143 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Natural Gas Company, L.L.C.	Docket No. CP12-4-001
High Point Gas Transmission, LLC	Docket No. CP12-9-001
High Point Gas Transmission, LLC	Docket Nos. RP12-945-001 and RP12-945-002

ORDER DENYING REHEARING

(Issued June 5, 2013)

1. On June 21, 2012, the Commission issued an order authorizing Southern Natural Gas Company, L.L.C. (Southern) to abandon by sale to High Point Gas Transmission, LLC (High Point) natural gas facilities on Southern's pipeline system, located in onshore and offshore Louisiana and the Gulf of Mexico, south of Southern's Toca Compressor Station (South of Toca Facilities).[1] The June 2012 Order analyzed the primary function of the facilities and granted High Point certificate authority to acquire and operate the jurisdictional facilities.

2. On July 23, 2012, requests for rehearing were filed challenging Southern's abandonment authorization, the Commission's determination to apply the primary function test to the South of Toca Facilities, and certain rate and tariff provisions approved for High Point's services using the South of Toca Facilities.

[1] *Southern Natural Gas Co., L.L.C.*, 139 FERC ¶ 61,237 (2012) (June 2012 Order).

3. On September 28, 2012, the Commission issued an order accepting High Point's compliance tariff records and rates subject to further review and refund.[2] High Point filed a request for rehearing of the condition making its rates potentially subject to refund. Other parties filed requests for rehearing and clarification asserting that only High Point, not its new gathering affiliate, was authorized to acquire and operate the facilities that the June 2012 Order found to be gathering facilities and that High Point was required to include proposed gathering rates in its compliance filing.

4. Below, the Commission denies all requests for rehearing of the June 2012 Order and the September 2012 Order.[3]

I. Background

5. The South of Toca Facilities include over 600 miles of pipeline facilities that move offshore gas production to Southern's onshore Toca Compressor Station. In October 2011, Southern and High Point filed applications with the Commission seeking necessary authorizations under section 7 of the Natural Gas Act (NGA)[4] for Southern to abandon the South of Toca Facilities by sale to High Point.

6. The June 2012 Order found that the public convenience and necessity permitted Southern's abandonment of the South of Toca Facilities, which were all constructed and operated by Southern under section 7(c) certificate authority. However, as discussed in the June 2012 Order,[5] when Southern received the certificate authority to construct the various South of Toca Facilities from the 1960s to the 1980s to connect new gas supplies for its then-existent merchant function, the Commission had not yet implemented its open-access policies requiring unbundling of pipeline services. Thus, during the period the South of Toca Facilities were constructed, there was no need, as a practical matter, for the Commission to review interstate pipeline companies' applications for certificate authority to ascertain whether any of the proposed new facilities might actually function

[2] *High Point Gas Transmission, LLC,* 140 FERC ¶ 61,259 (2012) (September 2012 Order).

[3] The Commission will issue a further order in High Point's Docket No. RP12-945 after the Commission has completed its review of High Point's initial section 7 rates filed in that docket.

[4] 15 U.S.C. § 717f (2006).

[5] June 2012 Order, 139 FERC ¶ 61,237 at P 75.

as non-jurisdictional gathering facilities. Consequently, in many instances, gathering facilities were constructed under certificate authority.

7. However, to ensure that High Point was only granted certificate authority for the South of Toca Facilities that are actually jurisdictional transmission facilities and still in use, the June 2012 Order analyzed the function of the South of Toca Facilities still in use under the primary function test, and determined whether each facility performed a jurisdictional transmission or a non-jurisdictional gathering function.[6] The June 2012 Order also required High Point to file with the Commission gathering rates for any gathering services it would provide with the non-jurisdictional South of Toca Facilities in connection with its transmission services on the jurisdictional South of Toca Facilities.[7]

8. Timely requests for rehearing of the June 2012 Order were filed by Century Exploration New Orleans, LLC; Dynamic Offshore Resources, LLC; Energy XXI (Bermuda) Ltd.; Hilcorp Energy Company; McMoRan Oil & Gas LLC; Pisces Energy LLC and W&T Offshore, Inc., filing jointly; Arena Energy, LP; and LLOG Exploration Company, L.L.C. (collectively, Offshore Producers).[8] A timely request for rehearing was also filed by Indicated Shippers, which include Apache Corporation, BP American Production Company, BP Energy Company, and Shell Offshore, Inc., filing jointly.

9. In their requests for rehearing of the June 2012 order, Offshore Producers challenge the authorization granted for Southern to abandon the South of Toca Facilities and the Commission's decision to apply the primary function test to those facilities. Indicated Shippers challenge the abandonment authorization and issues relating to High Point's rates and approved tariff provisions for services using the facilities.

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[6] The June 2012 Order identified facilities that had not flowed gas for more than one year as "unused" facilities.

[7] Although the order only granted High Point certificate authority for facilities that are still in use and that were found to be jurisdictional transmission facilities, High Point was free to acquire the unused facilities, as well as the facilities found to be non-jurisdictional facilities. However, the order stated that High Point may not include acquisition and other costs associated with the unused facilities and the gathering facilities in its cost of service for purposes of calculating its initial section 7 rates for its services on the jurisdictional facilities. High Point accepted its certificate for the jurisdictional facilities on July 23, 2012.

[8] While the companies referred to collectively as Offshore Producers filed separate requests for rehearing, their pleadings raise the same arguments.

10. On November 1, 2012, Southern exercised the abandonment authority granted by the June 2012 Order by selling the South of Toca Facilities to High Point.[9] On the same date, High Point commenced service over the jurisdictional South of Toca facilities.[10] However, High Point transferred the facilities found to be non-jurisdictional gathering facilities to a new gathering affiliate, High Point Gathering, L.L.C (High Point Gathering). Thus, High Point did not provide any service over the gathering facilities.

II. High Point's Compliance Filing in Docket No. RP12-945

11. The June 2012 Order directed High Point to revise its initial recourse rates to allocate costs associated with the various South of Toca Facilities consistent with the June 2012 Order's findings based on the Commission's application of the primary function test;[11] to file separately-stated gathering rates for any services it would provide over the gathering facilities;[12] and to file revised tariff records at least thirty days but not more than sixty days prior to commencing service on the South of Toca Facilities.[13]

12. On August 14 and 16, 2012, High Point submitted its compliance filing in Docket No. RP12-945 including revised initial rates calculated using a cost of service that only includes costs associated with the South of Toca Facilities that the June 2012 Order found to be jurisdictional and still in use.[14] High Point did not include separately-stated gathering rates in its compliance filing. Rather, High Point explained that a new affiliate, High Point Gas Gathering, would become the owner of the gathering facilities and unutilized facilities.

13. On August 27, 2012, Indicated Shippers and Offshore Producers filed protests arguing High Point's compliance filing was deficient because it did not include gathering rates for service on the portions of the South of Toca Facilities that the June 2012 Order determined perform a gathering function. On September 28, 2012, the Commission accepted High Point's tariff records in Docket No. RP12-945 subject to further review

[9] Southern November 9, 2012 Filing at 1.

[10] High Point November 5, 2012 Filing at 2.

[11] June 2012 Order, 139 FERC ¶ 61,237 at ordering para. (I).

[12] *Id*. P 223.

[13] *Id*. at ordering para. (I).

[14] On August 16, 2012, the Commission issued notice of High Point's compliance filing in Docket No. RP12-945-000. 77 Fed. Reg. 51,990 (Aug. 28, 2012)

and refund.[15] The Commission stated that it could not find that High Point's tariff records fully comply with the Commission's June 2012 Order. The Commission further stated that issues pertaining to the June 2012 Order's authorization of Southern's abandonment of the South of Toca Facilities and findings related to High Point's acquisition of the facilities and any resulting continuity of service concerns would be addressed in its order on rehearing of the June 2012 Order. Accordingly, these arguments are addressed below.

14. On October 31, 2012, High Point requested rehearing of the September 2012 Order in Docket No. RP12-945. High Point challenges the Commission's decision to subject High Point's initial rates to potential refund. High Point's rehearing request on this issue also is addressed below.[16]

III. Discussion

A. Public Convenience or Necessity Determination

15. A company's abandonment of certificated facilities that have been used to transport natural gas in interstate commerce subject to the Commission's jurisdiction is subject to the requirements of section 7(b) of the NGA. Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.[17]

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[15] September 2012 Order, 140 FERC ¶ 61,259 (2012).

[16] To gain additional information to assist in the Commission's review of High Point's initial section 7 rates accepted by the September 2012 Order subject to refund, the Commission issued High Point a data request in Docket No. RP12-945 on October 16, 2012. High Point responded on October 26, 2012, and the Offshore Producers filed comments on November 6, 2012. When the Commission's review is complete, it will issue a further order in Docket No. RP12-945.

[17] 15 U.S.C. § 717f (2006).

The burden of proof is on the applicant to show that the public convenience or necessity permits abandonment; that is, that the public interest will in no way be disserved by the abandonment.[18] To make this determination, the Commission examines abandonment applications on a case-by-case basis, considering all relevant factors.[19] In deciding whether a proposed abandonment is warranted, the Commission considers all relevant factors, but the criteria vary as the circumstances of the abandonment proposal vary. Among the factors that the Commission has considered in reviewing a request by an interstate pipeline company to abandon certificated facilities by sale to another pipeline company are: (1) the needs of the two natural gas systems and the public markets they serve; (2) the economic effect on the pipelines and their customers; and (3) the presumption in favor of continued service.[20] This does not mean that abandonment is prohibited if there is harm to any narrow interest. Rather, the Commission takes a broad view in abandonment proceedings and evaluates abandonment proposals against the benefits to the market as a whole.[21]

16. On rehearing, Indicated Shippers and Offshore Producers make a number of arguments, all of which were raised prior to, and addressed in, the June 2012 Order.[22] First, the parties assert that the June 2012 Order did not give sufficient weight to the impacts of Southern's proposed abandonment of the South of Toca Facilities on offshore producers and interruptible shippers. Second, the parties argue that continuity of service cannot be ensured because of the impacts on producers and interruptible shippers. In

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[18] *See Mich. Consol. Gas Co. v. F.P.C.*, 283 F.2d 204, 214 (D.C. Cir. 1960); *Transcontinental Gas Pipe Line Corp. v. F.P.C.*, 488 F.2d 1325, 1328 (D.C. Cir. 1973).

[19] *Transwestern Pipeline Co. L.L.C.*, 140 FERC ¶ 61,147, at P 12 (2012).

[20] *Southern Natural Gas Co.*, 126 FERC ¶ 61,246, at P 27 (2009).

[21] *See Southern Natural Gas Co.*, 50 FERC ¶ 61,081, at 61,222 (1990). *See also Consol. Edison Co.* v. *FERC*, 823 F.2d 630, 643 (D.C. Cir. 1987) ("We agree with FERC that the 'public convenience or necessity' language of the NGA's abandonment provision envisions agency policy-making to fit the regulatory climate.") (citation omitted).

[22] Indicated Shippers include Apache Corporation, BP America Production Company, BP Energy Company, and Shell Offshore, Inc., all of which are offshore producers in the Gulf of Mexico. Notwithstanding this group's self-designated name of Indicated Shippers, none of these entities nor any of the entities included in Offshore Producers have agreements with Southern for firm transportation service or have paid to ship gas on an interruptible basis on the South of Toca Facilities in the last three years. June 2012 Order, 139 FERC ¶ 61,237 at P 43.

addition, Indicated Shippers assert the June 2012 Order's overestimates how much Southern's abandonment of the South of Toca Facilities will benefit its firm shippers and challenge the June 2012 Order's finding that the abandonment will not violate a prior settlement agreement which provided that the settlement rates would not be modified before September 2, 2012, as the result of any other proceeding. Each of the issues identified on rehearing is discussed below.

