

125 FERC ¶ 61,303
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Williston Basin Interstate Pipeline Company

Docket No. RP00-107-011

ORDER REQUESTING DATA AND COMMENT

(Issued December 18, 2008)

1. This order responds to the remand by the United States Court of Appeals for the District of Columbia Circuit in *Williston Basin Interstate Pipeline Company*.¹ In *Williston*, the court reviewed Commission orders requiring the conversion of a Part 157 transportation service agreement (Rate Schedule X-13) between Williston Basin Interstate Pipeline Company (Williston) and Northern States Power Company (NSP) to an open-access contract pursuant to Part 284 of the Commission's regulations and Williston's Rate Schedule FT-1. The court found, among other things, that the Commission had not sufficiently explained its decision to require this conversion and remanded the matter to the Commission for further explanation. The court, however, did not vacate the Commission's decision, finding instead that a significant possibility exists that the Commission may adequately explain its decisions on remand.

2. In this order, we direct the parties to provide more current information in order that the Commission may address the issues raised in the remand with updated data and argument.

¹ *Williston Basin Interstate Pipeline Co.*, 519 F.3d 497 (D.C. Cir. 2008) (*Williston*) (Remand Order).

I. Background

3. The extensive background to this matter is set forth in prior Commission orders² and the opinion of the court of appeals, and is reproduced here only to the extent necessary to understand the issue. NSP, a local distribution company serving natural gas retail customers in North Dakota and Minnesota, receives transportation services from Williston in and around Fargo, North Dakota, along a pipeline facility known as the Mapleton Extension. The Mapleton Extension facilities consist of a 49.3-mile extension of pipeline and appurtenant facilities from Valley City to Mapleton, North Dakota.

4. Prior to the Commission's November 22, 2005 order,³ NSP took the majority of its service from Williston on the Mapleton Extension under Rate Schedule X-13, an individually-certificated service under Part 157 of the Commission's regulations.⁴ The parties entered into the Rate Schedule X-13 contract on February 22, 1991, for a 20-year term. On March 30, 1992, the Commission issued an order in Docket No. CP91-1897-000 granting a certificate of public convenience and necessity to Williston to construct the Mapleton Extension facilities for NSP and to provide firm transportation service on that lateral under Rate Schedule X-13 at the rate of \$19.5778 per Mcf per month for 8,000 Mcf per day of contract demand.⁵ Since that certification, the parties' lengthy relationship under Rate Schedule X-13 has been contentious. The X-13 rate, pursuant to its terms, was to be recalculated each odd-numbered year, commencing March 1, 1995, until the rate became equal to or less than Williston's maximum FT-1 rate, including surcharges. At that time, the biennial rate restatement would cease, and the rate would coalesce into the FT-1 rate.

5. Several times during the restatement proceedings for Rate Schedule X-13, NSP expressed its desire to convert the Part 157 Rate Schedule X-13 service to open-access Part 284 service under Rate Schedule FT-1. Because the biennial restatement proceedings were for the limited purpose of ensuring that the rate was calculated correctly, the Commission deferred acting on the conversion issue in the context of these

² *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007, *order aff'g initial decision*, 113 FERC ¶ 61,201 (2005), *order on reh'g*, 115 FERC ¶ 61,081 (2006).

³ *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 (2005) (November 22 Order).

⁴ NSP took the remainder of service on the Mapleton Extension from Williston under a Part 284 Rate Schedule FT-1 open access contract designated as Contract No. FT-00157. The instant order, however, addresses only the X-13 contract.

⁵ *Williston Basin Interstate Pipeline Co.*, 58 FERC ¶ 61,344 (1992).

biennial restatements. The Commission hoped the parties would be able to resolve the issue in the context of Williston's rate case in Docket No. RP00-107-000. Such a settlement did not take place, and the ALJ issued a decision that did not address the conversion issue.⁶ In reviewing the ALJ's decision, the Commission found that the ALJ should have permitted NSP to address the conversion issue, and therefore remanded the issue (and a related matter) to the ALJ for decision on the merits.⁷

A. Commission Orders

6. In her April 8, 2005 Initial Decision, the ALJ found that the Commission has the authority to require conversion, that NSP's request for conversion was timely, and that the applicable burden of proof was the "just and reasonable" standard under section 5 of the Natural Gas Act.⁸ Therefore, the ALJ found that the Commission should grant NSP's request to convert Rate Schedule X-13 to an open-access contract. In its November 22, 2005 Order, the Commission affirmed the ALJ's Initial Decision.⁹ Specifically, the Commission found that Rate Schedule X-13 was no longer just and reasonable because it denied NSP and its customers the ability to obtain the open-access benefits that are the hallmarks of the competitive natural gas market that the Commission seeks to foster.

