

134 FERC ¶ 61,239
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

UGI Storage Company
UGI Central Penn Gas, Inc.

Docket No. CP10-23-001
Docket No. CP10-24-001

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued March 28, 2011)

1. On November 22, 2010, the SS-1 Customers¹ filed a request for rehearing of the Commission's October 21, 2010 order which: (1) granted UGI Storage Company (UGI Storage) certificates under section 7 of the Natural Gas Act (NGA)² to acquire and operate the Tioga, Meeker, and Wharton storage facilities and provide services at market-based storage rates; and (2) authorized UGI Central Penn Gas, Inc. (CPG), under NGA section 7(b), to abandon jurisdictional service at those facilities.³ Also on November 22, 2010, CPG and UGI Storage (collectively, Applicants) filed a request for clarification or, in the alternative, rehearing of the October 21 Order.
2. This order denies the SS-1 Customers' rehearing request and grants the Applicants' requested clarification.

¹ The SS-1 Customers include: The National Grid Gas Delivery Companies, Atlanta Gas Light Company (Atlanta Gas), Pivotal Utility Holdings Inc. d/b/a Elizabethtown Gas, PSEG Energy Resources & Trade LLC, and South Jersey Gas Company. The National Grid Gas Delivery Companies include the following: The Brooklyn Union Gas Company d/b/a National Grid NY; Key Span Gas East Corporation d/b/a National Grid; Boston Gas Company, Colonial Gas Company and Essex Gas Company, collectively d/b/a National Grid; EnergyNorth Natural Gas Inc. d/b/a National Grid NH; Niagara Mohawk Power Corporation d/b/a National Grid; and The Narragansett Electric Company d/b/a National Grid.

² 15 U.S.C. § 717f (2006).

³ *UGI Storage Co.*, 133 FERC ¶ 61,073 (2010) (October 21 Order).

I. October 21 Order and Rehearing Requests

3. CPG is a local distribution company regulated by the Pennsylvania Public Utility Commission (Pa PUC). On November 19, 2009, CPG filed an application pursuant to section 7(b) of the NGA for authorization to abandon the storage services it provides using the Tioga, Meeker, and Wharton storage facilities pursuant to the blanket certificate originally issued to its predecessor, North Penn Gas Company (North Penn), under section 284.224 of the Commission's regulations.⁴ Concurrently, UGI Storage filed an application under section 7(c) of the NGA for certificate authority to acquire and operate CPG's interests in these storage facilities. UGI Storage also requested a Part 284 blanket certificate to provide open-access transportation services and approval of its market-based rate storage proposal. Numerous parties intervened, including the SS-1 Customers and Transcontinental Gas Pipe Line Company, LLC (Transco), which has purchased storage service from CPG, and its predecessor North Penn, for many years in order to provide service to the SS-1 Customers.⁵

4. The October 21 Order authorized CPG's abandonment of storage service and granted UGI Storage the requested market-based storage rate authority. The Commission granted these authorizations effective April 1, 2011, with the condition that the effective date could be sooner depending on agreement between UGI Storage and Transco, or directly between UGI Storage and the SS-1 Customers, for the arrangement of storage service by UGI Storage to begin earlier.⁶

5. In their rehearing request, the SS-1 Customers argue the Commission erred by: (1) approving proposals of CPG and UGI Storage that unduly discriminate against the SS-1 Customers in favor of CPG and CPG's retail customers; (2) failing to set UGI Storage's market-based rate proposal for evidentiary hearing and by failing to reconcile certain factual findings as to good alternatives with applicable precedent; (3) failing to apply the correct legal standards to CPG's proposal to abandon its obligation to provide

⁴ 18 C.F.R. § 284.224 (2010). *See North Penn Gas Co.*, 59 FERC ¶ 61,258 (1992) (*North Penn Order*). None of CPG's pipeline transportation or distribution facilities will be included in the transfer to UGI Storage; those facilities remain non-jurisdictional, subject to Pa PUC regulation.

⁵ With the exception of Atlanta Gas, Transco provides service to the SS-1 Customers under its Part 284 open-access blanket certificate. Atlanta Gas, however, takes service from Transco under a case-specific NGA section 7 certificate. Concurrently with this order, the Commission is issuing an order in Docket No. CP11-4-000 granting Transco's application to abandon the natural gas storage service and related firm transportation service it provides to Atlanta Gas under that certificate. *See Transcontinental Gas Pipe Line Co., LLC*, 134 FERC ¶ 61,238 (2011).

⁶ October 21 Order, 133 FERC ¶ 61,073 at Ordering Paragraph (E).

storage service under its section 284.224 limited-jurisdiction certificate; (4) not requiring CPG to adhere to its contractual obligations by continuing to provide firm storage service to the SS-1 Customers at cost-based rates approved by the Pa PUC; (5) misapplying the Certificate Policy Statement⁷ by failing to recognize that CPG has existing customers that would be adversely affected by the Applicants' proposals; (6) finding that UGI Storage's market-based storage rate proposal would provide benefits; and (7) finding that the SS-1 Customers' protests to Applicants' open season were moot.

6. In their request for clarification or alternative request for rehearing, UGI Storage and CPG assert that the Commission meant to state the 1,680 psia pressure of the Meeker field as measured at the maximum wellhead pressure, rather than as the bottom hole storage pressure.

II. Additional Background

A. Tioga, Meeker, and Wharton Storage Facilities

7. CPG's interest in the Tioga West storage field is one of the assets that the October 21 Order authorized CPG to abandon by transfer to UGI Storage. Tioga West is part of the Tioga Storage Complex. While partially owned by CPG, Tioga West is already an NGA jurisdictional storage facility operated by Dominion Transmission, Inc. (DTI). CPG's capacity in Tioga West includes 10 Bcf of working gas capacity, 6 Bcf of cushion gas capacity, and 179,000 Mcf/d of peak deliverability.

8. Presently, Transco is CPG's only customer still receiving NGA-jurisdictional storage service under a firm contract. Service under this agreement, which will expire on March 31, 2011, utilizes CPG's storage capacity within the entire Tioga Storage Complex and entitles Transco to approximately 9.2 Bcf of CPG's working gas storage capacity on

⁷ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

a firm basis. As noted above, Transco has used these storage rights to provide firm service for its SS-1 Customers under authority granted in 1987.⁸

B. 1992 Stipulation and Agreement

9. From the 1940s until 1992, CPG's interests in the Tioga, Meeker, and Wharton storage facilities were owned by CPG's predecessor, North Penn, under NGA certificates.⁹ In 1991, North Penn filed an application seeking authority to abandon its certificate authorizations for its facilities and a declaration that it would qualify as an NGA-exempt Hinshaw pipeline.¹⁰ However, North Penn also requested a blanket certificate of limited jurisdiction pursuant to section 284.224 of the Commission's regulations so that it could continue providing interstate services without jeopardizing its new status as an otherwise non-jurisdictional Hinshaw pipeline.¹¹ At the time, North Penn's predominant NGA-jurisdictional services were storage services, including storage service to Transco pursuant to a service agreement between North Penn and

⁸ See *Transcontinental Gas Pipe Line Corp.*, 40 FERC ¶ 61,185 (1987), *reh'g denied*, 42 FERC ¶ 61,354 (1988).

