

127 FERC ¶ 61,164  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Express Pipeline LLC

Docket No. CP08-6-001

Enogex Inc.

Docket No. CP08-9-001

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued May 21, 2009)

1. On July 25, 2008, the Commission issued an order (July 25, 2008 Order)<sup>1</sup> granting Midcontinent Express Pipeline LLC (Midcontinent) the authorizations necessary to construct and operate a 506-mile pipeline extending from southeastern Oklahoma to western Alabama and for Midcontinent to lease up to 272,000 dekatherms per day (Dth/d) of capacity on the Oklahoma intrastate pipeline system of Enogex Inc. (Enogex).<sup>2</sup> The Commission also issued in the July 25, 2008 Order a limited-jurisdiction certificate to Enogex to enable it to carry out its jurisdictional responsibilities under the lease agreement, while remaining non-jurisdictional with respect to its intrastate activities.

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<sup>1</sup> *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008).

<sup>2</sup> Enogex is an intrastate pipeline with natural gas transportation facilities entirely within the State of Oklahoma. Enogex's system, consisting of approximately 2,283 miles of transmission pipeline arranged in a web-like configuration, receives natural gas from numerous wells and gathering facilities and from other intrastate and interstate pipelines. Enogex offers firm and interruptible intrastate transportation services, as well as interruptible transportation service in interstate commerce under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA). Enogex does not offer NGPA section 311 firm transportation service.

2. Apache Corporation (Apache) filed a request for rehearing of the July 25, 2008 Order. Midcontinent filed a request for clarification. As discussed below, we will deny rehearing and grant Midcontinent's request for clarification.

### **I. Background**

3. In approving Midcontinent's and Exogex's proposals, the July 25, 2008 Order addressed several protests, including Apache's. Apache asserted that because Enogex does not offer firm section 311 transportation service, the lease is unduly discriminatory. Apache also alleged undue discrimination between the rates Midcontinent charges for its leased capacity on Enogex and the rate Enogex charges for section 311 interruptible transportation service. Finally, Apache contended that the lease of capacity from Enogex to Midcontinent, in concert with Enogex's lease of capacity to Gulf Crossing Pipeline Company, LP (Gulf Crossing)<sup>3</sup> would impair its rights as an NGPA section 311 interruptible shipper on Enogex's system.

4. The Commission rejected Apache's claims of undue discrimination in the July 25, 2008 Order. In response to Enogex's alleged undue discrimination in not offering firm section 311 service, the Commission stated that leases are viewed differently from transportation service contracts, such that lessees are not similarly situated to interstate shippers on the lessor's pipeline. We explained that a lessee of pipeline capacity is generally a natural gas company under the NGA that needs NGA section 7(c) certificate authorization to acquire the capacity, and that the lessee, in essence, owns the leased capacity, uses that capacity for its own customers, and the leased capacity is subject to the lessee's tariff. Additionally, the Commission stated that Enogex will not be providing firm transportation service over the leased capacity; Midcontinent will. In any event, the Commission noted that its regulations do not require intrastate pipelines, such as Enogex, to provide NGPA section 311 service on a firm basis as requested by Apache.<sup>4</sup>

5. With respect to Apache's claim that the lease payments were unduly discriminatory because they were substantially less than Enogex's interruptible rates, the

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<sup>3</sup> *Gulf Crossing Pipeline Company LLC*, 123 FERC ¶ 61,100 (2008) (*Gulf Crossing*). The Commission certificated Gulf Crossing's lease of 90,000 Dth/d of capacity on Enogex's system and the construction of new pipeline facilities from an interconnection with Enogex at Bennington to an interconnection with Gulf South Pipeline Company, LP (Gulf South).

<sup>4</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 52.