1. The Needs of the Two Natural Gas Systems

17. The June 2012 Order responded to arguments that the proposals lacked evidence of benefits to pipeline customers, and that the benefits for firm shippers identified by Southern were not sufficient to outweigh the negative effects of the abandonment on Indicated Shippers and Offshore Producers. The June 2012 Order acknowledged that Indicated Shippers and Offshore Producers did not believe they would receive any affirmative benefit as a result of the proposal, but the order found that the showing of support from Southern's firm shippers for the proposed abandonment was a strong indication that those shippers believe the abandonment will result in tangible benefits to themselves as customers.[23] The June 2012 Order rejected arguments that Southern's claimed benefits were speculative or illusory because none of the costs associated with the South of Toca Facilities would be removed from Southern's cost of service until its next NGA section 4 general rate case, and the revised rates filed by Southern in the rate case would recover its $35 million loss on the sale of the South of Toca Facilities for three years into the future.[24]

18. Indicated Shippers and Offshore Producers argue on rehearing that the Commission erred in relying on the support of Southern's firm shippers – in the form of a Customer Letter Agreement and the arrangements set forth therein[25] – to find that the

[23] June 2012 Order, 139 FERC ¶ 61,237 at P 45.

[24] The June 2012 Order incorrectly stated that Southern was required under the terms of a previous settlement to file a general rate case no later than March 31, 2013. June 2012 Order, 139 FERC ¶ 61,237 at P 45. The settlement agreement in Docket No. RP09-427 actually required Southern to file a rate case before March 1, 2013. On January 31, 2013, the Commission issued an order in Docket No. RP09-427-006 granting Southern's request to postpone the date by which it must file its rate case for three months, until May 31, 2013, to give parties additional time to continue settlement negotiations. *Southern Natural Gas Co., L.L.C.*, 142 FERC ¶ 61,078 (2013).

[25] Southern entered into a Customer Letter Agreement with many of its firm shippers that sets forth the conditions under which the customers would agree to support Southern's sale of the South of Toca Facilities. Under the terms of the Customer Letter

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abandonment was in the public interest and would benefit the market as a whole. Indicated Shippers and Offshore Producers believe that the Commission relied too much in the June 2012 Order on the lack of protest by any of Southern's firm shippers, while dismissing the protests of offshore producers. Indicated Shippers reiterate the argument that Southern's shippers will not realize any reduction in their rates to account for removal of costs related to the South of Toca Facilities until Southern files an NGA section 4 general rate case, and, even then, Southern's shippers will not see the full effect of any rate reduction from the sale until Southern recoups its $35 million loss on the sale over the next three years.

19. Indicated Shippers' and Offshore Producers' arguments ignore the significant evidence of benefits in this record. Virtually all of the South of Toca Facilities originally were constructed to connect new gas supplies required for Southern's then-existent merchant function.[26] In their applications, Southern and High Point describe the significant changes in historical supply sources and patterns, and the need for interstate gas pipelines with offshore systems to rationalize their services and costs to correspond with the needs of their current customers and to compete for new customers.[27] In an effort to provide high-value service to its customers, over the past decade, Southern has assisted its shippers in their efforts to diversify supply sources in order to limit the effects of hurricanes and other events that can damage offshore facilities and curtail access to offshore supplies. For example, during this time, Southern has purchased capacity on the Southeast Supply Header System beginning at the Perryville Hub in Louisiana, added LNG supply to its system, and added interconnections with new pipelines that access shale gas supplies so that such supplies can be moved to Southern's system.[28]

Agreement, in its next section 4 general rate proceeding, Southern may seek recovery of a regulatory asset in its jurisdictional rates in an amount equal to the difference between the net book value of the South of Toca Facilities and the proceeds to be realized from the sale of the facilities (i.e., net book value of $85 million minus proceeds of $50 million, which results in a $35 million regulatory asset). The Customer Letter Agreement further provides that Southern may amortize the regulatory asset over a three-year period beginning the date of the sale of the assets to High Point, and to make a limited section 4 filing to eliminate the cost of service effect of the regulatory asset when it has been fully recovered. June 2012 Order, 139 FERC ¶ 61,237 at P 8.

[26] June 2012 Order, 139 FERC ¶ 61,237 at P 30.

[27] Southern October 7, 2011 application at 12-16; High Point October 13, 2011 application at 7.

[28] June 2012 Order, 139 FERC ¶ 61,237 at P 29.

20. However, Southern's market area transportation customers still bear the costs of Southern's facilities that access Gulf of Mexico production, regardless of whether those customers' supplies are sourced from offshore production areas.[29] Thus, as Southern relates, its abandonment of the South of Toca facilities will benefit its firm transportation customers in its next rate case by reducing current costs, including operating and maintenance costs, *ad valorem* taxes, and depreciation expense, and eliminating future costs and risks.[30] Southern estimated that the sale will result in a $4 million rate reduction when it files its NGA section 4 general rate case.[31] Southern further estimated that when its proposed regulatory asset is fully amortized after three years, the sale will reduce Southern's annual cost of service by an additional $15 million.[32]

21. In addition, future capital expenditures for maintenance, repair, and replacement of the South of Toca Facilities due to hurricane and tropical storm damage will be avoided, and future abandonment liability associated with the South of Toca Facilities was assumed by High Point under the terms of the sale. This is a significant removal of a possible future liability from Southern's customers, exemplified by the fact that Southern incurred almost $170 million of hurricane-related repair and replacement costs associated

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[29] *Id*. P 30. Southern has a non-additive zone rate design for its firm reservation charge, sometimes referred to as a "city-gate" rate design, and its shippers' reservation charges are billed on the basis of the point of delivery, not on the point of receipt. Under this rate design, shippers with delivery points in downstream zones pay for a significant amount of costs originating from upstream zone locations.

[30] *Id.* P 31.

[31] Southern October 7, 2011 Application at 15. While the Commission granted Southern's request for a three-month defer to file its next general NGA section 4 filing as noted above, the Commission found that the amendment to the settlement permitting the extension of time for Southern to file its section 4 rate case must place counterparties in the same position as they would have been if there had been no amendment. To accomplish that objective, the Commission required, in the event that a further settlement is not reached by May 31, 2013, that Southern's section 4 rate case filing must use a test period consistent with what section 154.303 of the regulations would have required if it had made its section 4 rate case filing on the original deadline. *Southern Natural Gas Co., L.L.C.*, 142 FERC ¶ 61,078 at PP 34-35. Thus, the test period for the new rate case filing remains the same as existed in Southern's October 7, 2011 application.

[32] *Id.* at 16.

with the South of Toca Facilities as a result of Hurricanes Ivan and Katrina, $73 million of which were not reimbursed by insurance.

22. In sum, Southern has identified substantial cost savings that will benefit its customers now and in the future. Southern also believes its abandonment of the South of Toca Facilities will ultimately help to make Southern more competitive by aligning its costs and services in a more economically-efficient manner.[33]

23. While supplies in the Gulf of Mexico have declined, High Point stated in its application that it anticipates this area will continue to contribute to the overall U.S. natural gas supply portfolio. High Point also believes the South of Toca Facilities can be better utilized to improve the process by which offshore producers' supplies can be brought to market by, for example, establishing liquid trading points to focus on maximizing the efficiency and usage of the South of Toca Facilities.[34]

24. Most of the firm shippers on Southern's system agreed to the Customer Letter Agreement, which described Southern's proposal to sell the South of Toca Facilities and the rate and regulatory impacts.[35] Those firm shippers that did not affirmatively assent to the Customer Letter Agreement also did not file protests or negative comments in the abandonment or certificate proceedings.[36] Thus, no shipper paying for service over the South of Toca Facilities filed an adverse pleading.

25. Firm customers are important, as they pay most of a pipeline's fixed costs through reservation charges, regardless of how much of their reserved capacity they use. In return, pipelines' service obligation to firm customers may be abridged only in very limited circumstances. It was reasonable for the Commission to conclude based on the

[33] June 2012 Order, 139 FERC ¶ 61,237 at P 31.

[34] High Point October 13, 2011 application at 10.

[35] Signatories to the Customer Letter Agreement included shippers representing 72 percent of the firm transportation revenues on the system, and 63 percent of the firm capacity on the South of Toca Facilities. Southern October 7, 2011 application at 11.

[36] Southern also received approval from a number of non-signatories to the Customer Letter Agreement to represent that they either assented to or would not oppose Southern's proposal to sell the South of Toca Facilities. These shippers represented an additional 19 percent of the firm revenues on the system, and an additional 27 percent of the firm capacity on the South of Toca Facilities. Southern October 7, 2011 application at 11.

lack of opposition from firm customers on Southern's system that its abandonment of the South of the Toca Facilities will benefit such shippers.[37] In any event, Southern's burden of proof under NGA section 7(b) was limited to "making a factual showing that the public interest will not be disserved by the abandonment and need not show actual benefit."[38] Similar to the Commission's findings in previous Commission orders,[39] the lack of opposition by firm customers is evidence that such customers do not believe they will be harmed by the abandonment by sale of the South of Toca Facilities.

26. It is true that Southern's customers will not enjoy any immediate rate benefit from the removal of the South of Toca Facilities from Southern's rate base. However, the timing of Southern's next general section 4 rate case is not a matter of wide speculation, as Southern must initiate by May 31, 2013. Thus, Southern's firm shippers will begin to realize benefits from Southern's sale of the South of Toca Facilities relatively soon and continue to benefit from Southern's avoidance of the significant expenses that can be expected to maintain these offshore facilities in view of their age and the likelihood of damage from hurricanes.

27. As noted above, in reviewing a request by an interstate pipeline company to abandon certificated facilities by sale to another company, the Commission can consider how both companies can use the subject facilities to serve their respective markets.[40]

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[37] *See Panhandle Eastern Pipe Line Co., LP*, 141 FERC ¶ 61,119, at P 23 (2012) ("Based [on] the absence of protests from any shippers bearing the costs of operating and maintaining the facilities proposed to be abandoned, it appears that downstream shippers do not place a high value on the service being provided by those facilities (that is, assuring ready access to the production upstream of the facilities).").

[38] *See Pennsylvania Public Utility Commission v. FERC*, 881 F.2d 1123, 1127 (D.C. Cir. 1989) (observing that "affirmative proof of benefit to the public interest is not necessary to justify an abandonment").

[39] *See, e.g., Panhandle Eastern Pipe Line Co., LP*, 141 FERC ¶ 61,119 at P 23.

[40] In some proceedings in which the Commission has authorized interstate pipelines to abandon certificated gathering facilities by transfer to gathering companies, orders have discussed how the gathering companies' acquisition of the facilities will enhance producers' access to markets, increase utilization of currently underutilized facilities, and, in some instances, avoid impacts on landowners and the environment by avoiding the need for construction of duplicative facilities. *See, e.g., Northern Natural Gas Company and PVR Midstream LLC*, 123 FERC ¶ 61,325, at P 16 (2008). While the Commission believes it is appropriate to acknowledge such benefits in a proceeding in which it finds that certificated facilities are non-jurisdictional gathering facilities, the

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Indicated Shippers and Offshore Producers argue that producers whose gas has to be transported on the South of Toca Facilities will be harmed by Southern's abandonment of the facilities. Although others pay for the transportation service, the producers believe Southern's abandonment of the South of Toca Facilities will result in an increase in the total cost to deliver gas to downstream markets, which shippers will take into account in deciding whether to purchase gas supplies from these producers. The Commission understands producers' concern. However, producers are not the market served by the South of Toca Facilities. The fact that none of Southern's firm shippers opposed its abandonment proposal strongly suggests there currently is no market that is dependent on offshore supplies accessed by the South of Toca Facilities. Further, Southern has been focusing its efforts on creating access to other supply areas to ensure that it will be able to continue to serve its markets.

