

125 FERC ¶ 61,306
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Arlington Storage Company, LLC

Docket No. CP08-96-000

ORDER ISSUING CERTIFICATES

(Issued December 18, 2008)

1. On March 14, 2008, Arlington Storage Company, LLC (Arlington) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA) requesting a certificate of public convenience and necessity authorizing the construction and operation of a natural gas storage facility and associated facilities in Steuben County, New York, known as the Thomas Corners Project. Arlington also requests a blanket construction certificate under Part 157, Subpart F of the Commission's regulations, and a blanket certificate under Part 284, Subpart G of the Commission's regulations to provide open-access firm and interruptible natural gas storage and hub services. Additionally, Arlington requests authority to charge market-based rates for the proposed storage and hub services, and waivers of certain filing, accounting and reporting requirements applicable to storage providers proposing cost-based rates. Further, Arlington requests waiver of the Commission's "shipper must have title" policy, and approval of its proposed pro forma gas tariff.

2. As discussed below, the Commission finds that Arlington's proposed project is required by the public convenience and necessity, and issues Arlington its requested certificates, subject to conditions. The Commission also grants Arlington's request to charge market-based rates for its storage and hub services and its requested waivers, as more fully discussed and conditioned below.

I. Background

3. Arlington is a limited liability company organized and existing under the laws of Delaware, and is a developer of underground natural gas storage facilities in Steuben County, New York. Arlington owns both the development rights for the Thomas Corners Project and, through its ownership interests in Steuben Gas Storage Company (Steuben),

the Adrian Field storage facility, an existing natural gas storage facility in Steuben County, New York. Arlington is a wholly-owned subsidiary of Inergy, LP (Inergy), which acquired Arlington in 2007 for the purpose of constructing and operating the Thomas Corners Project.¹ Inergy also owns Central New York Oil and Gas Company, LLC (Central New York), which is the owner and operator of the Stagecoach Natural Gas Storage Project (Stagecoach) in New York.

II. The Proposal

A. New Facilities

4. Arlington proposes to construct and operate the Thomas Corners Project by converting the depleted Thomas Corners Field in the Town of Bath in Steuben, New York, an existing natural gas production field, into an underground natural gas storage facility. The Thomas Corners Project will use depleted reservoirs having similar geological characteristics to those of the Adrian Field that was developed in connection with the existing Steuben natural gas storage facility located six miles to the southwest of the Thomas Corners Project. The proposed storage reservoir includes the Onandaga reef and the underlying Oriskany Sandstone, located approximately 3,600 feet below the surface. The caprock, which ensures gas will be contained within the storage reservoir, is defined as the 100 feet above the Onandaga reef and consists of impermeable shale.²

5. The estimated total gas storage capacity of the Thomas Corners Project is approximately 10.0 Bcf, with approximately 7.0 Bcf of working gas capacity and 3.0 Bcf of base gas at a stabilized reservoir pressure of 2,541 psia. The maximum design injection wellhead pressure is 2,700 psig to assure that the maximum inventory can be achieved in the injection time available. Arlington anticipates that the Thomas Corners Project will have an injection capability of approximately 70 million cubic feet (MMcf) of gas per day and a withdrawal capability of approximately 140 MMcf of gas per day.

6. Arlington requests certificate authority to: (1) construct wells, piping, compression, and related facilities, as more fully described below, to develop the approximate 7.0 Bcf of working gas storage capacity for the project; (2) install and operate approximately 1.7 miles of a 4- to 6-inch pipeline to join and integrate the wells;

¹ The Thomas Corners Project was previously certificated by the Commission in 1995 in Docket No. CP95-119-000, but it was not constructed within the time allowed by the Commission's orders. *See Steuben Gas Storage Co.*, 72 FERC ¶ 61,109 (1995), *reh'g denied*, 74 FERC ¶ 61,060 (1996).

² Exhibit H to the application contains detailed information on the Thomas Corners field, including stratigraphic maps of the reservoir.

(3) install and operate approximately 8.0 miles of a 12-inch lateral pipeline and associated metering and measurement equipment and appurtenant facilities connecting to Tennessee Gas Pipeline Company (Tennessee); (4) convert an existing 7.5 mile, 8-inch line connected to Columbia Gas Transmission Corporation's (Columbia) pipeline to a storage lateral line, and install associated metering and measurement equipment and appurtenant facilities at the Columbia interconnection; and (5) install and operate an interconnection and metering and measurement station at the compressor station yard to handle deliveries of gas to and from Corning Natural Gas Company (Corning), a local distribution company in the vicinity of the project.

7. The central storage site proposed for the project is in the Town of Bath, New York in a sparsely-populated area, on land currently devoted to forest and agricultural uses. The storage site will be centrally located over the top of the reef on a 27-acre tract of land that Arlington has been in negotiations to acquire in fee. Arlington proposes to drill up to ten nearly horizontal storage wells from a common well pad on the east side of the 27-acre tract to a depth of approximately 3,650 feet, from which point the wells will then be extended laterally through directional drilling up to 1,500 feet to reach to full extent of the Onandaga reef formation. The wells will be tied together through the 1.7-mile pipeline system, which will also connect them to the central compressor station, also located on the central storage tract.

8. The compressor station for the Thomas Corners Project will be located approximately 350 feet to the west of the common well pad, and will consist of two ISO-rated 3,550 horsepower gas-driven reciprocating engines. The compressor station will be equipped with tri-ethylene glycol dehydration units and a field separator. Arlington will also install a diesel-fired auxiliary generator for emergency power generation. The following associated appurtenances will also be installed: valves, taps, station piping utilities for the control building, gas blow-down silencer, diesel storage tank, potable water, and a pig launcher/receiver for the 12-inch and 8-inch pipelines.

9. The approximately 8.0 miles of 12-inch pipeline lateral that Arlington proposes to install and operate will extend in a westerly direction from the central storage site to a point of interconnection with Tennessee's Line 400 at a point in Steuben County, New York approximately 1.5 miles to the west of the Steuben Adrian facility (the TC West Lateral). Construction of the westernmost 1.5 miles of the TC West Lateral will involve removing the existing 4-inch diameter pipeline and placing a new 12-inch line in the existing right-of-way. As noted, above, Arlington also proposes to convert 7.5 miles of an existing 8-inch pipeline to a storage line, which will be connected to the 12-inch TC West Lateral near the storage facility site and will extend in a southerly direction to an interconnection with Columbia's A-5 Line in Steuben County, New York (the TC South Lateral). The TC West and the TC South Laterals will have bi-directional flow capability. The TC West Lateral will be designed to deliver at least 140 MMcf of gas per day at the Tennessee interconnect and the TC South Lateral will be designed to deliver up

to 80 MMcf of gas per day at the Columbia interconnect. A meter station will be placed at each interconnect equipped with measuring and communications equipment. The meter stations will each require a tract of slightly less than an acre of land. Further, with respect to the interconnection with Corning that Arlington proposes to construct and operate, Corning will also construct necessary nonjurisdictional facilities (a four-mile, four-inch diameter gas pipeline) to connect its main distribution facilities with the Thomas Corners' interconnect with Corning.³

10. Arlington states that pipeline lateral construction will require disturbance of approximately 79 acres during the construction process, assuming use of 70-foot-wide construction rights-of-way for the gathering and lateral pipelines. However, Arlington states that once construction is complete and the project is in service, only about 35 acres will be maintained as a right-of-way, assuming a permanent right-of-way width of 40 feet.

B. Market Support and Need

11. Arlington states that the proposed project will provide incremental gas storage capacity for the capacity-constrained Mid-Atlantic and Northeast gas markets through the interconnections with Tennessee and Columbia, fortifying the nation's energy infrastructure and fulfilling Congress's and the Commission's desire to add needed gas storage capacity.⁴

12. Arlington states that the need for new storage capacity is especially critical along the Mid-Atlantic/Northeast pipeline corridor, which serves major temperature-sensitive, industrial and electric generating gas consumption markets. Arlington asserts that needed gas supply is now being brought to these markets not only from traditional Gulf Coast supply sources, but also from Canada, the Rocky Mountains and imported liquefied natural gas (LNG) terminals located at Cove Point, Maryland. Arlington expects these

³ Additional non-jurisdictional facilities associated with this project will be a 1.1-mile, 480-volt distribution voltage power line that will be constructed by Steuben Rural Electric Company to provide electrical service to facilities on the storage facility site.

⁴ Arlington states that in the Energy Policy Act of 2005 (EPACT 2005), Congress recognized the need for new storage infrastructure and provided pricing incentives to spur new natural gas storage development. Energy Policy Act of 2005, Pub L. No. 109-58, § 312, 119 Stat. 594,688 (2005) (adding Section 4(f) to NGA to permit sponsors of new storage projects to charge market-based rates even if they cannot satisfy the Commission's traditional market power test). *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, Docket No. RM05-23-000, *et al.*, FERC Stats & Regs., ¶ 31,220 at P 115 (2006).

markets will also receive gas from other planned LNG terminals in the Mid-Atlantic states and New England.

13. Arlington emphasizes that its proposal to create additional gas storage capacity serves a number of vital functions in assuring reliability of gas service and enhancing market efficiency. Arlington states that adequate natural gas storage capacity is: (a) essential to accommodating the timing differences between the initial delivery and ultimate consumption of supply in the market; (b) key to balancing seasonal and daily swings in load, such as the seasonal swings experienced by heat sensitive customers and the daily and seasonal swings experienced by gas-fired electric generators; (c) important to gas marketers in the provision of asset management and gas portfolio management services to local distribution companies, electric generators and other large end users, and in capturing arbitrage opportunities presented by price differences across the pipeline grid; and (d) vital to energy security and reliability by providing readily available supply in emergency situations, such as it did following Hurricanes Katrina and Rita in the late summer and fall of 2005.

14. Arlington contends that commercial interest in the project is strong and the need for the additional storage capacity to be provided by the project has already been confirmed by the market. In response to a non-binding open-season conducted in October and November 2007, Arlington submitted, on May 19, 2008, precedent agreements⁵ with six different customers for 5.7 Bcf of firm storage capacity, representing all the firm capacity that Arlington is willing to sell prior to project completion and testing to confirm total available working gas capacity.⁶

C. Storage and Hub Services and Rates

15. Arlington seeks a blanket certificate under Part 284, Subpart G to offer open access firm and interruptible storage and hub services from the Thomas Corners Project in interstate commerce. Arlington also requests approval of its pro forma tariff included

⁵ The precedent agreements were filed as Exhibit I to the application.

⁶ Arlington explains in its application that although it believes that the working gas capacity of the project will actually prove to be approximately 7.0 Bcf, it wanted to take a conservative approach to its preconstruction commitments for such capacity. Arlington states that to fulfill the requests of its anchor customers for all the available capacity, it has provided such customers the option to take an allocable share of the remaining working gas capacity determined to be available within a year after the project is placed in service.

in its application in Exhibit P. Arlington's pro forma tariff sets forth the following rate schedules covering traditional open-access storage services: Firm Storage Service (Rate Schedule FSS), firm No-Notice Storage Service (Rate Schedule NNSS) and Interruptible Storage Service (Rate Schedule ISS). Rate Schedule NNSS will permit customers to adjust their injections into, and withdrawals from, Arlington's storage facility as their requirements dictate, without having to give Arlington advance notice of such changes.

16. Arlington also proposes to provide a number of open-access hub services. Arlington's pro forma tariff provides for a firm parking service under Rate Schedule FP, a firm loan service under Rate Schedule FL, an interruptible parking service under Rate Schedule IP, and an interruptible loan service under Rate Schedule IL. Arlington also proposes an interruptible wheeling service under Rate Schedule IW, and an interruptible hourly balancing service under Rate Schedule IHBS.

17. Arlington requests authorization to charge market-based rates for its proposed firm and interruptible storage and hub services. Arlington supports its request with a market power analysis in Exhibit Z-1 of its application that concludes that Arlington will lack market power with respect to the services it will provide.

D. Requests for Waivers

18. Because it proposes to charge market-based rates, Arlington requests waiver of certain of the Commission's filing, accounting, and reporting requirements applicable to cost-based rate proposals, which the Commission has previously found inapplicable to storage providers that are granted market-based rate authority. These regulations include: (1) section 157.6(b)(8) (applicants to submit cost and revenue data); (2) sections 157.14(a)(13), (14), (16), and (17) (cost-based exhibits); (3) the accounting and reporting requirements of Part 201 and section 260.2 (relating to the cost-of-service rate structure, i.e., Form 2A); (4) section 284.7(e) (reservation charge); and (5) section 284.10 (straight fixed-variable rate design methodology).

19. Arlington also requests waiver of several additional Commission regulations and policies. Since Arlington proposes to provide only natural gas storage service, and no stand-alone transportation services, it requests waivers of the section 284.7(d) requirement pertaining to segmentation and the section 157.14(a)(10) requirement to provide a showing of accessible gas supplies.

20. Further, Arlington seeks a waiver of the Commission's "shipper must have title" policy to enable it to obtain off-system capacity that may be necessary to provide the storage services to its customers. In support of its request, Arlington proposes tariff language stating that Arlington will only transport gas for others using such off-system capacity pursuant to its open-access tariff and subject to Commission-approved rates.

III. Notice and Interventions

21. Notice of Arlington's application was published in the *Federal Register* on March 28, 2008.⁷ Timely, unopposed motions or notices to intervene were filed by Dominion Transmission, Inc., PSEG Energy Resources & Trade LLC, Wyckoff Gas Storage Company, LLC, National Fuel Gas Supply Corporation, the Public Service Commission of New York, Robert O. Quick, and Donald R. Rombaut. Mr. Quick and Mr. Rombaut included comments with their motions to intervene, raising environmental and routing issues, respectively. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁸

22. On April 28, 2008, Colleen Mullins, Executor of Lawrence Mullins' Estate (Mullins), filed an untimely motion to intervene and objections to the application. We will grant this motion filed 14 days late, since to do so at this stage of the proceeding will not unduly delay, disrupt, or otherwise prejudice the proceeding or other parties.⁹

23. Mullins is the owner of the 27-acre tract of land Arlington proposes as the central storage site on which it intends to build its storage facilities, including up to ten wells, the compressor, buildings, pig launcher receivers and pipeline.¹⁰ In numerous filings, Mullins raises a host of issues in opposition to the Thomas Corners Project, including issues regarding need for the project, Arlington's right to develop the project and drill test wells on Mullins property and the validity of a 1970 lease Arlington holds from the Mullins' family, the valuation of the Mullins' property and the adequacy of Arlington's compensation for the right to develop the property, alternative sites for the storage facilities, and environmental impacts.¹¹

⁷ 73 Fed. Reg. 37,752.

