

113 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Williston Basin Interstate Pipeline Company

Docket Nos. RP00-107-003
RP00-107-004

ORDER ON INITIAL DECISION

(Issued November 22, 2005)

I. Introduction

1. This proceeding arises from a December 1, 1999 general rate increase filing made by Williston Basin Interstate Pipeline Company (Williston) pursuant to section 4 of the Natural Gas Act (NGA). All issues have been resolved with the exception of two issues remanded by the Commission to the Presiding Administrative Law Judge (ALJ).¹ Those issues, which are now before the Commission on exceptions to the Initial Decision issued April 8, 2005 (ID),² are (1) whether the Commission should order the conversion of Williston's Rate Schedule X-13 service to Northern States Power Company (NSP) from Part 157 service to Rate Schedule FT-1 open-access Part 284 service with the same rights as other FT-1 shippers, and (2) whether the 50-percent annual delivery quantity (ADQ) limitation on service provided to NSP under Williston's Rate Schedule FT-1 is just and reasonable.

2. In the ID, the ALJ determined that NSP had demonstrated that the Part 157 service provided by Williston has become unjust and unreasonable and that it should be

¹ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 (2004).

² *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 (2005).

converted prospectively to Part 284 service.³ The ALJ also determined that Williston's refusal to increase NSP's ADQ under Rate Schedule FT-1 from 50 to 100 percent is unjust and unreasonable because Williston does not have operational or maintenance concerns that justify the limitation.

3. The parties filed briefs on and opposing exceptions.⁴ As discussed below, the Commission affirms the ID.

II. Background

A. History of the Instant Rate Case Proceeding

4. The lengthy background of this general rate proceeding is summarized in the ID⁵ and will be related only briefly here.

5. NSP is a local distribution company serving approximately 400,000 natural gas retail customers in North Dakota and Minnesota. NSP receives transportation services from Williston in and around Fargo, North Dakota, along a pipeline facility known as the Mapleton Extension. The Mapleton Extension facilities consist of a 49.3-mile extension of pipeline and appurtenant facilities from Valley City to Mapleton, North Dakota.

6. Two transportation services provided to NSP by Williston are at issue here. Together they cover the entire capacity on the Mapleton Extension. The first service, which is provided under Rate Schedule X-13 and relates to most of the service on the Mapleton Extension, is an individually-certificated service under Part 157 of the Commission's regulations.⁶ The second service, covering the remaining service on the Mapleton Extension, is provided under Williston's Part 284 Rate Schedule FT-1 pursuant

³ The ALJ also held that the Part 157 Rate Schedule X-13 service and related ADQ limits were not unduly discriminatory or preferential. Because the Commission is affirming the ALJ's determination that the Rate Schedule X-13 service and the ADQ have become unjust and unreasonable, the Commission need not address arguments that the ALJ erred in holding they were not unduly discriminatory or preferential.

⁴ Williston and NSP filed briefs on exceptions. Williston, NSP, and the Commission Staff (Staff) filed briefs opposing exceptions.

⁵ *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 2-7 (2005).

⁶ The parties entered into the Rate Schedule X-13 contract on February 22, 1991, for a 20-year term and executed Amendment 1 on April 22, 1992.

to a contract designated as Contract No. FT-00157.⁷ This contract contains limitations on the Maximum Daily Delivery Quantity (MDDQ) as a result of the 50-percent limitation on the ADQ.

7. At the time of Williston's original rate increase filing in this proceeding, NSP contended in part that its Rate Schedule X-13 service should be converted from Part 157 service to Part 284 open-access service. NSP also asserted that the 50-percent ADQ limitation on service under Contract No. FT-00157 was unjust, unreasonable, and unduly discriminatory and should be increased to 100 percent. Following the first hearing in this proceeding, the ALJ determined that the United States Court of Appeals for the Eighth Circuit (Court) already had addressed the conversion issue. The ALJ also found that NSP had been treated fairly with respect to FT-1 service on the Mapleton Extension, having been afforded the use of all firm capacity on those facilities, with an effective load factor total of over 97 percent.⁸ However, the Commission remanded these two issues to the ALJ for further proceedings because they are interrelated and because the Court in fact did not address the conversion issue.⁹

8. After several discussions, the parties concluded that settlement would not be possible. Accordingly, the ALJ conducted the second hearing from January 4 through 6, 2005. On April 8, 2005, the ALJ issued the ID addressed in this order, finding in NSP's favor on both issues.

B. History of Rate Schedule X-13

9. On March 30, 1992, the Commission issued an order in Docket No. CP91-1897-000 granting a certificate of public convenience and necessity to Williston to construct the Mapleton Extension facilities for NSP and to provide firm transportation service on that lateral under Rate Schedule X-13 at the rate of \$19.5778 per Mcf per month for 8,000 Mcf per day of contract demand, using an annual cost of service of \$1,879,471 and an overall rate of return of 12.06 percent.¹⁰ The Commission also directed Williston to

⁷ The Rate Schedule FT-1 Contract No. FT-00157 has a primary term commencing August 23, 1993, and extending through July 1, 2013.

⁸ *Williston Basin Interstate Pipeline Co.*, 95 FERC ¶ 63,008 (2001).

⁹ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 (2004).

¹⁰ *Williston Basin Interstate Pipeline Co.*, 58 FERC ¶ 61,344 (1992).

adjust the initial rate to reflect the final outcome of its then-ongoing rate proceeding in Docket No. RP89-34-000.

10. Since that certification, the parties' lengthy relationship under Rate Schedule X-13 has been contentious. The X-13 formula rate, pursuant to its terms, is to be recalculated (using elements from Williston's cost-of-service) effective March 1 of each odd-numbered year, commencing March 1, 1995, until such time as the rate becomes equal to or less than Williston's maximum FT-1 rate, including surcharges. At that time, the rate restatement process will cease, and the X-13 rate will be identical to the maximum FT-1 rate.

11. During the first half decade or so of restatements (restatements 1 through 3), Williston disputed the Commission's interpretation¹¹ of the formula for computing the rate under Rate Schedule X-13.¹² The Court ultimately upheld the Commission's

¹¹ Had Williston's interpretation of the X-13 formula prevailed, the X-13 rate would have reached equivalence with the FT-1 rate very slowly, if ever, because the components would be those proposed at Williston's discretion in its rate filings, not the components ultimately found just and reasonable by the Commission. For the early history of X-13 restatements, *see, e.g., Order on 1st Biennial Restatement*, 70 FERC ¶ 61,372, *order on reh'g*, 71 FERC ¶ 61,373 (1995); *Order on 2nd Biennial Restatement*, 78 FERC ¶ 61,316, *reh'g denied*, 79 FERC 61,349, *order requiring refund in first two restatements*, 81 FERC ¶ 61,318 (1997), *reh'g of refund order denied*, 85 FERC ¶ 61,103 (1998); *Order on 3rd Biennial Restatement*, 86 FERC ¶ 61,314, *reh'g denied*, 88 FERC ¶ 61,159 (1999).

¹² The rate of return on equity and depreciation components of the X-13 rate were to reflect the rate of return on equity and systemwide depreciation rates underlying Williston's FT-1 rate, "as such may be in effect from time to time." The Commission interpreted this as requiring that, when the FT-1 rate at the time of a restatement filing is in effect subject to refund based on the final outcome of a pending general section 4 rate case, the restated X-13 rate also must be subject to revision based on the outcome of that rate case. This would ensure that the final X-13 rate reflects the cost components determined by the Commission to be just and reasonable and not merely the cost components Williston proposed in its general rate increase filing.

interpretation on June 27, 2000.¹³ After that decision, subsequent restatements (restatements 4 through 6)¹⁴ were processed somewhat more smoothly, but with NSP repeatedly bringing to the Commission's attention in those proceedings its desire to convert the Part 157 Rate Schedule X-13 service to open-access Part 284 service under Rate Schedule FT-1. Because the biennial restatement proceedings were for the limited purpose of ensuring that the rate was calculated correctly, the Commission deferred acting on the conversion issue in that context. The Commission, however, did not intend to deny NSP and Williston a forum for a final resolution of that issue, and it was always possible that it might be settled by the parties in the context of the ongoing rate case in Docket No. RP00-107-000. However, it became clear that settlement was not possible. In fact, testimony regarding the matter had never been tested, but had been challenged by Williston and struck by the ALJ, who believed that the Court already had addressed the question of whether conversion should be ordered, as well as the dispute concerning how to calculate the rate itself. Because the Court's decision addressed only the mechanics of calculating the rate and not whether conversion to open-access service should be ordered, the Commission remanded the conversion issue and the related ADQ matter to the ALJ so that the parties might obtain a final decision on the merits.