⁹ *New York State Natural Gas Corp.*, 3 FPC 844 (1942) (Commission order granting certificate to DTI's predecessor); *North Penn Gas Co.*, 3 FPC 936 (1943); and *Allegany Gas Co.*, 3 FPC 943 (1943) (Commission order granting certificate to North Penn's predecessor). On December 31, 2004, North Penn was merged into PPL Gas Utilities, and on October 1, 2008, PPL Gas Utilities was acquired by UGI Corporation and became CPG.

¹⁰ Under section 1(c) of the NGA, known as the Hinshaw amendment, a pipeline that engages in interstate sales or transportation of natural gas is exempt from the provisions of the NGA if it receives all of its gas within or at the boundary of its state, all of the gas is ultimately consumed within that state, and its facilities, rates and services are subject to regulation by a state commission.

¹¹ Obtaining a limited-jurisdiction certificate pursuant to section 284.224 of the Commission's regulations allows a Hinshaw pipeline to provide jurisdictional services involving gas that will leave its state under Commission-approved rates and conditions without jeopardizing its otherwise exempt Hinshaw status. When appropriate, the Commission approves the Hinshaw pipeline's state-approved rates for its jurisdictional NGA services under a section 284.224 certificate.

Transco dated January 23, 1987 (1987 Service Agreement).¹² CPG's and Transco's 1987 Service Agreement provided for service until March 31, 2008.

10. Thereafter, the parties to the North Penn proceeding entered into a Stipulation and Agreement (1992 Stipulation and Agreement). The relevant language of the 1992 Stipulation and Agreement provided that North Penn's rates for the continuing interstate services under the requested certificate of limited jurisdiction would be cost-based, Pa PUC-determined rates:

The Commission may impose the following condition on the approvals described in Section 3.1 herein:

* North Penn's certificate authorization and adjustment is granted provided that North Penn does not use rates greater than the rates approved by the Pennsylvania Public Utility Commission (Pa PUC) for its section 284.224 blanket certificate sales, transportation, and storage of natural gas.

* North Penn shall, within 30 days after the issuance of a final order approving this settlement, file and pursue an application for determination by the Pa PUC that its intrastate transportation and storage rates are cost-based as well as just and reasonable. North Penn shall file with the Commission a copy of the applicable Pa PUC order within 15 days after its issuance.¹³

11. In the *North Penn Order*, the Commission approved North Penn's proposals to transition from a fully NGA-jurisdictional company to a state-regulated Hinshaw pipeline, and approved the 1992 Stipulation and Agreement, including the provisions regarding the establishment of rates for the interstate services that North Penn would continue to provide under the section 284.224 certificate of limited jurisdiction:

Section 2 of article III provides that the Commission may impose the following conditions on these approvals:
(1) North Penn shall not use rates greater than the rates the Pa PUC approved for its section 284.224 blanket certificate sales, transportation, and storage services; and (2) North Penn

¹² In the October 21 Order, the Commission incorrectly stated the date of the 1987 Service Agreement as February 2, 1987. *See* October 21 Order, 133 FERC ¶ 61,073 at P 7.

¹³ 1992 Stipulation and Agreement at 8-9 (attached to Applicants' January 6, 2010 Answer).

shall file and pursue an application for a Pa PUC determination that its intrastate transportation and storage rates are cost-based and just and reasonable. The Commission is requiring North Penn to conform to these requirements, and North Penn shall file with the Commission a copy of the applicable Pa PUC order within 15 days after its issuance, as provided by this article.¹⁴

12. The original term of CPG's and Transco's 1987 Service Agreement, in effect at the time of the 1992 Stipulation and Agreement, ended on March 31, 2008.¹⁵ CPG's predecessor and Transco extended the term in February 2008 for an additional two-year period. Thus, the service agreement would have expired on March 31, 2010, but for a provision in the February 2008 amendment giving Transco a one-time contractual right to further extend the service agreement for at least one more year. In a March 2010 Amendment, Transco exercised that extension right for only one more year, through and including March 31, 2011.¹⁶

13. As stated above, Transco is CPG's only customer still receiving NGA jurisdictional storage service under a firm contract, and that contract terminates by its own terms on March 31, 2011. CPG states that its other contracts for firm storage service under its section 284.224 blanket certificate expired on March 31, 2010.¹⁷

¹⁴ *North Penn Order*, 59 FERC at 61,945 (1992).

¹⁵ The 1987 Service Agreement stated that "[t]his Agreement shall be effective as of the date and year first written above [January 23, 1987] and shall remain in full force and effect until the end of the storage injection-withdrawal cycle that starts twenty (20) years from the date storage services commences hereunder." 1987 Service Agreement at 3. The first injection-withdrawal period began April 1, 1987, and ended March 31, 1988. Thus, the end of the twenty-year service period under the original agreement was March 31, 2008.

¹⁶ See March 10, 2010 letter from Transco to CPG, attached to SS-1 Customer March 31, 2010 Supplement to Protest of Open Season.

¹⁷ CPG November 19, 2009 Application at 4. CPG provides 14.7 Bcf of storage service for the following customers with contracts terminating as follows: (1) Transco's contract for approximately 9.2 Bcf of storage service terminates on March 31, 2011; (2) DTI's contract for approximately 2.7 Bcf of storage service terminated on March 31, 2010; (3) contracts with individual transportation shippers on CPG's distribution system for approximately 0.7 Bcf of storage service terminated on March 31, 2010; and (4) CPG's contracts for approximately 2.1 Bcf of storage service for system needs to meet its obligations to on-system distribution sales customers terminated on March 31, 2010.

C. Pa PUC Proceedings

14. On June 18, 2010, CPG filed a Stipulation before the Pa PUC to address the rate impact of the proposed transfer of assets to UGI Storage on CPG's local distribution services. The Stipulation among CPG, the Office of Trial Staff of the Pa PUC, the Pennsylvania Office of Consumer Advocate, and the Office of Small Business Advocate resolved all outstanding issues concerning CPG's request before the Pa PUC to reduce its base rates for its intrastate services upon Commission approval of the transfer of CPG's storage facilities to UGI Storage in this proceeding. On September 28, 2010, the Pa PUC issued an Opinion and Order finding that CPG's intrastate customers will benefit from CPG's transfer of the storage facilities to UGI Storage.¹⁸

III. Procedural Matters

15. On December 7, 2010, Applicants filed a motion for leave to answer the SS-1 Customers' rehearing request. On December 22, 2010, the SS-1 Customers filed a response to the Applicants' December 7, 2010 filing and a motion for an expedited order by the Commission to grant a stay of the October 21 Order. The Applicants responded on January 6, 2011. On January 28, 2011, the SS-1 Customers filed a request for expedited action on their December 22, 2010 motion for a stay. On March 11, 2011, the SS-1 Customers filed a supplemental protest to open season, and the Applicants responded to the supplemental protest on March 15, 2011.

A. Answers

16. Rule 213 of the Commission's procedural rules provides that an answer may not be made to a request for rehearing unless otherwise ordered.¹⁹ However, Rule 101 of the Commission's procedural rules authorizes the Commission to waive provisions of the procedural rules for good cause.²⁰ The Commission finds such good cause exists in this case because the subsequent pleadings will assist the Commission in resolving the issues raised in the SS-1 Customers' rehearing request.

B. Stay Request

17. UGI Storage held an open season January 17, 2011 through February 16, 2011 to solicit bids for storage service at market-based rates for the storage season April 1, 2011

¹⁸ Pa PUC September 28, 2010 Opinion and Order in Docket No. P-2009-2145774 (Pa PUC 2010 Order) at 13 (attached to Applicants' October 8, 2010 supplemental data response).

