136 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

BG Energy Merchants, LLC
and
EXCO Operating Company, LP,
Complainants

v.

Crosstex LIG, LLC,
Respondent

Docket No. PR11-107-000

ORDER ON COMPLAINT

(Issued August 10, 2011)

1. On May 3, 2011, BG Energy Merchants, LLC (BGEM) and EXCO Operating Company, LP (EXCO), (jointly Complainants) filed a complaint (Complaint) against Crosstex LIG, LLC (Crosstex), alleging that Crosstex impermissibly assessed a fuel charge in excess of the contractual level. For the reasons set forth below, the Commission dismisses the Complaint since Complainants' request presents a question of contract interpretation which should be addressed in state court.

Background

2. Crosstex is an intrastate pipeline, providing interstate transportation service pursuant to Natural Gas Policy Act (NGPA) section 311, as well as intrastate service. The Complainants, EXCO and BGEM, have service agreements with Crosstex for firm NGPA section 311 transportation service. On July 20, 2006, Crosstex and EXCO'S

predecessor, Winchester Production Company (Winchester),[1] entered into an agreement for firm section 311 transportation service (Crosstex-EXCO Agreement).[2] EXCO assigned fifty percent of this firm capacity to BGEM. On August 14, 2009, Crosstex and EXCO amended their service agreement to reflect that assignment, and Crosstex then directly contracted with BGEM on similar terms.[3]

3. Complainants assert that, beginning in the January 2010 production month, Crosstex has charged them a fuel rate exceeding the fuel rate included in their service agreements. They argue that section 5.1 of their service agreements cap the fuel that Crosstex may retain at 0.75 percent of the quantity of gas they deliver to Crosstex, and Crosstex has been retaining quantities in excess of 0.75 percent. Crosstex contends the Commission should dismiss the complaint, because it involves a contract dispute which should be resolved by the Texas state courts through the pending litigation in *Crosstex LIG, LLC v. BG Energy Merchants, LLC and EXCO Operating Company, LP*, Case No. 11-06298, in the 191st District Court of Dallas County, Texas (State Court Proceeding). Alternatively, Crosstex asks the Commission to summarily deny the Complaint and direct Complainants to make payments as invoiced. Crosstex argues that the 0.75 percent cap applies to the charge for fuel consumed at certain delivery points specified in the Agreements, and not to fuel consumed elsewhere on the system to transport the Complainants' gas.

4. The provisions of the Crosstex-EXCO Agreement and the Crosstex-BGEM Agreement (Agreements) relevant to the parties' dispute are identical. Section 3.1(b) of the Agreements requires Crosstex deliver an "equivalent quantity" of gas to BGEM and EXCO at delivery points downstream on the pipeline. The term "equivalent quantity" is defined in section 1.10 of the Agreements as equal to the amount of gas received by Crosstex less, *inter alia*, the shipper's "pro rata share of compressor fuel and equivalents and use requirements and gas lost and unaccounted for, as well as any incremental compressor fuel incurred by [Crosstex] to compress the gas in order to receive the gas at the Point of Receipt or deliver gas to the Point of Delivery."

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[1] EXCO succeeded to Winchester's interests through a series of acquisitions and mergers.

[2] A copy of the Crosstex-EXCO Agreement is attached to the Complaint as Exhibit CPT-2.

[3] A copy of the Crosstex-BGEM Agreement is attached to the Complaint as Exhibit CPT-1.

5. Section 5.1 of the Agreements provides that BGEM and EXCO will each pay transportation rate of $0.16 per MMBtu of their contract demand. Section 5.1 then provides:

> Additionally, Shipper shall be responsible for the actual allocated fuel for deliveries of gas hereunder to the ANR and Columbia Points of Delivery described on the attached Exhibit "A," up to, but not to exceed, 0.75% of the quantity of gas actually delivered to Shipper or for Shipper's account at such Points of Delivery. There shall be no deductions for fuel for quantities of gas delivered to Shipper for Shipper's account at the Points of Delivery designated on Exhibit "A" as Texas Gas and Trunkline as long as the operating pressures on those pipelines do not exceed 620 psig and 680 psig, respectively. In the event that operating pressures exceed these levels, Transporter shall nevertheless use its commercially reasonable efforts to continue deliveries at these Points of Delivery at the prevailing pressures. In the event that the operating line pressure on Texas Gas is greater than 620 psig, and compression is required by either Texas Gas to receive gas, or by Transporter to continue delivering gas, Shipper shall be responsible for the actual allocated fuel for continued deliveries of gas to these points, up to, but not to exceed 0.75% of the quantity of gas actually delivered to Shipper or for Shipper's account at the Texas Gas Points of Delivery. In the event that the operating line pressure on Trunkline is greater than 680 psig, and compression is required by either Trunkline to receive gas, or must be installed by Transporter to continue delivering gas, Shipper shall be responsible for the actual allocated fuel for continued deliveries of gas to these points, up to, but not to exceed 0.75% of the quantity of gas actually delivered to Shipper or for Shipper's account at the Trunkline Point of Delivery. Shipper and Transporter, as applicable, shall also make all other payments as required in the Statement of Operations. [[4]]