July 25, 2008 Order noted that because capacity lease arrangements differ from firm section 311 transportation service, the Commission has declined to engage in direct comparisons between a lessor's existing rates and payments to be charged under a lease agreement. The Commission stated that its policy is to not approve a lease of capacity by an interstate pipeline unless the lease payments are less than or equal to the lessor's firm transportation rates for comparable service over the term of the lease. The Commission found that it was not a disqualifying factor that the lease payments may also be less than the lessor's interruptible rates because shippers on Enogex are not similarly situated to interruptible shippers on Midcontinent.<sup>5</sup>

6. Apache also contended that the lease of capacity from Enogex to Midcontinent, in concert with Enogex's lease of capacity to Gulf Crossing, would impair its rights as an NGPA section 311 interruptible shipper on Enogex's system by reducing the amount of capacity that would be available for existing Enogex services. On the subject of the likelihood of curtailment of existing interruptible section 311 services, the Commission found that the engineering information in the record demonstrated that, as configured, the Enogex system will readily accommodate the capacity commitments under these leases and that, while certain individual receipt points may decrease in capacity, the overall amount of capacity on Enogex's system will increase as a result of the facility addition Enogex proposed.<sup>6</sup> The Commission determined that in any event, while the amount of capacity available for interruptible section 311 services may decrease in the future, those transactions are, by definition, interruptible and subject to change.<sup>7</sup>

7. The July 25, 2008 Order also addressed a claim that the Midcontinent-Enogex lease did not comport with Commission policy requiring identification of specific, physical receipt and delivery points.<sup>8</sup> Apache claimed that under the lease, the parties

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<sup>5</sup> *Id.* at P 59.

<sup>6</sup> Enogex's facility additions include 43 miles of 24-inch lateral pipeline in Woods and Major Counties, Oklahoma to provide an interconnection with the Waynoka Plant and a new 24,000 hp compressor station at the Bennington delivery point.

<sup>7</sup> *Id.* at P 43.

<sup>8</sup> Midcontinent's and Enogex's operating lease agreement, which can be renewed at the end of a primary term of ten years, provides that Midcontinent will lease 272,000 Dth/d of capacity (exclusive of fuel) on Enogex's intrastate system. Enogex will support firm deliveries from the receipt points specified in the lease – the Waynoka physical point, and Enogex's paper pooling points at West Pool, and East Pool – to the Bennington lease delivery point through a combination of existing capacity and capacity Enogex will create through the addition of compression and certain other pipeline

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could change receipt points under the lease at any time, thus conveying a “floating” capacity right to move anywhere on the system, preempting existing gas flows and potentially shutting in production.

8. The Commission found in the July 25, 2008 Order that the specific point and path rights shippers have in their transportation contracts are dictated by the operational attributes of the pipeline’s system. The Commission concluded that for pipelines such as Enogex, with multidirectional and frequently changing flows, it may be operationally infeasible to implement physical pathing; instead, gas may flow on these systems under multiple routes depending upon a variety of factors.<sup>9</sup> Moreover, the Commission noted that some pipelines, due to the operations of their systems, contract firm capacity to customers at specific receipt and delivery points and do not identify any specific gas flow path.<sup>10</sup> Here, Midcontinent’s lease with Enogex clearly identifies the specific receipt and delivery points in the lease.<sup>11</sup> In the circumstances of this case, the Commission concluded that it was not inappropriate to locate two of the receipt points at Enogex’s East Pool and West Pool and not at a physical receipt meter.<sup>12</sup>

## II. Apache’s Request for Rehearing

### A. The Lease is Unduly Discriminatory, Anticompetitive, and in Violation of Open-Access Regulations

9. Apache states that Enogex must provide NGPA section 311 transportation service “without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices or volumes of natural gas to be transported, customers classification, or undue

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facilities.

<sup>9</sup> Those factors may include the location of other pipeline interconnections, the location and volume of storage, and local production requirements, as well as the demands placed on the pipeline on a particular day.

<sup>10</sup> See e.g., *Gulf South Pipeline Company, LP*, 98 FERC ¶ 61,278 (2002); *Dominion Transmission, Inc.*, 95 FERC ¶ 61,316 (2001).

<sup>11</sup> Midcontinent-Enogex Lease, Exhibit A, as modified in Amendment No. 4 filed with the Commission on April 23, 2008.