28. On the other hand, even though supplies in the Gulf of Mexico have declined, High Point anticipates this area will continue to contribute to the overall U.S. natural gas supply portfolio. Moreover, High Point expects to improve the process by which connected producers can bring their supplies to market by, for example, establishing liquid trading points to focus on maximizing the efficiency and usage of the South of Toca Facilities.[41] High Point also states it will seek to increase utilization of the South of Toca Facilities by providing innovative rates, services, and incentives for producers to tender their commodity for transportation.[42]

29. Indicated Shippers and Offshore Producers have raised no new issues and presented no new evidence that alters the Commission's finding that approving Southern's abandonment proposal will serve the public interest by allowing both Southern's remaining system and the South of Toca Facilities to better serve their existing and potential markets. As such, rehearing is denied on this issue.

2. Economic Effects on Offshore Producers

30. As noted above, the entities represented by Offshore Producers and Indicated Shippers are all offshore producers, none have firm service agreements with Southern or

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Commission wants to clarify that the record to support a finding that the public convenience and necessity permit the interstate pipeline's abandonment of the facilities does not need to include evidence that the gathering company's acquisition of the facilities will have identifiable benefits.

[41] High Point October 13, 2011 Application at 10.

[42] *Id.* at 11.

have transported gas under their own interruptible service agreements in the last three years. However, these producers have had pooling service agreements with Southern that have allowed them to have their gas transported at no charge to them on the South of Toca Facilities to Southern's Toca Compressor Station. The Toca Compressor Station is one of the pooling points on Southern's system, thus Southern's shippers that purchase gas from offshore producers can nominate the Toca Compressor Station as their receipt point and have the gas transported to their downstream delivery points. Further, Indicated Shippers argue Southern's sale of the South of Toca Facilities to High Point will create burdens for producers and shippers, without creating any new service or economic benefits for them or the market as a whole, as the result will be that moving gas from a receipt point on the South of Toca Facilities to any of Southern's Production Area delivery points will cost a higher combined rate and require the use of two separate nomination platforms and transporting under two separate tariffs.[43]

31. The protesters believe they will be economically harmed by Southern's sale of the South of Toca Facilities to High Point because either the producers or the purchasers of their gas will have to pay High Point for transportation service to the Toca Compressor Station delivery point on Southern's system, and the prices that purchasers are willing to pay for the gas will be less if they have to pay High Point for transportation. Either way, producers believe their netbacks will be reduced. Offshore Producers assert the Commission improperly gave interruptible service less protection than firm service in the June 2012 Order, and that the Commission's findings in that order cannot be reconciled with its findings in a recent proceeding, *Tennessee Gas Pipeline Company*,[44] where Offshore Producers believe the Commission placed greater emphasis on the "potential that shippers will be charged higher rates for the same service they are currently receiving."[45]

32. It is appropriate to consider rate impacts on interruptible shippers as well as firm shippers when evaluating whether an interstate pipeline's abandonment of jurisdictional facilities is permitted by the public convenience and necessity.[46] The Commission has

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[43] Indicated Shippers also emphasize that heretofore producers as well as Southern's shippers could move gas from a receipt point on the South of Toca Facilities to any of Southern's Production Area delivery points by paying only Southern's Production Area transportation rate and using only one nomination system and complying with one tariff.

[44] 137 FERC ¶ 61,105 (2011) (*Tennessee*).

[45] *Id.* P 27.

[46] *Id*.

not ignored the potential effects that Southern's abandonment of the South of Toca Facilities could have on rates charged for any jurisdictional services. The June 2012 Order acknowledged that, regardless of whether shippers sign up firm or interruptible service with High Point, granting the abandonment will result in higher costs for the shippers that use the South of Toca Facilities, as the costs of providing service on those facilities will no longer be subsidized by Southern's shippers that do not rely on the facilities for their supplies.[47] However, the June 2012 Order also recognized that Southern could have kept the South of Toca Facilities and achieved this result through an NGA section 4 filing.[48]

33. As explained in the June 2012 Order, the fact that the protesting producers have not been paying for transportation service under their pooling service agreements over the South of Toca Facilities did not mean that such service has been free. All gas transported on the South of Toca Facilities is received at Southern's Toca Compressor Station, which is one of the pooling points on Southern's system. While producers can submit nominations to Southern for transportation to pooling points on Southern's system and the producers are not charged, the transportation rates paid by the shippers transporting gas from the pool include the transportation rate for transportation to Southern's pooling points as well as the transportation rate for transportation away from the pooling points. The Commission's approval of Southern's and High Point's proposals will have the result that only shippers who want gas supplies accessed by the South of Toca Facilities will be paying rates recovering costs associated with those facilities.

34. The parties argue that Southern's transportation rates will not be immediately reduced to reflect the abandonment of the South of Toca Facilities. While it is true that Southern's downstream customers will not enjoy the rate benefits from the removal of the facilities from its rate base until Southern's next NGA section 4 general rate case, these customers will nevertheless enjoy such benefit at that time. In Southern's case, the timing of the next NGA section 4 rate case is not unknown. Southern is required to file a general NGA section 4 rate case by May 31, 2013. Southern stated that its proposed rates will reflect cost savings resulting from its sale of the South of Toca Facilities. However, while the costs of Southern's offshore facilities will be removed from Southern's costs of service in its rate case, it is pure speculation that Southern's rates will be reduced.[49]

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[47] June 2012 Order, 139 FERC ¶ 61,237 at P 54.

[48] *Id*. P 58.

[49] The Commission does not favor piecemeal ratemaking. *Trunkline Gas Co.*, 94 FERC ¶ 61,381, at 62,422 (2001) (*Trunkline*) ("The Commission's policy is to avoid a piecemeal modification of a pipelines' rates in limited section 4 filings, because there are

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35. Indicated Shippers and Offshore Producers contend the prices they can obtain for natural gas will be adversely affected by Southern's sale of the South of Toca Facilities to High Point. However, gas commodity prices are not subject to the Commission's jurisdiction.[50] In the June 2012 Order, the Commission noted that the extent to which the price of transportation affects the price of natural gas at either the well head or in the end-use market in a competitive natural gas market cannot be gauged precisely. The protesters' production competes with that of other producers, and many of those producers -- including other producers in the Gulf of Mexico -- do not enjoy the competitive advantage the protesters have had as a result of the costs of transporting their production to the pooling point on Southern's system being paid for by all of Southern's shippers because of a remnant of the well-head-to-market rate design approved prior to restructuring. By approving Southern's sale of the South of Toca Facilities to High Point, the Commission's June 2012 Order levels the playing field on which the protesters compete to serve gas markets. As the Commission no longer has jurisdiction over the prices charged for decontrolled gas, it would not be appropriate for the Commission to exercise its jurisdiction over interstate transportation rates in order to bolster the deregulated commodity prices received by producers in a particular area.

36. There are many NGA jurisdictional pipelines like High Point that only offer offshore transportation services that end when the gas reaches onshore processing plants.[51] Indicated Shippers and Offshore Producers have not justified continued protection of their competitive advantage that results from Southern customers that do not use offshore facilities to transport their gas nevertheless paying rates which include the costs of those facilities. As a result of the June 2012 Order and the contemporaneous orders for TC Offshore LLC[52] and Sea Robin Pipeline Company, LLC,[53] most Gulf of

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many variables addressed in a general rate proceeding that can change overall rate levels.").

[50] June 2012 Order, 139 FERC ¶ 61,237 at P 58.

[51] The following are examples of Commission-authorized jurisdictional pipelines in the Gulf of Mexico that only transport supplies from offshore production to onshore processing plants: Black Marlin Pipeline Company (Black Marlin), Discovery Gas Transmission, LLC (Discovery), High Island Offshore System, L.L.C. (High Island), Stingray Pipeline Co., L.L.C. (Stingray), and Venice Gathering System, L.L.C. (Venice). Shippers transporting gas on each of these pipelines incur further transportation expense following delivery onshore.

[52] *ANR Pipeline Co.*, 139 FERC ¶ 61,238 (2012).

[53] *Trunkline Gas Co., LLC*, 139 FERC ¶ 61,239 (2012).

Mexico offshore producers will face comparable service options to move their supply to market.[54]

37. Further, as noted above, even if the Commission had rejected Southern's abandonment proposal, Southern would have been free to make a section 4 filing to propose rate design changes so that its shippers would pay pooling rates reflecting its costs to provide service on any facilities upstream of the pooling points on its system. Thus, denial of Southern's abandonment proposal would not necessarily prevent a shift in cost responsibility to shippers whose services rely on the South of Toca Facilities.

38. The June 2012 Order squarely placed cost responsibility for the South of Toca Facilities with shippers that actually use those facilities – an outcome that is consistent with basic cost-causation principles.[55] Nothing in Indicated Shippers' and Offshore Producers' filings rebuts this finding. However, citing to *Tennessee*, Indicated Shippers and Offshore Producers believe the Commission nevertheless should have placed greater emphasis on the "potential that shippers will be charged higher rates for the same service they are currently receiving."[56] In that proceeding, Tennessee proposed to abandon 800 miles of mostly offshore pipeline facilities by sale to Kinetica Partners, LLC (Kinetica), which requested that the Commission find that all of the facilities were non-

[54] High Point originally proposed an interruptible transportation rate of $0.3295 per dekatherm (Dth) for transportation from any receipt point on the South of Toca Facilities to the interconnection with Southern's system. However, in its August 14, 2012 compliance in Docket No. RP12-945-000, High Point stated that the gathering facilities would be transferred to High Point Gathering. High Point therefore excluded costs associated with the gathering facilities and submitted a revised interruptible rate of $0.2921 per Dth for transportation from any receipt point on the jurisdictional South of Toca Facilities it was retaining to the interconnection with Southern's system at the Toca Compressor Station. The above-referenced jurisdictional pipelines in the Gulf of Mexico charge the following interruptible service rates to transport gas to onshore processing plants: Black Marlin - $0.9000 per Dth; Discovery - $0.2845 per Dth (mainline plus expansion); High Island - $0.3950 per Dth; Stingray - $0.595 per Dth; Venice - $0.3500 per Dth. Shippers transporting gas on each of these pipelines incur further transportation expense following delivery onshore.

[55] The U.S. Court of Appeals for the District of Columbia Circuit defined the cost-causation principle as follows: "Simply put, it has traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them." *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

[56] *Tennessee*, 137 FERC ¶ 61,105 at P 27.

jurisdictional gathering facilities. The Commission acknowledged the potential rate impacts of Tennessee's abandonment proposal.[57] However, the Commission could not deny Tennessee authority to abandon the facilities found to be non-jurisdictional gathering facilities based on rate considerations.[58] As for the facilities found to be jurisdictional transmission facilities, the Commission denied Tennessee's request for abandonment authority, not because of rate issues, but because Kinetica had not filed a certificate application to acquire and operate the jurisdictional facilities subject to the Commission's NGA jurisdiction and open-access policies.[59]

39. The June 2012 Order did evaluate whether approval of Southern's abandonment proposal would result in shippers paying more for the same service they were currently receiving on jurisdictional South of Toca Facilities. The June 2012 Order acknowledged that shippers that seek service from High Point on the South of Toca Facilities will have to pay High Point's rate for offshore transportation service to Southern's Toca Compressor Station, whereas in the past the offshore shippers did not pay for transportation to the Toca Compressor Station pooling point. However, the June 2012 Order observed that Southern did not provide the offshore transportation upstream of the

[57] *Id*. P 27.