Section 5.2 of the Agreements provides that:

> Transporter has the right hereunder to file from time to time with the Commissioner of Conservation of the State of Louisiana ("Commissioner") or the FERC, or both, and/or any successor thereto, whether executive, legislative or regulatory, for any change in the rate provisions prescribed in 5.1 above including any changes in the type or level of such rate and to change the Statement of Operations. Effective as of the date such change is

[4] Exhibit No. CPT-1, at 10-11 and Exhibit No. CPT-2, at 10-11 of the Complaint.

> approved and/or allowed to become effective or otherwise allowed to go into effect, by the appropriate authority or authorities, Shipper agrees to abide by the terms and provisions of the Statement of Operations as they were so changed. In the event that after the initial required regulatory approvals have been obtained and accepted, Transporter's rates are adjusted by the appropriate authority or authorities, the transportation rate will be adjusted effective as of the date provided for the appropriate authority or authorities. The adjusted rate will be equal to the rate so determined by and based upon such determination. Notwithstanding anything contained in this Agreement, including this Section 5.2, to the contrary, in no event shall any such rate adjustment result in an increase in the rate set forth in Section 5.1 hereof. [[5]]

6. At all times during the period relevant to the parties' dispute, section 19.3 of Crosstex's Statement of Operating Conditions (SOC) has provided that:

> [Crosstex] will retain from all Shippers a pro rata share of company use and lost and unaccounted-for gas. In addition, a Shipper will incur a pro rata share of actual compressor fuel for each stage of compression in Shipper's designated transportation path.[6]

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[5] Exhibit No. CPT-1, at 11 and Exhibit No. CPT-2, at 11.

[6] Crosstex included section 19.3 of its SOC in its Docket No. PR09-19-000 petition for approval of rates and a revised SOC, to be effective March 3, 2009. On February 18, 2010, the Commission approved a settlement of that proceeding (Settlement), which included approval of section 19.3. *Crosstex LIG, LLC*, Docket No. PR09-19-000 (February 18, 2010) (unpublished letter order) (February 2010 Order). The February 2010 Order (at P 2) provided that:

> [Crosstex] also is authorized to continue retaining from its shippers on the [Crosstex] system a *pro rata* share of company use and unaccounted-for gas and each shipper will incur a *pro rata* share of actual compressor fuel used in its designated transportation path (collectively referred to as "Fuel Charge") as set forth in the Statement of Operating Conditions filed by [Crosstex] on March 3, 2009 in this proceeding (March 3 SOC).

7. On August 5, 2010, in Docket No. PR10-78-000, Crosstex filed additional revisions to the SOC, including the addition of a new last sentence to section 7.1 of Crosstex's SOC providing that: "Compressor fuel includes, but is not limited to, natural gas and electricity." That filing was accepted by an unpublished letter order on June 15, 2011, effective August 1, 2010, as proposed. The Complainants did not protest either the settlement of the Docket No. PR09-19-000 proceeding establishing SOC section 19.3 or the Docket No. PR10-78-000 proceeding revising the definition of compressor fuel.

8. Crosstex completed construction and began operation of its Red River Compressor Station and Kolin Compressor Station in approximately September 2009 and August 2010, respectively, located along the Complainants' designated transportation paths. Crosstex's fuel charges to Complainants began including their respective shares of fuel used at the Red River (Red River Fuel Charge) and Kolin (Kolin Fuel Charge) Compressor Stations.

<u>The Complaint</u>

9. The Complainants argue that Crosstex's charge for fuel reimbursement in excess of the 0.75 percent cap is an unfair and inequitable attempt to collect amounts in excess of contract amounts in the Agreements contrary to the *Mobile-Sierra* doctrine.[7] Complainants assert that, beginning in 2010, Crosstex unilaterally began charging fuel rates in excess of the contractual amount of 0.75 percent of the quantity of gas actually delivered, sometimes as high as 1.50 percent. Complainants further assert that Crosstex then began charging a blended fuel rate consisting of both natural gas and electricity charges so that the fuel rate further exceeded the 0.75 percent cap.