¹⁹ 18 C.F.R. § 385.213(a)(2) (2010).

²⁰ 18 C.F.R. § 385.101(e) (2010).

through March 31, 2012. The SS-1 Customers request the Commission stay the effectiveness of its October 21 Order to prevent UGI Storage from awarding capacity to bidders in that open season until the SS-1 Customers have been given the opportunity to exercise a right of first refusal allowing them to match bids for the levels of storage capacity to which they are currently entitled through their SS-1 Storage agreements with Transco. In their stay request, the SS-1 Customers argue that UGI Storage is required to provide Transco or the SS-1 Customers with a right of first refusal, permitting them to obtain from UGI Storage the capacity previously subscribed by Transco from CPG, for the service to commence April 1, 2011. In support, the SS-1 Customers cite language from the UGI Storage application offering the SS-1 Customers rights of first refusal they can exercise by meeting the offers of the highest bidders during UGI Storage's open season for the 2010-2011 storage season.²¹ They assert UGI Storage is still bound by this offer when reviewing bids received in its most recent open season for 2011-2012 storage service. The SS-1 Customers argue they will be irreparably harmed if they are not guaranteed a right of first refusal for the storage capacity.²²

18. The Applicants state the right of first refusal offer described in UGI Storage's November 19, 2009 application was only a transition mechanism, intended to provide the SS-1 Customers continued service should the proposed asset transfer have occurred during the 2010-2011 storage service season, which ends March 31, 2011.²³ While the Commission's October 21 Order provided for the Applicants' authorizations to become effective immediately if UGI Storage reached a mutual agreement with either Transco or the SS-1 Customers for continued service, that did not happen. Under the terms of the October 21 Order, the parties' failure to reach agreement only delays the effective date of the Applicants' authorizations to April 1, 2011. Thus, the Applicants assert the right of first refusal for service only during the 2010-2011 storage service season is irrelevant at this point.²⁴

19. When considering a motion for a stay, the Commission applies the standards set forth in section 705 of the Administrative Procedure Act, which provides as follows:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be

²¹ See UGI Storage Application at 7, 18-19.

²² SS-1 Customers December 22, 2010 Response at 2.

²³ Applicants' January 6, 2011 Answer at 5.

²⁴ *Id.* at 4-7.

taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.²⁵

20. In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.²⁶ The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.²⁷ If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.²⁸

21. The Commission finds no merit in the SS-1 Customers' claim to a right of first refusal and declines to grant the stay requested. As the Commission found in the October 21 Order, the existing contract between CPG and Transco for service to the SS-1 Customers will expire on March 31, 2011.²⁹ The Commission agrees with Applicants that the right of first refusal contemplated in their November 19, 2009 applications was clearly limited to the 2010-2011 storage service cycle. Further, as conditioned by the Commission's October 21 Order, the Applicants' authorization would not become effective until the end of the 2010-2011 storage season on March 31, 2011 unless the parties were able to reach mutual agreement before then.³⁰ The parties failed to reach an

²⁵ 5 U.S.C. § 705 (2006). *See, e.g., Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992); *United Gas Pipe Line Co.*, 42 FERC ¶ 61,388 (1988); *Trinity River Authority of Texas*, 41 FERC ¶ 61,300 (1987); *City of Centralia, Washington*, 41 FERC ¶ 61,028 (1987).

²⁶ *See, e.g., CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,631 (1991) (*CMS Midland*), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993); *NE Hub Partners, L.P.*, 85 FERC ¶ 61,105 (1998); *Boston Edison Co.*, 81 FERC ¶ 61,102 (1997).

²⁷ *CMS Midland*, 56 FERC at 61,630-31. *See also Sea Robin Pipeline Company*, 92 FERC ¶ 61,217 (2000).

²⁸ *CMS Midland*, 56 FERC at 61,631.

²⁹ October 21 Order, 133 FERC ¶ 61,073 at P 40.

³⁰ *Id.* P 41-42.

agreement. Therefore, the certificate authority granted by the October 21 Order will not be effective until April 1, 2011.

22. Further, when a storage company is authorized to charge market-based rates, there is no “maximum” rate as contemplated by the right of first refusal provisions in section 284.221(d), *Pre-grant of abandonment*. While gas storage providers with market-based rate authority may voluntarily negotiate a right of first refusal with their customers, neither the Commission’s regulations nor its policies require market-based rate storage providers to offer their customers a right of first refusal.³¹

23. Further, having found that the SS-1 Customers have no right of first refusal in UGI Storage’s most recent open season, the Commission need not consider whether its denial of the SS-1 Customers’ stay request might cause them irreparable harm if they had such a right of first refusal. On the other hand, granting a stay now could interfere with the results of the open season UGI Storage held January 17, 2011 through February 16, 2011 for the coming 2011-2012 storage season and prevent UGI Storage and other customers from realizing the benefits of their agreements resulting from the open season. Accordingly, the Commission finds that granting a stay would not serve the public interest.

IV. SS-1 Customers’ Request for Rehearing

24. In their rehearing request, the SS-1 Customers raise seven issues. The Commission will consider each issue in turn.

A. Undue Discrimination Argument

25. The SS-1 Customers argue that the October 21 Order unduly discriminates against the SS-1 Customers in favor of CPG and CPG’s customers. The SS-1 Customers argue the Commission should have treated UGI Storage and CPG as a single entity for purposes of evaluating the applications. Viewed this way, the SS-1 Customers characterize the October 21 Order as allowing Applicants to charge market-based storage rates to some customers but not all.

26. The Commission finds the SS-1 Customers’ allegations of undue discrimination in favor of CPG and its customers to be baseless. The SS-1 Customers complain of the rate concessions that CPG, a non-jurisdictional local distribution company, has agreed to, and the Pa PUC has approved, with respect to its non-jurisdictional services. CPG’s rates are regulated by the Pa PUC and UGI Storage’s rates are regulated by the Commission. The

³¹ See, e.g., *Monroe Gas Storage Col, LLC*, 121 FERC ¶ 61,285, at P 63-64 (2007); *MoBay Storage Hub*, 117 FERC ¶ 61,298, at P 52 (2006); *Egan Hub Storage, LLC*, 116 FERC ¶ 61,174, at P 10 (2006); and *Unocal Windy Hill Gas Storage, LLC*, 115 FERC ¶ 61,218, at P 49 (2006).

fact that the two regulatory agencies do not regulate these companies' rates in the same manner does not mean that any customers are being unduly discriminated against. As discussed elsewhere, the Commission has determined that there are adequate assurances that UGI Storage's market-based storage rates will be just and reasonable, which fulfills the Commission's obligations under the NGA.

27. Nor does the Commission find that the SS-1 Customers have supported any claim of undue discrimination because CPG will have a right of first refusal for service following the upcoming 2011-2012 storage season. UGI Storage's open season brochure stated that *all* winning bidders for service during the 2011-2012 storage season would have a right of first refusal. CPG was a winning bidder, and there is no evidence it received any rights not available to the other winning bidders for service after March 31, 2012.

28. The Commission accepts that the SS-1 Customers would have preferred to maintain the status quo under which Transco has been paying CPG cost-based rates, and Transco, in turn, has been providing storage service at cost-based rates to the SS-1 Customers. The Commission also recognizes that UGI Storage's authorization to charge market-based rates for storage capacity may impact the SS-1 Customers, should they contract for storage service from UGI Storage.