[58] In *Tennessee*, *id*. n.24, the Commission stated:

> Yet, the cases cited by Tennessee with respect to the charging of separate rates on abandoned facilities are mostly inapplicable here, because in those cases the Commission found that the facilities at issue were performing a gathering function at the time the applications were filed and thus were excluded by NGA section 1(b) from Commission jurisdiction. The issue before us here is the proposed abandonment of facilities that we find are currently performing a jurisdictional transmission function. The protestors' concerns with respect to rate impacts which would result from such an abandonment are thus a significant consideration in our decision-making process.

[59] *Id.* at P 28. Kinetica subsequently filed a certificate application to acquire and operate the facilities that the Commission found jurisdictional in *Tennessee*. On May 31, 2013, the Commission approved Tennessee's request to abandon the facilities and granted certificate authority for Kinetica to acquire and operate the jurisdictional facilities. 143 FERC ¶ 61,196 (2013).

pooling point for free. Those offshore transportation costs were paid for by the downstream shipper.[60] The Commission found that shifting the responsibility for paying for the offshore transportation to shippers that actually use facilities would not result in impermissible rate stacking. The June 2012 Order noted that the rates paid by Southern's shippers for downstream service will be revised in its upcoming NGA section 4 general rate case to reflect the removal of the South of Toca Facilities' costs, and that none of Southern's firm shippers had protested its proposed abandonment.[61]

40. Indicated Shippers and Offshore Producers argue on rehearing that the potential for Southern's abandonment proposal to result in shippers paying more for the same service they were receiving from Southern on the South of Toca Facilities should be a controlling factor in the Commission's abandonment decision, but they cite no Commission precedent to support their position. As discussed above, the June 2012 Order found that High Point's acquisition of the South of Toca Facilities would change customer revenue responsibility, the change was consistent with cost-causation principles, and the change in customer responsibility could have been achieved by Southern filing under section 4 to change its rate design to allocate its costs associated with its facilities upstream of the pooling points on its system to customers that rely on those facilities. Moreover, as both Southern and High Point will be fully subject to the Commission's jurisdiction, they may only charge rates found by the Commission to be just and reasonable. Thus, the Commission fully considered this factor in its evaluation of the proposed abandonment, and gave it appropriate weight in its decision-making process.

41. Offshore Producers argue that the June 2012 Order improperly diminished the protections afforded interruptible shippers relative to firm shippers. While the Commission believes the public interest is better served by seeking to avoid results that would allow pipelines to prematurely cease transportation services without exploring other options,[62] the Commission does not agree that interruptible customers need or should be afforded the same amount of protection as firm customers.

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[60] June 2012 Order, 139 FERC ¶ 61,237 at P 54.

[61] *Id*.

[62] In *Northern Natural Gas Company, et al.*, 135 FERC ¶ 61,048 (2011), the Commission denied the applicants' request for authorization to abandon and retire from service their jointly-owned offshore and onshore facilities known as the Matagorda Offshore Pipeline System (MOPS). Utilization rates for MOPS facilities had declined over the years as production declined. The applicants proposed to abandon the facilities in place. The Commission acknowledged that the assured availability of interruptible

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42. Firm customers pay reservation charges to reserve capacity for the term of their contract even if they do not ship gas. Firm customers have taken on financial obligations in return for an agreement from the pipeline to have capacity available for the life of the contract. Conversely, while customers with interruptible service agreements have the right to use available capacity, they pay nothing when they do not want to ship gas. In addition, when the Commission approves higher rates for a pipeline's firm and interruptible services, its customers with agreements for firm service are obligated to pay the higher reservation charge for the remainder of their contract terms, whereas interruptible customers are not obliged to pay the higher rate for interruptible service, as they can simply stop shipping gas.

43. Because interruptible shippers do not obligate themselves to pay rates under a long-term service agreement, interruptible service is not comparable to firm service in terms of rights and obligations, and the Commission has not and does not treat firm and interruptible service agreements as giving shippers equivalent rights. Thus, the Commission has given much greater weight to how a pipeline's proposed abandonment will affect its ability to meet its firm service obligations and the quality of its firm services.[63] Further, even if the Commission were to view interruptible and firm

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capacity on MOPS was the likely reason remaining shippers had not felt the need to commit themselves to firm service transportation agreements that would obligate them to pay reservation charges. *Id*. P 36. However, the Commission found there were no readily-accessible transportation alternatives available to MOPS shippers (*id*. P 38), further onshore shippers are not currently subsidizing shippers on MOPS (*id*. P 43), and the record did not support a finding either that the gas supplies accessed by the MOPS facilities had been depleted to the extent that continuance of service was unwarranted or that the abandonment was otherwise permitted by the public convenience or necessity (*id*. P 44). Therefore, the Commission found it reasonable to require that the applicants continue to offer service, while continuing to explore the options of either selling MOPS or negotiating with shippers to seek agreement on negotiated rates that would recover costs. In the absence of reaching a negotiated agreement on rates, the Commission said a section 4 rate case was the appropriate forum for determining the rates necessary for applicants to recover their costs in providing services on the MOPS facilities. *Id*. P 43.

[63] In *Trunkline*, 94 FERC ¶ 61,381, Trunkline proposed to abandon a 720-mile-long loop segment of its main transmission line by sale to a company that would convert the pipeline to transport petroleum products. The Commission approved the abandonment only after finding that it would not adversely affect Trunkline's ability to meet its firm service obligations. The Commission also considered the concerns of interruptible shippers that were receiving service at discounted rates and had protested on the ground, *inter alia*, that Trunkline's sale of the loop would reduce the amount of

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customers as equal for the purposes of evaluating abandonment applications, it is unlikely in this proceeding that the outcome would be different. Here, there is no continuity of jurisdictional service issue, as the Commission explains below. Therefore, whether the service was firm or interruptible, shippers would still be receiving the firm or interruptible service, albeit rendered by a different jurisdictional pipeline.

44. Offshore Producers suggest that in *Tennessee* the Commission was unable to find that Tennessee's abandonment proposal was in the public interest because producers and shippers were receiving no-fee service on the offshore facilities to Tennessee's downstream pooling points and would have to begin paying for such service if Tennessee sold the facilities to another company.[64] It is correct that the Commission acknowledged that its policy requires consideration of the potential of approval of a pipeline's abandonment proposal will result in shippers having to pay higher rates for the same jurisdictional services.[65] However, there was no proposed rate for the Commission to consider in the *Tennessee* proceeding, since Kinetica had not filed a certificate application or proposed rates for service on the jurisdictional facilities at issue. The Commission gave no indication in *Tennessee* that it would reject an abandonment proposal in order to shelter producers and shippers presently receiving no-fee service to a pipeline's pooling points from having to pay another pipeline a cost-based rate approved by the Commission for such service.

45. For all of the above reasons, we deny Indicated Shippers' and Offshore Producers' request for rehearing on this issue.

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capacity available for interruptible service and, thus, Trunkline's incentive to discount its interruptible rate as steeply in the future. The Commission did not dispute the possibility that Trunkline would no longer have sufficient capacity to satisfy all interruptible service requests. However, after finding that alternative pipeline transporters were available, the Commission approved Trunkline's abandonment proposal, observing that investors "do not construct an interstate pipeline or continue it in operation to serve only interruptible customers at discounted rates." *Id*.

[64] *Tennessee*, 137 FERC ¶ 61,105 at P 26 ("Indicated Shippers also argue that paying to have Kinetica transport their gas to Tennessee's onshore pooling points will raise commodity prices at the pooling areas and cause shut-in of Gulf of Mexico gas production.").

[65] *Id*. P 27.

3. **Continuity of Service**

46. The June 2012 Order found that Southern's proposal satisfied the presumption in favor of continued service, and would have no effect on the ability of offshore supplies accessed by the South of Toca Facilities to access markets, because, upon acquisition of the facilities, High Point would become a fully-jurisdictional natural gas company under the NGA, and thus its services would be subject to the Commission's open-access policies and regulations and its rates would be Commission-approved rates.[66]

47. On rehearing, Indicated Shippers and Offshore Producers argue that the abandonment should not have been authorized because it will affect the ability of any production gas along the South of Toca Facilities to access markets. Offshore Producers contend that the statement in the June 2012 Order that the proposed abandonment will have no impact on the ability of offshore supplies, accessed by the South of Toca Facilities, to access markets, improperly casts a narrow focus on whether there will be, after the proposed conveyance is completed, physical infrastructure to enable the Offshore Producers' gas to access markets. Offshore Producers further assert that continuity of service necessarily means continuity of service by the applicant, rather than simply continuity of service by an NGA jurisdictional company. In support, Offshore Producers cites *Tennessee*[67] and *Transcontinental Gas Pipeline Corporation v. F.P.C.*[68]

48. High Point requested and received Part 284 open-access blanket transportation certificate authority.[69] As a holder of such certificate authority, High Point must make the capacity of the jurisdictional South of Toca Facilities available for service on an open-access basis at its Commission approved rates. The fact that shippers of gas over High Point's facilities have to pay High Point's rate may increase the total cost of transporting gas to downstream markets does not change the fact that High Point's rate for transportation service on the jurisdictional South of Toca Facilities is cost-based. Further, while Southern needed abandonment authority to sell the gathering facilities because they had been certificated, the Commission could not withhold authorization for Southern to abandon the non-jurisdictional gathering facilities based on concerns over continuity of service on the gathering facilities. Since High Point's acquisition of the

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[66] June 2012 Order, 139 FERC ¶ 61,237 at PP 36, 38.

[67] 137 FERC ¶ 61,105.

[68] 488 F.2d 1325 (D.C. Cir. 1973) (*Transcontinental*).

[69] June 2012 Order, 139 FERC ¶ 61,237 at P 220.

gathering facilities was not certificated, it did not need the Commission's prior approval to transfer the gathering facilities to its gathering affiliate.

49. The protesting producers' argument that section 7(b) of the NGA necessarily precludes abandonment of service by one entity where service is continued by another is flawed. In *Tennessee*, Tennessee requested NGA section 7(b) authority to abandon by sale to Kinetica offshore and onshore facilities located in the Gulf of Mexico and Louisiana.[70] At the same time, Kinetica filed a petition asking the Commission to find that non-jurisdictional gathering would be the primary function of all of the facilities it sought to acquire from Tennessee.[71] The Commission analyzed the function of the facilities under the primary function test, and determined that some of the facilities perform a jurisdictional transmission function. Therefore, the Commission denied Tennessee's request to abandon the facilities that are still providing jurisdictional transmission because Kinetica had not sought a certificate to acquire and operate the jurisdictional facilities.[72]

50. In denying Tennessee's abandonment proposal, however, the Commission stated that its denial was without prejudice to Tennessee filing another application for authorization to abandon all of the certificated facilities at issue in conjunction with a application by Kinetica or another company seeking certificate authority to acquire and operate the facilities found to be jurisdictional subject to the Commission's NGA jurisdiction and open-access policies.[73] This requisite was satisfied by Southern's and High Point's applications in the instant proceeding, as High Point requested certificate authority for all of the facilities it sought to acquire from Southern. Thus, the *Tennessee* order is distinguishable from the Southern and High Point proposal (*Tennessee* involved a jurisdictional company's proposed transfer of jurisdictional facilities to a non-jurisdictional company, and the present case involves a jurisdictional company's transfer of jurisdictional facilities to another jurisdictional company). To the extent *Tennessee* stands for anything applicable to the proposals herein, *Tennessee* actually *supports* the Commission's view that there is no continuity of service issue when the abandonment involves the transfer of jurisdictional transmission facilities from one NGA jurisdictional company to another.

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[70] *Tennessee*, 137 FERC ¶ 61,105 at P 1.

[71] 15 U.S.C. § 717(1)(b) (2006). Section 1(b) of the NGA states that the NGA shall not apply to the production or gathering of natural gas.

[72] *Tennessee*, 137 FERC ¶ 61,105 at P 3.

[73] *Id.* P 28.