⁸ 18 C.F.R. § 385.214(a)(3) (2008).

⁹ 18 C.F.R. § 385.214(d) (2008). We note that H.J. Yeon filed a comment protesting the application, but did not move to intervene in the proceeding. Arlington states that the project does not affect Mr. Yeon's property.

¹⁰ The Mullins property consists of two contiguous parcels totaling approximately 97 acres, and is pasture and wooded land. The 27-acre tract that Arlington plans to use is cleared hayfields, and has no houses, structures, roads, or fences on it. Neither Colleen Mullins, nor any of the other family members who have an interest in the property reside on the property.

¹¹ On May 29, 2008, Mullins filed an "Objections to Application" raising a number of environmental issues.

24. In the motion to intervene, Mullins asserts that Arlington's application is incomplete because it lacks completed environmental reports regarding wetlands, cultural resources, and state endangered species,¹² and because Arlington had not yet filed its application for an underground storage permit with the New York State Department of Environmental Conservation (NYSDEC). Mullins requests that the Commission deny Arlington's request for a shortened notice period and waiver of an evidentiary hearing, or in the alternative, delay any consideration of and action on Arlington's application, including Arlington's requests for expedited treatment and waiver of hearing, until Arlington has filed completed environmental surveys and reports, its concurrent application with NYSDEC, and executed service agreements.

25. There is no basis for granting these requests. First, as Arlington points out, full evidentiary hearings are warranted only upon a showing that there are genuine issues of material fact in dispute.¹³ Mullins argues that its claim that there is a preferable alternative site for the project facilities requires an evidentiary hearing. However, the issue of whether Arlington can or should use a different site for its storage wells and compressor stations does not raise any material factual issues that cannot be resolved on the basis of the written record before us. Further, section 7 of the NGA provides for a hearing when an applicant seeks authorization under that section, but it does not require that such hearings be trial-type evidentiary hearings. The Commission need not conduct evidentiary hearings when disputed issues, such as the alternative siting issue in this case, can adequately be resolved on the written record.¹⁴ As reflected in the Environmental Assessment issued in this case, there is sufficient information, without resort to a formal, in-person, trial-type evidentiary hearing, to make a reasoned decision on the issue of siting for the proposed project. In fact, it is the Commission's practice to decide certificate cases on the basis of the written record presented in the proceeding.

26. Second, it is also the Commission's practice to permit completion of the necessary environmental surveys and reports to take place after the application has been filed, simultaneously with the Commission's consideration of non-environmental issues and its

¹² Mullins notes that a wetlands report is required since the project is situated in wetlands and a river traverses the project area. Mullins states a cultural resources report is necessary because Native Americans frequented the project area.

¹³ *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); *See also, CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994); *Environmental Action v. FERC*, 996 F. 2d 401, 413 (D.C. Cir. 1993); *Alabama Power Co. v. FERC*, 993 F. 2d 1557, 1565 (D.C. Cir. 1993); *Louisiana Ass'n*. 958 F.2d at 1113-15; *Cascade Natural Gas Corp.*, 955 F.2d 1412 (10th Cir. 1992).

¹⁴ *See Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,080, at P 37 (2007).

preparation of the Environmental Assessment. Moreover, as discussed more fully in the Environmental Assessment and indicated below in the environmental section of this order, Arlington has completed and/or filed all environmental surveys, reports and other activities, necessary for the Commission to act on the application. In addition, on May 19, 2008, Arlington filed both its application for an underground storage permit with the NYSDEC, and executed precedent agreements for all of the proposed project's available capacity with the Commission. Consequently, there is no basis for delaying action on Arlington's application.

27. Mullins also argues that action on Arlington's application must be stayed pending a state court determination on the validity of the alleged Mullins' storage lease.¹⁵ On August 12, 2008, Arlington filed an answer to Mullins' motion for stay. Further, on August 27, 2008, Mullins filed a motion to dismiss Arlington's application on the basis that the 1970 oil and gas lease does not grant Arlington the right to develop storage operations on the Mullins' property.¹⁶ Arlington filed an answer to the motion to dismiss on September 11, 2008. Subsequently, on October 3, 2008, Mullins filed a brief in support of its motion to dismiss, to which Arlington responded on October 20, 2008.

28. The Commission addresses Mullins' arguments regarding the 1970 lease and the motion for stay and motion to dismiss in the discussion of the Certificate Policy Statement below. In the environmental section of this order, the Commission addresses Mullins' argument regarding a preferred alternative site for the facilities and other specific environmental concerns raised by Mullins, as well as the issues that have been raised by the other intervenors in this case.

IV. Discussion

29. Since the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction, acquisition, and operation of the facilities are subject to the requirements of the NGA section 7, subsections (c) and (e).

¹⁵ See August 5, 2008 "Reply of Mullins Estate to Response of Applicant to Mullins Estate Request That FERC Allow Limited Factual Inquiries of the Applicant to Demonstrate This Proceeding Must Be Stayed or Dismissed Pending Resolution of the Validity of the Mullins Alleged Storage Lease."

¹⁶Mullins' August 27, 2008 "Motion to Dismiss Application of Arlington Storage Company."

A. Certificate Policy Statement

30. The Commission's September 15, 1999 Certificate Policy Statement provides guidance as to how it will evaluate proposals for certificating new construction.¹⁷ The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. Our goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, and the avoidance of the unnecessary exercise of eminent domain or other disruptions of the environment.

31. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, we will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will we proceed to complete the environmental analysis where other interests are considered.

32. The threshold requirement is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. Although Arlington is the majority owner of Steuben and operator of its existing Adrian Field storage facility,¹⁸ the Thomas Corners Project is a new facility, which has no existing customers. Thus, due to the separation of corporate entities, there will be no subsidization of the Thomas Corners Project by Steuben's storage customers.¹⁹

¹⁷*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹⁸ Arlington's affiliate, Central New York, is the owner and operator of the Stagecoach storage project.

¹⁹ Steuben has its own Commission-regulated tariff and provides storage services at cost-based rates.

Moreover, under its market-based rate proposal, Arlington assumes the economic risks associated with the costs of the project's facilities to the extent that any capacity is unsubscribed or revenues are not sufficient to recover costs. Thus, the Commission finds that Arlington has satisfied the threshold requirement of the Certificate Policy Statement.

33. The Commission is satisfied that the proposed project will have no adverse impact on existing customers or services since, as noted above, the Thomas Corners Project is a new facility, Arlington, Steuben and Central New York will have separate Commission-regulated tariffs, and Steuben provides service at its Adrian Field storage facility at cost-based rates. The Commission is also satisfied that there will be no negative impact on existing storage providers or their captive customers since, as discussed below, the proposed project will be located in a competitive market and will serve incremental growth in a region that is experiencing rapid growth in natural gas use. The proposal will also enhance storage options available to pipelines and their customers, and thus, will increase competitive alternatives.

34. With respect to the project's impacts on landowners, Arlington states in its application that it expects to be required to invoke eminent domain for the acquisition of surface and underground property rights on a minimal basis.²⁰ Arlington states that it has acquired or has options to acquire most of the needed mineral, surface, and subsurface rights for the development of the storage facility site. It states that it already owns the land for the 8-inch TC South lateral and the westernmost 1.5 miles of the right-of-way for the 12-inch TC West lateral, and is in the process of acquiring the rest of the land for the pipeline laterals.

35. In addition, it is Arlington's position that it already holds by lease or by fee all of the mineral or subsurface storage rights necessary to develop the project.²¹ Specifically, Arlington indicates that it has been successful in obtaining either in fee or through lease 82 percent of the necessary storage rights,²² while the remaining 18 percent of the total storage rights – those on the 27-acre Mullins tract – were previously granted to Arlington's predecessor by Lawrence and Pauline Mullins under a 1970 oil and gas and

²⁰ Application at 33.

²¹ At the time of Arlington's application, Arlington indicated it currently held more than 90 percent of the gas storage rights in the Thomas Corners Field.

²² See September 11, 2008 Answer of Arlington to Motion of Mullins to Dismiss Application at 4. Arlington notes that under applicable New York law, once a storage operator controls 75 percent of the rights in a storage field, it can secure state authorization to operate an underground gas storage facility.

gas storage lease (1970 Lease).²³ Arlington maintains that the 1970 Lease affords it all necessary rights to develop its storage wells and compressor station without the need to purchase any lands in fee from Mullins.²⁴ Nevertheless, Arlington asserts that it has attempted to purchase the entire Mullins' property outright, offering a multiple of the appraised value and agreeing to allow Mullins to hold rights for future oil and gas exploration on the property. However, since such negotiations for the purchase of the Mullins' property have been unsuccessful, Arlington states that it plans to develop the project relying on the gas storage rights conferred by the 1970 Lease.

36. Mullins disputes Arlington's claim that it already holds leasehold and storage rights under the 1970 Lease, on the basis that the lease has terminated by its own terms, when gas production from the last existing well on the Mullins property ceased on January 9, 2008. Mullins also argues that: (1) the lease does not grant Arlington the right to store gas underneath the property; (2) Arlington has not properly consulted with Mullins on the location of the storage wells; (3) Arlington has not timely removed the equipment from the non-producing gas wells on the leased premise; and (4) Arlington lacks authority to lay pipelines across the leased premises in connection with its gas storage operations.

37. On the basis of its position that the 1970 Lease is void, Mullins argues that the Commission lacks "jurisdiction" to act on Arlington's application at this time and the proceeding should be dismissed or stayed until a state court rules on the validity of the 1970 Lease.²⁵ Mullins asserts that Arlington does not control enough of the proposed

²³ Arlington includes a copy of the 1970 Lease as Attachment 1 to its August 12, 2008 Answer to Mullins Interests' Motion for Stay.

²⁴ Arlington states that Section 1 of the 1970 Lease confers rights in "all the oil deposits and natural gas" underlying the leased premises. In addition, it states that Section 11 of the 1970 Lease provides that such grant includes "the exclusive right to employ any oil or gas stratum underlying leased premises for the storage of gas or protecting gas stored within and under adjoining and neighboring lands" for an annual rental of \$5.00 per acre. Arlington states that Section 11 of the 1970 Lease further grants it "necessary or useful surface rights and privileges relating" to the storage of gas in return for a payment of liquidated damages of \$500 for each well utilized in gas storage operations.

²⁵ See Mullins' August 5, 2008 "Reply to Response of Applicant to Mullins Estate Request that FERC Allow Limited Factual Inquiries of the Applicant to Demonstrate This Proceeding Must be Stayed or Dismissed Pending Resolution of the Validity of the Mullins Alleged Storage Lease." On August 12, 2008, Arlington filed an answer to Mullins' the August 5 motion for stay. Mullins had filed a document entitled "Factual Inquiry" on July 28, 2008, posing to Arlington 16 factual questions allegedly designed to

(continued...)

storage field, or have in place easements to move gas off of the storage facility, to make the issue of whether a certificate of public convenience and necessity should be granted ripe for adjudication. Alternatively, assuming the Commission has jurisdiction, Mullins argues this proceeding should be stayed pending resolution of the validity of the alleged 1970 Lease in New York state courts, so as not to waste the Commission's administrative resources.

38. In its answers to Mullins' various pleadings, Arlington responds that Mullins' arguments are incorrect because Mullins ignores the plain terms of the 1970 Lease, failing to discuss or quote from any portion of the lease to support its position. Arlington maintains that Mullins' arguments are simply posturing designed to coerce Arlington to pay an unreasonable price for the purchase of the property,²⁶ and points out that Mullins has not yet filed any state court action contesting the 1970 Lease, despite Arlington's test well drilling activities on the Mullins property since the beginning of January 2008.

39. Mullins' request to stay Commission action on Arlington's application is denied. Mullins' contention that either the Commission has no jurisdiction to act on the application because the lease is void, or that the Commission should not act until the legal dispute between Mullins and Arlington involving the validity of the 1970 lease is resolved in the New York courts, reflects a misunderstanding of the process by which the Commission acts in applications for certificates of public convenience and necessity under section 7 of the NGA. That section contemplates that applicants might not possess

determine whether the proceeding is premature and to request that the Commission compel Arlington to answer the questions. Arlington had filed an answer to Mullins' request for a factual inquiry on July 31, 2008, asserting that the factual inquiry should be summarily dismissed as an improper request for discovery. Arlington is correct that under the Commission's Rules of Practice and Procedure, discovery is not permitted unless the proceeding has been set for evidentiary hearing, or the Commission has otherwise authorized discovery. 18 C.F.R. § 385.401(a). The Commission has not set this case for hearing or authorized discovery. The Commission has, as part of its review of the application, issued data requests to Arlington to gather any further information needed to process the application, to which Arlington has responded. Moreover, the questions Mullins raises either are not material to our review of the application, or are not relevant to the protection of the Mullins' interests. The Commission denies Mullins' request to compel Arlington to respond to the factual inquiry.

²⁶ Arlington states that in negotiations Mullins has increased her demand from 3.8 times the appraised value of the property to more than 5.3 times the appraised value, and has represented that her litigation position in a condemnation action would be more than 90 times the appraised value of the property. *See* Arlington's May 9, 2008 Answer to Mullin's Motion to Intervene at 2 and 5.

the property rights necessary to develop their projects when they file their certificate applications. Specifically, section 7(h) provides that if the holder of a certificate of public convenience and necessity issued under section 7 cannot acquire the necessary property rights to construct its facilities, it may acquire those rights through the exercise of the right of eminent domain. Eminent domain proceedings commence in the district court for the United States in the district in which the property is located, or in the state courts. In the eminent domain proceeding, the landowner will be compensated for its property according to the applicable state law.