29. However, the October 21 Order found that CPG's decision to create a new affiliate to acquire its storage capacity assets and operate them as NGA jurisdictional facilities was fully consistent with the fact that most of this capacity has been used for many years to provide jurisdictional interstate services.³² The result of the October 21 Order is that UGI Storage and the subject storage capacity are fully jurisdictional under the NGA.

30. The Commission's regulations and policies prohibit undue discrimination by interstate companies in the rates they charge to their customers. However, another important goal of the Commission's pricing policies, as discussed in the October 21 Order, is to promote the efficient allocation of pipeline and storage capacity.³³ Therefore, so long as there is adequate assurance that a company is not in a position to exercise market power, the Commission believes that capacity should go to the customers willing to pay the most for it.³⁴ When a company lacks market power, competition will ensure that market-based storage rates are just and reasonable.³⁵ In the October 21 Order, the Commission found both that UGI Storage will lack market power and that the current cost-based pricing of the subject storage capacity might be preventing

³² October 21 Order, 133 FERC ¶ 61,073 at P 45.

³³ *Id.* P 46.

³⁴ *Id.*

³⁵ *Id.* n.39.

efficient allocation of the capacity by allowing current subscribers to hold on to the capacity at less than its market value and thus preventing other customers that would place a higher value on the capacity from obtaining it.³⁶

B. Request for Evidentiary Hearing on Market-Based Storage Rate Proposal and Reconciliation of Precedent Regarding Good Alternatives

31. The SS-1 Customers argue the Commission erred by failing to set UGI Storage's market-based storage rate proposal for an evidentiary hearing before an Administrative Law Judge (ALJ) and by failing to reconcile certain factual findings as to good alternatives with applicable precedent. Citing *Cajun Electric Power Cooperative, Inc. v. FERC*,³⁷ the SS-1 Customers stress that the Commission must conduct an evidentiary hearing before an ALJ whenever genuine issues of material fact exist.

32. Citing *Koch Gateway Pipeline Co.*, an order from 1998, the SS-1 Customers also argue that the October 21 Order's finding that storage facilities in the Pennsylvania and New York geographic market area can be good alternatives, even if presently fully subscribed, is inconsistent with the Commission's statement in that order that "[t]o determine available capacity, it is necessary to know whether there is unsubscribed capacity on the alleged alternatives."³⁸ The SS-1 Customers point out that the fact that capacity can be released does not mean that it has been or will be released.³⁹

33. The SS-1 Customers also rely on the statement in the Commission's Alternative Rate Policy Statement⁴⁰ that an existing company has market power if it can raise its prices by 10 percent or more above its maximum approved cost-based rate for a sustained

³⁶ *Id.* P 46.

³⁷ 28 F.3d 173 (D.C. Cir. 1994) (*Cajun*).

³⁸ *Koch Gateway Pipeline Co.*, 85 FERC ¶ 61,013, at 61,042 (1998), *order on reh'g*, 89 FERC ¶ 61,046 (1999) (*Koch Gateway*).

³⁹ SS-1 Customers Request for Rehearing at 23.

⁴⁰ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines* (Alternative Rate Policy Statement), 74 FERC ¶ 61,076, at 61,232 (1996), *reh'g and clarification denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998); *criteria modified, Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, Order No. 678-A, *order on clarification and reh'g*, 117 FERC ¶ 61,190 (2006) (Order No. 678).

period without losing significant market share.⁴¹ For purposes of this test, the SS-1 Customers assert that the only appropriate comparison is one of UGI Storage's rates to CPG's rates. The SS-1 Customers allege that bids during UGI Storage's open season for the 2010-2011 storage season were much higher than CPG's existing cost-based rates for the same storage capacity, between 300 and 500 percent higher by the SS-1 Customers' estimation.⁴²

34. The SS-1 Customers also contend that very different circumstances were involved in the cases cited by the Commission in the October 21 Order, where it has also granted market-based rate authority to storage operators in the Pennsylvania and New York geographic area.⁴³ First, the SS-1 Customers assert that no party in any of those cases presented a meaningful challenge to the applicants' factual support for their claims that they lack market power.⁴⁴ Second, the SS-1 Customers emphasize that those cases involved construction of new storage facilities to add needed gas infrastructure, whereas this case involves existing storage capacity that is already serving the interstate market.⁴⁵

35. The Commission found in the October 21 Order that UGI Storage met the standards under the Alternative Rate Policy Statement, specifically finding: (1) the New York and Pennsylvania market is competitive with good alternatives; (2) there is ease of entry into the market; (3) UGI Storage cannot exercise market power with a small market share in the storage market of 3.2 percent for working gas and 4.2 percent for daily deliverability; and (4) UGI Storage's two largest competitors, DTI and National Fuel Gas Supply Corp. (National Fuel), respectively controlling 41 and 12 percent of the market, are cost-based rate storage providers with rates approved by the Commission.⁴⁶

⁴¹ In the Alternative Rate Policy Statement, the Commission concluded that when an existing company can increase its rates by 10 percent or more above its maximum approved cost-based rate for a sustained period without losing significant market share, the company is in a position to exercise market power to the detriment of the public interest if allowed to change from cost-based rates to market-based rates. The Commission explained, however, that its adoption of this 10 percent threshold as a general policy would not preclude parties in particular proceedings from making arguments for either higher or lower thresholds based on circumstances. Alternative Rate Policy Statement, 74 FERC at 61,232.

⁴² SS-1 Customers Request for Rehearing at 25.

⁴³ October 21 Order, 133 FERC ¶ 61,073 at n.81.

⁴⁴ SS-1 Customers November 22, 2010 Rehearing Request at 27.

⁴⁵ *Id.*

⁴⁶ October 21 Order, 133 FERC ¶ 61,073 at P 80-85.

Further, the Commission revised its policy for market-based storage rates in Order No. 678,⁴⁷ expanding the alternatives to storage service to include: (1) local gas supply; (2) liquefied natural gas (LNG); (3) financial instruments; and (4) pipeline capacity.⁴⁸ The Commission's regulations require that an applicant for market-based rate authority demonstrate that it lacks market power because customers have good alternatives, which are defined as an alternative that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for the applicant's service.⁴⁹

36. The SS-1 Customers' interpretation of *Cajun* is overbroad, as that case does not support the proposition that a trial-type evidentiary hearing must be conducted even when the Commission does not agree that the issues raised are material issues of fact or has found that the existing written record is sufficient for it to resolve any material issues of fact.⁵⁰ The Commission does not dispute the SS-1 Customers' factual arguments that UGI Storage may be able to price the subject storage capacity higher than CPG currently prices it; however, current market conditions may change, and the Commission does not take it as a fact that UGI Storage's market-rate will always be higher than CPG's existing cost-based rate. There is no need for discovery and cross-examination before the Commission to address the SS-1 Customers' arguments regarding whether the October 21 Order's findings were consistent with Commission precedent and policy.

37. The Commission does not agree with the SS-1 Customers' view that Commission precedent dictates denial of UGI Storage's request for market-based storage rate authority based on a comparison of the bids received by UGI Storage during its open season to the cost-based rates that CPG is currently allowed to charge. The SS-1 Customers are correct that the Commission concluded in both the Alternative Rate Policy Statement and in *Koch Gateway* that an existing company has market power if there are insufficient alternatives available at reasonable rates to prevent the company, if granted market-based rate authority, from increasing its rates to 10 percent or more above its current maximum cost-based rates for a sustained period without losing significant market share.⁵¹ However, when the Alternative Rate Policy Statement and *Koch Gateway* were issued,

⁴⁷ Order No. 678, FERC Stats. & Regs. ¶ 31,220.