7. The Commission found that Williston's refusal to permit NSP to convert Rate Schedule X-13 to an open-access contract was based mainly on Williston's desire to maintain control over as much of the secondary capacity market as possible to the benefit of itself and its FT-1 customers. The Commission noted that Williston's largest FT-1 customer, Montana-Dakota Utilities Company (MDU), is an affiliate of Williston and accounts for more than 93 percent of Williston's FT-1 capacity. The Commission also found that conversion was appropriate here because the parties' evident intent that Rate Schedule X-13 would generally mirror FT-1 service as rates for the two contracts were derived from the same cost data and were designed to eventually merge through the biennial rate adjustments. In light of these findings, and the Commission's policies in favor of open-access service and the most competitive markets possible for natural gas, the Commission found that it could not support Williston's refusal to permit conversion, especially because such refusal would perpetuate a secondary market dominated by the

⁶ *Williston Basin Interstate Pipeline Co.*, 95 FERC ¶ 63,008, at 65,123 (2001).

⁷ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164, at P 99-101 (2004). The related matter pertains to a 50 percent limitation Williston placed on NSP's capacity under its open access Contract No. FT-00157.

⁸ *Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007, at P 68 (2005).

⁹ *Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 (2005).

pipeline and its affiliate. Accordingly, the Commission found that the Rate Schedule X-13 service had become unjust and unreasonable and inconsistent with the current regulatory scheme.

8. The Commission next reviewed the impact of a conversion on Williston and its other customers, noting that none of Williston's customers intervened in order to argue that they would be adversely affected by the conversion.¹⁰ The Commission discussed the estimated cost impact of converting Rate Schedule X-13 to open access on Williston's other FT-1 customers, noting that NSP stood to gain between \$401,920 and \$694,449 in additional revenue each year from capacity release and segmentation while Williston would only lose interruptible revenues from the sales of capacity on the Mapleton Extension, which amounted to \$39,000 in 2003 (although the rates were designed with an assumed level of \$50,000 of FT-1 revenues). Williston disputed this projected cost shift, predicting instead a range of \$410,920 to \$2.2 million. The Commission found Williston's assumptions in arriving at this figure to be unreasonable insofar as Williston's figures presume NSP would release and segment its entire Rate Schedule X-13 capacity for 12 months of the year and never use its own capacity to serve its own markets. Therefore, the Commission found that the benefits outweighed some small cost shifts that, in any event, would not occur until a future rate case, at which point all of Williston's costs of service would be examined.

9. To offset even this *de minimis* loss to Williston, the Commission recognized that NSP would pay the FT-1 reservation charge and a surcharge for the cost differential between the FT-1 reservation charge and what the Rate Schedule X-13 charge would have been, as well as forgoing any interruptible revenues made possible by the Mapleton Extension and the 25 basis point reduction reflected in the Rate Schedule X-13 rates. Williston argued that NSP's Rate Schedule X-13 rates do not account for non-Mapleton Extension costs and should therefore be increased under a converted service contract so that NSP would contribute to mainline costs. Noting that NSP offered to pay more than its current rates, the Commission disagreed with Williston, stating that Williston could not use the remand of the X-13 issue to adjust other rates, whether they are NSP's or any other customer's rates, as the scope of the Commission's original remand order was limited to the Rate Schedule X-13 conversion issue. Furthermore, the Commission recognized that under Rate Schedule X-13, NSP transported gas to the Mapleton Extension via other parts of Williston's mainline system, finding that as a result of this existing use, mainline transportation costs were arguably included in the Rate Schedule X-13 rates.