51. The *Transcontinental* order cited by the protesting producers also does not support their position. In that order, which predates the unbundling of sales and transportation services, the Commission authorized producers in the La Gloria field area in Texas to abandon gas sales to Transco and instead sell their gas to another interstate pipeline company because Transco's contracts with the producers had expired. The court reversed the Commission's decision, finding that the Commission, in basing its holding on the proposition that Transco's contracts had expired, "abdicated its statutory responsibility to guarantee that the overall public interest 'will in no way be disserved' by abandonment."[74] The court held that the Commission must examine all factors relevant to determining the public interest, including the presumption in favor of continued service. The *Transcontinental* case does not imply that continuity of service means continuity of service from the existing certificate holder. The court did not find that the Commission had to require that the La Gloria field area producers continue selling gas to Transco, but merely that the Commission could not limit its examination to private contracts and meet its statutory responsibilities in deciding if the abandonment was permitted by the public convenience and necessity. The Commission here has followed its established criteria for examining an abandonment proposal, and determined, among other things, that there are no issues regarding continuity of jurisdictional services presented in these proceedings. Thus, the Commission finds that the *Transcontinental* case is not relevant, and rehearing is denied on this issue.

4. <u>Rate Case Settlement</u>

52. Indicated Shippers had argued that Southern's application for abandonment authority should be denied because a rate case settlement in Docket No. RP09-427-000 barred Southern from making any changes to the transportation rates on its system until September 1, 2012.[75] The June 2012 Order rejected this argument, explaining that Southern had not proposed to change its system-wide rates in the abandonment proceeding, and any modification of Southern's system-wide rates to reflect the abandonment of the South of Toca Facilities would not occur until Southern's next NGA section 4 general rate case.[76]

[74] 488 F.2d at 1328.

[75] June 2012 Order, 139 FERC ¶ 61,237 at P 66. Indicated Shippers refer to the Stipulation and Agreement dated October 5, 2009, and approved in Docket No. RP09-427-000 in *Southern Natural Gas Co.*, 130 FERC ¶ 61,004 (2010).

[76] June 2012 Order, 139 FERC ¶ 61,237 at P 66. As noted above, at the time the June 2012 Order was issued, Southern's deadline for filing to initiate its rate case was March 1, 2013, but that deadline has been extended until May 31, 2013, to give parties

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53. On rehearing, Indicated Shippers argue the fact that Southern's abandonment application did not propose changes to its system-wide rates was irrelevant to the question of whether Southern's filing of the abandonment proposal before September 1, 2012, nevertheless violated the terms of the settlement agreement. They contend the June 2012 Order failed to address the specific language or intent of Southern's rate settlement in Docket No. RP09-427-000,[77] in which Southern agreed that no shipper would face higher transportation costs until at least September 1, 2012.

54. Indicated Shippers argue the settlement rates covered by the settlement agreement include the rates for service on the South of Toca Facilities, as well as Southern's rate design allocating the costs of pooling service to shippers' contracts for transportation service downstream of the pooling points. Indicated Shippers argue Southern violated the settlement agreement by filing an application before September 1, 2012 to seek abandonment authorization that would undeniably alter the rates paid for service on the South of Toca Facilities.

55. To accept Indicated Shipper's argument, the Commission would have to find either that High Point's charges for service over the South of Toca Facilities should be viewed as a rate increase by Southern or that the rate settlement in Docket No. RP09-427-000 obligated Southern to keep all facilities used to provide any services to which the settlement rates apply. There was no provision in the settlement agreement that prohibited Southern from proposing to abandon the South of Toca Facilities. Further, Southern's abandonment does not violate the rate provisions of the settlement agreement in Docket No. RP09-427-000 as Southern cannot change its settled or maximum rates until it files its section 4 rate case.[78] Southern has not violated the terms of its settlement

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additional time to continue settlement negotiations. *Southern Natural Gas Co., L.L.C.*, 142 FERC ¶ 61,078.

[77] Stipulation and Agreement dated October 5, 2009, approved in *Southern Natural Gas Co.*, 130 FERC ¶ 61,004.

[78] The Docket No. RP09-427-000 Stipulation and Agreement provides at Article IV.D:

> 1. … Nor shall this Settlement preclude the parties from taking any position in such Section 4 or Section 7 proceeding filed by Southern Natural; provided that such position does not advocate or suggest changes to be implemented during the Rate Moratorium in the Settlement Rate Provisions, Settlement Tariff Provisions or any other terms of this Settlement, or have the effect of requiring the implementation of any such changes or changes in the maximum lawful rates

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agreement. The rates charged by High Point for transportation service over the South of Toca Facilities are outside of Southern's rate settlement proceeding. Therefore, the Commission affirms its findings on this issue in the June 2012 Order.[79]

5. Regulatory Asset

56. Southern proposed to account for its abandonment of the South of Toca Facilities by deferring its entire $35 million loss on the sale of the facilities as a regulatory asset and to amortize the costs over 36 months beginning on the closing date of the sale.[80] While the June 2012 Order addressed Southern's proposed accounting, the Commission explicitly stated that it was making no finding that would create a presumption supporting Southern's recovery of a regulatory asset in its rate proceeding.[81]

57. The Commission's Uniform System of Accounts (USofA) requires a pipeline to record its loss on a sale of facilities at the time of the sale. However, as noted in the

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> charged by Southern Natural to parties not subject to the Settlement Rate Provisions during the Rate Moratorium.
>
> 2. In this regard, parties shall be free to propose, support or oppose …
>
> (b) the abandonment of any facilities,
>
> provided that, regardless of their position, such parties agree to and support the outcome that no changes in the Settlement Rate Provisions, Settlement Tariff Provisions or any other terms of this Settlement may be implemented during the Rate Moratorium regardless of any such determination.

[79] The Commission notes that, even if it were to accept the argument that High Point's rates should be viewed as a rate increase by Southern, the rate moratorium established by the settlement agreement in Docket No. RP09-427-000 ended September 1, 2012, and Southern's sale of the South of Toca Facilities to High Point was not executed until November 1, 2012.

[80] June 2012 Order, 139 FERC ¶ 61,237 at P 67. The Customer Letter Agreement between Southern and certain of its firm customers set forth the conditions under which those customers would agree to support Southern's abandonment application and pursuant to which Southern would seek to recover, among other items, its loss on its sale of the abandoned facilities in its jurisdictional rates in the future.

[81] *Id*. n.68.

June 2012 Order, Southern had provided "support in the form of a signed Customer Letter Agreement indicating that all or a portion of the loss may be recovered from *certain customers* in future rates" (emphasis added).[82] Therefore, the June 2012 Order found that it would be appropriate for Southern to defer a portion of its loss by recording it in Account 182.3, *Other Regulatory Assets*, but only that portion it regards as probable of future recovery. The June 2012 Order stated that the remaining portion of the loss, i.e., the portion not probable of future recovery, should be recorded at the time of the sale in Account 421.2, *Loss on Disposition of Property*.[83] The June 2012 Order further stated that at each reporting date Southern must reassess the recoverability of the regulatory asset and write-off any additional portions which are not probable of future recovery by moving them from Account 182.3, *Other Regulatory Assets*, to Account 426.5, *Other Deductions*.[84]

58. Indicated Shippers request that the Commission clarify that any regulatory asset will be recovered from only those "certain customers" that signed the Customer Letter Agreement. For all other customers, Indicated Shippers request clarification, or rehearing to require that Southern must record its entire $35 million loss on the sale immediately, and apply the cost of service effect of the loss immediately.

59. The Commission did not make a determination in the June 2012 Order that any approved regulatory asset will apply only to those customers that signed the Customer Letter Agreement. As noted above, the June 2012 Order explicitly stated that although the order provided direction for Southern to appropriately account for a regulatory asset, the Commission was not making a determination that would create a presumption supporting approval of Southern's recovery of a regulatory asset in its upcoming rate proceeding. Parties to the rate proceeding will have the opportunity to challenge Southern's recovery of any regulatory asset and the allocation of any regulatory asset that is proposed. Therefore, the Commission will deny Indicated Shippers' requested clarification and alternative request for rehearing on this issue.

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[82] *Id*. P 71.

[83] *Id*. The term "probable," as used in the definition of regulatory assets, refers to that which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain nor proved. *See Revisions to Uniform System of Accounts to Account for Allowances under the Clean Air Amendments of 1990 and Regulatory-Created Assets and Liabilities and to Form Nos. 1, 1-F, 2 and 2-A*, Order No. 552, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,967 (1993).

[84] June 2012 Order, 139 FERC ¶ 61,237 at P 7.

B. Primary Function Test

60. Indicated Shippers and Offshore Producers filed requests for rehearing of the June 2012 Order and protest to High Point's compliance filing in Docket No. RP12-945-000 in which they emphasize that Southern and High Point did not propose to refunctionalize the South of Toca Facilities. In any event, the protesters argue a critical finding supporting the Commission's decision to approve Southern's abandonment proposal was that *all* of the South of Toca Facilities would be taken over by High Point, which as an interstate pipeline would be subject to the Commission's jurisdiction over rates charged for gathering service provided in connection with jurisdictional transmission service.[85] The Commission recognizes that its rejection of that argument, for the reasons discussed above, as well as its application of the primary function test in the June 2012 Order, serve to facilitate the removal of the Commission's jurisdiction under section 4 of the NGA to regulate the rates, terms and conditions for service on the South of Toca Facilities found to be gathering facilities.

61. However, as discussed in the June 2012 Order, it was appropriate for the Commission to analyze the jurisdictional status of the South of Toca Facilities to ensure that the certificate of public convenience and necessity issued to High Point only encompasses facilities and services over which the Commission actually has jurisdiction under section 7 of the NGA.[86] The June 2012 Order explained that all of the South of Toca Facilities were constructed under certificates issued by the Commission under section 7(c) of the NGA years ago, prior to the Commission's unbundling of interstate pipelines' services and the requirement that they separately state their charges for service on gathering facilities they still retain. As the result of unbundling requirements, many certificated facilities have been found by the Commission to perform a gathering function.[87] Therefore, after finding the public convenience and necessity permitted Southern's abandonment of all its certificated South of Toca Facilities by sale to High Point, the Commission needed to analyze the jurisdictional status of the various facilities to insure that the certificate of public convenience and necessity issued to High Point

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[85] *See, e.g.,* July 23, 2012 Rehearing Request of Century Exploration New Orleans, LLC, *et al.*, at n.20.

[86] June 2012 Order, 139 FERC ¶ 61,237 at P 75. Under section 1(b) of the NGA, the Commission's jurisdiction does not extend to facilities used for "the production or gathering of natural gas." 15 U.S.C. § 717(b) (2006).

[87] *See, e.g.*, *Equitrans, L.P.*, 109 FERC ¶ 61,209, at P 59 (2004).

only encompassed facilities and services over which the Commission actually has jurisdiction under section 7 of the NGA.[88]

62. Offshore Producers emphasize that neither Southern nor High Point requested that the Commission make any jurisdictional findings regarding the South of Toca Facilities, and that High Point applied for section 7 certificate authority to acquire and operate all of the facilities. Offshore Producers argue due process required that the Commission give parties notice that it might find that some of the South of Toca Facilities are non-jurisdictional gathering facilities and not grant High Point certificate authority for those facilities.

63. The Supreme Court has explained that "the touchstone of due process is protection of the individual against arbitrary action of government."[89] Constitutional due process thus requires certain procedural safeguards, including the requirement that a party affected by government action be given "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,"[90] and also "the opportunity to be heard at a meaningful time and in a meaningful manner."[91] However, circumstances vary and the sufficiency of the procedures supplied must be decided in light of the circumstances of each case.[92] The Commission assesses due process claims case-by-case based on the totality of the circumstances.[93]

64. As discussed below, parties did have notice and the opportunity to comment and present their arguments for consideration by the Commission in its analysis of the jurisdictional status of the South of Toca Facilities. Therefore, the Commission rejects Offshore Producers' claim that the Commission violated section 554(c) of the

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[88] June 2012 Order, 139 FERC ¶ 61,237 at P 75.