⁴⁸ See 18 C.F.R. § 284.503(b)(4) (2010).

⁴⁹ See Alternative Rate Policy Statement, 74 FERC at 61,231.

⁵⁰ *Northern Natural Gas Co.*, 131 FERC ¶ 61,209, at P 14 (2010), and *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

⁵¹ If an applicant's competitors are providing service at rates 10 percent or more above the applicant's cost-based rate, then, presumably, the applicant too, would be able to command such a rate.

virtually all interstate natural gas companies were charging cost-based rates for storage and the Commission had not yet authorized the numerous new storage projects (virtually all operated by independent storage providers) for which it has granted market-based rate authority in recent years. The Commission has not required these companies to demonstrate that alternatives are available at what would be their cost-based rates, if calculated. Indeed, since issuance of the Alternative Rate Policy Statement and *Koch Gateway*, the Commission has not required any applicant for market-based storage rate authority to demonstrate that alternatives are available at the applicant's existing embedded cost-based rate.

38. Thus, Commission current precedent does not require an analysis of whether UGI Storage will have market power based on the 10 percent threshold test discussed in the Alternative Rate Policy State and the cited *Koch Gateway*. As explained below, subsequent court opinions and current Commission precedent make clear that the relevant inquiry is whether a company can raise its rates above the competitive level without losing substantial business. In any event, for the reasons discussed below, the Commission does not believe a comparison of CPG's existing cost-based rates to the bids received by UGI Storage provides a good basis for determining whether granting UGI Storage market-based rate authority is in the public interest.

39. The Commission recognizes, as emphasized by the SS-1 Customers, that the storage capacity at issue here is existing capacity already being used for interstate service. Therefore, market-based storage rate authority for UGI Storage will not provide a needed incentive for new interstate infrastructure. However, under the circumstances of this proceeding, the Commission does not believe the fact that UGI Storage will be using existing capacity is an appropriate basis for denying its request for market-based rate storage authority or for limiting it to charging rates that are no more than 10 percent higher than CPG's current rates. As discussed in the October 21 Order, the subject storage capacity has been used for many years to provide interstate services by North Penn, a fully jurisdictional company, and more recently by CPG under a certificate of limited jurisdiction. The rates charged by CPG and its predecessor for interstate service utilizing these storage fields from 1942 to the present have always been subject to the Commission's approval. There was never any reasonable basis to support an expectation that the Commission would require in perpetuity that the rates for the interstate services using the subject storage capacity be based on cost-based rates approved by the Pa PUC.⁵² The SS-1 Customers have fully realized the benefits of their bargain in the 1992 Stipulation and Agreement during the term of the original contract pursuant to which the subject capacity has been used by Transco to provide service for the SS-1 Customers. Further, a competitive New York/Pennsylvania market with both cost-based and market-based storage providers will achieve allocative efficiency by sending more accurate price signals to storage customers, a motive for using a

⁵² October 21 Order, 133 FERC ¶ 61,073 at P 35 and 39.

competitive rate benchmark rather than the existing cost-of-service rate. The Commission has found that the goal of efficient allocation of capacity in the future will be promoted by allowing any customers that place a higher value on the capacity to secure that capacity by outbidding other potential customers.⁵³

40. By itself, the fact that the bids UGI Storage received during its open seasons were higher than CPG's Pa PUC-approved rates may only be confirmation that the subject capacity is currently being priced under market value, not that UGI Storage will have market power. Thus, even if the Commission were to adopt the SS-1 Customers' position that UGI Storage should be treated like an existing storage company charging cost-based rates, the Commission would not deny UGI Storage's request for market-based rate authority based solely on whether it will be able to charge rates higher than CPG's current rates.

41. UGI Storage submitted a market power study and the Commission found that it demonstrates that UGI Storage will not be able to exercise market power. UGI Storage also has met the policy set forth in Order No. 678,⁵⁴ issued in 2006. In Order No. 678, the Commission cited the court's recognition in *Elizabethtown Gas Co. v. FERC*⁵⁵ that competition can prevent a company from raising its charges above the "competitive level" without losing substantial business. Depending on the market, competitive prices may well be more than 10 percent higher than what the embedded cost-based rates of an applicant would be. In such cases, an absolute 10-percent threshold could prevent the market from being more competitive. Moreover, in cases where applicants requesting market-based rate authority have been able to demonstrate lack of market power, the Commission has granted waivers of the regulations' requirement that applicants file the cost-related information that would have been needed to calculate cost-based rates.⁵⁶

42. Regarding the inclusion of subscribed capacity as an alternative for purposes of the market power analysis, the Commission does not believe that its statement in the 1998 *Koch Gateway* order that "[t]o determine available capacity, it is necessary to know

⁵³ Alternative Rate Policy Statement, 74 FERC at 61,229.

⁵⁴ Order No. 678, FERC Stats. & Regs. ¶ 31,220.

⁵⁵ 10 F.3d 866, 871 (D.C. Cir. 1993).

⁵⁶ See, e.g., *Steckman Ridge, LP*, 123 FERC ¶ 61,248, at P 42 (2008); *Port Barre Investments, L.L.C. d/b/a Bobcat Gas Storage*, 116 FERC ¶ 61,052, at P 33 (2006); *SG Resources Mississippi, L.L.C.*, 101 FERC ¶ 61,029, at P 26 (2002); and *Egan Hub Partners, L.P.*, 95 FERC ¶ 61,395, at 62,473 (2001) and 99 FERC ¶ 61,269, at 62,142 (2002).

whether there is unsubscribed capacity on the alleged alternatives,”⁵⁷ barred it from deciding in the October 21 Order in this proceeding that it was appropriate to include subscribed storage capacity in the Pennsylvania and New York geographic market area in the analysis of whether good alternatives exist to restrain UGI Storage’s market-based rates. While the Commission does not dispute the SS-1 Customers’ observation that the fact that subscribed capacity *can* be released does not guarantee it *will* be released, the fact is that subscribed capacity *is* being released.⁵⁸ As noted below, DTI, the largest storage provider in the New York and Pennsylvania market area, indicated in its semi-annual storage report for the 2009/2010 winter heating season that it released 24 Bcf of seasonal withdrawal capacity. This represents over 16 percent of DTI’s seasonal withdrawal of storage capacity and is nearly double CPG’s 14.7 Bcf of working gas storage and approximately three times the approximately 9.2 Bcf of storage capacity subscribed by the SS-1 Customers. Furthermore, regardless of how much subscribed capacity is available as the result of releases at any given time, there are other factors at work to maintain UGI Storage rates at competitive levels.

43. Currently, there is significant development of gas production in New York and Pennsylvania. This local area production can provide a substitute for storage capacity and service. Therefore, the Commission found in its October 21 Order that it was appropriate to include local production in the market-power analysis.⁵⁹ Including local production for purposes of the summary measures of market concentration known as the Herfindahl-Hirschman Indices (HHI) yielded HHIs well below 1,800, the threshold below which one can generally conclude that customers have sufficiently diverse sources of supply in a market such that no one company or group of companies acting together can profitably raise market prices. When local production is included in the sources of supply, UGI Storage’s market share of working gas capacity is only 2.1 percent and its market share of peak day deliverability is only 3.6 percent.⁶⁰ Further, in the October 21 Order, the Commission found that including local production in

⁵⁷ *Koch Gateway*, 85 FERC ¶ 61,013 at 61,042 (1998), *order on reh’g*, 89 FERC ¶ 61,046 (1999).