12. Therefore, the Commission's merits decision on the conversion issue cannot be totally unexpected by Williston or any party, given the history leading up to it. Whether other pipelines may have responded more readily to requests to convert to open-access service, while Williston has refused, is irrelevant to the issue of the Commission's authority, pursuant to NGA sections 4 and 5, to order the conversion of the Part 157 Rate Schedule X-13 service to Part 284 service. Although the Commission may use such authority sparingly and favors settlements of such matters wherever possible, the Commission concludes here that the operation of Rate Schedule X-13 to restrain capacity releases is inconsistent with the Commission's open-access regulations and is unjust and

¹³ *Williston Basin Interstate Pipeline Co. v. FERC*, 215 F.3^d 875 (8th Cir. 2000).

¹⁴ See *Order on 4th Biennial Restatement*, 94 FERC ¶ 61,392 (2001); *Order on 5th Biennial Restatement*, 102 FERC ¶ 61,327 (2003); *Order on 6th Biennial Restatement*, 110 FERC ¶ 61,390 (2005).

unreasonable, particularly where the shipper is willing to pay the former incremental rate until such time as the X-13 rate would have expired.¹⁵

C. History of the FT-1 Service to NSP

13. Contract No. FT-00157, which commenced August 23, 1993, and has a term extending to July 1, 2013, covers the service on remaining capacity of the Mapleton Extension that is not provided under Rate Schedule X-13. In 1993, NSP submitted a request for service projecting its initial annual volumes under the FT-00157 contract. Based on that projection, Williston set a 19-percent limit on the ADQ that NSP could request. In 1996, NSP requested that Williston increase the ADQ level under Contract No. 00157 from 31,680 equivalent Dkt per year to a 100-percent load factor basis or 168,300 equivalent Dkt per year. In response, Williston determined that it would be willing to provide a 50-percent load factor (or 84,150 equivalent Dkt per year) under Contract No. FT-00157, and the parties executed a revised service agreement. However, NSP viewed the limitation as a temporary solution, and continued to emphasize its disagreement with Williston's interpretation of NSP's initial service request as somehow establishing an ADQ limitation.

14. Thus, NSP has firm entitlements of up to 461 Dkt per day, with an ADQ restriction that limits its annual service to a 50-percent load factor rate. Despite that limitation, NSP pays demand charges to Williston for 365 days of service per year at a 100-percent load factor rate. Accordingly, the Commission remanded this issue to the ALJ for further hearing procedures.¹⁶ As discussed herein, the ALJ found that the 50-percent ADQ is unjust and unreasonable,¹⁷ and the Commission affirms the ID on this issue.

¹⁵ Rate Schedule X-13 commits NSP to pay the incremental cost of service of the Mapleton Extension facilities for the term of the contract, and NSP does not propose to depart from that obligation. Moreover, the Rate Schedule X-13 rate was to reflect 25 basis points less than the rate of return used to develop the FT-1 rates, yet NSP states that it is willing to forego this advantage if it is allowed to convert to Part 284 service. The conversion is thus revenue neutral as to Williston. The conversion is also, at this juncture, revenue neutral as to other shippers. No reallocation of costs will occur except in the context of some future rate case, at which time the justness and reasonableness of any such reallocation will be examined in light of all of Williston's costs and revenues.

¹⁶ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 at P 95-101 (2004).

¹⁷ *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 160 (2005).

III. Discussion

A. Conversion of Part 157 Service to Part 284 Service

1. The ID

15. The ALJ held that the Commission has the authority to require conversion pursuant to NGA section 5 and that NSP's request for conversion was not untimely.

16. The ALJ found that Williston's resistance to the conversion has allowed it to retain control of the capacity to the detriment of NSP's customers.¹⁸ The ALJ also rejected Williston's argument that conversions may be implemented only on a voluntary basis. The ALJ distinguished proceedings in which the Commission declined to order conversion when the conversion would create significant operational concerns, finding that Williston has not made such a showing in this proceeding.

17. The ALJ interpreted *Tennessee Gas Pipeline Co. (Tennessee)*¹⁹ as not precluding conversions if Part 157 service has become unjust and unreasonable. She pointed out that subsequently, in *Transcontinental Gas Pipe Line Corp. (Transco I)*,²⁰ the Commission ordered the pipeline to unbundle its SS-1 Part 157 service and convert it to Part 284 service when it found the bundled service to be unjust and unreasonable.²¹ Similarly, the ALJ found that a statement in *Northwest Pipeline Corp. (Northwest)*²² that Order No. 636 does not require a pipeline to offer its customers an opportunity to make this sort of conversion does not control in this case where the customer has shown that the Part 157 service is no longer just and reasonable. Reviewing *Great Lakes Gas Transmission Ltd. Partnership (Great Lakes)*,²³ the ALJ ruled that the question was not whether the pipeline should be required to allow conversion, but rather whether the shippers could be forced to

¹⁸ The ALJ cited *Atlanta Gas Light Co. (Atlanta)*, 100 FERC ¶ 61,071 at 61,279-80 (2002).

¹⁹ 63 FERC ¶ 61,096 (1993).

²⁰ 94 FERC ¶ 61,362 (2001).

²¹ *Id.* at 62,321 (2001), *aff'd in pertinent part*, 106 FERC ¶ 61,299 at P 48, 53 (2004).

²² 77 FERC ¶ 61,323 (1996).

²³ 70 FERC ¶ 63,001 (1995).

convert. Citing *Northern Border Pipeline Co. (Northern Border)*,²⁴ the ALJ held that the case supports only the proposition that a pipeline cannot require a shipper to convert Part 157 service to Part 284 service. In further support of her decision that it was appropriate to apply the “just and reasonable” standard under NGA section 5 to the conversion issue, the ALJ found that *Papago Tribal Utility Authority v. FERC (Papago)*²⁵ involved a factual basis similar to that of the instant case, and that Rate Schedule X-13 contains language providing for NGA section 5 review and the “specific acknowledgment of the possibility of future rate change.”²⁶

18. The ALJ pointed out that the Commission’s policy at the time the parties executed the Rate Schedule X-13 contract did not permit incremental rates for Part 284 open-access service. The ALJ thus found it reasonable that NSP did not make a fruitless effort to seek Part 284-type service for the Mapleton Extension. However, the ALJ emphasized that the Commission now rarely approves individually-certificated types of service because it deems case-specific certificates to be inconsistent with the aims of Order No. 636.

19. The ALJ pointed out that the Part 157 service does not allow NSP to use capacity release, segmenting, and flexible receipt and delivery points, and she concluded that NSP should have access to the tools provided by the Commission to improve the market for natural gas. The ALJ also recognized that NSP has been paying the costs of the Mapleton Extension facilities through its incremental rate, which it proposes to continue. Thus, the ALJ found that recovery of the cost of the facilities is not a legitimate concern. Instead, the ALJ stated that the controversy centers around entitlement to revenues generated by the sale of NSP’s unused capacity. The ALJ found that the evidence supports NSP’s estimate of the harm it is suffering and that the impact of the remedy on Williston’s FT-1 customers would be insignificant. Accordingly, the ALJ recommended that the Commission grant the requested conversion to Part 284 service.

²⁴ 81 FERC ¶ 61,402 at 62,847 (1997).

²⁵ 723 F.2d 950, 954 (D.C. Cir. 1983).

²⁶ *Id.* The ALJ also cited Article IX, Part II – Service Agreement “Unilateral Applications” of Rate Schedule X-13 (Williston’s FERC Gas Tariff, Original Volume No. 2, Original Sheet No. 349). *See infra* note 32.

2. Exceptions Raised and Commission Disposition

a. Burden of Proof

20. Williston asserts that, under the *Mobile-Sierra* doctrine,²⁷ when the Commission invokes its NGA section 5 authority to change a contract, the standard governing its action is different from the just and reasonable standard applicable when the Commission acts to review a change under NGA section 4. Williston maintains that the proper *Mobile-Sierra* standard is whether the contract “adversely affect[s] the public interest . . . , cast[s] upon other consumers an excessive burden, or [is] unduly discriminatory.”²⁸ Williston submits that this is the standard the Commission must observe to change the Rate Schedule X-13 contract, even though that agreement gives NSP the right to initiate a proceeding under NGA section 5.²⁹

21. Williston insists that NSP is seeking an entirely new contract,³⁰ which does not meet the standard employed by the ALJ “of contractual language ‘susceptible to the construction that the applicable rate may be altered while the contract subsists[.]’”³¹ Williston states that it is not reasonable to read this contract to give NSP the ability to make a fundamental alteration so easily. The Commission finds that the terms and conditions of Rate Schedule X-13 give either party the right to seek changes, whether

²⁷ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

²⁸ *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

²⁹ Williston cites Rate Schedule X-13, Article IX (Ex. NSP-3 at 16).