[89] *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

[90] *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (citation and quotation omitted).

[91] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations and quotation omitted).

[92] *Id.* at 334 ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (citation and quotation omitted).

[93] *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

Administrative Procedure Act (APA)[94] by basing its jurisdictional findings on a record that was incomplete because no parties but Southern and High Point were permitted to submit evidence.

65. On October 19, 2011, the Commission issued a notice of Southern's application, filed pursuant to section 7(b) of the NGA, for authorization under that section "to abandon, by sale to High Point Gas Transmission, LLC, certain onshore facilities located in Louisiana and certain offshore supply facilities located offshore Louisiana in the Gulf of Mexico."[95] On the same day, the Commission issued notice of High Point's application, filed pursuant to section 7(c) of the NGA, for certificate authorization under that section "to acquire, own and operate certain onshore facilities located in Louisiana and certain offshore facilities located offshore Louisiana in the Gulf of Mexico."[96]

66. In its December 21, 2011 data request, Commission staff described 7 of the 29 questions as "necessary to assist the Commission in its evaluation of the appropriate functionalization of Southern's South of Toca facilities for which transfer to High Point is proposed."[97] Staff included a request that the applicants "provide a Farmland/Sea Robin functionalization analysis so that the Commission can better evaluate the function of each subject facility."[98] The Offshore Producers were served with a copy of the data request, and they were served with a copy of the applicants' January 11, 2012 responses providing information about the jurisdictional status of the facilities.[99] Thus, it is not the case that the Offshore Producers did not have notice that the Commission was considering how the various South of Toca Facilities should be functionalized by High Point if the Commission approved Southern's proposed abandonment of the South of Toca Facilities by sale to High Point. Indeed, despite the fact that these requests by staff

[94] 5 U.S.C. § 554(c)(1) (2006). This section provides that an "agency shall give all interested parties opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit . . . ."

[95] October 19, 2011 Commission Notice in Docket No. CP12-4-000.

[96] October 19, 2011 Commission Notice in Docket No. CP12-9-000.

[97] December 21, 2011 Data Request in Docket Nos. CP12-4-000 and CP12-9-000 at 3.

[98] *Id*. at 4.

[99] Southern and High Point January 11, 2012 Data Response at 18-19.

for information and the applicants' responses were placed in the public record in this proceeding and were served on all parties on the service list, including the Offshore

Producers, no party took the opportunity to comment on the jurisdictional status of the facilities.[100]

67. Given the circumstances here, the Commission's application of the primary function test did not deprive the Offshore Producers of their opportunity to be heard, under either the Fifth Amendment's Due Process Clause or the APA. Offshore Producers and other parties had notice that the Commission was considering the jurisdictional status of the South of Toca Facilities and the opportunity to be heard before the Commission's made its jurisdictional findings in the June 2012 Order. The notice referenced NGA section 7(c), which contains the Commission's statutory authority to issue certificates for NGA jurisdictional facilities. However, for purposes of determining what sort of facilities the Commission has statutory jurisdiction to certificate, the Commission must look to NGA section 1(b) because the Commission cannot certificate facilities that are not performing a jurisdictional function. As we have stated before, "fundamentally, the Commission's statutory obligation to correctly ascertain and assert its jurisdiction is a continuing obligation that does not and cannot hinge on the positions or pleadings of any party. Jurisdiction arises directly from the Act."[101] The Commission's analysis under NGA section 7(c) is inextricably bound to, and necessarily guided by, the jurisdictional limits of NGA section 1(b). In other words, as the Commission explained in response to the same issue in another proceeding,[102] the Commission is not required to give notice that it is not going to do what it does not have statutory jurisdiction to do.

68. Under these circumstances, an additional comment period on the jurisdictional status of Southern's facilities would not have improved the Commission's decision-making. The Commission has wide discretion in selecting its procedures.[103] Further,

[100] *See Equitrans, L.P.*, 109 FERC ¶ 61,209 at P 31 (allowing a protestor's answer to a data request response because doing so would ensure a complete and accurate record).

[101] *Commonwealth Gas Pipeline Corp.*, 28 FERC ¶ 61,223, at 61,416 (1984) (responding to an argument that the Commission is precluded from investigating allegations by a third party that challenges a Hinshaw exemption holder's status).

[102] *Trunkline Gas Company, LLC, and Sea Robin Pipeline Company*, 142 FERC ¶ 61,133 (2013).

[103] *Pacific Gas and Electric Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984) ("We must allow the [Commission] wide discretion in selecting its own procedures . . .

(continued…)

these proceedings are ongoing and this order on rehearing is part of that ongoing process. Thus, Offshore Producers had another opportunity to present any arguments they had to challenge the jurisdictional findings the Commission made in its June 2012 Order based on the primary function test's criteria. Offshore Producers made no attempt in their rehearing requests to present any substantive arguments to refute the June 2012 Order's findings regarding the primary function and jurisdictional status of any of South of Toca Facilities, identify any errors the Commission made in its primary function analysis, or provide any other reasons to persuade the Commission to change its jurisdictional findings.[104] Thus, there is no reason to believe the Commission's decision-making process would have been improved by providing for an additional comment period for the specific purpose of allowing Offshore Producers more time to challenge the June 2012 Order's jurisdictional determinations. Accordingly, the Commission denies the requests for rehearing on this issue.

69. Although Offshore Producers do not present arguments to challenge how the Commission applied the primary function test in the June 2012 Order, they cite three orders in support of their claim that the Commission's decision to perform the primary function test was inconsistent with its approach in three previous proceedings addressing applications by other interstate pipeline companies for abandonment authority. Offshore Producers are correct that in the two cited *Tennessee* orders, the Commission did not perform a primary function analysis before authorizing Tennessee to abandon facilities by sale to Tauber Pipeline, L.L.C., which planned to operate the facilities as non-jurisdictional gathering facilities.[105] However, no party opposed Tennessee's sale of the facilities that the Commission authorized Tennessee to abandon in those proceedings. Thus, it was not necessary to perform the primary function test in order to find that the

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and must defer to the [Commission] interpretation of its own rules, unless the interpretation is plainly erroneous.") (citations omitted).

[104] *See Blumenthal v. FERC*, 613 F.3d 1142, 1146 (D.C. Cir. 2010) (finding that, where Connecticut had the opportunity on rehearing to respond to ISO New England's filings and where the Commission considered Connecticut's arguments on rehearing, Connecticut was not denied due process); *State of California ex rel. Lockyer v. FERC*, 329 F.3d 700, 711 (9th Cir. 2003) (Commission provided "all the procedural protections required" when it considered the claims made in requests for rehearing); *accord CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994) (where petitioner had, among other things, opportunity to make its case on rehearing, it had "ample notice and opportunity to be heard").

[105] *Tennessee Gas Pipeline Co*., 131 FERC ¶ 61,127 (2010); *Tennessee Gas Pipeline Co*., 134 FERC at ¶ 62,274 (2011).

public convenience and necessity permitted Tennessee's abandonment of the facilities. Further, unlike High Point in this proceeding, Tauber did not request certificate authority to acquire and operate any of the facilities at issue.[106] Thus, the cited *Tennessee* orders provide no support for Offshore Producers' argument that the Commission deviated from precedent by performing a primary function analysis of the South of Toca Facilities in this proceeding.

70. Nor was the Commission's decision to apply the primary function test to the South of Toca Facilities inconsistent with the fact that the Commission did not do a primary function analysis in the *Transco* order cited by Offshore Producers.[107] In that proceeding, Transco sought authorization to abandon its 151.7-mile-long, onshore McMullen Pipeline in Transco's production area IT feeder service zone, in which Transco is authorized to provide only interruptible transportation service. Transco proposed to abandon the McMullen Pipeline by sale to Copano, which planned to construct interconnecting lines so that the pipeline could be used to receive unprocessed gas from Copano's gathering system and transport it to a processing plant, from which pipeline-quality gas would be delivered to Transco's compressor station. The Offshore Producers are correct that both Transco and Copano requested that the Commission make a finding that McMullen Pipeline would become a non-jurisdictional gathering facility if Copano made its planned changes. However, the Commission found that the public convenience and necessity did not permit Transco's abandonment of the McMullen Pipeline, as it was currently being used by Transco to provide essential interstate transportation service.[108] Therefore, the

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[106] There is no requirement that a company planning to construct or acquire facilities that it plans to operate as gathering facilities first seek a finding by the Commission that the facilities will in fact qualify as non-jurisdictional gathering facilities. If the Commission has not made such a finding, the company assumes any risks associated with any future allegations that the facilities might be jurisdictional to the Commission. *Id.*, 131 FERC ¶ 61,127 at n.5.

[107] *Transcontinental Gas Pipe Line Company, LLC and Copano Field Services/Central Gulf Coast, L.P.*, 129 FERC ¶ 61,255 (2009) (*Transco*).

[108] *Id*. P 42. Because Transco does not offer firm service on facilities in its production area IT feeder service zone, the interruptible shippers protesting Transco's proposed abandonment of the McMullen Pipeline had not had the option of signing up for firm service on the pipeline. Further, the costs of the McMullen Pipeline had been largely recovered through Transco's interruptible rates approved by the Commission and paid by the protesting interruptible shippers for the jurisdictional services provided by the pipeline. Under the circumstances, the Commission found that the protesting

(continued…)

Commission did not need to reach the question of whether Copano's plans for the pipeline would allow it to qualify as a non-jurisdictional gathering facility.

71. For the reasons discussed above, the Commission rejects the Offshore Producers' claims that the Commission's review of the jurisdictional status of the South of Toca Facilities violated due process and that its decision to perform a primary function analysis was arbitrary and capricious or otherwise in error. The Commission fully considered all evidence contained in the record, including all arguments made by the Offshore Producers in their protests before the June 2012 Order was issued and in their requests for rehearing of that order. Accordingly, the Commission denies rehearing on this issue.

C. High Point's Transfer of Gathering Facilities to Affiliate

72. High Point, in its Docket No. RP12-945 compliance filing, did not propose initial gathering rates. High Point stated that it did not include gathering rates in its compliance filing because it did not intend to provide gathering services in connection with its own jurisdictional transmission services. High Point stated that the facilities that the Commission had found to be providing gathering service had been transferred to a new gathering affiliate, High Point Gathering. On September 24, 2012, Indicated Shippers and Offshore Producers filed additional comments in Docket No. RP12-945-000, arguing that the Commission had relied on the applicants' representation that *all* of the South of Toca Facilities would be taken over by High Point, which as an NGA-jurisdictional company would be subject to the Commission's jurisdiction over the rates charged by interstate pipeline companies for gathering services they provide in connection with their jurisdictional transmission services.

73. On September 28, 2012, the Commission accepted High Point's tariff records subject to further review and refund.[109] The September 2012 Order found that since High Point does not intend to assess a rate for gathering service, the June 2012 Order did not require it to submit a rate for gathering services provided in connection with its jurisdictional transmission services.[110] The September 2012 Order further stated that absent Southern seeking and receiving amendment of its authorization to abandon the

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interruptible shippers' rate concerns should be given more weight than the Commission generally gives to rate issues raised by interruptible shippers. *Id*. n.20.

[109] September 2012 Order, 140 FERC ¶ 61,259.

[110] *Id.* P 14.

facilities by transfer to High Point Gathering, Southern could only transfer the facilities to High Point.[111]

74. Indicated Shippers filed for clarification that only High Point had been authorized to acquire and operate any of the South of Toca Facilities and, therefore, that neither Southern nor High Point could transfer the gathering facilities to High Point Gathering.