⁵⁸ The Commission notes, while the SS-1 Customers provide no support for the argument that the amount of released capacity available at any time is too speculative to allow subscribed capacity to be included for purposes of market power analyses, the Applicants have provided testimony that capacity release is an important factor in creating a competitive market. *See* Application, Kelly Beaver Testimony at 4.

⁵⁹ October 21 Order, 133 FERC ¶ 61,073 at P 81.

⁶⁰ *Id.*

UGI Storage's market power study revealed an HHI of 1,167 for working gas capacity and 1,620 for peak day deliverability.⁶¹

44. The Commission notes that the relevant New York and Pennsylvania geographic market contains the Marcellus Shale area and is one of the fastest growing production areas in the United States. In its application, UGI Storage relied on 2007 and 2008 production data reporting total annual production of 231,738 MMcf for the New York and Pennsylvania market.⁶² The annual production data in UGI Storage's market power study does not reflect the substantial increase in production in the New York and Pennsylvania market that has occurred subsequent to 2008. Based upon current data, production has increased to 2,211,893 Mcf per day,⁶³ over three times the level reflected in UGI Storage's production data. Such a significant increase in production results in greater competition, further reducing the HHI numbers and UGI Storage's market share for working gas capacity and peak day deliverability. The October 21 Order found that UGI Storage operates in a highly competitive market,⁶⁴ and the recent substantial increase in production⁶⁵ supports the Commission's finding that UGI Storage will be

⁶¹ *Id.* P 97.

⁶² UGI Storage derived its local production supply based on Energy Information Administration's (EIA) "Natural Gas Gross Withdrawals and Production," May 29, 2009. According to the EIA, for 2007, New York and Pennsylvania had annual production of 54,942 MMcf and 181,418 MMcf, respectively, for a total annual production of 236,360 MMcf. UGI Storage then adjusted the annual production for New York to 50,320 MMcf based upon the New York State Department of Environmental Conservation, "DEC Reports: Natural Gas Production Dips Slightly in 2008," July 6, 2009. With the adjustment for New York production, UGI Storage projected total annual production in the relevant geographic market to be annual production of 231,738 MMcf, which is equivalent to 0.638 Bcf of production per day. *See* UGI Storage Application, Kelly Beaver Testimony at 9.

⁶³ Bentek Energy Northeast Production Monitor (Daily Model Report as of 2/28/11) reports 2,211,893 Mcf per day of production in the New York and Pennsylvania market. The production market consists of: (1) Appalachian-NY with 45,778 Mcf per day; (2) Appalachian-PA North with 1,640,720 Mcf per day; and (3) Appalachian PA-South with 525,395 Mcf per day. The daily production of 2,211,893 Mcf per day as of February 28, 2011, for the New York and Pennsylvania geographic market is equal to 2.2 Bcf per day.

⁶⁴ October 21 Order, 133 FERC ¶ 61,073 at P 81.

⁶⁵ Bentek Energy Northeast Production Monitor (Daily Model Market Report as of 2/28/11) reports that the local production increased 170 percent in the past year, rising from an average of 1.35 Bcf per day as of March 1, 2010, to the current daily average

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unable to exert market power and that market-based rates for its storage services are appropriate.

45. As noted above and discussed in the October 21 Order, the two largest storage providers in the market area, DTI and National Fuel, providing service at Commission approved cost-based rates, with market shares of 41 and 12 percent, respectively, are regulated by the Commission. Their storage capacity is subject to the Commission's capacity release requirements, and their rates are cost-based. In fact, 89 percent of the storage capacity in the New York/Pennsylvania market is operated by cost-based storage providers with rates regulated by the Commission; market-based rate storage providers account for only 11 percent of the market.⁶⁶ The October 21 Order also found that there is ease of entry into the New York-Pennsylvania market as evidenced by the number of new entrants since 1994. In fact, since 1994, the HHI index in that market has decreased by more than 50 percent, demonstrating that the market is able to respond efficiently to competitive demand for additional capacity.⁶⁷

46. The demonstrated ease of entry by new storage projects shows that the market will be able to respond quickly with the construction of additional infrastructure in the event market conditions develop to make capacity critically tight at some point. This ease of market entry would limit the ability of UGI Storage and other storage operators with market-based rate authority to demand significantly increased rates over a long period for any of their capacity not already subject to long-term contracts at previously agreed upon rates. In any event, regardless of market conditions, UGI Storage's pricing of its 2.1 percent share of working gas capacity and 3.6 percent share of peak day deliverability should not significantly influence market prices.

47. In view of the above considerations, the Commission affirms its finding that UGI Storage will be unable to exercise market power in the competitive New York and Pennsylvania market. Therefore, the Commission declines to reverse its decision to grant UGI Storage's request for market-based storage rate authority.⁶⁸ As noted in the

of 2.21 Bcf as of February 28, 2011. In addition, Bentek Energy, LLC provided on March 11, 2011, the latest estimates projection for Marcellus Shale production in Pennsylvania to increase from the 2010 data, another 25 percent in 2011 and 70 percent between 2011 and 2015.

⁶⁶ See UGI Storage Application, Bishop Testimony, Attachment A-1 and UGI Storage February 16, 2010 Data Response, Attachment 1 to Transportation and Rate Data Request No. 1.

⁶⁷ October 21 Order, 133 FERC ¶ 61,073 at P 81.

⁶⁸ As a fully jurisdictional interstate storage provider, UGI Storage will be required to comply with the requirements in section 284.13(b) of the Commission's regulations, which requires the posting of the rates charged in each storage transaction. Such

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October 21 Order, while the Commission has received no complaints regarding any of the market-based rate storage companies in the New York and Pennsylvania market area and the national storage markets, customers can file a complaint any time they believe a company is exercising market power to extract excessive rates.⁶⁹ In the event such a complaint is received, it will be investigated. In the event problems are identified, the Commission will be able to take any appropriate action, including revoking a company's market-based rate authority and requiring it to implement cost-based rates.

C. Abandonment of Section 284.224 Blanket Certificate

48. The SS-1 Customers argue the Commission erred by failing to apply the correct legal standards to CPG's proposal to abandon its section 284.224 certificate authority to provide storage service. The SS-1 Customers make clear that their argument is not directed just at CPG's abandonment of its current service to Transco, but rather to "CPG's request to abandon its obligation to provide firm storage service on a non-discriminatory basis under a section 284.224 certificate in accordance with open access principles required by Part 284 of the Commission's regulations."⁷⁰

49. The Applicants respond by pointing out that, unlike certificates granted to interstate pipelines, the limited jurisdiction section 284.224 certificate applies only to the interstate services authorized under the certificate, not to the facilities used to provide the services. Applicants further state that accepting the limited jurisdiction section 284.224 certificate placed CPG under no obligation to provide firm service to the interstate market and that CPG could have unilaterally chosen to no longer provide any interstate services and to provide service solely to the intrastate market regulated by the Pa PUC.⁷¹ By choosing to file their application in these proceedings and accepting the authorizations granted by the Commission's October 21 Order, the Applicants emphasize that they have voluntarily made the subject facilities themselves fully NGA jurisdictional, which will better enable the Commission to insure that services rendered by the facilities are provided at just and reasonable rates and in full accord with the Commission's open-access policies.

measures will enable the Commission and shippers to promote competition through price transparency by monitoring market-based transactions for undue discrimination and preference. The requirement that UGI Storage report price information will permit shippers to compare storage costs at various facilities and make informed decisions to determine the most economical means of receiving storage service.