10. Complainants argue that primary jurisdiction for this Complaint rests with the Commission which maintains concurrent jurisdiction with state and federal courts in matters of contract interpretation. Complainants further argue that the Commission maintains discretion whether to exercise its primary jurisdiction in the matters of interpreting a jurisdictional contract and the facts and information in this case allow the Commission to exercise its primary jurisdiction. Complainants assert that, in cases of interpretation concerning a jurisdictional contract, the Commission considers the three factors set forth in *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*) which in this case support the assertion of primary jurisdiction. First, Complainants argue that the Commission possesses specialized expertise when interpreting fuel rates as part a jurisdictional transportation

[7] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (collectively *Mobile-Sierra*).

contract subject to section 311 of the NGPA. Second, they argue that the rate provisions in the Agreements are subject to the *Mobile-Sierra* doctrine and that its public interest presumption is applicable across the electric and natural gas industries. Third, the Complainants contend that the issues raised by this Complaint are important in relation to the regulatory responsibilities of the Commission since, as recognized in *Bay Gas Storage*, a dispute involving the applicability of NGPA section 311 to fuel rates contained within a jurisdictional contract and the consistent application of Commission policies to this dispute "is important in relation to the regulatory responsibilities of the Commission…."[8]

11. Complainants assert that pursuant to section 5.1 of the Agreements, Crosstex may assess them the following charges: (i) a fixed transportation rate of $0.16 per MMBtu; (ii) a fuel rate that is allocated fuel for deliveries of natural gas up to, but not to exceed, 0.75 percent of the quantity of gas actually delivered; and (iii) a *pro rata* amount of company use and LAUF fuel. Complainants further assert that section 5.2 in the Agreements prevents Crosstex from making adjustments to those charges which result in a rate increase. Complainants assert that section 5.1 of the Agreements is consistent with a Binding Letter of Intent dated March 30, 2006, (Letter of Intent) executed by Crosstex and Winchester, EXCO's predecessor.[9]

12. Complainants contend that they did not file protests to the Settlement or to the revisions to Crosstex's SOC in Docket No. PR10-78-000 because they did not believe that those filings could affect the fuel rate in the Agreements. Complainants assert, on information and belief, that, in and around the January 2010 production month, for the first time, Crosstex began calculating the fuel rate under section 5.1 of the Agreements on a monthly basis dividing the monthly calculation by the number of days in the month to determine the daily fuel rate in an amount in excess of the 0.75 percent fuel rate cap. Complainants further assert that over-tender imbalances are smaller than they otherwise would be, resulting in smaller purchase payments by Crosstex and under-tender imbalances are higher resulting in larger purchase payments by Complainants.

13. Complainants assert that Crosstex began assessing a fuel rate, in and around the September 2010 production month, that included electricity, which increased the fuel rate further in excess of the 0.75 percent rate cap. Complainants further assert that they contacted Crosstex concerning the 0.75 percent fuel rate cap and Crosstex responded that section 19.3 of its SOC allowed these fuel charges. Complainants argue that Crosstex's

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[8] *Citing Bay Gas Storage Company, Ltd.*, 131 FERC ¶ 61,034, at P 26 (2010) (*Bay Gas Storage*).

[9] Exhibit No. CPT-3 of the Complaint.

interpretation of the Agreements is improper and results in an unfair and inequitable fuel rate allowing Crosstex to evade the contractually established fuel rate cap and over-recover costs and collect compression costs incurred for the benefit of third parties in the recent Red River expansion project and the additional expansion project in which they declined to participate and provide no benefit to the Complainants, in order to subsidize those projects.[10]

14. Complainants contend that, under the *Mobile-Sierra* doctrine, a fixed rate transportation agreement may be unilaterally changed by the transportation provider only after the Commission finds that setting aside the contract rate is necessary to avoid harm to the public interest. Complainants further contend that Crosstex has failed to make the required public interest showing. Complainants assert that, if a fixed-rate transportation agreement contains a *Memphis* clause,[11] then a transportation provider maintains the limited rights to unilaterally change rates and other terms and conditions set forth in a tariff or SOC. Complainants further assert that, although section 5.2 of both Agreements appears to be a *Memphis* clause allowing a rate change, those provisions also state that: "Notwithstanding anything contained in this Agreement, including this Section 5.2, to the contrary, in no event shall any such rate adjustment result in an increase in the rate set forth in Section 5.1 hereof" preventing Crosstex from revising its contract-specific two-part rate.