¹⁰ *Id.* P 51-58.

10. In its April 20, 2006 order on rehearing, the Commission affirmed its decision in the November 22, 2005 Order to require conversion of the Rate Schedule X-13 contract to an open-access contract pursuant to Williston's FT-1 Rate Schedule.¹¹ The Commission summarized its decision as confirming the general rule that when a shipper contracts and pays for capacity on a pipeline, it is the shipper's right to release and segment the capacity for which it has paid. In response to Williston's argument that the Commission had not adequately conveyed the circumstances that exist here that impel the Commission to "require" rather than "favor" conversion of a Part 157 service agreement, the Commission identified the following conditions:

the history of Williston's aggressive interpretation of Rate Schedule X-13, reflected in its mispricing of the rates thereunder, the unique fact of its affiliation with its largest customer and the protection from transmission competition the vestigial X-13 arrangement offered these entities, the impairment of market health resulting from this diminution of competition, and the rejection by the transporter of alternatives offered at hearing for transitioning to open-access service from X-13, which was the culmination of many years of rebuffing the shipper's request to negotiate such a transition.¹²

Furthermore, the Commission noted that "since these elements in the aggregate evidenced obstruction of the Commission's policy favoring open-access use of capacity by those who pay for it, the appropriate conditions were presented for the Commission to act in furtherance of that pro-competitive goal."¹³ Therefore, the Commission denied rehearing and affirmed its decision to require conversion of the Rate Schedule X-13 contract.

B. Decision of the U.S. Court of Appeals for the District of Columbia

11. In its decision remanding the matter back to the Commission for further explanation, the United States Court of Appeals for the District of Columbia Circuit found that the Commission was correct to decide the case under the just and reasonable standard, but that further explanation was needed to support its decision requiring

¹¹ *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61,081 (2006).

¹² *Id.* P 45.

¹³ *Id.*

Williston to convert Rate Schedule X-13 to an open-access service contract.¹⁴ The court emphasized that the Commission needed to further articulate its policy, especially here where the Commission's leading policy statement refrained from mandating the conversion of Part 157 contracts and where this is the first instance in which the Commission required such a conversion.

12. The court addressed the Commission's identification of the "appropriate circumstances" in which it would *require* conversion of a Part 157 contract, rather than simply *favor* such conversion. Of the five reasons given by the Commission, the court found three to be irrelevant.¹⁵ The two conditions that the court found relevant were "the unique fact of [Williston's] affiliation with its largest customer and the protection from transmission competition [that] the vestigial X-13 arrangement offered these entities, [and] the impairment of market health resulting from this diminution of competition."¹⁶ Additionally, the court found that the Commission failed to either identify "special characteristics" applicable to Williston, or to explicitly revise its policy from favoring to requiring conversion of Part 157 contracts. Furthermore, the court stated that the Commission's "ubiquitous interest in enhancing competition" was not a sufficiently compelling reason to override the contract.

13. The court next addressed the Commission's discussion of the financial impact that conversion would have on each party, finding that the Commission did not adequately explain its assertion that converting Rate Schedule X-13 to open access would yield an annual gain to NSP of approximately \$402,000 to \$695,000 and an annual loss to Williston of approximately \$50,000. The court noted, but took no position on, documents that indicate that Williston and NSP had a shared understanding that existing shippers would not bear the costs of the Mapleton Extension and that Williston—not NSP—would benefit from NSP's unused capacity. Additionally, the court objected to the Commission's statement that other cost reductions may offset the reallocation of Rate Schedule X-13 costs, at least to the extent that the Commission's order did not enable those specific cost reductions.

¹⁴ *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497 (D.C. Cir. 2008).

¹⁵ *Id.* (identifying the following conditions as irrelevant: the history of Williston's aggressive interpretation of Rate Schedule X-13; Williston's rejection of alternatives offered at hearing for transitioning to open access service; and the conditions, in the aggregate, evincing obstruction of the Commission's policy favoring open access).

¹⁶ *Id.* at 501.