⁶⁹ October 21, 2010 Order, 133 FERC ¶ 61,073 at P 140. *See* 18 C.F.R. § 385.206 (2010).

⁷⁰ SS-1 Customer Request for Rehearing at 29.

⁷¹ Applicants December 22, 2010 Answer at 19.

50. In evaluating the arguments of the SS-1 Customers, the Commission begins with two fundamental points. First, while the Commission grants abandonment authority to CPG in this case, the Commission has simultaneously granted UGI Storage an NGA section 7 certificate to continue service using the subject facilities for the interstate market. Thus, the SS-1 Customers and other participants in the interstate market can continue to use the facilities to meet their needs. Second, the SS-1 Customers, and all other customers of jurisdictional interstate pipeline companies, are entitled to a just and reasonable rate. As a matter of law, a market-based storage rate is a just and reasonable rate.⁷² Contrary to their assumptions, neither Transco nor the SS-1 Customers are guaranteed continued service at the same rates and under the same terms and conditions after Transco's current contract expires on March 31, 2011.

51. The SS-1 Customers state that the Commission erred by failing to consider the fact that CPG's service to Transco was used by Transco to provide storage and transportation service to the SS-1 Customers.⁷³ However, this argument ignores the fact that the facilities are still available to them at just and reasonable rates as direct customers of UGI Storage paying market-based storage rates.

52. The SS-1 Customers assert that they were not put on notice in the proceedings culminating in the *North Penn Order* that customers would be giving up their abandonment protection as the result of CPG's predecessor, North Penn, switching from being fully jurisdictional to a Hinshaw pipeline providing interstate services under a 284.224 blanket certificate.⁷⁴ However, the pleadings filed by Transco in the North Penn proceeding make clear that there were consequences to North Penn changing from a fully jurisdictional company subject to all of the Commission's regulations to an otherwise non-jurisdictional company providing some interstate services under the limited jurisdiction section 284.224 certificate.⁷⁵ Transco requested in that proceeding that the Commission condition North Penn's limited jurisdiction certificate to require that North Penn offer Transco and its other interstate service customers a right of first refusal.⁷⁶ Transco explained that absent a right of first refusal, North Penn would have pregranted abandonment authority; however, Transco later withdrew the request, explaining that it had worked out an agreement in principle with North Penn.⁷⁷ That

⁷² See *Elizabethtown*, 10 F.3d at 871.

⁷³ SS-1 Customer November 22, 2010 Request for Rehearing at 32.

⁷⁴ *Id.* at 5-6.

⁷⁵ See Transco May 11, 1992 Supplemental Comments.

⁷⁶ *Id.* at 3.

⁷⁷ Transco May 14, 1992 Pleading at 2.

agreement in principle resulted in the present amended contracts that expire on March 31, 2011. However, in any event, no customer of an interstate pipeline has an absolute guarantee that its service will never be abandoned. Rather, it has assurance that any such abandonment cannot be accomplished without prior authorization by the Commission. CPG sought, and is granted such authorization in this proceeding.

53. Eighty percent of the capacity of the storage facilities at issue in this case is already being used to serve the interstate market.⁷⁸ UGI Storage's acquisition of the facilities will ensure that they continue to serve the interstate market. While some of the SS-1 Customers may conclude that, at market-based storage rates, UGI Storage's capacity is no longer the most economical choice for them, it is not the case that the Commission's October 21 Order reduces the availability of that capacity to the interstate market at just and reasonable rates. In addition, the Commission rejects the SS-1 Customers' arguments that they cannot find the proposed abandonment to be permitted by the public convenience and necessity in light of the 1992 Stipulation and Agreement's condition regarding the continued provision of services at a Pa PUC cost-based rate.

D. Improper Abrogation of Stipulation and Agreement between North Penn and the SS-1 Customers

54. On rehearing, the SS-1 Customers renew their argument that the Commission erred by failing to require CPG to adhere to its contract obligations to provide firm storage service to the SS-1 Customers at Pa PUC approved, cost-based rates.⁷⁹ The SS-1 Customers disclaim the argument that the SS-1 Customers have a right to service at Pa PUC-approved cost-based rates in perpetuity, but they still maintain that CPG's contractual obligation has not yet ended and that the Commission erred by failing to require that CPG adhere to that contractual obligation by continuing service at cost-based rates until such time as the Commission finds that the commitment is "seriously harming the public interest."

55. The SS-1 Customers' argument continues to ignore the lack of a time frame specified in the 1992 Stipulation and Agreement and that a reasonable determination of how long the parties' obligations continue thereunder is that such obligations coincide with the terms of the service agreements in effect at the time the 1992 Stipulation and Agreement was reached. Therefore, the Commission affirms its finding that CPG's obligation under the 1992 Stipulation and Agreement to ensure continuation of service at cost-based rates is reasonably interpreted as terminating simultaneously with the expiration of the underlying service agreements in existence at the time. Further, as the

⁷⁸ October 21 Order, 133 FERC ¶ 61,073 at P 10.

⁷⁹ SS-1 Customer November 11, 2010 Request for Rehearing at 33-35.

Commission observed in the October 21 Order,⁸⁰ it would not have knowingly approved a settlement to continue to be binding indefinitely, regardless of the expiration of the underlying contracts and regardless of changes in Commission policy and circumstances over the years. The SS-1 Customers provide no counter argument on this point, and the Commission finds no grounds for stretching the 1992 Stipulation and Agreement as far as the SS-1 Customers would have the Commission take it.

56. In response to the Commission's finding regarding the optional nature of the cost-based rate condition specified in the 1992 Stipulation and Agreement, the SS-1 Customers argue the Commission disregards the plain language and stated intent of the parties. Notwithstanding the use of the optional "may" in the 1992 Stipulation and Agreement's provision that the Commission "may impose the following condition . . . that North Penn does not use rates greater than the rates approved by the Pennsylvania Public Utility Commission," the SS-1 Customers argue there is a clear expression of intent by the parties to be bound by an agreement that rates for interstate services provided by North Penn under its limited jurisdiction certificate would be Pa PUC-approved rates.⁸¹ The SS-1 Customers further argue that this agreement by the parties was an essential element of the bargain, and that the Commission therefore should ignore the word "may."

57. The Commission finds the SS-1 Customers' interpretation is at odds with the meaning of the word "may." Moreover, since the Commission did not require any modifications that would affect the parties' agreement that Pa PUC-approved rates would apply to North Penn's interstate services, there is no way to know whether the agreement regarding Pa PUC approved cost-based rates was an essential element of the bargain which, if modified by the Commission, would cause the entire settlement agreement to fall apart. In any event, even if all the parties agreed that Pa PUC approved cost-based rates were an essential part of their bargain, the Commission does not need to rely on the optional nature of the "may" to exercise its discretion by finding that the public interest does not require that UGI Storage charge cost-based rates going forward for the subject storage capacity.

E. Improper Application of Certificate Policy Statement

58. The SS-1 Customers also argue the Commission misapplied the Certificate Policy Statement by failing to recognize that CPG has existing customers that would be

⁸⁰ October 21 Order, 133 FERC ¶ 61,073 at P 35.