³⁰ Williston cites *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 21 (2005) (“the new FT-1 service agreement that NSP and Williston would enter into if the requested conversion is allowed.”).

³¹ *Id.* at P 84, citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998).

fundamental or not.³² NSP only seeks to participate in the open-access markets the Commission has fostered. It will essentially be paying the rate it now pays.

22. The ALJ properly found that the *Mobile-Sierra* doctrine does not apply in this proceeding. NSP's burden in this case was to show that, under the circumstances presented, it has become unjust and unreasonable to continue service under a form of transportation no longer favored by the Commission. Rate Schedule X-13 does not afford NSP adequate flexibility in the use of the capacity for which it pays. Further, there are no countervailing circumstances that warrant retention of the Rate Schedule X-13 service. Accordingly, the Commission finds that NSP has carried this burden.

23. The Commission therefore affirms the ALJ's holding that application of the "just and reasonable" standard is appropriate in this case rather than the "public interest" standard. As NSP and Staff have pointed out, the Rate Schedule X-13 contract specifically permits Williston to "make unilateral application to the . . . Commission . . . for changes in rates and terms and conditions under section 4 of the Natural Gas Act" The contract also provides that NSP can "seek to initiate proceedings under Section 5 of the Natural Gas Act."³³ As the ALJ correctly recognized, it has long been settled that contractual provisions of this nature preserve the customer's section 5 rights.³⁴ Given the parties' ability to seek changes in rates or terms and conditions of

³² Williston's FERC Gas Tariff, Volume No. 2, Original Sheet No. 349 provides as follows:

Nothing herein shall be construed as affecting in any way the right of [Williston] to make unilateral application to the Federal Energy Regulatory Commission, or successor agency (ies), for changes in rates and terms and conditions under Section 4 of the Natural Gas Act, . . . Nor shall this Agreement be construed as affecting in any way the rights of NSP to intervene, protest or otherwise participate in such proceedings or to seek to initiate proceedings under Section 5 of the Natural Gas Act, other provisions thereof, or the FERC's rules and regulations thereunder, or any other applicable statute.

³³ See *supra* note 32. Contractual provisions of this type have been standard in interstate pipeline service agreements since 1948. *United Gas Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 114-15 n.8 (1958).

³⁴ *Id.* Williston *Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 84, n.334 (2005). See also *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983), in which the Court of Appeals stated as follows:

(continued)

service under the Rate Schedule X-13 contract, NSP may seek a modification of that contract pursuant to the just and reasonable standard under NGA section 5 to obtain the full Part 284 open-access transportation rights that Williston provides under its Rate Schedule FT. The Commission rejects Williston's contention that the *Mobile-Sierra* public interest standard must be satisfied in order to require a change from individually-certificated transportation service to Part 284 open-access service. In Order No. 500, the Commission relied on the NGA section 5 just and reasonable standard to order interstate pipelines to permit their sales customers to convert their individually-certificated sales contracts to Part 284 open-access transportation contracts.³⁵ Similarly, in Order No. 636, the Commission relied on the NGA section 5 just and reasonable standard to require that contracts for bundled sales and transportation service be unbundled, with Part 284 open-access transportation service provided under a separate contract.³⁶ The Commission's

[S]pecific acknowledgement of the possibility of future rate changes is virtually meaningless unless it envisions a just and reasonable standard. The public interest standard is practically insurmountable Future rate changes would be a dim prospect, hardly worthy of recognition, if the parties did not intend the just and reasonable standard to govern.

³⁵ In Order No. 436, the Commission relied on NGA section 7, rather than NGA section 5, to require this change. However, in *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1014 (D.C. Cir. 1987), the D.C. Circuit Court of Appeals held that the Commission could only order such a change under NGA section 5, "which allows the Commission to set aside any unjust, unreasonable or unduly discriminatory 'contract affecting' rates and charges." On remand, in Order No. 500, the Commission relied on the just and reasonable standard in NGA section 5 to support the conversion requirement. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, FERC Stats. & Regs. (Regulations Preambles 1986-1990) ¶ 30,761 at 30,796 (1987).

³⁶ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. (Regulations Preambles 1991-1996) ¶ 30,939 at 30,398, 30,406 (1992).

In generally upholding Order No. 636, the Court of Appeals cited the following statement from that order: "the continued enforcement of a pipeline sales customer's purchase obligations, agreed to before implementation of unbundling under this rule, is unjust and unreasonable, and unduly discriminatory." *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1130 (D.C. Cir. 1996) *citing* Order No. 636 at 30,453. The Court of

(continued)

decision to apply a just and reasonable standard of review in this case is consistent with this precedent.

24. Williston maintains that NSP is seeking to be relieved of its responsibilities under the Rate Schedule X-13 contract, but this argument ignores the previously-cited facts that NSP is neither seeking to change gas suppliers, nor seeking more favorable rate treatment. NSP seeks only to convert its service from a type no longer favored by the Commission to a type that affords NSP the ability to use the tools of Part 284 to further the Commission's goal of a competitive natural gas market. Pursuant to NGA section 5, NSP has shown that it is unjust and unreasonable for Williston to deny NSP this ability.

b. Commission Authority to Require Conversion of Part 157 Service to Part 284 Service and Timeliness of NSP's Request

25. Williston argues that the Commission cannot compel conversion in this case and that the ALJ erred in holding that Commission policy currently favors conversion to Part 284 in an appropriate situation. Further, continues Williston, if there has been a policy change from voluntary conversions to mandatory ones, the Commission's remand in this case would have been a show cause order to Williston. Williston also challenges the ALJ's reliance on the cases she cited and argues that there have been no changes on the pipeline, in Commission policy, or in the industry that would compel a change to Part 284 service from Part 157 service.

26. In response, NSP and Staff assert that the Commission does not limit conversions of Part 157 contracts to Part 284 contracts to situations in which both parties agree. Rather, they contend that the Commission bases its decisions on facts presented in individual proceedings.

27. The Commission affirms the ALJ's determination that it has the authority and should exercise it to require conversion of NSP's Part 157 service to Part 284 service. The facts of this case make it clear that the Rate Schedule X-13 Part 157 service is no longer just and reasonable because it denies NSP and its customers the ability to obtain the open-access benefits that are the hallmarks of the competitive natural gas market that the Commission seeks to foster. Further, as is evident from the history of Rate Schedule X-13, NSP was not lax in making known its wish to convert, and this general rate case is an appropriate proceeding in which to hear and test arguments on this issue.

Appeals did not require that the Commission meet the public interest standard in Order No. 636.

28. The ALJ properly found that, even though Order No. 636 did not mandate conversion from Part 157 contracts to Part 284 contracts, the Commission no longer favors individually-certificated services such as Rate Schedule X-13. Additionally, while a shipper cannot be required by a pipeline to agree to a conversion, objection on the part of a pipeline will not preclude the conversion in appropriate cases. On the other hand, if all parties wish to continue an individually-certificated service, the Commission may concur, absent countervailing factors. To dispel any uncertainty regarding the Commission's policy on this issue, the Commission specifically affirms that it favors conversion of all individually-certificated services unless (1) conversion of a particular service would adversely affect other customers of the pipeline, or (2) in an appropriate case, where the pipeline and the customer have agreed that they desire the individually-certificated services to continue.

29. Williston misstates the Commission's policy, arguing that it appears that the Commission will permit a conversion solely at the option of the shipper unless there are operational reasons not to allow the conversion. The Commission's policy is that it generally will not force shippers to convert if they do not wish to do so, but pipelines may be required to accept conversion if the facts show that the Part 157 service has become unjust and unreasonable. That standard requires more than just the "sole option of the shipper" unless operational considerations require a different decision. Further, this statement of policy does not diminish the Commission's preference that pipelines and their customers accomplish conversion outside of the Commission's formal procedures now that the pipeline restructuring proceedings are completed. In the instant case, if the Commission had a policy against requiring conversion over the objections of the pipeline, there would have been no need to remand the proceedings to the ALJ to develop a more comprehensive record of the facts surrounding NSP's request to convert its Rate Schedule X-13 service.