40. Thus, while the extent to which an applicant may be able to avoid the exercise of eminent domain is a factor considered by the Commission in assessing the relative merits of a proposal, the Commission's jurisdiction is not dependent on an applicant's possession of the requisite property interests to develop its proposed project. Consequently, the validity of the 1970 Lease is irrelevant to the Commission's authority to issue a certificate of public convenience and necessity. Accordingly, we find no basis upon which to grant a stay of Commission action in this proceeding pending resolution of the validity of the 1970 Lease in state court.²⁷ Similarly, there is no basis for the Commission to grant Mullins' August 27, 2008 motion to dismiss the application simply because the 1970 Lease allegedly does not grant storage rights on the Mullins property to Arlington. It is not necessary for the Commission to wait for a state court to interpret the lease as to whether its provisions give Arlington the right to develop the storage project on Mullins' property since, as discussed above, Arlington can acquire such rights without the 1970 Lease, either through a new lease or easement, the purchase of the necessary property rights through negotiation, or via eminent domain proceedings.

41. Mullins also argues that because it maintains the 1970 Lease expired and became void earlier this year after gas production from the Mullins #1 well ceased, Arlington's recent action in drilling two test wells on the property constituted a trespass for which Arlington Storage is accountable for damages and restoration of the property.²⁸ On January 22, 2008, Arlington filed a request for exemption from section 7(c) certificate requirements with the Commission, seeking to drill two stratigraphic test wells, which would ultimately be used as natural gas storage wells, in anticipation of development of

²⁷We note, as Arlington points out, Mullins has not yet filed any action in state court challenging the validity of the 1970 lease under which Arlington claims it has the right to develop its project on the Mullins' land.

²⁸See Mullins' July 1, 2008 e-mail message to Arlington, in which the Commission was included as a "cc" party. Mullins also argues that under the lease, even if valid, Arlington had an obligation to consult with her prior to drilling the wells. Arlington filed an "Answer to Filing by Mullins' Interests" on July 9, 2008, requesting the Commission to dismiss Mullins' trespass arguments for lack of jurisdiction.

the project. In a prior order, the Commission granted the exemption authorizing the drilling and testing activities of which Mullins complains,²⁹ since Arlington claimed to have the necessary leasehold and storage rights under the 1970 Lease to conduct those activities, and no motions to intervene or protests had been filed. Although the issue of which party legally holds those rights on the Mullins' property is now in dispute, the Commission has no jurisdiction over landowners' real property or damages claims.³⁰

42. Mullins claims that Arlington has offered inadequate compensation to purchase the land. Mullins claims that Arlington discounts the value of the property, pointing to Arlington's assertions in its application that "[t]here are no visually sensitive areas along the proposed route or near the proposed surface facilities" and "no significant adverse comments were raised."³¹ Mullins contends that these statements ignore her vehement opposition to the project, stemming in part from her plans to rebuild on the property, as well as the proposed project's threatened impact on the property's pristine and scenic qualities. Additionally, Mullins claims that Arlington has failed to address the amount of native gas remaining in the existing well, and that Mullins should receive the highest market value as of the time production ceased.³²

43. In the event issues involving compensation cannot be negotiated between the Mullins and Arlington, as seems to be the case, such issues are appropriately resolved by a court, according to New York law, in an eminent domain proceeding. The Commission has no jurisdiction over landowner valuation claims.³³ Through the eminent domain process, the court will decide the appropriate value of Mullin's mineral and property rights, and would have the authority to resolve the nature and extent of Arlington's responsibility to compensate Mullins for any native gas remaining in the existing well, or for any other loss of use of the property of which Mullins complains, such as redevelopment of the property.

²⁹ *Arlington Storage Company, LLC*, 122 FERC ¶ 61,152 (2008).

³⁰ *See, e.g., Millenneum Pipeline Co., LP*, 100 FERC ¶ 61,277, at P 245 (2002), *order on reh'g*, 117 FERC ¶ 61,319 (2006), *order on reh'g*, 119 FERC ¶ 61,173 (2007); and *ANR Pipeline Co.*, 86 FERC ¶ 61,245, at 61,882 (1999).

³¹ Application at 28 and 30.

³² Mullins also contends its land contains valuable gas reserves in the Marcellus Shale. However, Arlington has agreed to allow Mullins to reserve the gas production rights to the Marcellus Shale.

³³ *See Transwestern Pipeline Co., LLC*, 122 FERC ¶ 61,165, at P 40 (2008), and *Northwest Pipeline Corp.*, 99 FERC ¶ 61,365, at P 47 (2002).

44. The Commission acknowledges that the Thomas Corners Project will likely have an impact on one landowner, Mullins, whose property comprises 27 acres of the 62.85 total acres that will be required for permanent operations, notwithstanding the fact that Mullins, as discussed above, will be compensated for the loss of any mineral rights and surface use of the land. Such compensation will be determined either: (a) through further negotiations with Arlington leading to the purchase of the property; (b) under the terms of the 1970 Lease if upheld by a state court in any subsequent state litigation; or (c) through eminent domain proceedings in state or federal court if a New York state court finds that the 1970 Lease does not grant storage rights to Arlington.

45. Questioning the need for Arlington's proposed storage project, Mullins asserts that the proposed project would add a mere 1.4 percent to the region's storage capacity. Mullins also states that the facts that Arlington received only non-binding bids in response to its open season, and that Arlington's predecessor held a certificate authorizing the proposed storage project for 13 years without developing it, speak to a lack of need for the project. These points fail to cause us to doubt that there is a current need for the Thomas Corners Project. The reasons for the failure of Arlington's predecessor to develop this project 13 years ago are not relevant to the present market. The Thomas Corners Project will provide critically needed incremental gas storage capacity for the capacity-constrained Mid-Atlantic and Northeast corridor. As explained by Arlington in its application, this added storage capacity will contribute toward assuring reliability of gas service and enhancing market efficiency in that corridor's major temperature-sensitive, industrial and electric generating gas consumption markets.³⁴ Moreover, Arlington's executed precedent agreements with six different customers for 5.7 Bcf of firm storage capacity, representing all of the firm project capacity Arlington is currently willing to sell at this time and 80 percent of the total estimated project capacity, corroborate that need.

46. The Commission concludes that the Thomas Corners Project will provide needed incremental storage capacity, help assure gas reliability, and enhance market efficiency. It will have no adverse effects on existing customers, other pipelines, or communities. It potentially will, as detailed above, have a relatively significant impact on one landowner. However, we find that on balance, the significant public benefits of the additional storage capacity which will be made available by the project outweigh the potential adverse impacts. Therefore, we find, consistent with the Certificate Policy Statement and section 7 of the NGA, that the public convenience and necessity requires approval of the Thomas Corners Project, subject to the conditions discussed below.

³⁴ See PP 12 - 13 of this order, *supra*.

B. Market-Based Rates

47. Generally, the Commission evaluates requests to charge market-based rates for storage under the analytical framework of its 1996 Alternative Rate Policy Statement (Alternative Rate Policy Statement).³⁵ Under the Policy Statement, the Commission will approve market-based rates for storage providers where the applicant has demonstrated it lacks market power or has adopted conditions that significantly mitigate market power. The Commission has approved requests to charge market-based rates for storage services based on a finding that the proposed projects would not be able to exercise market power due to small size, anticipated share of the market, and numerous competitors.³⁶ The Commission permits storage applicants to include non-storage products and services, including pipeline capacity and local production and LNG supply in the calculation of its market concentration and market share.³⁷ The Commission's analysis of whether an applicant has the ability to exercise market power includes three major steps: (1) definition of the relevant markets; (2) measurement of a firm's market share and market concentration; and (3) evaluation of other relevant factors.³⁸

1. Storage Services and Hub Services Other than Wheeling

48. The market power analysis for Arlington's proposed storage services defines the relevant product and geographic markets, measures market share and concentration, and evaluates other relevant factors, such as the ease of entry into the relevant market. The

³⁵ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076; *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). *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 (2006), *order on clarification and reh'g*, Order No. 678-A, 117 FERC ¶ 61,190 (2006).

³⁶ *Egan Hub Partners, L.P.*, 99 FERC ¶ 61,269 (2002); *Egan Hub Partners, L.P.*, 95 FERC ¶ 61,395 (2001); *Moss Bluff Hub Partners, L.P.*, 80 FERC ¶ 61,181 (1997); *Egan Hub Partners, L.P.*, 77 FERC ¶ 61,016 (1996).

³⁷ Order No. 678 at P 26.

³⁸ If an applicant is unable to, or elects not to, demonstrate that it lacks market power, it may still receive market-based rates when such rates are deemed to be in the public interest to encourage construction of natural gas storage, where customers are adequately protected. Order No. 678.

market power analysis identifies two relevant product markets: (1) firm and interruptible market area natural gas storage and storage-related hub services; and (2) interruptible wheeling service. The market power study identifies the relevant geographic market as New York and Pennsylvania. The study states that this geographic market definition is consistent with the definition the Commission has adopted in evaluating numerous market area natural gas storage projects also located in New York and Pennsylvania that have received market-based rate authority.³⁹ The market power study avers that a broader market definition would be appropriate for the market power analysis, particularly since existing storage in neighboring areas, such as West Virginia, is also utilized to serve the same northeastern and Mid-Atlantic United States markets as the proposed project. However, the study has been conducted conservatively by narrowly limiting the geographic market to New York and Pennsylvania.

49. Attachments A and B⁴⁰ to the market power study present the market share and market concentration calculations for both working gas capacity (Attachment A) and for maximum daily withdrawal capability (Attachment B) for the project's relevant geographic region. The study states that, consistent with Commission policy, it grouped together all storage entities that are affiliated with one another at the corporate level, which has the effect of increasing the market share and market concentration.

50. The market power study states that, with the exception of interruptible wheeling service, hub services are all variations of firm and interruptible storage services, and thus represent substitutes for firm and interruptible storage service, consistent with

³⁹ See, e.g., *Avoca Natural Gas Storage*, 68 FERC ¶ 61,045 (1994); *Steuben Gas Storage Company*, 72 FERC ¶ 61,102 (1995) and 74 FERC ¶ 61,060 (1996); *New York State Electric & Gas Corp.*, 81 FERC ¶ 61,020 (1997); *NE Hub Partners, LP.*, 83 FERC ¶ 61,043 (1998); *Honeoye Storage Corp.*, 91 FERC ¶ 62,165 (2000); *Central New York Oil and Gas Co., LLC (Central New York)*, 94 FERC ¶ 61,194 (2001); *Seneca Lake Storage, Inc.*, 98 FERC ¶ 61,163 (2002); *Wyckoff Gas Storage Company, LLC*, 105 FERC ¶ 61,027 (2003) (*Wyckoff*); *Central New York*, 116 FERC ¶ 61,277 (2006).

⁴⁰ The data used to conduct the market power analyses provided in Attachments A and B were based primarily on the information presented in Intelligence Press' *Natural Gas Storage and LNG Facilities in the United States and Canada* published in 2004, as updated through various FERC filings, trade press research, information on company websites and other publicly-available materials. The study states that Intelligence Press' publication has been relied upon by other applicants in the past and the Commission has found this to be a reasonable source of data for conducting market power analyses for storage facilities.

Commission policy in the granting of market-based rate authority for hub services.⁴¹ Further, the study notes that the Commission has stated that "parking, loaning, balancing, and imbalance trading hub services are essentially variations of storage service."⁴² Therefore, the study relies on the market share and market concentration analyses presented in Attachments A and B for storage services as demonstration that Arlington also lacks market power for hub services other than wheeling.⁴³

a. **Market Share**

51. As stated, *supra*, Inergy acquired Arlington in 2007 for the specific purpose of constructing and operating the Thomas Corners Project.⁴⁴ Arlington owns both the Thomas Corners development property, and the Adrian Field storage facility, an existing natural gas storage facility also in Steuben County, New York, through its interest in Steuben. Also, Central New York, owned by Inergy, is the owner and operator of the Stagecoach storage project. Central New York has its own Commission market-based rate tariff for the Stagecoach storage field,⁴⁵ and Steuben has its own Commission-regulated tariff and provides storage services at cost-based rates.⁴⁶

52. Attachment A shows that the geographic market used in the analysis contains 12 entities, including Inergy, with a total market area working gas capacity of 519.77 Bcf.

⁴¹ See, e.g., *Liberty Gas Storage LLC*, 113 FERC ¶ 61,247 (2005); *Unocal Keystone Gas Storage, LLC*, 106 FERC ¶ 61,033 (2004).

⁴² See *Liberty Gas Storage LLC*, 113 FERC ¶ 61,247, at 61,976 (2005).

⁴³ See Market Power Study at 12.

⁴⁴ Inergy is the controlling partner in Arlington; however there are other limited partners in Arlington, not affiliated with Inergy, including National Grid, Honeoye Storage and John Hancock. For purposes of the market power analysis herein, Arlington (and in turn the Thomas Corners and Adrian facilities) has been assumed to be fully owned by Inergy. See Market Power Study at 7, n.17.

⁴⁵ Stagecoach received market-based rate authority from the Commission to provide firm and interruptible natural gas storage service, as well as interruptible wheeling service, at market-based rates. *Central New York*, 116 FERC ¶ 61,277 (2006); *Central New York*, 94 FERC ¶ 61,194 (2001). See Market Power Study at footnote 16.

⁴⁶ See Market Power Study at 3.