14. Finally, the court addressed the Commission's decision to continue NSP's right to biennial rate adjustments (established in the Rate Schedule X-13 contract) in the new Part 284 contract. Although the court rejected the Commission's argument that it sought to preserve as much of the original agreement as possible. The court, however, acknowledged that the X-13 rate was intended to converge with the FT-1 rate and invited the Commission to develop this argument more fully on remand.

II. Discussion

15. The issue the court has directed the Commission to address on remand involves NSP's request to convert Rate Schedule X-13, a Part 157 contract between NSP and Williston, to an open access contract, despite Williston's objection to the conversion. Because of the existence of a *Memphis* clause in Rate Schedule X-13, our standard of review is the "just and reasonable" standard under section 5 of the Natural Gas Act.

16. In the instant case, we find it appropriate to update and clarify the record before reexamining whether Rate Schedule X-13 is indeed unjust and unreasonable and whether conversion to a Part 284 open-access contract will result in increased competition on Williston's system. Three and a half years have passed since the Initial Decision on this matter. Because market conditions change over time and the parties now have experience operating under a converted Part 284 contract, we believe that more current information is needed to respond to the court's Remand Order. Additional information regarding this time period will better inform our decision on whether the concerns previously expressed by the parties are justified or speculative and will allow the Commission to address the inconsistencies noted in the Remand Order with respect to the financial impact of the conversion. A paper hearing process will allow us to obtain updated information and argument to make such a determination on an informed basis.¹⁷ Accordingly, we direct Williston and NSP to provide within 30 days of this order the following information, or indicate whether such information is not in their possession:

- The amount of transportation capacity, by rate schedule, currently held by affiliates and non-affiliates of Williston;

¹⁷ The use of a paper hearing rather than a trial-type evidentiary hearing has been used in a number of cases as appropriate. *See, e.g., New Century Services, Inc.*, 108 FERC ¶ 61,148, at n.9 (2004) (citing *Public Service Company of Indiana*, 49 FERC ¶ 61,346 (1989), *order on reh'g*, 50 FERC ¶ 61,186, *opinion issued*, Opinion No. 349, 51 FERC ¶ 61,367, *order on reh'g*, Opinion No. 349-A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990), *dismissed, Northern Indiana Public Service Company v. FERC*, 954 F.2d 736 (D.C. Cir. 1992)).

- For the last three years, on a monthly basis, the amount of capacity that NSP has released, the rate for the releases and the revenue generated by the releases;
- For the last five years, on a monthly basis, the amount of capacity released, the rate for the releases and the revenue generated by the releases on Williston's system by shippers other than NSP;
- For the last five years, on a monthly basis, Williston's interruptible transportation volumes and interruptible revenue, separately stated for both the Mapleton Extension and Williston's system as a whole;
- The costs allocated by Williston to interruptible transportation service in its last rate case;
- The amount of interruptible revenue from the Mapleton Extension credited to FT-1 rates by Williston in its last rate case.

17. In addition, we direct the parties to file initial comments within 60 days of this order, and reply comments within 20 days thereafter, containing all arguments and supporting evidence that they wish to present, to update the record with regard to the issue under remand. Specifically, the Commission directs the parties to address at least the following issues:

- The status of Williston's secondary market with respect to the availability of released capacity and interruptible transportation capacity;
- The extent that Williston and its affiliates compete for the resale of unused pipeline capacity;
- The impact of the conversion of NSP's Rate Schedule X-13 to Part 284 service on Williston's capacity release and interruptible capacity markets;
- The impact of the conversion of NSP's Rate Schedule X-13 to Part 284 service on Williston's ability to recover the costs Williston has allocated to interruptible transportation service in its last rate case.

18. We urge the parties to spell out their arguments with reference to particular facts and specific circumstances that may be useful in addressing the Court's concerns, rather than make general assertions.

The Commission orders:

(A) Williston Basin and NSP are directed to file all necessary data in their possession, as discussed in the body of this order, within 30 days of the date of issuance of this order.

(B) Written comments, as discussed in the body of this order, shall be filed within 60 days of the date of issuance of this order.

(C) Reply comments addressing the written comments filed by other parties in accordance with Ordering Paragraph (B) above, shall be filed within 20 days of the due date for the filing of initial comments.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.