30. In Order No. 636, the Commission did not require that all transportation services be converted from Part 157 service to Part 284 open-access service. Instead, the Commission expressed its preference that such conversions be accomplished by agreement of the parties to Part 157 contracts, stating its support for that process in Order No. 636-B:

As a general proposition, the details of Part 157 conversions should be worked out in the restructuring proceedings so that the conversions can be coordinated with the other aspects of compliance with Order No. 636. Part 157 shippers should notify the pipeline during the restructuring of their desire to convert. The Commission will expect pipelines to implement such conversions to the maximum extent feasible. However, since rate and other implications of Part 157 conversions are specific to individual pipelines, the Commission cannot specify a universal mechanism for handling these

concerns; these issues are more appropriately addressed in individual cases.³⁷

31. The Commission thus clearly signaled its policy favoring conversion of Part 157 services to Part 284 services. As the Commission anticipated, most pipelines and their customers have reached agreement with respect to such conversions. However, the Commission's support of voluntary conversions must not be taken as an indication that the Commission lacks authority to require conversions in appropriate cases when agreement of pipelines and their customers cannot be achieved. This does not represent a change in policy, as the Commission repeatedly has emphasized the importance of the facts specific to each case. Recognizing in this case the Commission's ability and willingness to order conversions when appropriate does not represent a change of policy.

32. Williston correctly points out that *Transco I* and related orders, which address unbundling of storage and transportation services, do not involve a Commission-mandated conversion of Part 157 to Part 284 service. However, in one of the orders in the *Atlanta* show cause proceeding, the Commission touched on its ability to order conversion of Transco's Rate Schedule SS-1 storage service, stating in part:

Transco filed tariff sheets . . . offering existing Rate Schedule SS-1 customers the option to convert to open-access Part 284 storage and transportation service The Commission accepted Transco's tariff sheets for optional, unbundled, Part 284 SS-1 storage and transportation service. . . .

Because conversion of Atlanta's Part 157 services with Transco to Part 284 either has already been effectuated (Rate Schedule LG-A), is permissible at the shipper's (Atlanta's) option (Rate Schedule SS-1), or has been fully litigated in Transco's general rate proceeding, . . . the Commission will not order conversion of these Part 157 services to Part 284 in this proceeding.³⁸

³⁷ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636-B, 61 FERC ¶ 61,272 at 61,994 (1992) (footnote omitted).

³⁸ *Atlanta Gas Light Co.*, 102 FERC ¶ 61,323 at P 43-44 (2003).

33. Even at the commencement of the *Atlanta* show cause proceeding, the Commission made it clear that it has the authority to order conversion when Part 157 service becomes unjust and unreasonable. The Commission stated as follows:

We have urged the parties to consider conversion of those certificates to Part 284 open access, which would allow unbundled service for Atlanta and its customers to proceed on the same transparent and not unduly discriminatory basis as the rest of the pipeline industry [T]he parties seemingly continue to resist conversion for a variety of reasons. The proposal before us here, however, consists of an untenable use of interstate pipeline capacity in a fashion that is at odds with the Commission's open-access regulatory scheme, and that allows Atlanta to retain exclusive control of the disposition of interstate capacity, to the benefit of a select set of local Georgia marketers, one of whom is Atlanta's affiliate. Accordingly, we are concerned that the Part 157 certificates underlying Atlanta's services may no longer be consistent with just and reasonable practices. We are therefore initiating a show cause proceeding under Section 5 of the Natural Gas Act and directing the related interstate pipelines and Atlanta to show cause why we should not direct those certificates be converted to provide for open-access service under Part 284 of our regulations.³⁹

34. Williston also cites *Texas Eastern Transmission Corp. (Texas Eastern)*,⁴⁰ pointing to the Commission's statement that, while it had encouraged the pipeline to offer its customers further opportunities to convert their Part 157 contracts to Part 284 service, the Commission did not require conversion. In that case, the Commission recognized that three storage services had unique operational characteristics that persuaded the Commission not to require conversion to open-access service. However, the Commission clearly advised that it can require a pipeline to convert Part 157 services to Part 284 services when circumstances warrant. Following the sentence cited by Williston, the Commission continued as follows:

We recognize that certain certificated services contain provisions that do not lend themselves to open-access service. Indeed, the UGI Group . . . stated, "the essential operational characteristics of these storage services [SS, SS-1 and X-28] will remain separate and distinct from each other."

³⁹ *Atlanta Gas Light Co.*, 100 FERC ¶ 61,071 at P 32 (2002).

⁴⁰ 63 FERC ¶ 61,100 at 61,445 (1993).

Because of the distinct operational characteristics underlying each storage service, we will not require Texas Eastern to offer conversions from the certificated services to open-access service.⁴¹

35. Williston also contends that, in *Algonquin Gas Transmission Co. (Algonquin)*,⁴² the Commission did not require Algonquin to accept conversions. However, Williston selectively quotes only a portion of the relevant discussion in that case and omits the remainder of the Commission's ruling. While the Commission pointed out that it had encouraged the pipeline to consider mechanisms for such conversions, the Commission also emphasized its policy of looking at the facts of each situation, stating as follows:

Algonquin states that it has not discussed conversions with its affected customers, but will pursue such discussion at a later date. The Commission stated in the restructuring rule that the details of Part 157 conversions should be worked out in the restructuring proceedings. Further, the Commission stated that we expect pipelines to implement such conversions to the maximum extent feasible. Thus, we direct Algonquin to engage in meaningful discussion with the affected customers to resolve this issue. . . . The February 11, 1993 order in this proceeding was based on the particular facts and circumstances that apply to Algonquin's system and the compliance filing. To the extent similar facts or circumstances arise in other proceedings, the result would be the same.⁴³

Thus, *Algonquin* does not stand for the proposition that the Commission lacks authority or will decline to order conversions. It merely reiterates the Commission's policy of assessing the facts of each situation.

36. Williston next cites *Tennessee Gas Pipeline Co. (Tennessee)*,⁴⁴ in which the Commission stated that conversion is voluntary. However, nothing in that order precludes the Commission from requiring conversion in situations in which Part 157 service has become unjust and unreasonable and the parties have been unable to agree to conversion.

⁴¹ *Id.*

⁴² 63 FERC ¶ 61,188 at 62,348 (1993).

⁴³ *Id.*

⁴⁴ 63 FERC ¶ 61,096 at 61,373 (1993).

37. Williston also cites *Great Lakes Gas Transmission Limited Partnership*⁴⁵ in support of its claim that the Commission will not require conversion from Part 157 service to Part 284 service. In its order affirming the initial decision in that proceeding, the Commission stated, “The Commission has not forced any individually certificated customers to convert to Part 284 open-access service.”⁴⁶ The instant case is distinguishable in that it is the customer that is seeking the conversion rather than resisting it.

38. The *Northwest* case⁴⁷ cited by Williston also is distinguishable. An individually-certificated customer sought to convert its service to Part 284 service. After considering operational complexities that could arise in that particular situation, the Commission required Northwest to negotiate with its customers a resolution of the issues presented by the proposed conversion. The parties achieved agreement, which in part required the converting customer to accept an OFO mechanism that would protect the service rights of other customers. The Commission recognized the potential for disruption of service to the other customers in approving the contract-specific OFO. *Northwest* did not, however, involve an involuntary conversion. It involved a situation with unique operational concerns that the Commission considered in approving the voluntary conversion.

39. Williston also cites *Northern Border*.⁴⁸ In that case, the Commission granted in part the pipeline’s proposed abandonment of Part 157 individually-certificated service where the shipper did not oppose the conversion. However, where the guarantor of one customer’s service obligation objected, the Commission denied the proposed abandonment. The Commission stated that it would not compel a section 7(c) shipper to convert to Part 284 service, but cautioned that its ruling did not preclude a reexamination of the abandonment proposal if the parties reached agreement to convert. Further, the Commission advised the parties that a pipeline could convert Part 157 service to Part 284 without the customer’s consent after the contract between them expired. Thus, *Northern Border* also is distinguishable from the instant case in which it is the customer seeking conversion of a transportation service to the open-access service that promotes the Commission’s goal of a competitive natural gas transportation market.

⁴⁵ 70 FERC ¶ 63,001 at 65,013 (1995).

⁴⁶ *Great Lakes Gas Transmission Limited Partnership*, 74 FERC ¶ 61,257 at 61,856 (1996).

⁴⁷ 77 FERC ¶ 61,323 (1996).

⁴⁸ 81 FERC ¶ 61,402 at 62,847 (1997).