Inergy storage fields,⁴⁷ including the project's 7.0 Bcf of working gas capacity, will have 39.45 Bcf of working gas capacity, or approximately 7.6 percent, of the market area working gas capacity. Attachment B, using the same 12 entities, shows a total market area withdrawal capacity of 10,190 MMcf per day. Inergy storage fields, including the 140 MMcf per day of the project's withdrawal capacity, will have 700 MMcf per day, or approximately 6.9 percent, of the market area withdrawal capacity. These relatively small market shares will not enable Inergy or Arlington to exert market power in the relevant market area.

b. Market Concentration

53. The Commission uses the Herfindahl Hirschman Index (HHI) test to determine market concentration for gas pipeline and storage markets. The Alternative Rate Policy Statement states that a low HHI – generally less than 1,800 – indicates that sellers cannot exert market power because customers have sufficiently diverse alternatives in the relevant market.⁴⁸ While a low HHI suggests a lack of market power, a high HHI – generally greater than 1,800 – requires closer scrutiny in order to make a determination about a seller's ability to exert market power. The market power analysis for storage services and hub services other than wheeling shows an HHI calculation of 2,141 for working gas capacity and an HHI calculation of 2,120 for peak day deliverability.⁴⁹ These HHIs are above the 1,800 level cited in the Alternative Rate Policy Statement, under which no further market power analysis would be required. However, the study maintains that the concentration observed in the New York/Pennsylvania market is the result almost entirely of the presence of a single storage provider, Dominion Transmission Inc. (DTI). DTI's market share in each of the scenarios is approximately 40 percent and DTI's market share is the primary cause of the market concentration. The study states that, although the New York/Pennsylvania storage market is considered concentrated based on an HHI analysis, the Commission has found in numerous recent cases that since the majority of the storage services in this market, including those of DTI, are regulated and provided at cost-based, not market-based, rates, the degree of

⁴⁷ Attachments A and B include the other Inergy-owned Adrian and Stagecoach fields, in addition to Arlington's proposed project.

⁴⁸ See Order No. 678 at P 55 (which notes that the Commission is not changing the 1,800 HHI threshold level).

⁴⁹ See Attachments A and B, respectively.

market concentration was not a factor. Thus, the market power potential of relatively small applicants such as Inergy is alleviated.⁵⁰

54. As the study notes, the Commission has found in several proceedings that the majority of storage rates in the New York/Pennsylvania market are Commission-regulated cost-based rates.⁵¹ Companies with Commission-regulated cost-based rates cannot exercise market power to increase prices above the cost-based rate cap.⁵² In *Central New York*,⁵³ the Commission stated that, in order to attract customers seeking interruptible services, companies must offer those customers services that will lower their delivered gas prices and, in *Wyckoff*,⁵⁴ the Commission found that Commission-regulated, just and reasonable rates offer an incentive to market services at or below the regulated rates. Accordingly, the existence of Commission-regulated cost-based rates in a market area acts to prevent companies with market-based rates from exercising market power, even where market concentration is high.⁵⁵

2. Interruptible Wheeling Hub Service

55. Interruptible wheeling service is a distinct service that is not identical to storage service. As such, the market power study identified wheeling service as a separate product market and calculated Arlington's market power for interruptible wheeling services separately. To do this, the study identified other market area hubs, as well as numerous pipeline interconnections in the proximity of the project, that would provide customers with alternatives to the wheeling services to be offered by Arlington. The study contains two analyses consistent with the Commission's approach to evaluating interruptible wheeling services: (a) a "bingo card" analysis (Attachment C to the Market Power Study), which demonstrates the various alternatives to the project that market

⁵⁰ See, e.g., *Honeoye Storage Corp.*, 91 FERC ¶ 62,165 (2000); *Central New York*, 94 FERC ¶ 61,194 (2001); *Seneca Lake Storage, Inc.*, 98 FERC ¶ 61,163 (2002); *Wyckoff Gas Storage Company, LLC, et al.*, 105 FERC ¶ 61,027 (2003) (Wyckoff); *Central New York*, 116 FERC ¶ 61,277 (2006).

⁵¹ *Id.*

⁵² *Central New York*, 94 FERC ¶ 61,194, at pp. 61,706-07 (2001).

⁵³ *Id.*

⁵⁴ 105 FERC ¶ 61,027 at P 60 (2003).

⁵⁵ See *Central New York*, 94 FERC ¶ 61,194 and *Wyckoff*, 105 FERC ¶ 61,027, at P 60 (2003).

participants have for wheeling natural gas between pipelines; and (b) a market share and market concentration analysis for the competitive alternatives to the wheeling services the project will provide (Attachment D to the Market Power Study).

a. Bingo Card Analysis

56. The Commission uses a "bingo card" analysis to assess whether prospective customers of an applicant seeking market-based rate authority for interruptible wheeling service could obtain those same services from alternative providers. The Commission has relied upon the bingo card analysis to determine whether shippers can avoid the pipeline interconnections provided by the applicant by utilizing alternative interconnections available between the pipelines that are directly or indirectly connected to the applicant. The project will be interconnected directly to TGP and Columbia, and indirectly interconnected to DTI, National Fuel and Transco.⁵⁶ The bingo card analysis for the project is shown on Attachment C. The bingo card shows the 20 direct and indirect interconnections and the available capacity at each interconnection. Attachment D shows the alternative receipt and delivery points available via the pipelines to be directly and indirectly interconnected with the project and the available capacity at each receipt and delivery point.

57. Attachment C shows that the bingo card for the project is completely filled-in, meaning that the pipelines that are directly and indirectly interconnected to the project are also interconnected with each other. This demonstrates that there are numerous alternatives to Arlington's proposed interruptible wheeling service. As can be seen on Attachment D, page 5, there are 56 receipt and delivery points at the 20 direct and indirect pipeline interconnections to the project that would be capable of providing competing wheeling services.

58. Attachments C and D show that there are numerous alternative routes for shippers to transport gas to East Coast and Mid-Atlantic natural gas markets. However, an additional important aspect of the competitiveness of this market that is not reflected on Attachments C and D is that there are numerous large LDCs in the Northeast and Mid-Atlantic that hold firm capacity on many of the pipelines to which the project will be directly and indirectly connected. In addition, these large LDCs also contract for firm storage service from storage providers other than Arlington and its affiliates. As such, these large LDCs are able to effectuate transactions for third parties between these pipelines without relying on Arlington. In other words, the services that these large LDCs can offer in the market by leveraging their assets across the various pipelines, e.g.,

⁵⁶ For purposes of evaluating competitive alternatives to interruptible wheeling services, the Commission has previously accepted the use of direct and indirect pipeline interconnections. See *Unocal Keystone Gas Storage, LLC*, 106 FERC ¶ 61,033 (2004).

through exchanges, swaps, or bundled releases, will compete directly with the interruptible wheeling service that Arlington will provide.

b. Market Share and Market Concentration

59. The market share and market concentration analyses for Arlington's proposed interruptible wheeling service are shown on Attachment E to the Market Power Study. Consistent with the Commission's established approach to evaluating market share and market concentration for interruptible wheeling services, receipt capacity and delivery capacity are analyzed separately. As noted above, this analysis includes the interconnections for the pipelines directly and indirectly interconnected with the project, including those at the Leidy-Ellisburg market center and the Dominion market center. The receipt and delivery capacity for Arlington's affiliated Stagecoach storage facility has been included since Stagecoach is directly and indirectly interconnected to the same pipelines as the project and has previously received authority from the Commission to provide interruptible wheeling service at market-based rates.

60. Attachment E shows that Arlington will be a very small participant in the relevant market, with a market share of approximately 6.4 percent for both receipt and delivery capacity at the market centers in the relevant market. As shown on Attachment E, the market for wheeling services among these pipelines would be considered concentrated given the HHI levels of 2,010 and 2,187 for receipt capacity and delivery capacity, respectively. However, the other participants with receipt and delivery point interconnections are all regulated interstate pipelines and, as the market power study indicates, Arlington would be a very small participant and unable to exercise market power. As the study asserts, Inergy will be unable to exert market power since customers will have numerous alternatives from which to purchase the wheeling services proposed by Arlington.

3. Other Relevant Factors Mitigating Potential Market Power

61. Numerous other factors, in addition to market share and concentration, support the conclusion that Arlington will not be able to exercise market power in the New York/Pennsylvania market, including ease of entry and the project's or its parent's or affiliates' lack of ownership of connected transportation facilities.

62. Ease of entry into a market inhibits the potential for any given participant to exercise market power.⁵⁷ There are no significant barriers to entry in the New York/Pennsylvania market for storage services, as demonstrated by the numerous recent

⁵⁷ Alternative Rate Policy Statement at p. 61,234.

storage projects that have been developed in this market, as well as the proposed development of over 65 Bcf of additional working gas capacity over the next few years.⁵⁸ The lack of any significant barriers to entry in the New York/Pennsylvania market means that Arlington will not have the ability to unilaterally raise prices above competitive levels.

63. Neither Arlington nor Inergy will own or control any of the long-haul interstate transportation facilities to which the storage facilities are interconnected. The project will have to rely upon the transportation services provided by the two independent, non-affiliated interstate pipelines for its storage services to be utilized and provided to the ultimate end-users. Moreover, most of the interstate pipelines with which the project will be directly and indirectly interconnected all have their own market area storage (i.e., Columbia, DT1, National Fuel, Texas Eastern and Transco) that can be marketed in competition with the project's services. Therefore, the project will be dependent on non-affiliated transportation providers for its services to be effective, another indication that Arlington will be unable to exercise market power if provided market-based rate authority.

64. Furthermore, there are numerous competitive alternatives to the storage services Arlington proposes to provide. For example, many pipelines offer balancing and no-notice services that are effective substitutes to underground storage services. Balancing and no-notice services offered by the pipelines provide customers with the daily and hourly flexibility to manage the inevitable variations between projected demand, actual demand and supply, similar to the capability provided by storage. In addition, many natural gas marketers also offer seasonal and swing contracts that provide additional flexibility that competes with storage. Instead of purchasing 365-day service from pipelines, customers can purchase seasonal contracts that provide service for a more defined period of the year, similar to storage services. Swing contracts also provide a customer with the ability to call upon a certain amount of natural gas during a specified period of time for a specified number of days during that period, which represent another type of alternative to storage services. These types of services offered by pipelines and marketers compete directly with the storage services proposed to be offered by Arlington, further reducing the potential for Arlington to exercise market power.

65. Also, as shown in Attachments A and B, a significant portion of the storage in the New York and Pennsylvania region is owned and operated by large storage providers that offer service at cost-based rates regulated by the Commission. Given this fact, along with the fact that Arlington and its affiliates will have a small market share in a highly competitive storage market and the fact that there is an active capacity release market on

⁵⁸ See Market Power Study at 15-17.

all of the interstate pipelines in the region, it would be extremely difficult for Arlington to exercise market power for storage and hub services.

66. For all of the above reasons, the market power study concludes that it is highly unlikely that Arlington will be able to exercise market power if granted market-based rate authority for firm and interruptible storage services and interruptible wheeling services.

4. Conclusion

67. We find that Arlington's market power analysis demonstrates that its proposed storage facilities will be in a highly competitive area where numerous storage service alternatives exist for potential customers. We also find that Arlington's analysis properly identifies good alternatives and that Arlington's entry will increase the storage alternatives in the New York/Pennsylvania market area. Furthermore, we find that, within the relevant market, Arlington's prospective market shares are low and, although the market concentration is above the threshold which would require closer scrutiny, we find that barriers to entry are likely to be low in the relevant market. Thus, we conclude that Arlington will lack significant market power. Further, Arlington's proposal for market-based rates is unopposed. For these reasons, we will approve Arlington's request to charge market-based rates for all firm and interruptible storage, hub, and wheeling services.

68. Nevertheless, Arlington must notify the Commission if future circumstances significantly affect its present market power status. Thus, our approval of market-based rates for the indicated services is subject to re-examination in the event that:

(a) Arlington adds storage capacity to the project beyond the capacity authorized in this order; (b) an affiliate increases storage capacity; (c) an affiliate links storage facilities to the project; or (d) Arlington, or an affiliate, acquires an interest in, or is acquired by, an interstate pipeline connected to the project. Since these circumstances could affect its market power status, Arlington must notify the Commission within 10 days of acquiring knowledge of any such changes. The notification must include a detailed description of the new facilities and their relationship to Arlington and the project.⁵⁹ The Commission also reserves the right to require an updated market power analysis at any time.

C. Waivers of Filing Requirements

69. Given that it is requesting authority to charge market-based rates, Arlington requests that the Commission waive section 157.6(b)(8) of the Commission's regulations

⁵⁹ See, e.g., *Port Barre Investments, L.L.C. d/b/a Bobcat Gas Storage*, 116 FERC 61,052 (2006); *Copiah County Storage Company*, 99 FERC ¶ 61,316 (2002); *Egan Hub Partners, L.P.*, 99 FERC ¶ 61,269 (2002).

requiring it to submit cost and revenue information otherwise necessary for the Commission to make an up-front determination of the rate treatment for Arlington's storage project. Arlington also requests that the Commission waive the filing requirements of section 157.14(a)(13), (14), (16), and (17) to submit Exhibits K (Cost of Facilities), Exhibit L (Financing), Exhibit N (Revenues, Expenses, and Income) and Exhibit O (Depreciation and Depletion) and the filing requirements of section 157.20(c)(3), since these exhibits are required for cost-based rate authority. For the same reasons, Arlington requests waiver of the accounting and annual reporting requirements under Part 201 (accounting and reporting requirements of Uniform System of Accounts) and sections 260.1 and 260.2 (which require natural gas companies to file annual reports in FERC Form Nos. 2 and 2-A) of the Commission's regulations. Similarly, Arlington requests waiver of the requirement pertaining to straight fixed-variable rate design set forth in sections 284.7(e) and 284.10 also as being inapplicable to market-based rate design. Arlington also requests waiver of the filing requirement of section 157.14(a)(10) to submit total gas supply data (Exhibit H), as being inapplicable to natural gas storage services since Arlington's customers will hold title to the gas delivered for storage.

70. The cost-related information required by the above-described regulations is not relevant in light of our approval of market-based rates for Arlington's proposed services. Thus, consistent with our findings in previous orders,⁶⁰ we will grant Arlington's request for waiver of the regulations requiring cost-based related information for these services. We will also grant a waiver of section 157.14(a)(10) requiring an applicant to submit gas supply data, which is inapplicable to storage operations.

