was only on a backhaul basis, and only from the REX Receipt Point to Demarc. Thus, because the operational characteristics of the Northern system did not change with the addition of the REX Receipt Point, contrary to the REX Shippers' claim, a clarification of the *Order on Compliance* was not necessary, and that order remains in effect.

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<sup>42</sup> *Id.* P 19.

<sup>43</sup> REX Shippers' Brief on Exceptions at 21.

94. Staff also rebuts REX Shippers' argument that the Initial Decision ignored the obligation imposed on pipelines in other orders approving relief from the physical segmentation obligation of Order No. 637 to provide physical segmentation if it became operationally feasible for the pipeline to do so in the future, citing *WestGas InterState, Inc. (WestGas)*, 99 FERC ¶ 61,206, at 61,844-45 (2002) and *Columbia Gas Transmission Corp., (Columbia Gas)*, 100 FERC ¶ 61,084, at P 43, 51 (2002).

95. Staff responds that these orders presented completely different situations. In *WestGas*, since the pipeline had only one receipt point, segmentation of the type contemplated by Order No. 637 could not occur on it. However, the Commission added that if in the future the pipeline expanded its ability to offer segmentation by maintaining multiple receipt points, the Commission might re-examine the pipeline's segmentation provisions.<sup>44</sup>

96. As to *Columbia Gas*, Staff explained the issue was the implementation of a segmentation pooling approach, and the Commission required a report on its operations within 60 days after Columbia had implemented segmentation for one year. Significantly, the *Northern Compliance Order* did not require Northern to do anything similar and the Presiding Judge properly found that there was no basis to impose such a requirement when the Commission had not done so. Finally, Staff refers to the finding in the Initial Decision that even assuming an obligation was imposed on Northern to seek clarification if operational conditions changed, the operational circumstances have not changed to trigger such a filing because Northern's Market Area remains reticulated and subject to bi-directional and unpredictable flow paths.<sup>45</sup>

## **Discussion**

97. Having reviewed the Initial Decision and the Briefs on Exceptions and Briefs Opposing Exceptions, the Commission finds that all issues were correctly resolved by the Presiding Judge. Therefore, we deny the exceptions and affirm the Initial Decision.

98. We find that after the REX Receipt Point was constructed, Northern could offer backhaul service from that point in an Open Season, and award the service under the terms of that offer. The complainants here, REX Shippers, are shippers on the REX pipeline and are not shippers on the Northern system. They contend that Northern's sale of backhaul capacity from the REX interconnection detracted from the alternate point and capacity release rights of Northern's existing firm Market Area shippers granted to those shippers under Commission Order Nos. 636 and 637. These rights, they contend applied

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<sup>44</sup> *West Gas*, 99 FERC ¶ 61,206 at 61,846.

<sup>45</sup> Initial Decision at P 32.

to the capacity created at the REX Receipt Point because the forward haul capacity at the REX Receipt Point was fully subscribed and no new transportation capacity was created from construction of the REX Receipt Point. In REX Shippers' view, there was no capacity that Northern could sell, and the Open Season was in violation of the rights of the existing firm shippers. We disagree.

99. Although REX Shippers argued that the rights of Northern's existing firm shippers were compromised by the Open Season, none of Northern's existing firm shippers with their primary receipt point at Demarc<sup>46</sup> supported this claim.<sup>47</sup> In fact, a number of Northern's existing firm shippers urged the Commission to reject the REX Shippers' request to vacate or modify the contracts awarded under the Open Season, and requested the Commission to affirm those contracts including the rollover rights under those contracts.<sup>48</sup>

100. We also reject REX Shippers' assertions that the Initial Decision improperly relied on the reticulated, non-pathed nature of Northern's system, or misread the Commission's rulings in the *Columbia Gulf* and *Southern LNG* cases. In the *Northern Compliance Order* the Commission held that Northern's market area should be treated as a reticulated system and nothing was shown why that should not continue to apply.

101. The Briefs Opposing Exceptions demonstrated that there was no merit to REX Shippers' exceptions. We see no need to consider the exceptions *seriatim*, and will briefly review the primary arguments.

102. Although REX Shippers seek to distinguish between point capacity, which they assert was created, and transportation capacity, which they assert was not created, we find that the Presiding Judge correctly addressed this issue, and found that the REX Shippers'

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<sup>46</sup> Staff's Brief states that there are at least 40 firm shippers with their primary receipt point at Demarc with delivery points in Northern's market area.

<sup>47</sup> While the REX Shippers do not clearly state why they seek to vindicate certain rights of Northern's existing firm shippers, it appears that REX Shippers do so because they claim that Ultra was "injured by receiving less for its gas sold to backhaul shippers than Ultra would have received from selling its gas to Market Area customers not burdened by the backhaul charges imposed by Northern." (Joint Statement of Issues at 9). The Commission notes that the Initial Decision, at P 95, stated that gas from the REX pipeline comprised more than 60 percent of Northern's deliveries into the Market Area with the REX Receipt Point operating near 100 percent capacity.