40. The ALJ also properly relied on *Atlanta*, although she acknowledged that Williston itself is not alleged to be utilizing its capacity in a manner that is inconsistent with the existing regulatory scheme. However, it is clear that Williston continues to resist conversion of the service to Part 284, and its actions in that regard have allowed it to retain control of the disposition of its transmission capacity, which in large part benefits Williston and its affiliate, Montana-Dakota Utilities Company (MDU). Further, there was no need in this case to issue a show cause order to Williston when the issues were properly before the Commission in the instant rate proceeding. When it remanded two issues to the ALJ for further proceedings, the Commission remained hopeful that the parties would settle their differences, but if they failed to do so, the Commission concluded that a more comprehensive record was necessary on the issues. In any event, the Commission has the authority to order the conversion, and it reasonably directed a supplemental hearing to obtain a full record before deciding whether to exercise that authority.

41. The ALJ's ruling on this issue correctly applies current Commission policy, while the cases Williston cites generally pre-date *Transco I* and *Atlanta* and are not persuasive. Promulgation of Order Nos. 636 and 637 changed the regulatory landscape in ways that the parties could not fully anticipate, and it would not be consistent with the policies embodied in those orders to prevent a shipper from converting its restrictive Part 157 service to the market-oriented service the Commission seeks to promote. The Commission reiterates that it has the authority to require conversion if appropriate conditions are met, and as stated, the Commission concludes that the appropriate conditions have been met in this proceeding.

42. Williston also argues that the requested conversion should not be granted because NSP benefited from the Part 157 service by avoiding take-or-pay surcharges for its Rate Schedule X-13 contract.⁴⁹ Williston emphasizes that NSP pays only for the Mapleton Extension facilities and makes no contribution to Williston's other system costs, although it uses the other facilities. Moreover, states Williston, NSP continues to receive a biennial rate restatement,⁵⁰ which none of Williston's other customers receives.

⁴⁹ Williston cites *Williston Basin Interstate Pipeline Co.*, 65 FERC 61,183 (1993). Williston explains that NSP paid take-or-pay surcharges with its Rate Schedule FT-1 service, but not under its Rate Schedule X-13 service, despite the fact that both services are transportation services. Williston claims that NSP escaped payment of take-or-pay surcharges under its Rate Schedule X-13 service because that service was a Part 157 service, not because NSP had never been a sales customer.

⁵⁰ Williston cites Ex. NSP-3 at 26-38; Tr. 36.

However, the Commission finds these arguments unpersuasive in light of the fact that NSP has offered to pay whatever would have been the restated X-13 rate (and without any 25-basis point reduction in the return on equity component), seeking only the opportunity to use capacity release after conversion to participate in the open-access market.

43. Additionally, Williston contends that NSP only sought conversion after Williston removed its take-or-pay surcharges, which NSP vigorously opposed having to pay.⁵¹ Williston states that the Commission agreed that NSP should not be liable for take-or-pay surcharges because it was not an open-access shipper.⁵² However, the Commission clarifies that NSP was not obligated to pay take-or-pay costs because it had no responsibility for those costs having been incurred. Williston did not enter into gas purchase contracts relating to the Mapleton Extension, so it did not contribute to the incurrence of Williston's take-or-pay costs.⁵³ In fact, NSP was a new customer at the time the take-or-pay recovery mechanism was established. In any event, there is no Commission rule or precedent precluding a Part 157 customer that did not pay take-or-pay costs from converting to Part 284 service. Williston acknowledges that the Commission previously found that NSP was not liable for those surcharges because it was not a gas purchaser under Rate Schedule X-13.⁵⁴ Accordingly, the Commission finds that the fact that NSP did not pay take-or-pay surcharges does not prevent the Commission from granting the requested conversion of the service from Part 157 to Part 284 service.

44. Williston next contends that NSP failed to seek conversion of the contract in a timely manner, ignoring various opportunities to do so. First, explains Williston, the Commission rejected the original rate design in the Rate Schedule X-13 contract and conditioned the certificate.⁵⁵ Had NSP found the conditions to be unacceptable, Williston asserts that the contract would have allowed NSP to withdraw,⁵⁶ but it did not

⁵¹ *Williston Basin Interstate Pipeline Co.*, 64 FERC ¶ 61,079 at 61,702 (1993).

⁵² *Williston Basin Interstate Pipeline Co.*, 65 FERC ¶ 61,183 (1993).

⁵³ *Id.* See also *Williston Basin Interstate Pipeline Co.*, 66 FERC ¶ 61,283 (1994).

⁵⁴ *Williston Basin Interstate Pipeline Co.*, 65 FERC ¶ 61,183 (1993).

⁵⁵ Williston cites Ex. WBIP-1 at 5.

⁵⁶ Williston cites Ex. NSP-3 at 13.

do so. Subsequently, continues Williston, the parties executed Amendment No. 1, which provided for an incremental rate with a biennial restatement of the rate until the calculated rate becomes equal to or less than the effective maximum rate, including all surcharges, under Williston's Rate Schedule FT-1.⁵⁷ Williston points out that the contract and amendment were executed during the time the Commission was issuing Order No. 636, yet again NSP did not express concern about the Part 157 service. Finally, Williston states that NSP failed to convert its service during Williston's restructuring proceeding.

45. The Commission finds no merit to these arguments because, when the Commission first announced in Order No. 636-A that holders of individually-certificated transportation under Part 157 would not be able to release capacity under the capacity release regulations, the Commission already had approved Amendment No. 1 to the Rate Schedule X-13 contract, and NSP was no longer in a position to void its agreement with Williston. Moreover, NSP's right to seek section 5 action concerning this service was embodied in the X-13 rate schedule itself, as was Williston's right to seek section 4 action if it wished. No language limited the time frame within which either NSP or Williston could seek to exercise these section 4 and 5 rights under the NGA. Further, as stated above, NSP's failure to seek conversion during Williston's restructuring proceeding or at certain other milestones does not preclude it from seeking that relief now in a different proceeding with a different record. In setting the matter for hearing, the Commission recognized that NSP has long sought resolution of the conversion issue.⁵⁸

46. Accordingly, the ALJ correctly found that NSP was not late in seeking to convert once it was clear that there had been a change in Commission policy and that the Commission now encourages conversion. The record shows that Williston chiefly seeks to maintain control over as much of the secondary capacity market as possible, thereby

⁵⁷ Williston cites Ex. WBIP-1 at 5, 8. The first Rate Schedule X-13 contract was entered into on February 22, 1991, for a term of 20 years, but had a provision that operated as a minimum bill. The Commission rejected this provision, and the parties removed it, entering into Amendment 1 on April 22, 1992, to change the X-13 rate design and provide for biennial restatements of the rate.

⁵⁸ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 at P 98 (2004).

benefiting Williston and its other Rate Schedule FT-1 customers, the largest of which is its affiliate, MDU.⁵⁹

47. Rate Schedule X-13 contemplates that in all respects it will be subject to the provisions of Rate Schedule FT-1 and to the applicable provisions of Williston's General Terms and Conditions. NSP offers to pay what it would have paid under Rate Schedule X-13 and without the 25-basis point deduction in the return on equity component. The Commission finds this to be reasonable in view of the parties' evident intent that Rate Schedule X-13 service generally would mirror Rate Schedule FT-1 service as it stood at the moment Rate Schedule X-13 was executed, that the two rates would be derived from the same cost data, and that the rates eventually would merge.

48. The Commission consistently has "encouraged pipelines and customers to pursue the issue of converting Part 157 services to Part 284 service to promote the most open competitive market possible for natural gas."⁶⁰ In Order No. 637, the Commission amended its regulations regarding capacity segmentation "in order to improve the competitiveness and efficiency of the interstate pipeline grid."⁶¹ The Commission intended to provide captive customers the opportunity to reduce their cost of holding long-term pipeline capacity while continuing to protect against the exercise of market power. Consistent with the Commission's goal of promoting a competitive market for natural gas, the Commission cannot support a pipeline's refusal to permit conversion, especially if such a refusal perpetuates a secondary market that continues to be dominated by the pipeline and its affiliate.

49. The Commission set these issues for hearing to ascertain all the facts relevant to a decision, to afford the parties an opportunity to settle their differences and to determine if there are any operational reasons why the conversion should not be ordered. The record

⁵⁹ Williston maintains that MDU receives the same benefit from Williston's interruptible revenues as all firm shippers receive from the assumed level of FT-1 revenues built into the rates. However, Williston's affiliate MDU is by far the largest shipper on the Williston system, and accounts for over 93 percent of Williston's FT-1 load. Tr. at 126.

⁶⁰ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 at P 99 (2004).