71. Further, there is also no ongoing regulatory need to have cost-based financial statements prepared in accordance with the Commission's Uniform System of Account (USofA). Accordingly, we will grant Arlington's request to waive accounting requirements, as prescribed in Part 201, Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act. In addition, the Commission will grant Arlington's request to waive the reporting requirements prescribed in section 260.1, FERC Form No. 2, Annual Report for Major Natural Gas Companies (Form 2), and section 260.2, FERC Form No. 2-A, Annual Report for Nonmajor Natural Gas Companies (Form 2-A), as well as in section 260.300, FERC Form No.3-Q, Quarterly Financial Report of Electric Utilities, Licensees, and Natural Gas Companies, but note that such waivers do not extend to the Commission's assessment of annual charges (ACA). Therefore, Arlington is required to file page 520 of

⁶⁰ See, e.g., *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 (2004); *Egan Hub Partners, L.P.*, 95 FERC ¶ 61,395, at p. 62,473 (2001) and 99 FERC ¶ 61,269, at p. 62,142 (2002).

Form 2 or Form 2-A, respectively, with official certification, reporting the gas volume information which is the basis for imposing an ACA.⁶¹

72. These waivers are subject to revision in the event the Commission finds cause to review Arlington's market power or market-based rates. In addition, in the event the Commission may find cause to review records and data showing Arlington's costs, we will require Arlington to maintain records to separately identify the original cost and related depreciation on its facilities, and to maintain accounts and financial information of its facilities consistent with generally accepted accounting principles.

D. Tariff Provisions

73. As stated above, Arlington proposes to offer firm and interruptible storage, hub and wheeling services on an open-access basis under the terms and conditions set forth in the tariff, which is attached as Exhibit P to the application. Arlington states that its proposed tariff is modeled after Leaf River Energy Center, LLC's (Leaf River) pro forma tariff filed in Docket No. CP08-8-000.⁶² Leaf River's pro forma tariff was approved by the Commission on October 30, 2008.⁶³ We find that Arlington's proposed tariff generally complies with Part 284 of the regulations; however, certain provisions are discussed further below.

1. Segmentation

74. Section 284.7(d) of the Commission's regulations provides that an interstate pipeline must permit a shipper to make use of the firm capacity for which the shipper has contracted by segmenting that capacity into separate parts for the shipper's own use, or for the purpose of releasing that capacity to replacement shippers to the extent that segmentation is operationally feasible. Arlington requests a waiver of the Order No. 637 segmentation requirements contained in section 284.7(d), contending that it will not be offering stand-alone firm transportation services and that segmentation is not operationally feasible on its system.

75. In *Clear Creek Gas Storage Company*,⁶⁴ we found that the requirements of section 284.7(d) did not apply to pipelines engaged solely in natural gas storage and which did

⁶¹ See *Bluewater Gas Storage, LLC*, 117 FERC ¶ 61,122, at P 49 (2006).

⁶² See Application at 16, n.6.

⁶³ See *Leaf River Energy Center, LLC*, 125 FERC ¶ 61,131 (2008) (*Leaf River*).

⁶⁴ 96 FERC ¶ 61,071 (2001) (*Clear Creek*).

not provide stand-alone transportation services. Arlington meets the *Clear Creek* requirement. Thus, we hold that the requirements of section 284.7(d) do not apply to Arlington. Other tariff provisions related to segmentation, such as the allocation of primary point rights in segmented release and within-the-path scheduling, also do not apply to Arlington.

2. Acquisition of Off-System Capacity and Waiver of Shipper Must Have Title Policy

76. Arlington requests a generic waiver of the “shipper must have title” policy for any off-system capacity it may acquire in the future in order to provide storage and hub services to enable it to use that capacity to transport natural gas owned by third parties. Arlington states that, in the event that acquisition of off-system capacity requires Commission approval or reauthorization of any market-based rate authority, Arlington will seek such approval or authority at the appropriate time.⁶⁵ Section 29 of Arlington’s General Terms and Conditions (GT&C) provides:

[Arlington] may, from time to time, acquire transportation and/or storage capacity on a third-party pipeline system. [Arlington] will only provide transportation and storage services for others using such capacity pursuant to its open access FERC Gas Tariff subject to its rates approved by the Federal Energy Regulatory Commission, and the ‘shipper must hold title’ policy is waived to permit such use.⁶⁶

77. This language implements the Commission's policy with respect to pipelines' acquisition of off-system capacity. In *Texas Eastern Transmission Corporation (TETCO)*,⁶⁷ the Commission found that pipelines no longer need to obtain prior approval to acquire capacity on another pipeline, provided the acquiring pipeline has filed tariff language specifying that it will only transport for others using off-system capacity pursuant to its existing tariff and rates. Arlington’s proposed tariff language is consistent with the requirements set forth in *TETCO* and authorizations granted other storage companies authorized to charge market-based rates.⁶⁸

⁶⁵ Application at 36.

⁶⁶ Original Sheet No. 154.

⁶⁷ 93 FERC ¶ 61,273 (2000), *reh’g denied*, 94 FERC ¶ 61,139 (2001).

⁶⁸ *See, e.g., SG Resources Mississippi, L.L.C.*, 101 FERC ¶ 61,029, at P 30-33 (2002).

78. Therefore, we accept Arlington's proposed tariff language and grant waiver of the shipper must have title policy, with the following clarifications. Because Arlington has proposed only to offer firm and interruptible storage and hub services and interruptible wheeling service, and has proposed no rates or tariff provisions relating to any other transportation services other than storage, hub and wheeling, Arlington may only use capacity obtained on other pipelines pursuant to the *TETCO* waiver in order to move gas into and out of storage, pursuant to that pipeline's open access tariff and Commission-approved rates. That is, Arlington may not use its facilities and its capacity on other pipelines to transport gas which will not physically or contractually enter its storage facility unless and until it has received Commission authorization to provide such transportation services. Furthermore, Arlington's authorized use of the *TETCO* waiver to provide storage service shall be limited to the geographic area covered by its market study.

79. To ensure that Arlington uses acquired off-system capacity in a manner consistent with its market-based rate authority and tariff provisions, and to satisfy our responsibility to monitor and prevent the exercise of market power, we direct Arlington, once it becomes operational, to make an annual informational filing regarding its provision of service using off-system capacity, as detailed below.

80. Within 30 days after its first full year of operation, and every year thereafter, Arlington is directed to file, for each acquisition of off-system capacity:

- a. the name of the off-system provider;
- b. the type, level, term and rate of service contracted for by Arlington;
- c. a description of the geographic location – boundaries, receipt and delivery points, and segments comprising the capacity;
- d. the operational purpose(s) for which the capacity is utilized;
- e. a description of how the capacity is associated with specific transactions involving customers of Arlington; and
- f. an identification of total volumes, by Arlington's rate schedule and customer, that Arlington has nominated on each off-system provider during the reporting period.

3. Implementation of NAESB Standards

81. The Commission adopted in Part 284 of its regulations various standards for conducting business practices and electronic communication with interstate pipelines as promulgated by the North American Energy Standards Board (NAESB).⁶⁹ These standards govern nominations, allocations, balancing measurement, invoicing, capacity

⁶⁹ *Pipeline Service Obligations and Revisions to Regulations Governing Self-*
(continued...)

release, and mechanisms for electronic communication between pipelines and those with whom they do business. Section 22 of Arlington's GT&C contains the Version 1.7 NAESB Standards adopted by reference.⁷⁰ Consistent with Order No. 587-S, Arlington is directed to revise its tariff provisions to incorporate standard 3.3.17 and standards 5.3.13 – 5.3.16, 5.3.24 – 5.3.28, 5.3.44 – 5.3.45 and 5.3.59 – 5.3.60 for capacity release, or identify the tariff location of these standards when it files its actual tariff. In so doing, Arlington may either incorporate the aforementioned standards by reference or verbatim, but not both, in its tariff.

4. Creditworthiness

82. Sections 3.3(g), (h), (i) and (j), 3.4(a) and 30 of Arlington's proposed GT&C outlines the type of information that customers must supply to Arlington in order to establish creditworthiness and includes provisions concerning the posting of security for the value of gas loaned to customers under Rate Schedules FL or IL.⁷¹ Section 30.10 provides that upon notification by Arlington that it has failed to satisfy or no longer satisfies the credit criteria, the customer may still obtain credit approval if it elects to provide additional financial assurances in the form of a prepayment (or advance deposit), an irrevocable letter of credit, a Guaranty (as detailed in the tariff provisions) or another form of financial assurance acceptable to Arlington. In section 30.5 of its GT&C, Arlington states the amount of credit it will extend to a customer without financial assurances based on the customer's level of Standard & Poor's and Moody's Investors Service's credit ratings, and to extend higher levels of credit to customers with higher credit ratings.

Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13267 (April 16, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,939, at pp. 30,425-427 (April 8, 1992), *order on reh'g*, Order No. 636-A., 57 Fed. Reg. 36128 (August 12, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,950 (August 3, 1992), *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57911 (December 8, 1992), 61 FERC ¶ 61,272 (1992), *notice of denial of reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and vacated and remanded in part*, *United Dist. Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997). NAESB was formerly called the Gas Industry Standards Board (GISB).

⁷⁰ See Original Sheet Nos. 150 and 151.

⁷¹ See Original Sheet Nos. 107-112 and 155-157.

83. Arlington's proposed creditworthiness standards are the same as those approved by the Commission in *Leaf River*.⁷²

84. Pursuant to Part 284 of its regulations, the Commission issued a policy statement setting forth its approach to credit issues relating to transportation on natural gas pipelines.⁷³ In the Creditworthiness Policy Statement, we stated that pipelines must establish and use objective criteria for determining creditworthiness.⁷⁴ Arlington appears to have outlined the information that needs to be supplied and the criteria for creditworthiness, as discussed above. The Commission finds that Arlington's creditworthiness provisions are consistent with the Commission's Creditworthiness Policy Statement in that they are objective and transparent.⁷⁵ Arlington proposes to determine the amount of credit extended to creditworthy customers based on each customer's credit rating. This will provide Arlington with additional flexibility to address the potential for Arlington's credit exposure for loaned gas to increase dramatically due to the volatile gas commodity market.

85. However, Arlington has not met certain other requirements set out by the Creditworthiness Policy Statement. Section 30.11 of the pro forma tariff provides that Arlington will return the financial assurances to the customer whenever the customer's obligations under the storage service agreement terminate. Arlington must revise section 30.11 to provide that if a customer obtains credit approval by providing an advance deposit and subsequently satisfies the credit criteria, Arlington will return the advance deposit, plus interest. Finally, we will require Arlington to revise section 30.11 to provide that in such situations, Arlington is responsible for any expenses related to the maintenance of this escrow account. Arlington is directed to clarify its tariff accordingly.

5. Injection Ratchets

86. Section 9 of Rate Schedule FSS provides Arlington's customers a choice of two ratchet options for the injection of gas and three ratchet options for the withdrawal of gas. Arlington states that these ratchets reflect currently requested services and Arlington's best approximation of other service levels that customers may desire. Arlington states that, by including specifically defined injection and withdrawal ratchet options in its

⁷² See 125 FERC ¶ 61,131 (2008).

⁷³ See *Creditworthiness Standards for Interstate Natural Gas Pipelines*, 111 FERC ¶ 61,412 (2005) (Creditworthiness Policy Statement).

⁷⁴ *Id.* P 10.

⁷⁵ *Id.*

tariff, Arlington has avoided the concerns expressed by the Commission in *Golden Triangle Storage, Inc.*,⁷⁶ regarding negotiated injection/withdrawal ratchets in connection with storage service. Instead, all of Arlington's firm storage customers will have defined choices regarding injection and withdrawal ratchets, each different combination of which will likely carry a different value in the marketplace. Customers will select the ratchet option that best aligns with their needs and budgetary requirements.

87. The Commission has previously allowed storage service providers to offer this option.⁷⁷ Consistent with our acceptance of ratchets for other storage service providers, the Commission will accept Arlington's proposed use of ratchets.

6. Gas Retention Penalties and Credits

88. Arlington proposes to retain a customer's gas improperly left in storage in two circumstances: (1) when gas is not withdrawn from storage prior to the expiration of the customer's service agreement; and (2) when gas is not withdrawn from storage by an interruptible storage or parking customer following notice by Arlington that it is going to interrupt the customer's service and directing the customer to remove its gas. In the first situation, Arlington proposes to credit the firm shipper with 80 percent of the net revenue that the pipeline receives from an auction sale of the shipper's gas (a 20 percent penalty).⁷⁸ In the latter situation, Arlington proposes to retain the gas without crediting to the shipper any of the revenue that Arlington receives from the sale of the gas (a 100 percent penalty).⁷⁹

89. In addition, Arlington proposes in section 31 of its GT&C to credit to all of its customers whose gas was not purchased or retained, the net proceeds⁸⁰ from the sale of

⁷⁶ 121 FERC ¶ 61,313, P 53-54 (2007).

⁷⁷ See *Tres Palacios Gas Storage, LLC*, 120 FERC ¶ 61,253, at P 53-54 (2007) (*Tres Palacios*); and *Windy Hill Gas Storage, LLC*, 119 FERC ¶ 61,291, at P 43-44 (2007) (*Windy Hill*).

⁷⁸ See Exhibit P, sections 8.1 of Rate Schedules FSS, FP, ISS, IHBS and IP.

⁷⁹ See Exhibit P, Rate Schedule ISS, section 2.2; Rate Schedule IP, section 2; and Rate Schedule IHBS, section 2.4.

⁸⁰ "Net proceeds" is defined in GT&C, section 32 as "the total proceeds received from the auction less any costs [Arlington] incurred as a result of conducting the auction or the purchase or retention of Customer's gas." See Original Sheet No. 158.

the retained gas (i.e., the 20 percent penalty associated with firm service and the 100 percent associated with interruptible service).