15. Complainants assert that Crosstex has assessed improperly fuel rate charges in excess of the 0.75 percent fuel rate cap to BGEM that equal $170,888.83 in natural gas and $62,372.85 in electricity and to EXCO that equal $199,609.11 in natural gas and $94,668.69 in electricity. Complainants request that the Commission issue an order directing Crosstex to (i) assess a fuel rate beginning in the January 2010 production month that cannot exceed a maximum lawful and fair and equitable amount based upon a 0.75 percent fuel rate cap and (ii) refund, with interest, any amounts collected that exceed that amount.

Notice of Filings and Responsive Pleadings

16. Notice of the Complaint was issued on May 4, 2011, as corrected on May 5, 2011, with interventions and protests due by May 23, 2011. Pursuant to Rule 214, 18 C.F.R.

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[10] *Citing ETC Tiger Pipeline, LLC*, 134 FERC ¶ 61,084, at P 26 (2011).

[11] *Citing United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958) (*Memphis*). A *Memphis* clause allows a pipeline to reserve the right to make Natural Gas Act section 4 filings to propose changes in the rates and terms and conditions of service in settlements and contracts.

§ 385.214 (2011), all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

17. On May 23, 2011, Crosstex filed a motion to dismiss the Complaint, or, in the alternative, answer and motion for summary denial (Crosstex's Answer). On June 7, 2011, Complainants filed an answer to Crosstex's Answer (Complainants' Answer). On July 19, 2011, Complainants filed a letter containing a supplemental response to Crosstex's Answer (Supplemental Response).

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept all the responsive pleadings filed in this proceeding because they have provided information that assisted us in our decision-making process.

Crosstex's Answer

19. Crosstex asks the Commission to dismiss the Complaint and allow this dispute to be resolved by the Texas state courts through the pending litigation in the State Court Proceeding. Alternatively, Crosstex asks the Commission to summarily deny the Complaint and direct Complainants to make payments as invoiced.

20. Crosstex argues that the Complaint should be dismissed because this is purely a contract dispute to be interpreted under Texas law[12] more appropriately determined in the State Court Proceeding. Crosstex further argues that the Agreements at issue were not previously filed or approved by the Commission and Crosstex's SOC is the only component of the controversy that has been filed and approved by the Commission in the Agreements.

21. Crosstex contends that, under the *Arkla* tests, the Commission has no "special expertise" that is required to analyze this controversy that makes the case "peculiarly appropriate for Commission decision." Crosstex asserts that construction of specific contractual language in accordance with Texas law falls within special knowledge of the Texas courts and a proceeding is already making that determination. Crosstex argues that resolution of the Complaint does not turn on any technical issue within the special expertise of the Commission. Crosstex concludes that this dispute is similar to the dispute presented in *Arkla*.

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[12] Crosstex cites section 18.7 of the SOC as specifying that the contracts be construed and interpreted under Texas law.

22. Crosstex contends that, under the second part of the *Arkla* test, there is no need in this proceeding for "uniformity of interpretation" across the industry since the Agreements are unique contracts and interpretation of them will only affect the parties to the Agreements and not any general public interest. Crosstex further asserts that the *Mobile-Sierra* doctrine is not at issue in this dispute since, unlike *Bay Gas Storage*, this dispute does not concern an attempt by Crosstex to unilaterally alter terms of the Agreements.

23. Crosstex argues that, under the third part of the *Arkla* test, the Complaint is purely contractual and is not important in relation to the regulatory responsibilities of the Commission. Crosstex contends that, in contrast to *Bay Gas Storage*, this proceeding does not involve a change in rate or service proposed by Crosstex, the filed rate doctrine, or the additional regulatory issues raised there.

24. Alternatively, Crosstex argues that, if the Commission declines to dismiss the Complaint, it should be summarily denied. Crosstex contends that the controversy is nothing more than a contract dispute and the language in the Agreements is clear and unambiguous. Crosstex argues that Complainants mistakenly claim that the 0.75 percent cap applies to the charge for fuel consumed anywhere on the system, rather than at just the specified delivery points. Crosstex contends that authorization for the contested charges is found in the Agreements' requirements that Crosstex deliver an "equivalent quantity" of gas to Complainants at delivery points downstream on the pipeline

25. Crosstex asserts that the last sentence of section 5.1 in the Agreements affirms that Complainants shall make all other payments required by Crosstex's SOC and SOC section 19.3 expressly provides that, in addition to a shipper's *pro rata* share of company use and LAUF, "Shipper will incur a pro rata share of actual compressor fuel for each stage of compression in Shipper's designated path." Crosstex argues that section 5.1 of the Agreements does limit fuel charges, but only those for incremental compression to deliver gas to specified points of delivery since Complainants "are responsible for the actual allocated fuel for deliveries of gas hereunder to the ANR and Columbia Points of Delivery . . . up to, but not to exceed, 0.75%." Crosstex contends that neither section 5.1, nor any other provision in the Agreements, places any type of cap or limit on any other charges for compressor fuel. Crosstex further contends that sections 1.14 and 3.1 of the Agreements expressly incorporate its SOC and that section 3.1 of the Agreements provides that in the event of any conflict the terms and conditions of the SOC control.