75. On October 31, 2012, High Point filed an answer stating:

> Although the non-jurisdictional Gathering Facilities will initially be transferred to High Point, High Point will not provide any non-jurisdictional gathering services on such facilities. Instead, High Point will immediately transfer the Gathering Facilities and Unutilized Facilities to High Point Gathering, a non-jurisdictional gatherer, which will operate the Gathering Facilities.[112]

76. On November 13, 2012, Indicated Shippers filed an answer emphasizing that neither Southern nor High Point had included a request in their respective abandonment and certificate applications for any of Southern's certificated facilities to be found to be gathering facilities and transferred to High Point Gathering to be operated on a non-jurisdictional basis. Indicated Shippers assert that High Point's immediate transfer of the gathering facilities to High Point Gathering undermines the basis for the Commission's decision to approve Southern's abandonment proposal because the Commission had relied in the June 2012 Order on Southern's and High Point's assurances that all of the South of Toca Facilities, including the gathering facilities, would continue to be operated subject to the Commission's oversight.[113] Indicated Shippers emphasize that in several past proceedings, the fact that an interstate pipeline company proposed to abandon certificated facilities by sale to a company that would operate the facilities on a non-jurisdictional basis was a critical factor in the Commission's determination that the public

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[111] *Id.* n.22.

[112] High Point October 31, 2012 Answer at 6.

[113] Indicated Shippers cite to the Commission's statement in the June 2012 Order that "[i]n contrast to both of these cases, in the current proceeding Southern proposed to abandon the facilities by sale to a company that will become an interstate natural gas company under the NGA, subject to regulation by the Commission. Therefore, the protestors' fear that essential interstate transportation facilities will no longer be available to continue service is unwarranted." June 2012 Order, 139 FERC ¶ 61,237 at P 37.

convenience and necessity did not permit the interstate pipeline company's proposed abandonment of the subject facilities.[114]

77. We deny the requests for rehearing and clarification. In the cited cases, the Commission withheld abandonment authority in those proceedings because the subject facilities were performing jurisdictional transmission functions and the would-be purchasers had not applied for the requisite certificate authorization to acquire and operate the facilities. That is not the case here. Here, the only facilities still in use that have been transferred to the non-jurisdictional High Point Gathering are the facilities that the June 2012 Order found to be non-jurisdictional gathering facilities. In any event, there is no further issue as to whether Southern complied with the terms of the June 2012 Order's permission to abandon, as High Point subsequently informed the Commission that Southern did sell all of the South of Toca Facilities, including the gathering facilities, to High Point.

78. We do not agree with the protesters that High Point's immediate transfer of the gathering facilities to High Point Gathering violated a material term or condition of the June 2012 Order's grants of abandonment authority for Southern to sell all of the certificated South of Toca Facilities to High Point and certificate authority for High Point to acquire those facilities found to be jurisdictional transmission facilities. Nor do we believe Southern's direct transfer of the gathering facilities to High Point Gathering would have violated a material term or condition of the June 2012 Order or undermined its findings, since the NGA's exemption for gathering facilities could not be reconciled with a policy of withholding authorization for an interstate pipeline company to abandon certificated gathering facilities simply because the would-be purchaser is a non-jurisdictional company.

79. Indeed, once the Commission has found that certificated facilities are non-jurisdictional gathering facilities, the identity, nature and intentions of the purchaser generally are irrelevant except to the extent they could affect the scope of the Commission's environmental review and imposition of appropriate environmental conditions. As discussed in the June 2012 Order, the only construction activities needed to implement Southern's abandonment proposal were the installation of a meter station

[114] Indicated Shippers cite *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,105 (2011) (*Tennessee*) (rejecting proposal by Tennessee to abandon facilities by sale to a gathering company); *Transco*, 129 FERC ¶ 61,255 (rejecting proposal by Transco to abandon facilities by sale to a gathering company); and *Southern Natural Gas Co.*, 126 FERC ¶ 61,246 (2009) (*Southern*) (rejecting proposal by Southern to abandon some facilities by sale to a gathering company and other facilities by sale to an intrastate pipeline company affiliated with the gathering company).

and the rerouting of a dehydration header on industrial lands located entirely within the boundary of its existing Toca Compressor Station, and Southern would perform those construction activities under its Part 157 blanket certificate subject to the environmental conditions applicable to such activities. Thus, the June 2012 Order found that Southern's abandonment proposal qualified for a categorical exclusion under section 380.4 of the regulations and that no further environmental review or conditions were needed.[115] While the basis for the Commission's findings in the June 2012 Order may have been undermined if the applicants had planned all along for the gathering facilities to be immediately transferred to a salvage company for removal and the applicants had intentionally misrepresented their intent, the June 2012 Order's findings supporting the respective grants of abandonment and certificate authority to Southern and High Point have not been materially affected by the fact that High Point Gathering, rather than High Point, now owns and is operating the gathering facilities.

80. As discussed *infra* with respect to the continuity of service and primary function test arguments made on rehearing, we also disagree with Indicated Shippers' and Offshore Producers' assertions that having the gathering facilities continue to be operated by a jurisdictional company was critical to the Commission's decision to authorize Southern's abandonment of all the South of Toca Facilities, including the gathering facilities, by sale to High Point. Nor was that a critical consideration in the *Tennessee, Transco,* and *Southern* cases cited by Indicated Shippers. As noted above, in those proceedings, the Commission denied the interstate pipeline companies' requests for abandonment authority because they proposed to transfer facilities being used to provide jurisdictional transmission services to non-jurisdictional companies that had not requested NGA-certificate authority to operate the facilities as jurisdictional facilities, and that is not the case here.

81. Indicated Shippers and Offshore Producers conflate the abandonment and jurisdictional issues in arguing that the Commission relied on assurances that the gathering facilities included in the South of Toca Facilities would also continue to be operated by an NGA-jurisdictional company following Southern's abandonment of the facilities. This is not accurate, as section 1(b) of the NGA exempts gathering facilities and gathering services from the Commission's jurisdiction, and, as explained above, the Commission does not believe that statutory exemption for gathering facilities could be reconciled with a policy of refusing to authorize an interstate pipeline company's abandonment of certificated gathering facilities to a purchaser that will operate them as non-jurisdictional gathering facilities. While Southern needed section 7(b) abandonment authority to sell the gathering facilities because it had constructed and operated them

[115] June 2012 Order, 139 FERC ¶ 61,237 at P 221.

under certificate authority, the June 2012 Order did not grant High Point section 7(c) certificate authority to acquire the gathering facilities. Therefore, High Point did not need to seek abandonment authority from the Commission in order to transfer them to High Point Gathering.[116]

D. Certificate Issues

1. Return on Equity

82. The June 2012 Order approved a return on equity (ROE) of 12.99 percent for High Point, the same as the ROE approved by the Commission on February 17, 2011, in *Portland Natural Gas Transmission System* (*Portland*), Opinion No. 510.[117] Indicated Shippers contend that the June 2012 Order should not have approved an ROE higher than 11.55 percent because that was the ROE approved in the litigated NGA section 4 general rate case in *Kern River Gas Transmission Company* (*Kern River*), Opinion No. 486-E,[118] which was issued on July 21, 2011, five months after the 12.99 ROE was approved in *Portland*. Indicated Shippers argue that the Commission must use the most recent ROE approved in a litigated NGA section 4 general rate case, regardless of the test period dates, and that the Commission therefore should require High Point to use the 11.55 percent ROE approved in *Kern River*, rather than the 12.99 percent ROE approved in *Portland*.

83. Indicated Shippers' request for rehearing of the ROE approved for High Point in the June 2012 Order is denied. It is true that *Kern River* was decided after *Portland*, but *Kern River* did not determine a new ROE, it merely affirmed an ROE that was first established in Opinion No. 486-B on January 15, 2009.[119] As the Commission stated in

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[116] High Point would not have needed section 7(b) abandonment authority to transfer the gathering facilities even if it had commenced gathering services in connection with its jurisdictional transmission services. However, it would have been required to file pursuant to NGA section 4(d) to provide at least thirty days notice before ceasing its gathering services. *See, e.g., Columbia Gas Transmission Corp*., 86 FERC ¶ 61,214, at 61,762 (1999). As High Point did not commence gathering service in connection with interstate transmission before it transferred its gathering facilities to High Point Gathering, High Point is not required to file gathering rates.

[117] 134 FERC ¶ 61,129 (2011).

[118] 136 FERC ¶ 61,045 (2011).

[119] *Kern River Gas Transmission Co.*, 126 FERC ¶ 61,034, at P 1 (2009).

Opinion No. 486-E, the starting point for calculating Kern River's Period Two rates was the cost of service previously determined for Period One, which was based on 2004 test year data.[120] Since Kern River's 11.55 percent ROE for Period Two rates was based on 2004 test year data, with parties prohibited from relitigating the issue of the appropriate proxy group, the range of reasonable returns, and the median to be used as the starting point for any adjustment from the median, the 11.55 percent ROE approved for Kern River's Period Two rates on July 21, 2011, in Opinion No. 486-E is not the most recently-approved ROE litigated in a NGA section 4 general rate case.

84. For the above reasons, the Commission affirms the June 2012 Order's holding that High Point's rates should be designed based on an ROE of 12.99 percent, consistent with ROE approved for Portland in Opinion No. 510 issued on February 17, 2011.

2. <u>Capital Structure</u>

85. Indicated Shippers argue the Commission erred by allowing High Point to use its anticipated capital structure of 70 percent equity and 30 percent debt. Indicated Shippers assert that Commission policy on capital structure is to base capital structure on real entities, to the maximum extent possible, i.e., the pipeline or a company associated with the pipeline that obtains financing for the pipeline. Indicated Shippers argue that High Point does not yet have an actual capital structure and has not yet issued its own debt, and therefore the Commission should require High Point to use an imputed capital structure to eliminate the thick equity ratio.

86. In the June 2012 Order, the Commission approved High Point's proposed capital structure of 70 percent equity and 30 percent debt because of the greater risks of operating a natural gas pipeline in the Gulf of Mexico, with declining supplies and no firm customers. These circumstances make it difficult for High Point to obtain financing, which causes High Point to use more of its own equity.[121] The Commission prefers to use a company's actual capital structure instead of a hypothetical capital structure derived from a parent company or other entities. However, High Point's proposed capital structure reflects the response from the financial markets, and the difficulty and high debt costs that High Point received in its preliminary, non-binding quotes from various lenders. High Point's equity-thick capital structure is reflective of the high risk that it encounters and the reaction by the financial markets.

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[120] Opinion No. 486-E, 136 FERC ¶ 61,045 at P 16.

[121] June 2012 Order, 139 FERC ¶ 61,237 at P 151.

87. The Commission has reduced a company's capital structure when the equity rate is unjustifiably high; however, we will not do so here given the riskier circumstances under which High Point will be operating, and the financial market's reaction to High Point's debt solicitation. The Commission finds that Indicated Shippers have failed to provide new evidence requiring the Commission to change its position on High Point's capital structure. Therefore, rehearing on this issue is denied.

3. Hurricane Surcharge Amortization Period

88. Indicated Shippers contend that High Point did not provide any justification for its requested 36-month amortization period for the recovery of any hurricane-related costs and expenses. Indicated Shippers argue that it is unreasonable decision-making for the Commission to determine an amortization period in a vacuum, i.e., without knowing what costs will be amortized since there is no way to determine if the resulting surcharge will be just and reasonable. In addition, Indicated Shippers argue the Commission's approval of the proposed amortization period is in error because the Commission relied on orders approving settlements in gas pipelines' proceedings, which are not precedential by their own terms, and on decisions affecting oil pipelines, which are regulated under a different regulatory scheme. Indicated Shippers contend those cases are irrelevant, and the Commission should have denied High Point's requested 36-month amortization period.