90. The Commission has accepted similar gas retention proposals by other storage providers, stating that the retention of gas left in storage at the end of the withdrawal period is an operationally-justified deterrent to shipper behavior that could threaten the system or degrade service to firm shippers.⁸¹ If capacity exists, we would expect that a customer would be able to contract for interruptible service if needed. However, if capacity does not exist, Arlington would be unable to provide such service. As for the level of the penalty, Arlington has proposed to credit 80 percent of the auction value of the gas back to the firm or interruptible customer and credit the net proceeds from the auction to its other customers. Arlington thus proposes a less severe penalty than other storage providers, who do not credit any portion of the value of the retained gas to the customer.

91. Finally, if an interruptible storage customer does not remove its gas when Arlington determines that such interruptible storage capacity is needed to provide firm storage service, Arlington proposes to retain the gas with no credit back to the customer. This provision is consistent with the tariffs of other storage service providers.⁸²

92. For these reasons, we find that Arlington's gas retention and penalty proposals are consistent with Commission precedent and are accepted.

7. Index Pricing

93. Arlington proposes to use index pricing for calculating the penalties to be assessed when a customer violates an action alert or operational flow order (OFO).⁸³ Specifically, Arlington proposes to use the daily Gas Daily Mid Point price posting for Tennessee, zone 6 for calculating Action Alert and OFO penalties. This price index satisfies the

⁸¹ See *Leaf River*, 125 FERC ¶ 61,131, at P 71-73 (2008); *Windy Hill*, 119 FERC ¶ 61,291 at P 51-56.

⁸² See *Leaf River*, 125 FERC ¶ 61,131 at P 71-73 (2008); *Tres Palacios*, 120 FERC ¶ 61,253 at P 57-59; *Windy Hill* at P 54-56; *Pine Prairie Energy Center, LLC*, 109 FERC ¶ 61,215, at P 46 (2004); and, *Blue Lake Gas Storage Co.*, 96 FERC ¶ 61,164, at 61,728-29 (2001) (*Blue Lake*).

⁸³ See Exhibit P, GT&C, section 5.5(i).

criteria that the Commission has established for inclusion of price indices in jurisdictional tariffs.⁸⁴ The Commission will accept Arlington's proposal.

8. Imbalance Management Services

94. Section 284.12(b)(2) of the Commission's regulations requires that pipelines establish provisions for the netting and trading of imbalances and other imbalance management services. Orders No. 587-G and 587-L⁸⁵ adopt the NAESB standards related to these regulations. Arlington is not proposing to charge imbalance penalties. Arlington is proposing to provide a variety of services its customers will be able to use for imbalance management, including parking, lending, wheeling and hourly balancing. Furthermore, Arlington's tariff states that it will not inhibit the provision of imbalance management services by third parties.⁸⁶

95. In Order No. 637-A⁸⁷ the Commission stated that if a pipeline has no authority to assess penalties for imbalances, then there is no need to require that pipeline to offer such imbalance services. Therefore, the regulations requiring imbalance services, including netting and trading of imbalances, are not applicable to Arlington at this time and there is no necessity for an exemption. However, if Arlington seeks to impose imbalance penalties in the future, then it must comply with the Commission's policies and regulations regarding imbalance management services.

⁸⁴ See *Price Discovery in Natural Gas and Elec. Mkts.*, 109 FERC ¶ 61,184, (Ordering Paragraph D) (2004).

⁸⁵ *Standards For Business Practices of Interstate Natural Gas Pipelines*, Order No. 587-G, 63 Fed. Reg. 20,072 (Apr. 23, 1998), FERC Stats. & Regs. ¶ 31,062 (1998), Order No. 587-L, 65 Fed. Reg. 41,873 (July 7, 2000), FERC Stats. & Regs. ¶ 31,100 (2000).

⁸⁶ See Exhibit P, Original Sheet No. 3.

⁸⁷ See *Regulation of Short-Term Natural Gas Transportation Services, and Regulations of Interstate Natural Gas Transportation Service*, Order No. 637, 65 Fed. Reg. 10,156 (February 25, 2000), *FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000* ¶ 31,091, at p. 31,308 (2000), *order on reh'g*, Order No. 637-A, 65 Fed. Reg. 35,706 (June 5, 2000), *FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000* ¶ 31,099 (2000), 91 FERC ¶ 61,169 (2000); *order denying reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000).

9. Other

96. Arlington should replace the word “sole” with “non-discriminatory” in section 8.3 on Original Sheet No. 138.

E. Engineering

97. Commission staff completed an engineering analysis of the facility proposed for natural gas storage, including the design capacity of the proposed facility. Based on this analysis, we conclude that the facilities are properly designed to provide 10 Bcf of total storage capacity (7 Bcf working gas and 3 Bcf cushion gas). Further, we conclude that the natural gas facilities proposed by Arlington are properly designed to withdraw up to 140 MMcf per day.

F. Environment

98. On April 29, 2008, Commission staff issued a Notice of Intent to Prepare an Environmental Assessment for the Proposed Thomas Corners Storage Project and Request for Comments on Environmental Issues (NOI).⁸⁸ On May 21, 2008 we also issued a Notice of Site Visit for the Proposed Thomas Corners Storage Project. A site visit was conducted on June 6, 2008, to review the proposed project area. Several landowners and staff from the NYSDEC and the U.S. Army Corps of Engineers (Corps) attended. We received comments from the Department of Health and Human Services, U.S. Public Health Service (DHHS), the NYSDEC, the New York State Department of Agriculture and Markets (NYSDAM), the New York State Office of Parks, Recreation, and Historic Preservation (SHPO), the Steuben County Department of Public Works (Steuben DPW), and landowners William F. and Lois A Hassoldt (the Hassoldt's), Grace Schlageter, and Mullins.⁸⁹

99. The DHHS commented that the EA should address impacts on residences, economic characteristics, community services, water quality and quantity, hazardous materials and wastes, occupational health and safety, land use, and environmental justice. The NYSDEC provided comments on the general project description, water use and quality, endangered and threatened species, cultural resources, geological resources, impacts to state forest land, and air and noise quality. The NYSDAM provided comments to protect, mitigate, and monitor agricultural lands impacted by the project.

⁸⁸ The NOI was published in the *Federal Register* on May 6, 2008 (73 Fed. Reg. 24968).

⁸⁹ Arlington filed reply comments on June 17, 2008 to respond to the concerns of the commenters.

The Steuben DPW commented that they would like a road use agreement to prevent significant road damage caused by the project. The SHPO commented on cultural resources. The Hassoldt's requested rerouting of the TC West Lateral to avoid their tree farm, and Grace Schlageter raised general environmental concerns including potential dangers to residents, impacts on threatened or endangered species, and the placement of facilities. Mullins sought the relocation of the proposed compressor station and storage wells from her property to an adjacent alternative site. Mullins also asserted that the application failed to address a number of particular environmental issues.⁹⁰

100. All substantive comments raised in response to the NOI are addressed in the applicable sections of the environmental assessment (EA) that was prepared for the Thomas Corners Storage Project by the Commission's staff to satisfy the requirements of the National Environmental Policy Act (NEPA).

101. On October 31, 2008, we issued a Notice of Availability (NOA) for the proposed Thomas Corners Project and placed the EA in the record.⁹¹ The EA addresses the potential environmental effects of Arlington's proposed project on geology, soils, water resources, wetlands, vegetation, wildlife, threatened and endangered species, cultural resources, land use, air quality, noise and safety. The EA also addresses alternatives to the proposed project. The comment period for the EA ended on December 1, 2008. In response to the NOA, we received comments from Arlington, the U.S. Fish and Wildlife Service of the U.S. Department of the Interior (FWS), the Seneca Nation of Indians Tribal Historic Preservation Office (THPO), and Mullins. We also received additional comments from the SHPO. Below, we address these comments, certain comments filed in response to the NOI, and the environmental issues raised by the intervenors.

Wetlands and Water Resources

102. As noted in the EA, the TC West Lateral crosses 20 wetlands comprising a total area of 2.18 acres.⁹² In its comments, the FWS suggests that Arlington restore wetland

⁹⁰ In her May 29, 2008 "Objections to Application," Mullins identifies numerous environmental issues that she claims the application failed to address. However, subsequent to its filing of the application, Arlington completed its review and analysis of the environmental issues raised by Mullins and, as discussed below, each environmental concern was addressed in the EA.

⁹¹ The NOA was published in the *Federal Register* on November 7, 2008 (73 Fed. Reg. 66236).

⁹² EA at 29. No wetlands would be disturbed by construction at the central storage facility site or on the TC South Lateral extension.

contours after construction, seed disturbed areas to prevent germination by invasive species, monitor wetlands for 3 years, and if wetland hydrology and hydrophytic vegetation is not restored that remedial steps should be taken to achieve wetland restoration or provide for mitigation for permanent wetland loss. The FWS recommends surveying the Canisteo River contours prior to construction to ensure the river is restored to its preconstruction pattern, profile, and contours to prevent destabilization, including head cutting, bank erosion, and stream migration. The comments also suggest that offsite compensation mitigation may be required if the project contributes significantly to stream bank erosion and habitat degradation.

103. In response to the FWS comments, Arlington states that it has agreed to follow the FWS' recommendations.⁹³ Arlington will use our *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures) during construction and restoration, return wetlands to preconstruction contours, and seed according to our Procedures. Arlington will use dry crossing techniques for waterbody crossings and will coordinate with the NYSDEC on the method for crossing the Canisteo River. Arlington has surveyed the Canisteo River and will return it as closely as practicable to preconstruction contours. Arlington also proposes to use rip rap to stabilize the banks of the Canisteo. Arlington is not proposing any offsite compensation mitigation for streams or wetlands, and we do not expect significant impacts. The U.S. Army Corps of Engineers (COE) and NYSDEC may require mitigation for wetland and stream crossing impacts as part of the permit requirements for the NYSDEC Water Quality Certificate/COE Section 404 permit.

104. Based on the discussion in the EA, the implementation of Arlington's Erosion and Sediment Control Plan, which is consistent with our Procedures, and any permit conditions imposed by the COE and NYSDEC would minimize impacts on wetlands, including requiring mitigation.

Cultural Resources

105. In letters dated October 15, 16, and 17, 2008, the SHPO provided additional comments on the project. The SHPO's October 15 letter commented on the revised Phase I report. The SHPO requested additional information, and indicated that the Alfalfa Field Sites and the Hearth Site require avoidance or Phase II evaluation. We have revised EA condition 13 to address the SHPO's comments. In addition, Arlington has provided a response to the SHPO's letter. The SHPO also recommended that we initiate Native American consultation if we had not already done so. The EA provides the status of Native American consultation.⁹⁴

⁹³ Arlington's November 18, 2008 Comments on EA at 7.

⁹⁴ EA at 40.

106. In its October 16 letter, the SHPO commented on the deep testing addendum report, and concurred that Thomas Corners Deep Site #1 should be avoided or subject to Phase II evaluation; and if avoided, an avoidance plan and supplemental testing report be submitted for review and comment. We have revised condition 13 to address the SHPO's comments.

107. In its October 17 letter, the SHPO concurred with Arlington's testing plans for Thomas Corners Deep Site #1. Revised condition 13(e) addresses this comment. The SHPO also reiterated that we should initiate Native American consultation if we had not already done so. As noted above, the EA provides the status of Native American consultation. To address the SHPO's various comments, we have revised EA condition 13.

108. The THPO comments that the EA was in error when it stated that the THPO had made no comments other than to request the SHPO comments be forwarded to them. In fact, letters included with the THPO's comments (addressed to Arlington's archaeological contractors but not shared with our staff) document that it also requested a Phase I Archeological Survey be done in the project area, and that it be furnished with a copy of the full Phase I Archaeological Survey Report, as well as a copy of the accompanying report for the additional archaeological investigation. These comments have now been placed in the record, and Phase I surveys have been conducted. In addition, the THPO notes that it had not received documents previously requested. To ensure the THPO receives the requested information, we have added condition 13(g) to the Order.

109. Arlington states in its comments that it intends to "phase" its construction as follows: as soon as its certificate is issued, Arlington intends to proceed with work on the storage wells, the central storage site, and will begin clearing rights-of-way for the two laterals and associated meter stations. At about the same time, Arlington proposes to complete the Phase II cultural resources survey and file the necessary information and clearances from the SHPO with the Commission. Thereafter, it would proceed with all other construction work associated with the project. This approach is inconsistent with EA condition 13's stepwise plan to complete the section 106 process required by the National Historic Preservation Act before construction commences (which Arlington accepts.)⁹⁵ Arlington's comments also fail to recognize at least four other certificate conditions recommended in the EA that must be fulfilled before any construction is undertaken.⁹⁶ Because Arlington's intent would likely extend construction over a

⁹⁵ Arlington's November 18, 2008 Comments on EA, Exhibit I at 6.

⁹⁶ Prior to construction, Arlington will be required to satisfy conditions 3, 6, 9, and 15, as well as receiving a Notice to Proceed with Construction from the Director of OEP.

number of months, Arlington requests that we allow temporary bridges initially placed during clearing and right-of-way preparation this fall and winter to be left in place for subsequent pipeline construction. Without additional information, we cannot approve Arlington's request at this time. However, our staff will consider the request as part of its review of Arlington's initial Implementation Plan (condition 6) and any comments offered by the COE and NYSDEC.

Threatened and Endangered Species

110. Arlington consulted the FWS website regarding federally threatened and endangered species potentially located within the project area. No currently listed species were found. The FWS indicated that the NYSDEC/New York Natural Heritage Program (NYSNHP) would be the lead. Arlington consulted with these agencies and two wildlife species, the bald eagle and timber rattle snake, and one plant species, nodding wild onion, of concern are known to occur in the project vicinity. No specific bald eagle nesting areas were identified by the NYSDEC. Surveys for the nodding wild onion did not locate any in the project vicinity. Timber rattle snake are known to occur in portions of the project area. Timber rattle snakes could be avoided by working over the winter or by having a snake monitor onsite when working within one mile of a known den. For construction between April 15 and November 1, a NYSDEC Endangered Species Permit would be required.