<sup>12</sup> Midcontinent’s February 26, 2008 data response states that these pooling points are paper points at which gas is made available for purchase on an aggregated basis.

discrimination or preference of any kind.”<sup>13</sup> According to Apache, the Commission’s statement in the July 25, 2008 Order, that leases are different from transportation service contracts, such that lessees are not similarly situated to interstate shippers on the lessor’s pipeline,<sup>14</sup> places form over substance. Apache contends that the substantive result of this rationale, underpinning the Commission’s approval of the lease here, is that one class of shippers is able to purchase firm transportation on the Enogex pipeline (through Midcontinent), while other shippers on Enogex, like Apache, cannot. This, asserts Apache, is “de facto discrimination in the quality of service provided, and in the categories of service provided – both in violation of section 284.7(b).”<sup>15</sup>

10. Apache states that the Commission’s finding that there is no undue discrimination is based on the premise that leases are different from transportation service contracts, such that lessees are not similarly situated to interstate shippers on the lessor’s pipeline. However, states Apache, here the distinction is to be drawn between two sets of shippers, i.e., Midcontinent’s shippers on Enogex and Enogex’s shippers on Enogex.<sup>16</sup> According to Apache, these two sets of shippers are similarly situated because they “both are purchasing transportation service using the same Enogex pipeline facilities.”<sup>17</sup>

11. Moreover, Apache asserts that while Midcontinent will pay a rate equal to or less than Enogex’s current rates, Enogex has proposed a significant rate increase to its existing shippers.<sup>18</sup> According to Apache, this is discrimination in the prices to be paid, also a violation of section 284.7(b) of the Commission’s regulations and contrary to

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<sup>13</sup> *Citing Peoples Gas Light and Coke Co.*, 118 FERC ¶ 61,203, at P 19 (2007); 18 C.F.R. §§ 284.7(b) and 284.9(b) (2008).

<sup>14</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 52.

<sup>15</sup> Apache’s rehearing request at 8.

<sup>16</sup> We note that Apache made no such distinction in its protest, where Apache complained that “[i]t is unjust and unreasonable for the Commission to permit one entity, Midcontinent, an unduly discriminatory and preemptive option to lease ... capacity on a firm basis ... when Enogex’s existing shippers are only permitted to buy interruptible capacity.” Apache’s November 13, 2007 protest at 5-6.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> Apache predicts that Enogex’s unit rate will increase as a result of increased costs over time, less available capacity, and fewer shippers, while the lease payments are locked in for the term of the lease.

*Southern Natural Gas Co. (Southern)*,<sup>19</sup> wherein the Commission rejected as unduly discriminatory a lower rate structure proposed under a lease and required the lessee to pay the maximum tariff rate. Additionally, Apache asserts that the lease arrangement is anticompetitive in that Enogex has permitted Midcontinent to reserve capacity in the constrained West Zone to market firm transportation service, thereby conferring monopoly power to Midcontinent, while at the same time, Enogex refuses to sell section 311 firm transportation. Apache asserts that as a consequence, the lease, in conjunction with Enogex's refusal to commit to sell firm transportation, denies shippers the opportunity to access and purchase firm transportation on equal terms.

### **Commission Response**

12. As we stated in the July 25, 2008 Order, the Commission views lease arrangements differently from transportation services under rate contracts, such that lessees are not treated as shippers; therefore, we do not consider them to be similarly situated to interstate shippers on the lessor's pipeline.<sup>20</sup> On rehearing, Apache focuses its arguments not on the differences or similarities between the lessee, Midcontinent, and Enogex's shippers, but rather on those between Midcontinent's shippers on Enogex and Enogex's shippers on Enogex. This is an inapposite comparison. Apache's claim that these two sets of shippers are similarly situated because they "both are purchasing transportation service using the same Enogex pipeline facilities," ignores substantial differences between the character and quality of the services the two sets of shippers are each purchasing. Midcontinent's shippers are purchasing NGA section 7 firm transportation service from Midcontinent, subject to Midcontinent's open-access tariff, albeit provided by Midcontinent using capacity which it has leased on Enogex for that purpose. Our regulations require interstate pipelines to offer both firm and interruptible transportation under section 7 of the NGA on a non-discriminatory basis.<sup>21</sup> Enogex's interstate shippers, on the other hand, are purchasing interruptible NGPA section 311 service from Enogex. Our regulations provide that an intrastate pipeline "may" offer firm and/or interruptible service.<sup>22</sup> Enogex has chosen, as allowed by the regulation, to

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<sup>19</sup> 124 FERC ¶ 61,058, at P 38 (2008).