26. Crosstex asserts that, as authorized by both the Agreements and the SOC, Crosstex's fuel charges to Complainants began including their share of fuel used at the Red River Compressor Station and the Kolin Compressor Station which were located

along their designated transportation path. Crosstex further asserts that Complainants initially paid in full for their respective *pro rata* shares of the Red River Fuel Charge without objection, but later disputed those charges.[13] Crosstex argues that Complainants' decisions to not purchase additional firm capacity has no bearing on Crosstex's contractual right to charge them for their *pro rata* share of compressor fuel related to compressor stations in their designated transportation path, including fuel consumed at the Red River and Kolin Compressor Stations. Crosstex asserts that Complainants now both dispute the Kolin Fuel Charges. Crosstex asserts that to date (for production through March 2011), BGEM has withheld payment in the amount of approximately $205,029.13 and EXCO has withheld payment in the amount of approximately $209,860.80 for their respective *pro rata* shares of the Red River Fuel Charges and Kolin Fuel Charges.[14]

27. Crosstex contends that the Letter of Intent has no relevance to this proceeding and does not provide material support to the Complaint. Crosstex further contends that Complainants' objections to the charges for compressor fuel occurred while Docket Nos. PR09-19 and PR10-78 were pending, however, they never participated in those proceedings

Complainants' Answer and Supplemental Response

28. Complainants argue that the Commission may exercise its primary jurisdiction in this matter because: (i) it possesses specialized expertise to interpret the fuel rates contained within the Agreements for the section 311 transportation on an intrastate pipeline to reach a fair and equitable resolution; (ii) application of the *Mobile-Sierra* doctrine to the Complainants' fuel rates requires the Commission's uniformity of interpretation; and (iii) consistent application of section 311 to fuel rates contained in this jurisdictional contract falls squarely within the Commission's regulatory responsibilities.

29. Complainants assert that, in the Agreements, Crosstex states that the transportation will be subject to section 311 and the filed SOC. Complainants further assert that, as

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[13] Copies of the correspondence between Crosstex and BGEM and EXCO regarding this dispute are attached to Crosstex's Answer as Exhibit XTX-4.

[14] Crosstex alleges that Complainants have already paid some of the electricity portion of the disputed amounts and, thus, BGEM's and EXCO's payments to Crosstex are deficient by $205,029.13 and $209,860.80, respectively, as set forth in Exhibit XTX-2.

previously determined by the Commission,[15] the Commission has special expertise with agreements within its jurisdiction and with concepts that are otherwise unfamiliar to courts but are subjects it frequently addresses. Complainants assert that the Commission has specifically exercised its primary jurisdiction to ensure that rates charged by intrastate pipeline were consistent with the Commission's regulations.[16] Complainants further assert that this transportation is subject to NGPA section 311 administered by the Commission, and Crosstex's SOC provides the description of and rates for that transportation and is filed with the Commission. Complainants contend that Crosstex admits that its SOC and recent Commission decisions determine how it assesses various rates to Complainants and that each of these issues individually and the interplay between each issue directly and explicitly involves technical issues that are squarely within the Commission's expertise regarding section 311 and an intrastate pipeline's SOC, as recognized by the Commission in *Bay Gas Storage*.

30. Complainants argue that the Agreements, specifically sections 5.1 and 5.2, are fixed rate agreements within the applicability of the *Mobile-Sierra* doctrine. Complainants also argue that the burgeoning development of shale gas resources in the Haynesville region served by Crosstex and other regions across the country served by section 311 pipelines would benefit from the Commission providing predictability and uniformity in its interpretation of fixed rate agreements between shippers and section 311 transportation providers. Complainants assert that, to a substantial extent, effective shale development depends on the agreements reached between producers and the pipelines that can carry gas to market, including those acting under section 311. Complainants further assert that fixed rate terms should be met and, if contract terms can be discarded at will, effective shale development will be harmed which implicates federal interests.

31. Complainants argue that the Commission's assertion of primary jurisdiction is needed for the uniformity of interpretation of the *Mobile-Sierra* doctrine to section 311 contracts to provide contract certainty for shippers. Complainants assert that, as determined in *Bay Gas Storage*, the *Mobile-Sierra* doctrine is applicable to transportation contracts by section 311 intrastate pipelines to preserve and maintain the economic value of a bargain between a transporter and shipper. Complainants argue that the fixed fuel rate in the Agreements is not unique since many contracts throughout the natural gas industry are fixed and non-variable and the transportation of natural gas from shale regions throughout the United States is within the public interest considered by the

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[15] *Citing The United Illuminating Co. v. Dominion Energy Mktg., Inc.*, 111 FERC ¶ 61,224, at P 24 (2005) (*United Illuminating*).