111. The NYSDEC also requests that mussel surveys be conducted for the Canisteo River to help determine the appropriate crossing method, because mollusks are not well documented in New York State. No mussels or mollusks were found at the proposed Canisteo River crossing location.

Additional Comments by Arlington

112. In its comments on the EA, Arlington provides corrections and clarifications to the EA, and corrected typographical errors. For instance, Arlington notes that on page one of the EA, the referenced two "storage" wells should be described as "test" wells. Also on page six, "70 dekatherms" and "140 dekatherms" should have been "70,000 dekatherms" and "140,000 dekatherms." Arlington clarifies that the portion of the existing pipeline that would become the Thomas Corners (TC) West Lateral (that is being replaced) would not connect to the Steuben Gas Storage Field. Arlington also clarifies that both the TC West and the TC South Laterals would have bi-directional flow capacity. Further, the drip tank at MP 3.48 is no longer proposed because Arlington would now use pigging equipment to keep this segment of the pipeline free of excess liquid.

113. Arlington's comments include a table showing several minor changes to its previously-filed alignment sheets and a new set of alignments which reflect these changes. The changes reflect project refinements resulting from reducing, eliminating, or adding workspaces to avoid obstacles, facilitate access, straightening the alignment, and

adding a meter run at the Tennessee interconnection. The net result of these changes will increase the amount of construction disturbance by 0.11 acre.

Site Alternatives for Project Facilities

114. As explained, *supra*, Arlington proposes to place its gas storage wells and compressor station facilities on a portion of Mullin's property, a 27-acre tract located on the north side of Cross Corners Road in the Town of Bath, Steuben County, New York. As also noted, *supra*, the 27-acre tract consists of cleared hayfields, contains no houses or other buildings, fences or roads, and is one of two contiguous parcels totaling 97 acres owned by Mullins. In her motion to intervene and subsequent pleadings, Mullins argues that the central storage site containing the compressor station and storage wells should be relocated to an adjacent parcel of land to the east of Mullins' property owned by an energy company (the Sylvania property) due to, among other things, adverse aesthetic and agricultural impacts to her property, concern about the potential use of hazardous materials and groundwater contamination, and her loss of mineral rights. Mullins contends that Arlington has not made an effort to place its facilities on the Sylvania parcel.

115. In its June 5, 2008 environmental data responses, Arlington explains why it selected Mullins' property for the central storage site and why it is the best location for the storage wells and compressor station.⁹⁷ Arlington provided the following reasons: (1) the Mullins property, located directly over the geologic reef formation that will be used for the underground storage of the natural gas, is the best location for drilling into the reef and avoids the more extensive and expensive directional drilling techniques that would be required to reach the reef targets if the storage site was not directly above the reef; (2) the Mullins property was the site for the storage wells previously approved by the Commission for the Thomas Corners Project in Docket No. CP95-119-000 in 1995 and Arlington had no reason to believe the Mullins site would not continue to be supported by the public convenience and necessity; (3) Arlington purportedly has a lease under which Mullins' relatives consented to the placement of the equipment necessary for natural gas storage operations on their land; and (4) adjoining properties do not have superior attributes for a storage project. Arlington stated that the Sylvania property would be a difficult and expensive site for drilling eight storage wells because it is on the slope of a hill, and would require the clearing of trees.

116. In the EA, the Commission's staff listed a number of drawbacks to relocating the project facilities to the Sylvania property:

⁹⁷ June 5, 2008 Responses of Arlington to Staff's May 21, 2008 Environmental Data Request, at Response 27.

- (i) most of the Sylvania Property is forested, which would require substantial clearing to accommodate the aboveground facilities;
- (ii) the Sylvania Property is sloped and would require extensive grading to construct a relatively level site for the well pad and compressor station;
- (iii) the northeast portion of the Sylvania Property is classified as prime farmland;
- (iv) the relocated facility would be more visible on the side of a hill rather than the top of a hill surrounded mostly by forest; and
- (v) use of the Sylvania Property could jeopardize the performance of the Thomas Corners Storage Facility by placing it closer to the edge of the reef formation where the formation is thinner. This would likely require a redesign/reconfiguration of the facility to enable the directionally-drilled wells to access the target storage zones. The horizontal component of each directional drill would be longer, and a second well pad may be needed in order to obtain the proposed storage volumes and injection/withdrawal rates.⁹⁸

117. The Commission staff concluded that because the Mullins site is atop the thickest part of the reef formation, and would require no forest clearing and less grading than the Sylvania property, it will provide the most efficient operating parameters with the least environmental impact.⁹⁹

118. In its comments on the EA, Arlington states that Commission staff properly rejected Mullins' suggested Sylvania property alternative for the central storage site. Further, Arlington notes that Mullins is now advocating that the compression facilities be shifted from the west side of the 27-acre tract to the east side of Mullins' land. Arlington asserts that in correspondence from Mullins dated November 3, 2008, Mullins requests that the facilities be moved to the east side of the 27 acres to accommodate its plans to redevelop the Mullins' homestead on the west side of their property.

119. Arlington indicates that by letter dated November 18, 2008 to Mullins, it rejected Mullins' request since, among other things, (i) Mullins waived any rights they may have had to designate rights of way by not responding to Arlington's August 27, 2008 request to designate rights of way in a timely manner; (ii) even if timely, Mullins has no rights

⁹⁸ EA at 59.

⁹⁹ *Id.*

under the 1970 lease to direct where Arlington places its compressor station and associated facilities; and (iii) there is not enough space on the east side of Mullins' land to move the compressor station there without placing substantial facilities on the Sylvania property, which the EA rejected as an alternative.¹⁰⁰

120. In its comments on the EA, Mullins argues that Arlington has ignored its request to move the two compressors and related equipment to the west of the 27-acre site on contiguous land owned by Seneca Resources Corporation, an oil and gas company.¹⁰¹ Mullins argues that the neighboring property is equally convenient and its use as a facility site will avoid harm to the family's property.

121. The Commission is unclear if Mullins in its comments is requesting that the compression facilities be moved to a parcel to the west of the Mullins property, or to the adjacent property to the east that it previously identified as the Sylvania property.¹⁰² In any event, the Commission is convinced that Arlington considered both options of moving the facilities, including the compressors, to the east of the Mullins' property to the Sylvania property, and to the west of the Mullins' property.

122. The Commission finds that the EA adequately addressed the feasibility of relocating the storage facilities to the Sylvania property, and reasonably concluded, as described above, that it is too problematic and thus not suitable as a site for the Thomas Corners storage facilities. With respect to the property to the west of Mullins' property, ostensibly the Seneca Resources property, Arlington explained in its June 5, 2008 data response that while it would be possible to locate the compression facilities on the parcel to the west of the Mullins' property, use of that site would require disturbance to two landowners, the clearing of trees, more filling and grading to install the facilities due to the steeper slope, and the placement of the storage wells still on Mullins' property.¹⁰³

¹⁰⁰ Arlington's November 18, 2008 Comments on EA at 5 and Exhibit 3.

¹⁰¹ Mullins' Comments to EA at paragraph 11 and 33.

¹⁰² In paragraph 24 of its Comments to the EA, Mullins states that Arlington "could just as easily place the Compressor station and other toxic equipment 1,800 feet away on the Seneca Resources premises next to the wells." The wells are located on the east side of the 27-acre Mullins tract.

¹⁰³ June 5, 2008 Responses of Arlington to Staff's May 21, 2008 Environmental Data Request, at Response 27. *See also* May 9, 2008 Answer of Arlington to Mullins' Motion to Intervene Out-of-Time and Objections at 7.

The Commission will not require Arlington to use either the Sylvania property, or the property to the west of Mullins' land, for placement of the project facilities.¹⁰⁴

Landowner Requests for Lateral Route Variations

123. Several landowners requested minor route variations to the proposed TC West Lateral. In their motions to intervene, Robert Quick and Don Rombaut each requested rerouting of the lateral to avoid disturbance to freshwater springs on their or neighboring properties that supply drinking water, and to avoid blocking general access to their properties or access for emergency vehicles. As noted above, in their comments to the NOI, the Hassoldt's also requested rerouting of the lateral so that it would not run through their registered tree farm. Arlington agreed to the landowners' proposed route variations, and filed revised alignment sheets for the TC West Lateral with its August 6, 2008 supplemental data responses.¹⁰⁵

Noise and Air Impacts

124. Mullins also argues that the data in the EA regarding noise impacts is flawed, since it relies on the fact that no houses or structures exist on the 27-acre Mullins tract.¹⁰⁶ Mullins states that it notified Arlington at a February 2008 meeting with Arlington that she was "considering rebuilding its family homestead on the Premises." Mullins argues that the noise levels at the central storage site from project operations will exceed the noise of a "commercial jet taking off" and will prevent Mullins from restoring the family homestead. Mullins requests that the EA be modified.¹⁰⁷

¹⁰⁴ Nor will the Commission require Arlington to switch the compressor facilities from the west side of the 27-acre Mullins' tract to the east side of the tract. As Arlington indicates, it does not appear to be feasible to move the facilities to the eastern portion of the Mullins' land without also utilizing the Sylvania land which, as the EA found to be problematic. There would not be enough room to move the facilities to the eastern portion because the wells must remain on the eastern side of the Mullins' property, as proposed, so that they are located directly above the storage formation.

¹⁰⁵ August 6, 2008 Supplemental Responses of Arlington to Staff's June 16, 2008 Second Environmental Information Request. *See* EA at 59.

¹⁰⁶ Mullins' Comments to EA at paragraph 7.

¹⁰⁷ Mullins also implies that the data in the EA, which relies upon information in Arlington's application, is outdated, given current economic conditions. Mullins' Comments to EA at paragraph 8. We reject this argument.

125. The Commission denies Mullins' request. The data in the EA is not flawed. The EA examines the noise impacts of a project only on existing noise sensitive areas.¹⁰⁸ Mullins represents that it is only "considering" rebuilding a family residence on the property and therefore its plans are speculative. Given that the homestead does not presently exist, we cannot find fault with the staff's noise analysis as presented in the EA. Further, if a homestead is constructed, additional noise reduction measures may be added at the storage facility, if appropriate, to reduce noise at that time. Many compressor stations around the county have nearby residences and still meet acceptable noise levels at the residences.

126. Mullins comments that if the project is constructed within one calendar year, it would be a major source of air pollution. Major sources of air pollution are determined based on a source's operational emissions. The proposed operational emissions from the TCS Compressor Station, summarized in table B.6-3 in the EA, fall under the applicable major source thresholds for which a Title V or Prevention of the Significant Deterioration of Air Quality permit would apply. Construction emissions will be temporary and not included as part of a source's operational emissions. Because of a change in scheduling, the construction emissions summarized in table B.6-4 in the EA may fall mostly or entirely within the 2009 calendar year period; however, these emissions would not affect the compressor station's permitting status. In addition, the project's construction activities would not be located in a county currently designated by U.S. Environmental Protection Agency as nonattainment for ozone, for which a general conformity determination would potentially apply.

Hazardous Materials

127. Mullins reiterates its concern about the use of hazardous materials and potential for contamination during construction of the storage facility. Hazardous materials were discussed in the EA.¹⁰⁹ Arlington would develop a Spill Prevention, Control, and Countermeasure Plan to prevent spills of hazardous materials and provide for the quick containment and cleanup of any spills to reduce the likelihood of impacts on groundwater. Also, Arlington is required by the U.S. Department of Labor, Occupational Safety and Health Administration to have copies of Material Safety Data Sheets on-site for hazardous materials used during project construction and operation. These sheets would be available for use by employees and emergency personnel. Each Material Safety Data Sheet provides information about a particular product including physical data, toxicity, health affects, first aid, reactivity, storage, disposal, protective equipment, and

¹⁰⁸ The EA found that the nearest NSA to the proposed compressor station, NSA #2, would be located approximately 2,250 feet north of the station site. EA at 49.

¹⁰⁹ EA at 52-55.

spill/leak procedures. Arlington would also maintain the appropriate listing of chemicals used during the project, as required by state and federal permit applications.

128. Drilling fluids for the storage wells would be stored in lined reservoir pits within each well site, in accordance with NYSDEC regulations. Upon completion of the wells, drilling fluids would be trucked by a NYSDEC-authorized Part 364 hauler to an approved disposal facility. Storage wells would be constructed in accordance with NYSDEC regulations for protection of groundwater resources. Sufficient surface casing would be placed in all wells to extend below the deepest fresh water strata. The drilling, casing and completion program for all wells would prevent the migration of oil, gas or other fluids from one pool or stratum to another, thereby avoiding the contamination of groundwater used as a potable water supply.

Additional Comments by Mullins

129. In its comments to the EA, a number of Mullins' arguments are directed to Arlington's failure to answer Mullins' July 28, 2008 "Factual Inquiry" or to otherwise provide information that Mullins had requested.¹¹⁰ Mullins contends that Arlington's failure to provide it with the information it seeks has resulted in an inadequate record. In our discussion of the certificate policy statement, above, we deny Mullins request that the Commission compel Arlington to answer Mullins' factual inquiry questions. As we explained, Commission staff issued several data requests to Arlington to obtain the information staff determined it needed to make a determination on the application. Moreover, the questions Mullins raises in its factual inquiry either are not relevant to the protection of her interests, or not material to our review of the application. The Commission received all of the information it deemed necessary to properly evaluate Arlington's proposal and, therefore, is basing its decision on a complete, fully adequate record.¹¹¹

130. Many of Mullins' comments on the EA relate to the validity or interpretation of the 1970 Lease, discussed *supra*.¹¹² Mullins continues to argue that the application must be dismissed because the 1970 Lease is void or does not grant storage rights to Arlington. As we have explained above, the validity of the 1970 Lease and the rights provided

¹¹⁰ Mullins' Comments to EA at paragraphs 1, 22, 25, and 29.