<sup>20</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 51.

<sup>21</sup> Sections 284.7(a)(1) and 284.9(a)(1); 18 C.F.R. §§ 284.7(a)(2) and 284.9(a)(2) (2008).

<sup>22</sup> Sections 284.7(a)(2) and 284.9(a)(2) of the Commission's regulations; 18 C.F.R. §§ 284.7(a)(2) and 284.9(a)(2) (2008). However, an intrastate pipeline offering interruptible section 311 service is required to do so on a non-discriminatory

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provide such service only on an interruptible basis. Accordingly, we do not find that Enogex's shippers using Enogex's capacity for NGPA section 311 interruptible service are similarly situated to Midcontinent's shippers, for whom Midcontinent provides NGA section 7(c) firm service using leased capacity on Enogex. Thus, we find that Apache suffers no undue discrimination in allocation of capacity on Enogex's system.

13. As noted in the July 25, 2008 Order and above, Midcontinent is required to offer firm and interruptible transportation on a non-discriminatory basis; thus, any shipper, including an Enogex shipper, could have participated in Midcontinent's open season for firm transportation service through the leased capacity. The July 25, 2008 Order recognized that there might have been valid business reasons militating against that option for some of Enogex's shippers. However, the fact that certain of Enogex's shippers did not see bidding for firm service on Midcontinent to be an attractive business choice does not alter the fact that capacity for firm service on Enogex's facilities was available to all shippers on a nondiscriminatory basis through Midcontinent's lease of Enogex's capacity. Thus, we find that the lease is not anticompetitive or in violation of our open access regulations, as all shippers were offered access to service at Commission-approved rates without preference.

14. Apache's claim of rate discrimination is based on the fact that Midcontinent will pay a rate equal to or less than Enogex's current rates, and that Enogex is proposing a significant increase in its section 311 interruptible rates. Apache's reliance on *Southern* for the proposition that Midcontinent should be required to pay lease rates equivalent to Enogex's maximum section 311 rates is misplaced. In *Southern*, the issue was whether a Southern shipper utilizing capacity leased by Southern from Magnolia Enterprise Holdings, Inc. should pay an incremental rate that was lower than the system rate paid by Southern shippers in the same zone using non-leased capacity. The Commission found that because the leased facilities were to be operated as an integral part of Southern's existing Zone 3 system, and because an incremental rate would be lower than the existing system rate, charging an incremental rate for the expansion service would be inappropriate. In *Southern*, the Commission was addressing the potential for rate disparity between two sets of Southern shippers. In this proceeding, as we have noted repeatedly, Midcontinent is not a shipper on Enogex. Under Commission policy, we look to see that the lease payments will be less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease. That the payments may be significantly less than such rates, or even less than the lessor's interruptible rates, is not a disqualifying factor. Midcontinent is not similarly situated to

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basis. See section 284.9(b) of the Commission's regulations, 18 C.F.R. §§ 284.9(b) (2008).

interruptible shippers on Enogex. Therefore, the Commission does not believe the level of its lease payment is indicative of undue discrimination.<sup>23</sup> Finally, issues relating to the potential that section 311 rates will be increased is best addressed in any future rate proceeding where Enogex proposes to collect additional costs.

**B. Approval of the Lease must Contain a Condition Requiring that Section 311 Firm Transportation be Offered to Existing Shippers**

15. While Apache accepts our conclusion that the Commission cannot force an intrastate pipeline to offer firm section 311 service,<sup>24</sup> Apache claims that we have the authority under section 7(e) of the NGA to condition Enogex's limited-jurisdiction certificate to require that Enogex offer firm section 311 service to its other shippers. Apache cites *Islander East Pipeline Company, L.L.C. (Islander East)*,<sup>25</sup> *Gulf Crossing*,<sup>26</sup> and *Southern*,<sup>27</sup> as cases where, in response to discrimination claims, the Commission approved leases only after finding that the pipeline had previously offered firm capacity to its existing shippers and/or that existing shippers would not be negatively impacted. Apache states that in *Islander East*, the lessor-pipeline was required to offer the same type of lease and financial terms to "other similarly situated shippers." According to Apache, the Commission concluded in *Gulf Crossing* that since Gulf South, the lessor, had "actively marketed the lease capacity during the course of multiple open seasons," the preferential rights granted under the lease had been made available to other shippers on Gulf South. Apache states that in *Southern*, the Commission recently found that there was no discrimination where open seasons had been held to determine if there was any interest in the capacity before it was leased. In contrast to the above referenced cases, states Apache, Enogex did not first offer the firm capacity to its existing shippers before leasing the capacity to Midcontinent.