⁸¹ 1992 Stipulation and Agreement at 8-9 (attached to Applicants' January 6, 2010 Answer).

adversely affected by the Applicants' proposals. The SS-1 Customers also state that they will be required to subsidize other customers, i.e., the customers of CPG.⁸²

59. The SS-1 Customers continue to assert that the threat of higher prices is an adverse effect that outweighs any potential benefits of the Applicants' proposals. The Commission does not agree. While the Commission has considered the SS-1 Customers' price concerns in balancing the overall public interest under the Certificate Policy Statement, the Commission finds that those concerns do not outweigh the potential benefits resulting from the Commission's approving the transfer of CPG's storage assets to UGI Storage. Moreover, the fact that the SS-1 Customers may have to pay higher rates for storage service is not germane to questions of whether UGI Storage will have market power or whether competition can be relied upon to restrain its rates to just and reasonable levels if it is granted market-based rate authority.

60. Finally, the Commission rejects the SS-1 Customers' proposition that allowing UGI Storage to charge market-based rates will result in UGI Storage's customers subsidizing CPG's customers. The SS-1 Customers do not explain precisely how they believe they and UGI Storage's other customers will subsidize CPG's customers. In order for there to be such subsidization, a portion of the costs associated with UGI Storage's service to CPG would need to be shifted to UGI Storage's other customers. However all of UGI Storage's customers, including CPG, will be paying market-based rates. Thus, there does not appear to be any possibility for subsidization.

F. Benefits of Converting the Storage Facilities to NGA Jurisdictional Facilities

61. The SS-1 Customers argue the Commission erred by finding that UGI Storage's market-based rate proposal will provide benefits. They state that because they take service from Transco, they already enjoy benefits such as capacity release rights, intra-day nominations, and a right of first refusal.

62. The Commission takes a broader view than the SS-1 Customers do of the benefits that will derive from certificating the subject facilities and capacity under the NGA, thereby making all of the terms and conditions of services using that capacity subject to the Commission's jurisdiction. Under the terms of the limited jurisdiction certificate CPG holds pursuant to section 7 of the NGA and section 284.224 of the regulations, it has only been subject to the rate and reporting requirements in the Commission's Part 284, subpart C regulations, which also apply to intrastate pipelines. While the SS-1 Customers say CPG's ownership and operation of the subject capacity has not prevented the SS-1 Customers from enjoying the benefits of fully jurisdictional service as customers of Transco, so long as the facilities are owned by CPG, the Commission is not in a

⁸² SS-1 Customers November 11, 2010 Rehearing Request at 36.

position to ensure that those facilities will continue to be made available on an open-access basis to all potential customers seeking interstate service. Further, the Commission's application of the NGA and Part 284 of the Commission's regulations over these facilities will ensure that all customers will have the benefit and protection of the Commission's open-access policies and regulations.

G. Finding the Open Season Protest Moot

63. Finally, the SS-1 Customers argue the Commission erred in finding that the protests to the 2010-2011 open season were moot.⁸³ The SS-1 Customers say that the participation of a UGI Storage affiliate, UGI Energy Services Inc. (UGI Services), in the open season drove up the market rate, resulting in an unduly discriminatory rate structure.⁸⁴ The SS-1 Customers state the Commission should discard bids by affiliates of the Applicants when determining the bids for storage capacity that Transco or the SS-1 Customers must match under the right of first refusal.⁸⁵

64. In response to the SS-1 Customers, the Applicants point out that the SS-1 Customers have no claim to a contractual or regulatory right of first refusal for continued service, and that the Commission therefore properly concluded that that protest to the open season was moot.⁸⁶

65. The Commission rejects the argument of the SS-1 Customers regarding UGI Storage's open seasons. All of the contracts between CPG and its interstate customers, including Transco's for capacity to serve the SS-1 Customers, will expire by March 31, 2011. As the Commission discussed above in denying the SS-1 Customers request for stay, the right of first refusal that UGI Storage extended to existing CPG customers during last year's open season was for the purpose of allowing existing customers to match bids for service during the 2010-2011 storage cycle. UGI Storage still has not been able to commence service because, as conditioned by the October 21 Order, its certificate authority is not going to become effective until April 1, 2011. Also as discussed above, UGI Storage was not required by Commission policy or regulation to renew the offer of a right of first refusal to CPG's existing

⁸³ Applicants conducted the 2010-2011 open season from February 10, 2010 through March 1, 2010.

⁸⁴ UGI Services is owned by UGI Corporation. It markets natural gas, electricity, and liquid fuels to approximately 30,000 customers in nine eastern states and Washington, DC.

⁸⁵ SS-1 Customers November 22, 2010 Rehearing Request at 39.

⁸⁶ Applicants' December 7, 2010 Answer at 22.

customers and indirect customers such as the SS-1 Customers during its recent open season for service during the next storage cycle, i.e., the 2011-2012 season.

66. Although the SS-1 Customers opposed the Applicants' proposals, nothing prevented the SS-1 Customers from bidding during the first open season for service by UGI Storage in the event the Commission approved the proposals, or bidding during the more recent open season following the Commission's approval of the Applicants' proposals. While the SS-1 Customers may be concerned that an affiliate, particularly a corporate parent, may be indifferent in some situations to one of its affiliates paying an above market price for some service, it is not clear what incentive UGI Services would have to bid for more of UGI Storage's capacity than it thinks it will need, or to bid higher than it thinks it needs to in order to be sure of winning the capacity. If UGI Services does not need the capacity and cannot find another customer that is willing to pay at least as much for the capacity if it releases it, UGI Services might be benefiting UGI Storage, but only at UGI Services' own expense. In any case, it is not clear how the SS-1 Customers think shifting revenues from UGI Services to UGI Storage would benefit any other affiliate, including a corporate parent. One affiliate paying another affiliate above market price would seem to result, at best, in a wash as far as the corporate parent is concerned. If an affiliate reserves more capacity than it needs and then cannot find other customers that want the capacity and are willing to pay at least as much for it, the net result would be reduced overall revenues for the corporate family as a whole.

67. The Commission further notes that as a fully jurisdictional interstate storage provider, UGI Storage is required to comply with the requirements in 18 C.F.R. § 284.13(b) of the Commission's regulations, which requires the posting of the rates charged by UGI Storage for each storage service, including services under contracts with replacement shippers taking released capacity.⁸⁷ Further UGI Storage is required to comply with the Commission's regulations for semi-annual storage reporting required pursuant to 18 C.F.R. §§ 284.13(e) and 284.126(c) of the Commission's regulations. In the event the SS-1 Customers or any other market participants suspect the exercise of market power on the part of UGI Storage, the Commission's complaint procedures will provide the appropriate procedure for resolving that issue.⁸⁸

V. Applicants' Request for Clarification

68. On November 22, 2010, Applicants filed a request for clarification, or, in the alternative, rehearing of the engineering condition requiring UGI Storage to operate the Meeker field with a bottom hole storage pressure not in excess of 1,680 psia. Applicants state the condition should refer to the maximum wellhead pressure rather than the bottom hole pressure. The UGI Storage application indicates the surface pressure was 1,600 psig

⁸⁷ 18 C.F.R. § 284.13(b) (2010).

⁸⁸ See 18 C.F.R. § 385.206 (2010).

at the time of discovery in 1931, and the Pennsylvania Department of Environmental Protection authorized an increase in the pressure from 1,600 to 1,680 in 1997. Accordingly, the Commission agrees that the clarification requested by Applicants is appropriate, and clarifies that Engineering Condition A refers to the maximum shut-in pressure at the well head.

The Commission orders:

- (A) The SS-1 Customers' rehearing request is denied.
- (B) The Applicants' request for clarification is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.