⁶¹ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs., Regulations Preambles (July 1996-December 2001) ¶ 31,091 at 31,300 (2000).

shows that Williston will not voluntarily permit NSP to convert and that there are no operational or other reasons that outweigh the pro-competitive benefits of the conversion.

50. Accordingly, the Commission affirms the ALJ's determination that NSP may convert from Part 157 Rate Schedule X-13 service to Part 284 service under the terms it has offered. The Rate Schedule X-13 service has become unjust and unreasonable, should not be continued in the circumstances presented, and is inconsistent with the current regulatory environment.

c. Impact on Williston's Other Customers

51. Williston argues that the parties agreed at the outset that Williston's existing shippers would not bear any costs attributable to the Mapleton Extension facilities and further, that Williston's existing shippers would benefit from any transportation on those facilities when NSP was not utilizing all of its firm capacity.⁶² Williston suggests there will be a significant adverse impact on its other customers if NSP is allowed to convert to Part 284 service.⁶³ However, no other customers have intervened in order to argue they will be adversely affected. The Commission finds that the ALJ properly concluded that the evidence does not support the level of impact to Williston's other customers, as Williston claims. Moreover, any potential impact will not arise until some future rate case and should be mitigated by offsetting cost reductions.

52. The ALJ adopted NSP's position that it could expect to generate between \$401,920 and \$694,449 additional revenues annually from capacity release and segmentation if it is allowed to convert its contract to Part 284 service and that the impact on Williston's customers will only be the loss of interruptible revenues on the Mapleton Extension, which were \$39,000 in 2003, although the rates were designed with an assumed level of \$50,000 of Rate Schedule FT-1 revenues. Williston disputed the possible cost shift and its magnitude, predicting a range of \$401,920 to \$2.2 million.⁶⁴

⁶² Williston cites Ex. WBIP-1 at 4; Ex. WBIP-10; Ex. WBIP-11.

⁶³ Williston cites two internal NSP documents in support of its position. *See* Ex. WBIP-10; Ex. WBIP-11.

⁶⁴ Williston explains that there was some dispute at the hearing about the timing of the rate impact on Williston's other customers because it depends on when Williston files its next rate case. However, Williston asserts that there was no dispute that the rate impact is inevitable.

53. Williston argues that, if NSP were to release and segment its entire Rate Schedule X-13 capacity for 12 months out of the year, the annual loss in IT and short-term firm revenue to Williston and its customers could be as high as \$2.2 million.⁶⁵ However, NSP and Staff respond that Williston exaggerates the impact of the proposed conversion on its revenues. NSP and Staff challenge the notion that NSP could or would segment its capacity every day of the year and that the market would be willing to pay the maximum rate every day of the year for all of that capacity.⁶⁶ In other words, Williston assumes that NSP would never need all of the capacity that it currently uses on the Mapleton Extension to serve its own market.⁶⁷ The Commission finds this assumption unreasonable.

54. As Staff explains, Williston's FT-1 rates are designed based in part on the assumptions that a certain amount of IT will be performed and that the assumed revenues from the IT will be used to lower the costs that otherwise would be paid by FT-1 customers. In Williston's last section 4 rate filing, this reduction amounted to approximately \$50,000 or 140,000 Dkt out of a total IT throughput of 19,903,783 Dkt⁶⁸ attributable to increased revenues from IT utilizing NSP's unused capacity. If this is any indication of the possible impact of the conversion, it would be *de minimis*. Also, any change in the FT-1 rates could not take place until Williston seeks recovery of these costs in a future section 4 rate increase filing. The Commission therefore finds that the ALJ

⁶⁵ Williston cites Ex. WBIP-8.

⁶⁶ Staff cites the testimony of its witness as follows:

Capacity release is an effort by the holder of the unused capacity to recoup some of the reservation charge it must pay to the pipeline for capacity it is not using. A prospective purchaser of capacity on Williston's pipeline system can purchase daily IT capacity directly from Williston or released capacity from a firm shipper like NSP. These two services compete against each other, particularly in the non-peak summer season, when NSP would likely release its capacity. Prospective shippers know this fact and it is unlikely that shippers would be willing to pay maximum IT rates or maximum firm daily rates for the released capacity in the non peak season.

Ex. S-1 at 8.

⁶⁷ See Ex. NSP-15 at 12.

⁶⁸ See Tr. at 335-36.

properly concluded that the need for the benefits of competition outweighs some cost shifts, which will be *de minimis* and will not occur except in the context of a multitude of cost changes in a future section 4 rate case.

55. The Commission also recognizes that NSP has agreed to pay the full incremental rate notwithstanding the conversion to Part 284 service,⁶⁹ and NSP is willing to enter into a Rate Schedule FT-1 service agreement with the same MDDQ, ADQ, and contract termination date as Rate Schedule X-13, which is October 31, 2012.⁷⁰ Further, NSP has agreed that the rate under the Rate Schedule FT-1 service agreement will include the FT-1 reservation charge and a reservation surcharge for the cost differential between the FT-1 reservation charge and what the X-13 reservation charge would have been but for the conversion.⁷¹ By proposing to pay a somewhat higher rate than the rate it pays today,⁷² and by proposing to forego the IT-1 revenues made possible by the Mapleton Extension facilities,⁷³ while obtaining open-access flexibility on the main system, NSP further minimizes any net decrease in revenues to Williston and any ultimate shift of costs to Williston's other customers.

56. When NSP entered into the Rate Schedule X-13 contract, the provision allowing changes pursuant to NGA sections 4 and 5 gave notice that the rate schedule might be subject to adjustment. NSP sought such a change in several biennial rate change proceedings, but was told those proceedings were not the forum in which to raise the issue. Then, when NSP raised the issue in this general section 4 rate proceeding, it initially was rebuffed because of a misunderstanding over the substance of the Court's decision on the mechanics of the restatement mechanism. Now that NSP has made its case under NGA section 5, Williston asserts that the X-13 rate cannot be changed until Williston files yet another general section 4 rate case.⁷⁴ More specifically, Williston

⁶⁹ See Ex. NSP-1 at 10.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The proposed rate contains a 25-basis point higher cost component than the X-13 rate as now constituted.

⁷³ Brief Opposing Exceptions of Northern States Power Company at 31 (May 31, 2005).

⁷⁴ Williston cites Ex. WBIP-5 at 3.

claims that conversion would require NSP's rates to be increased so that it would begin to make a contribution to the mainline costs and that NSP's rate proposal does not adequately cover the costs of the non-Mapleton Extension facilities.

57. The Commission disagrees, as NSP has offered to pay more than it currently pays. Williston cannot use the remand of the X-13 issues in this supplemental proceeding to adjust any other rates, whether those of NSP or of any other customer. This case originally was set for hearing under both sections 4 and 5 of the NGA, and the issues other than those relating to Rate Schedule X-13 already had been decided by the Commission. The Commission determined that the hearing on remand was needed to afford the parties a forum to litigate whether the Mapleton Extension arrangements remained just and reasonable. In ordering the conversion, the Commission intends no rate increase for any party or for NSP⁷⁵ until Williston again files to increase its rates under NGA section 4. In any event, there is insufficient evidence in this record to support a rate increase. Under its existing Rate Schedule X-13 service, NSP transports gas to the Mapleton Extension through other parts of Williston's mainline system; therefore, mainline transportation arguably is contemplated in its current service and the rates it pays for such service. Allowing NSP to release capacity, utilize flexible point rights, and segment its capacity on the mainline will not result in transportation service beyond its existing primary points. NSP will continue paying a rate that fully covers the costs of the expansion facilities, and converting its service will not alter that fact.

58. In sum, the Commission affirms the ID with respect to the issue of the possible impact on Williston's other customers if NSP is permitted to convert the Part 157 service to Part 284 service. The Commission finds that NSP and Staff present more reasonable analyses of the impact and that the record supports their estimates, while Williston's higher estimate appears to be unlikely and based on faulty premises. Further, the Commission finds that NSP's willingness to continue to pay the full X-13 incremental rate upon conversion (the FT-1 rate plus a surcharge), including its proposal to forego the 25-basis point return on equity and IT-1 revenues related to the Mapleton Extension facilities, is a reasonable proposal for minimizing any potential adverse impact to Williston and its other customers. The Commission also affirms the ALJ's determination that the existing biennial review process should be continued. Finally, neither NSP's rates nor any other customer's rates should be increased further at this time.

⁷⁵ Other than the increase related to foregoing the 25-basis point cost reduction in the X-13 rate and foregoing any credits related to Williston's providing IT service on the Mapleton Extension.