16. To remedy Enogex's failure to hold an open season prior to leasing the capacity to Midcontinent, Apache states that the Commission should require under NGA section 7(e), as a condition to approval of the lease, that Enogex offer firm transportation

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<sup>23</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 59.

<sup>24</sup> See Apache's rehearing request at 12, citing the July 25, 2008 Order at P 52.

<sup>25</sup> 97 FERC ¶ 61,363, at P 71 (2001); 100 FERC ¶ 61,276, at P 70 (2002).

<sup>26</sup> 123 FERC ¶ 61,100 at P 126 (2008).

<sup>27</sup> 124 FERC ¶ 61,058 at P 29 (2008).

capacity to its other shippers. Otherwise, producer-shippers like Apache, who have no other options, could be shut in if their interruptible transportation is curtailed.<sup>28</sup>

### **Commission Response**

17. We find that the July 25, 2008 Order is consistent with both the Commission's regulations and precedent. The cases cited by Apache (*Islander East*, *Gulf Crossing*, and *Southern*) in support of its request that the Commission reject the lease or condition its approval on Enogex offering firm section 311 transportation service to its shippers are distinguishable from the facts in this case. In both *Islander East* and *Gulf Crossing*, the lesser was an interstate pipeline. As an interstate pipeline, Gulf South needed abandonment authorization to lease capacity to Gulf Crossing; the open seasons held by Gulf South, for services they were already required to provide pursuant to their tariffs, served to demonstrate that there were no potential shippers desiring the capacity to be leased, thus allowing the Commission to find that the public convenience and necessity permitted the abandonment. The open season Apache points to in *Southern* involved transportation service to be performed under Southern's tariff, not capacity which Southern would convey pursuant to a lease. Finally, in *Islander East*, the Commission was addressing concerns specific to an agreement between affiliates. Here, the lessor, Enogex, does not provide firm jurisdictional (311) transportation service, nor is it required to under our regulations. We are not persuaded that it is necessary for us to compel it to offer such service as a condition of its limited-jurisdiction certificate in order to prevent any undue discrimination.<sup>29</sup>

18. As an NGPA section 311 interruptible shipper, Apache has no claim on Enogex's capacity. If, in fact, there is a reduction in the availability of interruptible section 311 service in the future as a result of the Midcontinent-Enogex lease, that is a consequence inherent to the nature of interruptible service.<sup>30</sup> As we stated in the July 25, 2008 Order, while the amount of capacity available for interruptible 311 services may decrease in the

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<sup>28</sup> Apache states that 90 percent of its wells are dedicated to Enogex.

<sup>29</sup> Regarding Apache's concern that an intrastate pipeline might lease its entire system to an interstate pipeline without ever offering its shippers comparable (i.e., firm) 311 transportation rights, we note that in such an instance, all service on the facilities would be provided by interstate pipelines that are required by our regulations to provide both firm and interruptible service.

<sup>30</sup> "The intermittent quality of [interruptible transportation service] is its inherent characteristic, which all purchasers of such service must accept." *Columbia Gas Transmission Corp.*, 55 FERC ¶ 61,366 at 62,144 (1991).

future, those transactions are, by definition, interruptible and subject to change.<sup>31</sup> Interruptible shippers do not have the same claim on a pipeline's services as firm shippers. The relative status of interruptible service is always a function of how firm services are being used and what remaining capacity is available.<sup>32</sup>

19. As stated above, our regulations require interstate pipelines to offer firm and interruptible transportation on a non-discriminatory basis. However, our regulations only provide that an intrastate pipeline "may" offer firm and/or interruptible service under section 311.<sup>33</sup> We have long held that intrastate pipelines that provide transportation service under section 311 are exempt from offering firm intrastate transportation service.<sup>34</sup> Whatever adverse effects Apache might experience as a result of the Midcontinent-Enogex lease, those effects are, as explained above, inherent to the nature of Apache's service and they do not warrant the rejection of the Midcontinent-Enogex lease or the imposition of a condition requiring an intrastate pipeline to offer firm section 311 transportation service against its will.