[16] *Citing Bay Gas Storage*, 131 FERC ¶ 61,034 at P 22.

Commission. Complainants further assert that the availability of natural gas from shale in the Haynesville region that Complainants transport on Crosstex, as well as the availability of natural gas from other shale regions throughout the country, necessitates that the Commission exercise its primary jurisdiction to provide guidance to section 311 transportation providers and shippers and determine whether stated fixed rate contracts may be relied upon.

32. Complainants argue that a determination of the *Mobile-Sierra* doctrine in this proceeding is squarely within the regulatory responsibilities of the Commission. Complainants contend that *Farmland Industries Inc. v. Louisiana Intrastate Gas Corp.*, 56 FERC ¶ 61,257 (1991) (*Farmland*), unlike this case, involves the determination of whether the Commission may exert primary jurisdiction over a proceeding already subject to civil litigation before a court to determine the revenue crediting mechanism between a non-section 311 intrastate transportation contract and a section 311 interruptible contract on the same pipeline. Complainants assert that the *Farmland* holding cited is not a central holding of the Commission's order since the Commission stated that the outcome of the issue in that case would "turn on the intent of the parties rather than any determination requiring the Commission's special expertise."[17] Complainants state that they do not assert that all section 311 contracts require uniform contract provisions; rather, they simply request that Crosstex's agreements with them are maintained as written and in accordance with the Commission's policies. Complainants argue that, while the facts in *Bay Gas Storage* are different from those at issue here, the basis for that Commission decision is applicable in this case. Complainants assert that *Bay Gas Storage* found that the consistent application of the Commission's policies was "important in relation to the regulatory responsibilities of the Commission, for example to ensure against undue discrimination among shippers."[18] Complainants further assert that application of the *Mobile-Sierra* doctrine is at issue in this Complaint as it was in *Bay Gas Storage*.

33. With respect to the merits of the Complaint, Complainants contend that the specific terms of each agreement state the service and rate in terms of "delivery." Complainants further contend that under traditional rules of contract interpretation the same term is interpreted consistently in the same agreement and the term "delivery" in the Agreements encompasses the entirety of the service, including the receipt and transportation of the gas on the system. Complainants assert that Crosstex fails to explain why section 5.2 does not cap the fuel rate at 0.75 percent. Complainants further assert

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[17] *Citing Farmland*, 56 FERC at 61,954.

[18] *Citing Bay Gas Storage*, 131 FERC ¶ 61,034 at P 26.

that they believed that Crosstex's proposed changes in Docket No. PR09-19-000 would not affect or change the fuel rate or its guaranteed cap and did not participate. Complainants assert that they do not reject the application of electricity as fuel, rather, they reject the assessment of fuel costs, whether electricity or natural gas, that exceed the fuel rates in the Agreements capped at 0.75 percent of the gas actually delivered.[19]

34. In their Supplemental Response, Complainants argue that, in *Trailblazer Pipeline Company LLC*, 136 FERC ¶ 61,007, at P 31-33 (2011) (*Trailblazer*), the Commission rejected arguments similar to those raised by Crosstex and exercised its jurisdiction to preserve fixed fuel caps.

Discussion

35. For the reasons discussed below, the Commission dismisses the Complaint. This case presents a question of concurrent jurisdiction. The Commission finds that the Complainants' request presents a question of contract interpretation which should be resolved in the already pending State Court Proceeding in Texas.

Arkla Test

36. In *Arkla*, the Commission established a three-part test for determining when it should assert primary jurisdiction over a contract dispute that could otherwise be subject to the jurisdiction of another forum. The Commission stated that:

> Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. [[20]]

37. As discussed more fully below, the Commission finds that under this test, it should not take jurisdiction of this contract dispute. The Commission does not possess special expertise as to what the parties intended when they negotiated the Agreements. There is no need for uniformity of interpretation since the Agreements are unique contracts between these parties and there is nothing to indicate that the interpretation of those

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[19] Complainants' Answer, at 16, n. 52.

[20] *Arkla*, 7 FERC at 61,322.

agreements will affect anyone other than the parties to these agreements. Finally, this matter is not important in relation to the regulatory responsibilities of the Commission.