B. Whether the 50-Percent ADQ Limitation on Rate Schedule FT-1 Service is Just and Reasonable

1. The ID

59. This issue involves the second contract between NSP and Williston, Contract No. FT-00157, which covers the Mapleton Extension capacity that is not subject to the Rate Schedule X-13 contract. NSP has an MMDQ of 461 equivalent Dkt under this contract, which has a primary term extending from August 23, 1993, through July 1, 2013. In the ID, the ALJ determined that Williston's refusal to increase NSP's ADQ from 50 percent to 100 percent is unjust and unreasonable under the facts presented.⁷⁶

60. The ALJ recognized that NSP pays the maximum Rate Schedule FT-1 reservation rate on the full 461 equivalent Dkt, but it does not have the right to demand firm service up to its MDDQ on every day of the year because of the ADQ limit. That limit allows NSP to have only half of the firm service, on an annual basis, for which it is paying.

61. The ALJ explained that if NSP exceeds the ADQ limitation, as adjusted for heat content, it may be subject to an overrun penalty equal to two times the then-effective Rate Schedule FT-1 rate during non-critical periods or two times the unauthorized overrun Index Price during critical periods. She also stated that NSP sought an increased ADQ after it first exceeded its ADQ and recognized the impact of the ADQ on its rights to nominate its full MDDQ. The ALJ pointed out that Williston has 21 FT-1 service agreements, but only two with an ADQ limitation of less than 100 percent. The other FT-1 service agreement with an ADQ limitation of less than 100 percent is with Williston's affiliate, MDU.

62. The ALJ rejected Williston's claims that the ADQ limitation on NSP's right to firm service is necessary to allow Williston to perform routine maintenance on its compressor stations. She pointed out that Williston's tariff allows it to interrupt service

⁷⁶ NSP also argues on exceptions that the ADQ limitation is unduly discriminatory and should be rejected on that basis as well. NSP contends that the ALJ erred in failing to find that NSP is similarly situated to some of Williston's other customers and that Williston's refusal to increase the ADQ is unduly discriminatory because Williston granted the requests of two other FT-1 shippers to increase their ADQs. Williston opposes NSP's exception on this issue. However, as with the issue of the Rate Schedule X-13 contract discussed above, the Commission finds that Williston's failure to increase NSP's ADQ is unjust and unreasonable. Accordingly, the Commission need not reach the issue of whether Williston's failure to increase the ADQ is unduly discriminatory.

to any shipper when it needs to perform routine maintenance and that this right can be invoked at any time, regardless of whether a shipper has reached its ADQ. She also found that Williston can issue an operational flow order (OFO) if necessary and further, she found that Williston's practice is to delay routine maintenance if the proposed maintenance schedule does not suit the customer.

63. The ALJ also rejected Williston's claim that NSP has the ability to use the Mapleton Extension facilities on what is effectively a 97-percent load factor basis, holding that NSP's rights under the Rate Schedule X-13 contract do not spill over as equitable compensation for the rights it has been denied under its Rate Schedule FT-1 contract.

64. The ALJ ruled that if the Commission's remand had been solely for the purpose of encouraging settlement, it would not have provided for hearing procedures. Rather, she stated, the Commission intended that the parties develop a more complete record on the issues. In sum, the ALJ found that the record does not support a finding that Williston's refusal to allow a 100-percent load factor ADQ under Contract No. FT-00157 is based on valid operational or maintenance concerns.

2. Exceptions Raised and Commission Disposition

65. On exceptions, Williston argues that the record does not support a change in the ADQ provision. Williston contends that any such change will limit its discretion in operating its system. Williston also asserts that the Commission did not vacate its affirmation of the ALJ's first ruling on this issue.

66. Williston explains that the ADQ limitation exists so that it is not contractually committed to deliver gas at full capacity 24 hours a day, 365 days a year, and that the limitation allows it to perform normal maintenance without interrupting service to NSP.⁷⁷ Williston also claims that the limitation is based on the characteristics of the portion of the system used to provide this service to NSP, as well as on the total contractual obligations on that part of the system. Specifically, Williston explains that the Mapleton Extension delivery points are located on a portion of the system with unidirectional flow of gas and no receipt points or interconnections with other pipelines that would permit gas to be routed in alternative ways to reach the delivery points.⁷⁸ Williston emphasizes

⁷⁷ Williston states that NSP's ADQ limit applies from July to June of each year (Ex. WBIP-2 at 7-9), so it is more likely to reach its ADQ limit in the off-peak season when Williston would perform normal maintenance.

⁷⁸ Williston cites Ex. WBIP-13 at 8-9.

again that, together, the two contracts give NSP all the firm capacity on the Mapleton Extension, effectively giving it a 97-percent load factor.⁷⁹

67. Williston maintains that the ALJ misunderstood the terms of its tariff when she ruled that the same purpose could be accomplished under section 6.2 of the General Terms and Conditions. Williston argues that section 6.2 of the tariff give it the right to interrupt service to perform repairs,⁸⁰ while in contrast, the ADQ limitation gives it a contractual limitation on the customer's ability to schedule deliveries and allows it to avoid interrupting the customer's service. Williston emphasizes that it makes every effort to avoid impacting a customer's contractual rights.⁸¹

⁷⁹ Williston cites Ex. WBIP-12 at 1-3. Williston contends that the Commission previously has recognized that NSP's capacity gives it a 97-percent load factor on the Mapleton Extension. *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 at P 101 (2004).

⁸⁰ Williston states that section 6.2 provides as follows:

Alterations and repairs: Transporter shall have the right, without liability to Shipper(s), to interrupt the gathering, transportation, and/or storage of gas for Shipper(s), when necessary to test, alter, modify, enlarge, or repair any facility or property comprising a part of, or appurtenant to, Transporter's system, or otherwise related to the operation thereof. Transporter shall endeavor to cause a minimum of inconvenience to Shipper(s). Except in cases of unforeseen emergency, Transporter shall give advance notice to Shipper(s) of its intention to so interrupt the flow of gas, stating the anticipated timing and magnitude of each such interruption.

⁸¹ Williston cites Tr. 323, 339-40. Williston acknowledges that NSP and Staff contended that an OFO could be used as an alternative means to perform routine maintenance, but Williston contends that the ALJ did not adopt this argument because OFOs are limited to critical situations under section 16.1 and rarely are issued. Ex. WBIP-13.

68. Williston maintains that the ALJ never addressed its evidence that demonstrated the basis for the 50-percent ADQ limitation.⁸² Instead, contends Williston, the ALJ pointed to other ways in which Williston can balance the contractual rights of customers and still perform normal maintenance, which Williston argues does not establish that its method is unjust and unreasonable. According to Williston, the Commission always has allowed a pipeline to impose reasonable operating conditions on shippers,⁸³ reaffirming this principle in Order No. 636, where it stated that “the Commission recognizes that the pipeline must be able to control operation of the system facilities, such as operation of the compressors and the performance of maintenance.”⁸⁴ Therefore, reasons Williston, limiting transportation service to accommodate operational purposes is not contrary to the Commission’s open-access policies, but is within the scope of the policy balance established by the Commission.

69. Williston maintains that the impact of the ADQ provision on NSP is modest. According to Williston, NSP entered into the Rate Schedule FT-1 contract to be able to serve additional customers in the Fargo, North Dakota area, and the ADQ does not limit NSP’s ability to do so. However, states Williston, NSP claims that the 50-percent ADQ limits its ability to release that capacity during off-peak periods. Unfortunately, continues Williston, because NSP’s delivery points are on the Mapleton Extension, where Williston has less operational flexibility, NSP’s capacity must be subject to an ADQ limitation, although if NSP had delivery points on a different part of the system, the outcome could be different.⁸⁵

⁸² Williston contends that the ALJ also does not address an argument advanced by NSP that the ADQ limitation effectively doubles the unit rate for its Rate Schedule FT-1 service as compared to other Rate Schedule FT-1 shippers. Williston maintains that the ALJ properly ignored this argument because it incorrectly assumes that other shippers actually use their capacity on a 100-percent load factor basis, as opposed to having the right to do so.

⁸³ Williston cites *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, FERC Stats. & Regs. Preambles 1991-1996 ¶ 30,939 at 30,413-14 (1992).

⁸⁴ *Id.* at 30,424.

⁸⁵ Williston cites Ex. WBIP-13 at 8-10.