**C. The Commission's Finding that Existing Shippers will not be Harmed as a Result of the Lease was not Based on Substantial Evidence**

20. Apache contends that in finding that the lease will not have an unduly adverse impact on Enogex's existing services, the Commission ignored Apache's un rebutted evidence in the record regarding lack of capacity. While the Commission concluded, based on Enogex's engineering information, that Enogex's system will readily accommodate the capacity commitments Enogex has made under the Midcontinent and Gulf Crossing leases, Apache asserts that "accommodating" the leases does not address whether existing shippers will be impacted. According to Apache, there is no evidence that service at historical levels will be available once the lease capacity is used; if anything, there is evidence to the contrary. Moreover, Apache asserts that the

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<sup>31</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 43.

<sup>32</sup> *Id.*

<sup>33</sup> 18 C.F.R. §§ 284.7(a)(2) and 284.9(a)(2) (2008).

<sup>34</sup> *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665, at 31,502 (1985). The Commission exempted pipelines from providing firm transportation service to avoid the situation "whereby an intrastate pipeline is required to offer firm service for out-of-state shippers; thus progressively turning it into an interstate pipeline against its will and against the will of the responsible state authorities."

Commission itself concluded that “the amount of capacity Enogex can provide as interruptible section 311 transportation could change at some point in the future.”<sup>35</sup>

21. Apache contends that it rebutted Enogex’s engineering data by illustrating a number of flaws in the modeling used by Enogex.<sup>36</sup> Additionally, Apache asserts that not only did it proffer unrebutted evidence that capacity constraints were sure to result in the West Zone,<sup>37</sup> but Enogex has publicly announced that it is going to need expansions in the near future and it is using up its historical capacity. In these circumstances, states Apache, there can be no question that existing interruptible services will be detrimentally impacted.

22. Moreover, Apache contends that due to the failure of the lease to identify a defined capacity path, the Commission is unable to determine whether there is sufficient capacity on Enogex to commit to the lease without impacting existing customers. Specifically, Apache asserts that Enogex’s engineering analyses were discredited by Apache’s May 13, 2008 and July 1, 2008 rebuttal filings, raising material factual questions regarding the effect of the Midcontinent-Enogex lease on the operational capacities at receipt and delivery points on Enogex’s system and the resulting impact of the lease on existing services. Apache asserts that a hearing was required to resolve these factual issues. Apache also contends that Enogex refused to respond to data requests that Apache filed on April 4, 2008 in this proceeding, yet the July 25, 2008 Order failed to address Enogex’s failure to comply with discovery.

### **Commission Response**

23. The July 25, 2008 Order was based on all of the evidence submitted, including Apache’s May 13, 2008 and July 1, 2008 filings, which were intended to rebut Enogex’s engineering analyses. In particular, we considered Apache’s rebuttal filings and were not persuaded that the impact of lease operations cannot be measured or were inappropriately

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<sup>35</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 43.

<sup>36</sup> The claimed flaws include the facts that (i) the impact on existing customers could not be measured since the lease did not specify a capacity path or identify receipt points for the lease; (ii) Enogex’s model improperly measured the potential for constraints by using average numbers, rather than peak numbers; and (iii) Enogex based its model on hypothetical gas flows, which were inconsistent with the actual gas flows.

<sup>37</sup> Apache states that by affidavit, it has demonstrated that no new capacity was being added to the West Zone, and that the cross-haul pipelines transporting gas out of the West Zone are full.

estimated. In addition to Apache's contention that the impact of the lease cannot be measured unless there are physical receipt points designated and capacity paths determined, Apache maintains that the July 25, 2008 Order did not address other aspects of the evidence contained in Apache's or Enogex's engineering filings. Certain matters were not discussed in the July 25, 2008 Order, in part, due to concerns about the confidential nature of Enogex's engineering filing and much of Apache's engineering filings. However, those confidentiality requests do not prevent us from addressing issues raised by Apache concerning the methodology used by Enogex to model its system.