38. Complainants' assertions, in their Supplemental Response, that *Trailblazer* supports their position are mistaken. *Trailblazer* concerned the operation of the pipeline's generally applicable tariff,[21] including the fuel tracking mechanism and whether certain provisions of that mechanism should be waived. Thus, the issues in *Trailblazer* were not limited to the interpretation of bilateral contract provisions affecting only the parties to those contracts, as here.

Special Expertise

39. With respect to the first *Arkla* factor, the interpretation of the Agreements does not require the special expertise of the Commission which would make this case peculiarly important for a Commission decision. Resolution of this controversy depends on the determining the applicability of the 0.75 percent fuel rate cap in section 5.1 of the Agreements. Accordingly, the outcome of this case will depend on interpreting the particular facts and the intent of the parties with respect to the contractual language under applicable state contract law. As in *Arkla*:

> The outcome of this case appears to turn on interpretation of the intent of the parties of the contract rather than any determination requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise. [[22]]

The Commission reached the same result in *Farmland*, which also involved a complaint that an NGPA section 311 intrastate pipeline was violating the terms of a shipper's service agreement. In *Farmland*, the Commission stated that it "has no greater expertise than the courts in construing or applying state contract law."[23] The construction of specific contractual language to resolve this dispute concerns non-technical contract questions which are appropriately determined in the pending proceeding in the Texas state court.

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[21] *Trailblazer*, 136 FERC ¶ 61,007 at P 32-33.

[22] *Arkla*, 7 FERC at 61,323 (citations omitted).

[23] *Farmland*, 56 FERC ¶ 61,257 at 61,954.

40. Complainants assert that Crosstex admits that its SOC and recent Commission decisions determine how it assesses various rates to Complainants and that each of these issues individually and the interplay between each issue involve technical issues that are squarely within the Commission's expertise regarding section 311 and an intrastate pipeline's SOC. However, it is the interpretation of the Agreements and not the fuel rate or other provisions in Crosstex's SOC, or recent Commission decisions that will determine the outcome of this controversy. Complainants have not raised any issue concerning the interpretation of Crosstex's SOC. Their contention is that section 5.1 of the Agreements establishes a cap on their fuel rate that prevents Crosstex from charging any higher fuel rate that might be authorized by the SOC. In its answer, Crosstex does not contend that any provision of its SOC overrides section 5.1 of the Agreements, nor does it contend that section 5.1 is inconsistent with Commission policy. Rather, Crosstex contends that the 0.75 percent cap in section 5.1 only applies to fuel used to make deliveries at the delivery points specified in section 5.1. Thus, resolution of the dispute between parties turns on the interpretation of section 5.1 of the Agreements, not on the meaning of any provision in the SOC.

41. Complainants mistakenly cite *United Illuminating* as support for their position.[24] In *United Illuminating*, the Commission found the dispute at issue there involved regulatory concepts such as "transmission congestion costs" and "reliability must-run" which might be unfamiliar to a court but are frequently addressed by the Commission.[25] No such unfamiliar regulatory concepts are at issue here.

Uniformity of Interpretation

42. There is no need for uniformity of interpretation since the Agreements are unique contracts between the Complainants and Crosstex. The interpretation of the terms of these contracts will not have an industry-wide impact and has not been shown to affect any parties other than the parties to the Agreements. As the Commission stated with respect to the need for uniformity of interpretation of jurisdictional contracts in *Arkla*:

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[24] Complainants also cite *Bay Gas Storage* (at P 22) in support of their position. However, as explained more fully below, unlike this case, *Bay Gas Storage* involved interpretation of a provision of the pipeline's General Terms and Conditions (GT&C) in the generally applicable tariff, incorporated in the SOC and initiated in a Commission approved settlement. Therefore, the issue in *Bay Gas Storage* was whether the rates charged were consistent with the Commission's regulations and the pipeline's SOC rather than the interpretation of provisions in bilateral contracts in this dispute.

[25] *United Illuminating*, 111 FERC ¶ 61,224 at P 24.

> we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act. While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests," and to this end in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case. [[26]]

While the transactions at issue here are subject to our NGPA section 311 jurisdiction rather than our NGA jurisdiction, NGPA section 311 transactions also rely in large part on private contracts. Further, consistent with the Commission's finding in *Farmland*, interpretation of the Agreements:

> will establish no precedent of value to the natural gas industry at large because the interpretation of particular contract language depends on the state law which governs. The same language may be interpreted under different state laws. [[27]]

Resolution of this dispute concerns interpretation of specific language in unique contracts whose terms do not require uniform interpretation to prevent contravention of the relevant public interest.