¹¹¹ Mullins also argues that it is an abuse of discretion to fail to provide an evidentiary hearing. We also explain, *supra*, that an evidentiary hearing is not required where there are no genuine issues of material fact.

¹¹² Mullins' Comments to EA at paragraphs 2, 4, 5, 12, 13, 23, 25, 26, 28 30, 32, and 34.

thereunder will be resolved in state court. The validity and interpretation of the 1970 Lease does not impact our authority to issue a certificate of public convenience and necessity as Arlington will be able to acquire the rights to use Mullins' property through eminent domain, in the event the 1970 Lease is found invalid and Arlington cannot negotiate a sale or easement. The Commission has found, above, that the fact that Arlington may have to invoke eminent domain proceedings to acquire the Mullins' property does not outweigh the benefits of the project.

131. In its comments on the EA, Mullins argues that Arlington has not met certain state or local requirements. For example, Mullins states that Arlington has failed to file the "Completion and Cap Rock Reports with the New York DEC District and Storage Units," and has not negotiated the necessary rights-of-way with the state of New York across its state forests.¹¹³ While it is up to the state and local authorities to enforce compliance with their regulations, we note that Arlington is in discussions with the state to obtain the easement for the segment of the TC South Lateral that crosses state forest.

132. Mullins makes numerous allegations that Arlington has acted in bad faith in negotiating with Mullins and in its conduct, in general, with Mullins.¹¹⁴ The Commission finds no valid support for these allegations. The only support Mullins has provided is that she has not been able to convince Mullins of the invalidity of the 1970 Lease or that she is dissatisfied with the course and nature of the negotiations.

Conclusion

133. Based on the discussion in the EA, we conclude that if constructed in accordance with Arlington's application, its supplements, and the conditions imposed herein, approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

G. Blanket Certificates

134. Arlington requests a Part 157, subpart F blanket certificate. The subpart F blanket certificate gives a natural gas company section 7 authority to automatically, or after prior notice, perform certain activities related to the construction, acquisition, abandonment, and replacement and operation of pipeline facilities. Because Arlington will become an

¹¹³ *Id.* at paragraphs 6 and 10.

¹¹⁴ *See id.* at paragraphs 3, 7, 13, 16, 17, 25, 27, 30, and 32. For example, Mullins states that the application must be dismissed because Arlington has proceeded in bad faith "by insisting on enforcing a void Lease."

interstate pipeline with the issuance of a certificate to construct and operate the subject facilities, we will issue the requested Part 157, subpart F blanket certificate.

135. Arlington also requests a Part 284, subpart G blanket certificate in order to provide open-access storage services. Under a part 284 blanket certificate, Arlington will not require individual authorizations to provide services to particular customers. Arlington filed a pro forma Part 284 tariff to provide its open-access services. Since a Part 284 blanket certificate is required for Arlington to offer these services, we will grant Arlington a Part 284 blanket certificate, subject to the conditions imposed herein.

H. Conclusion

136. For the reasons set forth herein, and subject to the conditions set forth below, we find that granting authorization under section 7(c) of the NGA for Arlington's proposal is required by the public convenience and necessity. Thus, we grant the requested authorizations to Arlington.

137. At a hearing held on December 18, 2008, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto, as supplemented, submitted in support of the authorizations sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Arlington in Docket No. CP08-96-000 authorizing the construction and operation of natural gas storage facilities, as described more fully in this order and in the application.

(B) The certificate issued in Ordering Paragraph (A) is conditioned on Arlington's compliance with all applicable Commission regulations under the Natural Gas Act, particularly the terms and conditions set forth in Parts 154, 157, and 284, and paragraphs (a), (c)(1) and (2), (e), and (f) of section 157.20 of the regulations.

(C) A blanket transportation certificate is issued to Arlington under Subpart G of Part 284 of the Commission's Rules and Regulations.

(D) The certificate issued in Ordering Paragraph (A) is conditioned on Arlington's compliance with all applicable Commission regulations under the Natural Gas Act, particularly the terms and conditions set forth in Parts 154, 157, and 284, and paragraphs (a), (c)(1) and (2), (e), and (f) of section 157.20 of the regulations, except that the requirements of section 157.20(c)(3) are waived.

(E) Prior to commencing construction, Arlington must execute firm service agreements for level of service reflected in the precedent agreements submitted in support of its proposal.

(F) The facilities authorized in this order shall be constructed and made available for service within two years of the date of this order's issuance, in accordance with section 157.20(b) of the Commission's regulations.

(G) The certificate issued in Ordering Paragraph (A) is conditioned upon Arlington's compliance with the engineering and environmental conditions set forth in Appendices A and B to this order.

(H) Arlington's request to charge market-based rates for firm and interruptible storage services under Rate Schedules FSS, NNSS and ISS, and firm and interruptible hub services under Rate Schedules FP, FL, IHBS, IP, IL and IW is approved, as discussed and subject to the conditions in this order.

(I) Arlington shall notify the Commission within 10 days of acquiring knowledge of: (a) Arlington adding storage capacity beyond the capacity authorized in this order; (b) an affiliate's increasing storage capacity; (c) an affiliate's linking storage facilities to Arlington; (d) Arlington or an affiliate's acquisition of an interest in, or being acquired by, an interstate pipeline connected to Arlington. The notification shall include a detailed description of the new facilities and their relationship to Arlington. The Commission reserves the right to require an updated market power analysis at any time.

(J) Waiver is granted of the Commission's Rules and Regulations that have been deemed inapplicable to storage providers with market-based rates, as discussed in this order.

(K) Arlington is granted waivers of the applicable portions of Parts 201 and 260 of the Commission's regulations; however, the waiver does not extend to the Commission's assessment of annual charges. Arlington is required to maintain records to separately identify the original cost and related depreciation on its gas storage facilities and to file page 520 of Form 2 or Form 2-A, respectively, for calculation of the ACA.

(L) Waiver is granted of the Commission's "shipper must have title" policy, subject to the conditions discussed in the body of this order.

(M) Arlington shall file revised tariff sheets that comply with the requirements contained in the body of this order no more than 60 days and no less than 30 days prior to commencement of service.

(N) Within 30 days after its first full year of operation, and every year thereafter, Arlington is directed to file an annual informational filing on its provision of service using off-system capacity, as detailed in this order.

(O) Arlington shall notify the Commission's environmental staff by telephone, e-mail and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Arlington. Arlington shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

Engineering Conditions for Thomas Corners Storage Project

1. Maximum inventory of natural gas stored in the Arlington storage facility shall not exceed the certificated levels of 10 Bcf at 14.73 psia and 60 degrees Fahrenheit, and the maximum shut-in bottom hole storage pressure shall not exceed 2,541 psi without prior authorization of the Commission.
2. The Arlington Project shall be operated in such manner as to prevent/minimize gas loss or migration.
3. Arlington shall conduct an annual inventory verification study on the field, and file results with the Commission.
4. Arlington shall submit semiannual reports (to coincide with the termination of the injection and withdrawal cycles) containing the following information (volumes shall be stated at 14.73 psia and 60 degrees Fahrenheit and pressures shall be stated in psia):
 - (1) The daily volumes of natural gas injected into and withdrawn from the storage reservoir;
 - (2) The volume of natural gas in the reservoirs at the end of the reporting period;
 - (3) The maximum daily injection and withdrawal rates experienced during the reporting period, average working pressure on such maximum days, taken at a central measuring point where the total volume injected or withdrawn is measured;
 - (4) Results of any tracer or other monitoring program by which the leakage of injected gas may be determined. If leakage of gas exists, the report should show the estimated total volume of gas leakage, the volume of recycled gas, and the estimated remaining inventory of gas in the reservoir at the end of the reporting period;
 - (5) Any surveys of pressures in gas wells, and the results of back-pressure tests and inventory verification studies conducted during the reporting period;
 - (6) The latest revised structure contour maps showing location of the wells and the location of the gas-water contact if one exists. These maps need not be filed if there is no material change from the maps previously filed;
 - (7) For the reporting period, a summary that includes the below ground surface depth and casing settings of wells drilled, worked over, or recompleted. Additionally, summarize results of reservoir characteristics from analyses of any logs or cores taken in each well;
 - (8) Discussion of current operating problems and conclusions; and

- (9) Such other data or reports which may aid the Commission in the evaluation of the storage project.

5. Arlington shall continue to file these reports semiannually until the storage inventory volume and pressure have reached or closely approximate the maximum permitted in this order. Thereafter, the reports shall continue on a semiannual basis for a period of one year.

APPENDIX B

Environmental Conditions for Thomas Corners Storage Project

1. Arlington Storage Company, LLC (Arlington) shall follow the construction procedures and mitigation measures described in its application and supplements, including responses to staff data requests, and as identified in the environmental assessment (EA), unless modified by the Commission Order. Arlington must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Commission Order; and
 - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Arlington shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Arlington shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Commission Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Arlington's exercise of eminent domain authority granted under Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Arlington's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way (ROW) for a pipeline to transport a commodity other than natural gas.

5. Arlington shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species will be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by the *Upland Erosion Control, Revegetation, and Maintenance Plan*, and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of this Certificate and prior to construction,** Arlington shall file an initial Implementation Plan with the Secretary for review and written approval by the Director of OEP. Arlington must file revisions to the plan as schedules change. The plan shall identify:

- a. how Arlington will implement the construction procedures and mitigation measures described in its application (including responses to staff data requests), identified in the EA, and required by the Commission Order;
 - b. how Arlington will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - e. the training and instructions Arlington will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
 - f. the company personnel (if known) and specific portion of Arlington's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Arlington will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) the completion of all required surveys and reports;
 - (2) the mitigation training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. Arlington shall employ at least one EI for the Thomas Corner Storage (TCS) Project. The EI(s) shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Commission Order and other grants, permits, certificates, or authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.

8. Arlington shall file updated status reports prepared by the head EI with the Secretary on a **biweekly** basis during well drilling and development and on a **weekly** basis during pipeline construction **until all construction and restoration activities are complete**. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
 - a. the current construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - b. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - c. a description of corrective actions implemented in response to all instances of noncompliance, and their cost;
 - d. the effectiveness of all corrective actions implemented;
 - e. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Commission Order, and the measures taken to satisfy their concerns; and
 - f. copies of any correspondence received by Arlington from other federal, state or local permitting agencies concerning instances of noncompliance, and Arlington's response.

9. Arlington shall develop and implement an environmental complaint resolution procedure for at least 2 years following the completion of construction. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the ROW. **Prior to construction**, Arlington shall mail the complaint procedures to each landowner whose property would be crossed by the project.
 - a. In its letter to affected landowners, Arlington shall:
 - (1) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
 - (2) instruct the landowners that if they are not satisfied with the response, they should call Arlington's Hotline; the letter should indicate how soon to expect a response; and
 - (3) instruct the landowners that if they are still not satisfied with the response from Arlington's Hotline, they should contact

the Commission's Enforcement Hotline at (888) 889-8030 or at hotline@ferc.gov.

- b. In addition, Arlington shall include in its status reports a copy of a table that contains the following information for each problem/concern:
 - (1) the identity of the caller and the date of the call;
 - (2) the identification number from the certificated alignment sheet(s) of the affected property and the location by MP;
 - (3) a description of the problem/concern; and
 - (4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.
10. Arlington must receive written authorization from the Director of OEP **before commencing service** from the project. Such authorization will only be granted following a determination that rehabilitation and restoration of the ROW and other areas of project-related disturbance are proceeding satisfactorily.
11. **Within 30 days of placing the certificated facilities in service**, Arlington shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the Certificate conditions Arlington has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
12. **Prior to commencing operation**, Arlington shall file its Aboveground Facilities Screening Plan with the Secretary for review and written approval of the Director of OEP.
13. Arlington shall not begin construction and use of facilities and staging, storage, and temporary work areas and new or to-be-improved access roads **until** Arlington:
 - a. files the New York State Historic Preservation Office's (SHPO) comments on Arlington's response to the SHPO's October 15, 2008 letter;

- b. files the required report and/or plan for the Alfalfa Field Sites and the Hearth Site, and the SHPO's comments on the report/plan;
- c. clarifies whether access road 5 and the extra work space at milepost 2.2 were covered by the cultural resources survey, and if not, surveys these areas, provides a report, and the SHPO's comments on the report;
- d. files a supplemental survey report for any newly identified areas requiring survey, and the SHPO's comments on the report;
- e. files a Phase II report for the Thomas Corners Deep Site #1, or an avoidance plan and supplemental testing report, and the SHPO's comments on the report(s)/plan;
- f. files any required avoidance or treatment plan, and the SHPO's comments on any plan;
- g. provides the Seneca Nation Tribal Historic Preservation Office with all requested reports; and
- h. files, and the Director of OEP reviews and approves all reports and plans. The Director of OEP will notify Arlington in writing when it may proceed with any treatment or construction.

All material filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CONTAINS PRIVILEGED INFORMATION--DO NOT RELEASE.**"

14. Arlington shall make all reasonable efforts to ensure its predicted noise levels from the TCS Compressor Station are not exceeded at nearby noise-sensitive areas (NSA) and file noise surveys showing this with the Secretary **no later than 60 days** after placing the compressor station into service. However, if the noise attributable to the operation of the TCS Compressor Station at full load exceeds a day-night sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at any nearby NSA, Arlington shall file a report on what changes are needed and shall install additional noise controls to meet that level **within 1 year** of the in-service date. Arlington shall confirm compliance with this requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.
15. **Prior to beginning a horizontal directional drill (HDD) of the Canisteo River,** Arlington shall file, for the review and written approval of the Director of OEP, a noise analysis identifying the existing and projected noise levels at each NSA within 0.5 mile of the HDD entry and exit sites. If noise attributable to the HDD is projected to exceed an L_{dn} of 55 dBA at any NSA, provide a mitigation plan to reduce the projected noise levels at the NSA. During the drilling operations, Arlington shall monitor noise and make all reasonable efforts to restrict noise from the drilling operation to no more than an L_{dn} of 55 dBA at the nearby NSAs.