24. Enogex used historical average flow information to indicate how its system currently operates. Then, relying on its knowledge of current and anticipated service requirements on its existing system, as well as anticipated operations related to transportation of gas under the Midcontinent-Enogex lease,<sup>38</sup> Enogex modeled its system operations to determine how capacities would change at individual receipt and delivery points on Enogex's system. We believe the methodology used by Enogex to model its system is acceptable. Specifically, we find that the use of average flow information in the Enogex model was appropriate to determine the impact of the Midcontinent lease on Enogex's future pipeline operations. Enogex's estimate, based on average flows, was appropriate because it provided the best estimate of how the pipeline will operate in the future. The use of maximum flows to determine the impact of the lease would give only a snapshot of the system that may never be achieved because maximum flows by their nature do not occur regularly. Further, the use of average flows is the best approximation of how the lease will actually impact current customers. Finally, we find Enogex's use of hypothetical future flows to be appropriate. The purpose of the engineering model is to determine how the lease will impact the pipeline's future operations. The current actual flows on the Enogex system may be irrelevant once the lease capacity is in service, since receipt and delivery volumes may change. Thus, it is appropriate that Enogex used hypothetical future flows rather than the actual flows to determine the impact of the lease.

25. While we agree with Apache that capacity available on Enogex's system for section 311 interruptible transportation could be reduced at some time, especially in the

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<sup>38</sup> We note that a change in receipt points from those identified in the lease could result in different operating conditions; however, Enogex would still be obliged to provide for its firm commitments to Midcontinent for the lease capacity, as well as any other firm commitments Enogex may have. As discussed, Enogex does not have that same obligation for interruptible shippers, including those using section 311 interruptible transportation service. Thus, the lease provision providing for changes in receipt and delivery points is not inappropriate, as it will allow the parties to more easily adapt to changing circumstances.

West Zone, we do not believe that a shut-in of production is likely to result simply from lease operations. Aside from the effects of lease operations, which may result in changes to pressures and flows on Enogex, the trend toward, and potential for, capacity constraints on Enogex's system are primarily due to increases in production in the region seeking outlets via Enogex's system. The construction by Enogex to attach the Waynoka Plant in the West Zone is an example of production seeking an outlet, and such increasing production in the region is the impetus for Midcontinent's major interstate pipeline project and the associated lease of capacity on Enogex's system.<sup>39</sup> Finally, we will note that no existing firm shipper on Enogex's system filed comments in opposition to the lease proposal and, as stated above, interruptible shippers have no contractual or regulatory expectation that any historical levels of service will continue into the future.

26. In conclusion, we affirm the findings of the July 25, 2008 Order. Specifically, we affirm that the lease provides the benefit of avoidance of construction of duplicative pipeline facilities, since Midcontinent would have to construct duplicative facilities in order to create the desired firm, integrated service it can obtain through the lease of capacity on Enogex's system. As we stated above, since interruptible shippers have no claim of right to system capacity, the limited potential reduction in the capacity available for section 311 interruptible transportation service as a result of the lease cannot be viewed as an undue adverse effect. Thus, we affirm that the benefits from the Midcontinent-Enogex lease outweigh any possible changes that may result to existing shippers receiving interruptible section 311 transportation service.

27. Although section 7 of the NGA provides for a hearing when an applicant seeks a certificate of public convenience and necessity, section 7 does not require that all such hearings be trial-type evidentiary hearings. When a paper record provides a sufficient basis for resolving the relevant issues, it is our practice to provide for a "paper hearing," as we did in this case, rather than hold a formal in-person, trial-type evidentiary hearing pursuant to Part 385, subpart E of our regulations.<sup>40</sup> We have satisfied the hearing requirement in this proceeding by giving interested parties an opportunity to participate

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<sup>39</sup> Apache appears to acknowledge that growing production is at the root of anticipated capacity constraints on Enogex, citing Enogex's announcement that expansions will be needed in the near future. In fact, Enogex's open season for the Heartland Crossing Project, also noted by Apache, seems to indicate that Enogex is prepared to expand its system to accommodate increasing production.