70. In any event, concludes Williston, pointing to section 6.2 as a way in which Williston can balance the contractual rights of its customers and still perform normal maintenance does not establish that Williston's method is unjust and unreasonable. Williston emphasizes that the Commission has recognized that pipelines may impose reasonable operating conditions on shippers,⁸⁶ and Williston urges the Commission to find that the ADQ limitation serves a valid operational purpose, is not applied in an unduly discriminatory manner, and enables NSP to continue to meet the needs of its customers as it originally contracted to do.

71. NSP responds that the remand order makes it clear that the Commission recognized that it previously had not considered the ADQ issue closely. While NSP recognizes that the Commission did indicate a preference that the remanded issues be resolved by settlement, NSP contends that the Commission's approach in remanding the two issues is not unusual. Staff agrees, stating that the Commission asked the ALJ to reexamine the issue of whether Williston's ADQ limitation in NSP's Rate Schedule FT-1 contract has a valid operational purpose:

Williston argues that the restriction is justified for operational and maintenance reasons, but NSP counters that Williston's tariff gives the pipeline the right to perform necessary maintenance without triggering a breach of contractual obligations even if a customer had a 100% call on service on a particular segment. Since neither the possibility of converting the X-13 service to Part 284 service, nor the 50% limit on NSP's FT-1 service on the Mapleton extension have been heretofore closely examined by the Commission, the ALJ is directed, as part of the determination whether the X-13 rate should be converted to Part 284 service, to re-examine whether the 50% limit on NSP's FT-1 ADQ is just and reasonable under the circumstances presented.⁸⁷

72. NSP also challenges Williston's assertion that it needs the ADQ limit on NSP's volumes so that it can perform normal maintenance without affecting NSP's contractual right to call on the capacity. NSP agrees with the ALJ's interpretation of section 6.2 of the tariff, and NSP also emphasizes that it would gladly exchange the burdensome ADQ

⁸⁶ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulations of Natural Gas Pipelines After Wellhead Decontrol*, FERC Stats. & Regs. Preambles 1991-1996 ¶ 30,939 at 30,413-14 (1992).

⁸⁷ Staff cites *Williston Basin Interstate Pipeline Co.*, 107 FERC 61,164 at P 100 (2004).

limitation for the possibility that the FT-1 contract might be impacted occasionally by invocation of Williston's section 6.2 right to perform routine maintenance. NSP also points out that it is subject to a penalty if it takes deliveries above the ADQ level even if Williston does not perform any maintenance on the day the penalty is imposed. Moreover, continues, NSP, it always has reached agreement with Williston on the scheduling of routine maintenance.

73. Staff supports NSP's position on this argument. Staff maintains that the ALJ properly found that Williston's tariff specifically allows it to curtail service for the purpose of performing required maintenance, thus eliminating any need for Williston to create operational flexibility through the ADQ limitation.⁸⁸ In contrast, continues Staff, Williston appears to be claiming that performing maintenance under the ADQ limitation is preferable to curtailing NSP because it means Williston will never need to impact NSP's contractual rights.⁸⁹ Staff agrees with NSP that the ADQ limitation is a far greater detriment to NSP's service rights than the potential for occasional limitation of service under Williston's tariff provision. Staff also states that, because the parties have been able to harmoniously schedule maintenance in the past, there is no reason to assume that they will not be able to do so in the future.

74. Additionally, Staff challenges Williston's contention that it is incapable of performing routine maintenance if it is contractually obligated to stand by to provide NSP with 100 percent of the capacity of the Mapleton Extension. According to Staff, in the majority of the contract years since the Mapleton Extension was built, NSP has not taken its full ADQ under Rate Schedule FT-1. Staff maintains that, until NSP takes its full ADQ for a contract year, Williston is in fact contractually obligated to standby to provide NSP with the full capacity of the Mapleton Extension for any given day in that contract year. Thus, reasons Staff, for all the years that NSP didn't "use up" its ADQ, Williston was in the same position that it now contends will leave it incapable of performing routine maintenance. However, Staff emphasizes that Williston never had to interrupt the delivery of gas pursuant to section 6.2 of its tariff during those years, so apparently, it was able to work out the timing of the required maintenance to keep the Mapleton Extension facilities functioning properly even while contractually obligated to provide the full capacity of the Mapleton Extension to NSP.

⁸⁸ *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 148 (2005).

⁸⁹ *Id.*

75. Staff contends that Williston's mere desire to perform maintenance through this onerous method is insufficient evidence of operational or maintenance considerations that would justify retention of the 50-percent ADQ. Staff states that Williston concludes its argument regarding the ADQ limitation by claiming that the ADQ limitation has a modest effect on NSP that makes the restriction reasonable and that the ADQ limitation does not preclude NSP from meeting the needs of its customers as it originally contracted. However, Staff contends that, in light of the fact that the restriction serves no valid operational purpose, any adverse effect it has on NSP must be found unreasonable. Staff concludes that, because NSP pays the maximum Rate Schedule FT-1 reservation rate for every month of the year, it is improper for Williston to restrict the use of the capacity.

76. NSP emphasizes that the ADQ limitation requires it to pay SFV rates year round for a service it can demand or release only half of the year, which undermines the Commission's goal of allowing shippers to use the capacity for which they are paying and to release the capacity as a means of mitigating the impact of SFV rates. Thus, reasons NSP, the ADQ imposes higher costs on its customers than would be the case if it could release capacity, and this limitation is not offset by any efficiency considerations.

77. The Commission affirms the ID with respect to this issue. The Commission finds that section 6.2 of Williston's tariff gives it sufficient authority to schedule routine maintenance with advance notice to NSP, except in cases of unforeseen emergencies when advance notice may not be possible. The Commission does not find that the ADQ is necessary for operational or maintenance reasons, especially in light of NSP's expressed willingness to have its service interrupted on occasion so that it will have the full right to the firm service for which it pays. Moreover, Williston's arguments concerning the configuration and flow direction of the Mapleton Extension are insufficient to overcome the fact that section 6.2 permits it to perform routine maintenance upon notice to NSP, which also agrees to work with Williston to establish mutually agreeable timing for any such maintenance. Further, Williston acknowledges that NSP is most likely to reach its ADQ limit in the off-peak season when it normally would perform routine maintenance, and NSP's transportation patterns during the off-peak season should not change with the elimination of the 50-percent ADQ limitation. Thus, any potential interruption of service during the off-peak period should cause minimal disruption to NSP's service to its own customers.

78. The Commission also is unpersuaded by Williston's claim that NSP is not harmed by the ADQ limitation because it has the ability to use the Mapleton Extension facilities under both contracts on what is effectively a 97-percent load factor basis. The fact that NSP can achieve a 97-percent load factor when using both contracts is not convincing, given that the Rate Schedule X-13 contract covers 95 percent of the capacity of the Mapleton Extension. If there were no ADQ limitation, NSP would be able to use

100 percent of the Mapleton Extension capacity for which it pays a reservation fee. Moreover, the issue here concerns the merits of the ADQ provision under the Rate Schedule FT-1 contract. The fact that NSP has another contract for service on the Mapleton Extension facilities that does not have an ADQ limitation does not render the contract with such a limitation just and reasonable. The Commission rejects Williston's position on this issue.

79. The Commission remanded this issue (and the issue relating to conversion of the Part 157 service) so that the parties could develop a more complete record on which the Commission could make its determination. The Commission is satisfied that the record now is sufficient to permit it to conclude that Williston's retention of the 50-percent ADQ limitation in Contract No. FT-00157 is unjust and unreasonable and must be eliminated. Williston has not demonstrated adequate operational or maintenance considerations that overcome the value of allowing NSP to utilize the capacity for which it pays and to avoid punitive penalties that do not serve a valid operational purpose. The fact that Williston's affiliate, MDU, has a similar ADQ does not alter the Commission's decision here, as might, perhaps, a multitude of non-affiliates with like ADQ limitations. The fact that the Commission allows pipelines to impose reasonable operating conditions on shippers does not change the character of this unjust and unreasonable limitation in NSP's contract. No such reasonable operational basis for the ADQ limitation has been established in this case. Accordingly, the Commission affirms the ID and directs Williston to eliminate the 50-percent ADQ limitation from Contract FT-00157.

The Commission orders:

(A) The ID is affirmed, as discussed in the body of this order.

(B) Within 30 days of the date of issuance of this order, Williston must file to cancel Rate Schedule X-13 and must enter into and contemporaneously file an amended service agreement with NSP under the terms discussed in the body of this order, to be effective as a non-conforming FT contract. Thus the cancellation of the old rate schedule and the effectiveness of the amended contract shall occur simultaneously.

(C) Within 30 days of the date of issuance of this order, Williston and NSP must amend Contract No. FT-00157 to remove the 50-percent ADQ limitation.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.