43. Complainants' assertions that the Agreements are section 311 fixed rate and non-variable contracts common in the natural gas industry or may be used to transport shale gas fail to establish that the contractual terms which require interpretation are not unique to these contracts. Complainants' arguments regarding the *Mobile-Sierra* doctrine and applicability of the public interest standard to rate changes do not require the Commission to assert primary jurisdiction in this proceeding. The *Mobile-Sierra* doctrine concerns the standard of review to be used when a pipeline or shipper seeks to modify a contract. No party seeks to modify the Agreements. This case solely concerns the interpretation of the existing terms in these unique contracts, not a change in any

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[26] *Arkla*, 7 FERC at 61,323 (citing *Permiam Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

[27] *Farmland*, 56 FERC at 61,954.

provision of those agreements. Therefore, the resolution of this dispute will not impact the uniformity of the Commission's application of the *Mobile-Sierra* doctrine.

44. Further, there is no need of uniformity of the Agreements due to the impact of the interpretation of the terms of these contracts on the industry-wide transportation of shale gas. The interpretation of the unique fixed rate terms of these Agreements has not been shown to have a significant impact on the transportation of other shale gas. The Commission believes that the matter of the interpretation of this specific language in these unique Agreements is properly before the state court.

Regulatory Responsibilities

45. Resolution of this controversy is not sufficiently important in relation to the Commission's regulatory responsibilities for it to exercise primary jurisdiction. This dispute centers on interpretation of the Agreements, not the Commission's regulatory obligations. The Complainants mistakenly rely on the *Bay Gas Storage* case. The issue in that case involved the interpretation of a provision in the pipeline's GT&C incorporated by the SOC which took precedence over conflicting language in any service agreements[28] and the Commission's order on the settlement which accepted that provision. The Commission expressly stated that because the GT&C provision was part of the generally applicable tariff rather than a provision in a bilateral contract, there was a need for that provision to be interpreted in a uniform manner.[29] The Commission also stated that interpreting a settlement approved by the Commission was solely within its special expertise.[30] Further, the Commission decided to exercise its primary jurisdiction to ensure that the pipeline's rates were "consistent with the Commission's regulations and the filed rate doctrine."[31] In contrast with *Bay Gas Storage*, this case does not involve resolution of regulatory issues related to whether the rates charged pursuant to a generally applicable tariff provision are consistent with the Commission's regulations and the filed rate doctrine. Resolution of this case is dependent on the interpretation of unique language in a bilateral contract. Complainants also argue that, in *Bay Gas Storage*, the Commission found that application of its policies was "important to the regulatory responsibilities of the Commission, for example to ensure against undue discrimination

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[28] *Bay Gas Storage*, 131 FERC ¶ 61,034 at P 7.

[29] *Id.*, P 24.

[30] *Id.*, P 23.

[31] *Id.*, P 22.

against shippers."[32] However, in contrast with the interpretation of the bilateral contracts in this case, in that case, the Commission was referring to the need to consistently apply regulatory policies to a generally applicable tariff provision which originated in a Commission approved settlement.[33] There is no similar need in this case for a Commission decision to ensure consistent application of Commission policy.

46. Complainants assert that, in *Farmland*, the Commission stated that the outcome of the issue there would "turn on the intent of the parties rather than any determination requiring the Commission's special expertise"[34] and they are not requesting uniform contract provisions but rather that the Agreements be maintained as written and in accordance with Commission policy. However, as in *Farmland*, the resolution of the dispute here depends on the intent of the parties. A request that contracts be maintained as written and in accordance with Commission policy does not support Complainant's position that a decision regarding the facts of this dispute is important in relation to the regulatory responsibilities of the Commission. The resolution of this dispute ultimately depends on interpretation of the particular facts and the contractual language at issue related to these unique agreements, rather than a decision which is important to the Commission's regulatory responsibilities. As the Commission further stated in *Farmland* following the language cited by Complainants:

> the proper interpretation of these contracts will depend on the particular facts and the contractual language at issue and will require an inquiry into applicable state contract law. The Commission has no greater expertise than the courts in construing or applying state contract law. The issues of the intent of the parties in entering into the various agreements and the interpretation of the contracts are best determined in the appropriate state or federal court. [[35]]

As the Commission concluded in *Farmland*, "this case involves a basic contract dispute and we find no need to require uniform Section 311 contract provisions."[36]

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[32] *Id.*, P 26.

[33] *Id.*, P 23.

[34] *Citing Farmland*, 56 FERC at 61,954.

[35] *Farmland*, 56 FERC at 61,954.

[36] *Id.*

Conclusion

47. For the reasons discussed above, we find that the Complaint represents a question of contract interpretation of the Agreements which is best addressed in the pending State Court Proceeding. Accordingly, we dismiss the Complaint.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.