<sup>48</sup> See Indicated Shippers' Initial and Reply Briefs filed September 12, 2008 and September 29, 2008.

argument that no new transportation capacity was created by the construction of the REX interconnect is unconvincing. The Presiding Judge explained, at P 19, that after construction of the receipt point 200,000 Dth/day of the gas necessary to utilize that fully subscribed capacity could be injected onto Northern's system at the REX interconnection point downstream of Demarc, rather than at Demarc. As a result, 200,000 Dth of actual, unused backhaul transportation capacity from the REX Receipt Point to Demarc was created. The Presiding Judge correctly determined that construction of the REX Receipt Point created new transportation capacity from the REX Receipt Point to Demarc on a backhaul basis.

103. Since there was capacity available for the backhaul service, Northern was able to offer the capacity in its Open Season. That capacity was the pipeline's to sell as we held in the *Columbia Gulf* and *Southern LNG* cases. REX Shippers' contended this was error because even if new capacity was created by construction of the REX Receipt Point the capacity was not Northern's to sell because it had already been sold to existing Market Area shippers. There is no merit to REX Shippers' position because existing shippers had no right to realign to a receipt point that did not exist, segment capacity from a receipt point that did not exist, nor release capacity from a receipt point that did not exist. Backhaul capacity arising from the existence of such point was not available until construction of the REX Receipt Point. Northern could not sell, and firm shippers could not own, something that did not exist prior to construction of the REX Receipt Point. Thus, existing shippers did not have any rights to the new capacity created by construction of the new REX Receipt Point.

104. The fact that the forward haul service was fully subscribed did not prevent Northern from offering new capacity as a backhaul service. We find that that there was no degradation of the existing firm shippers' rights from that offer. Commission precedent establishes that when the tariff makes no distinction between forward or backhaul service, as is true for Northern's tariff, the backhaul service has secondary rights to alternate points because it provides for secondary forward haul service under the backhaul service contract.<sup>49</sup> REX Shippers' exception that these cases are not relevant has no merit. The fact that *Columbia Gulf* predates Order No. 637 is not relevant because Order No. 637 did not change the fact that the firm shippers' rights are not degraded by increasing the pool of secondary shippers and we so held subsequent to issuance of Order No. 637 in *Southern LNG*. Similarly, the Presiding Judge correctly rejected REX Shippers' contention that *Southern LNG* is not applicable because in that case the Commission only was referring to the possibility that there could be new capacity added by new construction and only in that situation did the pipeline have the right to offer the

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<sup>49</sup> See *Columbia Gulf*, 96 FERC ¶ 61,037 (2001), and *Southern LNG*, 122 FERC ¶ 61,137 (2008).

backhaul service, and here there was no new construction. As the Presiding Judge stated in the Initial Decision in *Southern LNG*, “the Commission did not mention any such new construction, and there is no indication that the Commission intended to so limit this statement.”<sup>50</sup> We confirm the ALJ’s understanding of our intent. Moreover, even if such an unintended limitation could be read into the Commission’s statement, construction of the REX Receipt Point did in fact create new backhaul capacity here, which Northern could offer.

105. In the *Northern Compliance Order*, the Commission, in light of the reticulated nature of Northern’s system, authorized virtual segmentation in Northern’s Market Areas and did not prohibit the sale of backhaul capacity. When the Commission issued that order, backhaul service similar to that at the REX Receipt Point was existent on the Northern system at the Trailblazer receipt point and at other points. Thus, the same finding of the reticulated nature of Northern’s system would apply when Northern offered similar backhaul service when the REX Receipt Point was constructed.

106. The Presiding Judge correctly held that construction of the REX Receipt Point has not changed the operational characteristics of Northern’s system. In accepting Northern’s virtual segmentation proposal the Commission did not waive Northern’s segmentation requirement, but permitted the virtual segmentation as consistent with the goals of Order No. 637. The *Northern Compliance Order* did not impose any requirement that Northern request clarification if additional backhaul service became possible with the construction of a new receipt point.

107. We agree with the ALJ that given the finding that Northern’s sale of the backhaul service was proper, there is no need to address Indicated Shippers’ request that the Commission not modify the contracts awarded pursuant to the 2007 Open Season.

108. Accordingly, we affirm the results reached in the Initial Decision.

The Commission orders:

(A) The findings and conclusions of the Initial Decision are hereby affirmed, as described in the body of this order.

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<sup>50</sup> Initial Decision at P 20.

(B) The contract awards for the 2007 Open Season are effective as granted, including all rollover rights.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.