89. The Commission has approved amortization periods for Hurricane Surcharges ranging from one year to four years.[122] High Point's proposed 36-month amortization period is certainly within that range. Further, while High Point has not incurred any hurricane-related costs and therefore appropriately proposed an initial Hurricane Surcharge of zero, the Commission did not view the likelihood that High Point will incur

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[122] *See, e.g.*, *Sea Robin Pipeline Co.*, 137 FERC ¶ 61,201, at P 51 (2011) (approving 4-year recovery period for hurricane surcharge and finding surcharge to be just and reasonable); *High Island Offshore System, L.L.C.*, 131 FERC ¶ 63,007, at P 17 n.6 (2010) (Administrative Law Judge certified a settlement that provided for a 36-month storm damage recovery period); *Stingray Pipeline Co., LLC*, 127 FERC ¶ 61,308 (2009) (approving tariff provisions that allowed up to 36 months to amortize hurricane-related costs); *Discovery Transmission LLC*, 122 FERC ¶ 61,099, at P 8 (2008) (approving a 12-month recovery period for a hurricane surcharge subject to a cap with any uncollected amounts due to the cap to be recovered in a subsequent period); *Colonial Pipeline Co.*, Oil Tariff Filing, Docket No. ISO2-313-008 (July 2, 2008) (24-month recovery period for a hurricane surcharge); *Chandeleur Pipe Line Co.*, 117 FERC ¶ 61,250 (2006) (approving 12-month hurricane surcharge recovery period that was subsequently extended to 24 months); *ExxonMobil Pipeline Co.*, FERC Tariff 255-273, Docket No. IS06-344-000 (May 31, 2006) (12-month recovery period for a hurricane surcharge).

storm-related costs in the future as too speculative to warrant approval of High Point's proposed Hurricane Surcharge mechanism. High Point's tariff provisions set forth the methodology for cost calculation and the recovery mechanism to be applied to its shippers. The tariff provisions also require High Point to provide notice that it intends to charge a Hurricane Surcharge,[123] and parties will have an opportunity to challenge the proposed Hurricane Surcharge in the limited section 4 proceeding.

90. Thus, while the June 2012 Order approved procedures for High Point to charge a Hurricane Surcharge if such storm-related costs are incurred, the order did not determine the amount of any surcharge that High Point may be allowed to impose in the future. As noted in the June 2012 Order, the type of costs High Point proposed to include in any prospective Hurricane Surcharge are extraordinary costs outside of its control. Providing High Point the ability to recover these costs can benefit its customers by improving the likelihood that High Point will be able to resume full service as quickly as possible following a catastrophic event.[124] Further, High Point's proposed 36-month amortization for recovery of hurricane-related costs and expenses is within the range of reasonableness for Commission-approved Hurricane Surcharges, providing a reasonable time both for High Point to recover its costs associated with such an event and to spread the costs out over the rates being paid by its shippers. Therefore, the Commission denies rehearing on this issue.

4. **Cost and Revenue Study**

91. Indicated Shippers argue the Commission erred when it did not require High Point to submit a cost and revenue study following one full year of service. Indicated Shippers contend that High Point's proposed rates are based on supposition and hypotheses, and thereby justify departure from the Commission's usual policy. Indicated Shippers argue that since High Point's debt is based on potential debt financing and its capital structure is anticipated, a cost and revenue study after one full year of service would reflect the actual debt cost amount and the actual capital structure, rather than the proposed debt cost and capital structure. Indicated Shippers also contend that since the Commission relied on the higher risks that High Point faces because it will operate in the Gulf of Mexico, the Commission will be better able, after High Point has been in service for a full year, to assess whether its operations are at sufficiently greater risk to warrant the equity-rich capital structure and higher ROE and approved by the June 2012 Order.

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[123] June 2012 Order, 139 FERC ¶ 61,237 at P 173.

[124] *Id*. P 176.

92. We deny Indicated Shippers' request for rehearing, and affirm our determination that High Point must submit a cost and revenue study after three years of service. We are not persuaded by Indicated Shippers' arguments that the information that would be provided by a cost and revenue study filed after only one full year of service would provide an adequate basis to determine whether the ROE and cost of debt approved for High Point in the June 2012 Order were too generous. Commission policy dictates that new pipelines such as High Point's file cost and revenue studies to justify their rates after three years of operation. High Point, like other new pipelines, needs adequate time to gain valuable operating experience before filing its cost and revenue study. As noted in the June 2012 Order, a three-year cost and revenue study will provide High Point and its shippers with sufficient operating history so that High Point can generate accurate costs and operations data that will include more than the costs associated with the start-up of a new interstate pipeline.[125] Further, High Point will be required to make annual FERC Form No. 2 filings, which will give all interested parties, including Indicated Shippers, the necessary information to determine whether High Point's rates are just and reasonable. The Commission does not find good reason to deviate from this established Commission policy, and denies rehearing on this issue.

5. <u>Refund Condition on Acceptance of High Point's Initial Rates</u>

93. As discussed above, the June 2012 Order that authorized Southern's abandonment of the South of Toca Facilities by sale to High Point found that some of those facilities provide non-jurisdictional natural gas gathering service and that some of the facilities had not been used in the last year. The Commission accordingly directed High Point to remove the costs of the gathering facilities from its jurisdictional transmission rates, to file separately-stated gathering rates for any services provided over the gathering facilities, to remove the costs of unused facilities from its rates, and to make various other tariff revisions.[126] The June 2012 Order required High Point to revised tariff records, together with work-papers supporting the revised initial recourse rates, at least thirty days but not more than sixty days prior to commencing service on the South of Toca Facilities.[127]

94. On August 14 and 16, 2012, High Point filed to comply with the June 2012 Order's requirements including revised initial rates calculated using a cost of service based upon costs associated with the South of Toca Facilities found by the June 2012

[125] *Id*. P 162.

[126] June 2012 Order, 139 FERC ¶ 61,237 at P 223.

[127] *Id*. ordering para. (I).

Order to be jurisdictional and still in use. As discussed above, High Point explained that its compliance filing did not include gathering rates because a new affiliate would become the owner of the gathering facilities and unutilized facilities.

95. In the September 2012 Order accepting High Point's tariff records subject to further review and refund,[128] the Commission stated that it was unable to verify that High Point had complied with the directives of the June 2012 Order regarding High Point's initial rates, including those focused on the proper refunctionalization and/or the removal from the cost of service of specific facility costs. The September 2012 Order also noted that High Point's rates could be affected by the resolution of certain issues raised by the pending requests for rehearing of the June 2012 Order, such as the appropriate ROE and capital structure for High Point's rates. Therefore, the Commission accepted the tariff records to be effective the latter of October 1, 2012 or the date the facilities are placed into service, subject to refund and further order of the Commission.[129]

96. On October 31, 2012, High Point requested rehearing of the September 2012 Order. High Point argues that the Commission erred in making its acceptance of High Point's initial rates subject to refund. High Point contends that the Commission lacks authority under NGA section 7 to accept initial rates subject to refund. High Point argues that the Commission has refund authority only when acting under section 4 of the NGA, and that section 4 refund authority is limited to rate increases proposed by a pipeline under that section.[130] High Point further asserts that section 5 of the NGA permits only prospective changes to rates with no provisions for refunds or retroactive relief.[131] High Point emphasizes that section 7 of the NGA does not include any references regarding refunds,[132] and that while section 7 allows the Commission to condition certificates, such conditions may not diminish the roles of the other sections of the NGA.[133]

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[128] September 2012 Order, 140 FERC ¶ 61,259.

[129] *Id*. PP 10 and 18.

[130] High Point's October 31, 2012 Request for Rehearing in Docket No. RP12-945 at 4 (citing 15 U.S.C. § 717c(e) (2006)).

[131] *Id*. (citing *El Paso Natural Gas Co*., 133 FERC ¶ 63,005, at P 6 (2010)).

[132] *Id*. (citing 15 U.S.C. § 717f (2006)).

[133] *Id*. (*citing Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979); *Northern Natural Gas Co. v. FERC*, 780 F.2d 59 (D.C. Cir. 1985), 827 F.2d 779

(continued…)

97. High Point asserts that its rates approved in the section 7 proceeding are subject to the "public convenience and necessity" standard set forth by NGA section 7, not the more stringent "just and reasonable" standard contained in section 4 of the NGA. Therefore, High Point asserts that the Commission abused its section 7 certificate conditioning authority by using its NGA section 4 refund authority in a manner the was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.[134]

98. As discussed in the September 2012 Order accepting High Point's rates, the Commission's decision in that order to make such acceptance subject to a refund condition was consistent with past practice. The September 2012 Order cited *KN Energy, Inc.*[135] and *Black Marlin Pipeline Company*,[136] two proceedings cited by the September 2012 Order where the Commission made its approval of initial section 7 rates for pipelines' service under new section 7 certificates subject to further review and refund if the Commission later found the initial rates unreasonable.[137] As the Commission explained in those cases, a pipeline cannot commence service until the Commission issues a certificate, finding that the service, including the initial rate, is consistent with the public interest standards in NGA section 7. The Commission's authority under NGA section 7 to establish a condition that the initial rate is subject to refund enables the Commission to permit the pipeline to start service before the Commission has completed its rate investigation. High Point fails to address either of these cases in its request for rehearing.

99. Moreover, the Commission's September 2012 Order cited the decision in *Transcontinental Gas Pipe Line Corp. v. FERC* (*Transco*), 54 F.3d 893, 899 (D.C. Cir. 1995), where the court upheld the Commission's orders making KN Energy's and Black Marlin's initial section 7 rates for services under new certificates subject to refund if

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(1987) (en banc); *Public Service Comm. of N.Y. v. FERC*, 866 F.2d 487 (D.C. Cir. 1989)).

[134] *Id*. at 4.

[135] 50 FERC ¶ 61,290 (1990) (*KN Energy*).

[136] 48 FERC ¶ 61,024 (1989) (*Black Marlin)*.

[137] September 2012 Order, 140 FERC ¶ 61,259 at n.16.

warranted following completion of the Commission's rate reviews.[138] In *Transco*, the Court stated:

> The norm seemingly represented by these FERC decisions . . . is that where service starts under § 7 before final determination of the rates, the rate finally determined will be applied retroactively to the start of service. . . The norm makes a good deal of sense, as it means that the "right rate", *i.e*., whatever rate the Commission lawfully determines to be right, is applied throughout the period despite the Commission's initial uncertainty and delay.[139]

100. The court in *Transco* outlined precisely the situation before the Commission in the instant proceeding in that service will start under a certificate issued under NGA section 7 before final determination of the rates, and the rate finally determined will be applied retroactively to the start of service. While High Point argues the Commission acted in an arbitrary and capricious manner and abused its discretion by deciding in the September 2012 Order to accept High Point's rates subject to refund, the court in *Transco* found that such an approach by the Commission "makes a good deal of sense."

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[138] The court also pointed to *Public Service Comm'n of New York v. Federal Power Comm'n*, 329 F.2d 242, 249 (D.C.Cir.1964) (*Public Ser*vice) which had upheld the Commission's power to award refunds in a proceedings in which it had issued a temporary certificate conditionally accepting proposed rates. Indeed, the *Public Service* court explicitly stated:

> The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity . . . . Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

Id. p. 249.

[139] *Id*.

101. Accordingly, in order to ensure the "right rate" when the Commission has had completed its review of High Point's rates, the Commission will deny High Point's request for rehearing of the September 2012 Order on this issue.

<u>The Commission orders</u>:

The requests for rehearing filed by High Point, Indicated Shippers and the Offshore Producers are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.