<sup>40</sup> *NE Hub Limited Partners, L.P.*, 83 FERC ¶ 61,043, at 61,192 (1998); *Pine Needle LNG Company, LLC*, 77 FERC ¶ 61,229 (1996).

through evidentiary submissions in written form.<sup>41</sup>

28. Apache cites several NGPA section 311 rate cases where parties engaged in discovery. However, as section 385.401 of the Commission's regulations<sup>42</sup> makes clear, our discovery procedures, including the submission of data requests,<sup>43</sup> applies only to proceedings set for hearing under Part 385, subpart E "and to such other proceedings as the Commission may order."<sup>44</sup> We did not set this proceeding for an evidentiary hearing.

29. Apache's data requests sought information regarding the specific path of capacity leased by Midcontinent and how facilities and services will be segregated, as well as certain historical information regarding Enogex's interruptible services. As explained above, the Commission determined that Enogex's flow model of its current system, together with the hypothetical operation of its system under the lease with Midcontinent provided sufficient and appropriate information to determine the impact of the Midcontinent lease on Enogex's future pipeline operations. In making this determination, the Commission also took Apache's rebuttal filings into account. The submissions in this proceeding provided the written evidentiary record necessary to resolve the issues presented here. Apache was not injured because Enogex did not answer Apache's questions. The July 25, 2008 Order did not err by failing to require that Enogex comply with Apache's discovery requests.

**D. The Lease Failed to Identify a Defined Capacity Path, As Required by Commission Policy**

30. Apache asserts that the Commission should require that the lease identify, point-by-point, the receipt and delivery points of the capacity to be leased. Apache claims that since two of the lease's receipt points are located at Enogex's East Pool and West Pool, which are aggregation points rather than physical receipt meter locations, the specific receipt point and capacity path to be used under the lease are not defined. This, Apache states, is contrary to Commission policy requiring that the pipeline identify receipt and

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<sup>41</sup> *Moreau v. FERC*, 982 F.2d 556, 558 (D.C. Cir. 1993).

<sup>42</sup> 18 C.F.R. § 385.401 (2008).

<sup>43</sup> *See* section 385.406 of the Commission's regulations, 18 C.F.R. § 385.406 (2008).

<sup>44</sup> *Id.*

delivery points.<sup>45</sup> Moreover, even if the receipt points were identified, Apache asserts that the lease expressly allows the parties to change the lease's receipt points at any time.

31. Apache contends that it is essential that the lease identify a clear capacity path for at least two reasons. First, Apache contends that the Commission must determine that there is sufficient capacity to commit to the lease without impacting existing shippers. Apache claims that the Commission relied on Enogex's engineering studies to reach this conclusion, even though those studies did not designate what facilities would be used to serve the lease. Second, Apache asserts that whereas other leases approved by the Commission were point-to-point leases on a single asset, conveying a defined property interest, here the lease conveyed a "floating" capacity right to Midcontinent to move anywhere, at any time it chooses, preempting existing gas flows and potentially shutting in Oklahoma production. In short, Apache claims that Midcontinent is leasing Enogex's entire pipeline system without specifying a path, rather than a defined property interest.

### **Commission Response**

32. Apache's contention that receipt and delivery points must be in all cases physical points misconstrues Commission policy requiring the identification of receipt and delivery points in the context of providing a firm right to capacity on a pipeline system. The cases cited by Apache to support its contention are not persuasive. In the *El Paso* cases, the Commission, addressing capacity allocations determined that a pipeline should assign its firm customers specific capacity rights at receipt and delivery points, where it is operationally feasible. However, this was in context of the pipeline providing firm capacity rights at a delivery point that exceeded the physical capacity of the point, resulting in allocations of firm capacity. That situation does not exist here.

33. In *Transco*, the Commission stated its policy that, to the extent operationally feasible, pipelines should assign specific rights to capacity including storage capacity, and capacity at receipt and delivery points. Such specific rights promote the option of segmented capacity release. However, the use of pooling points as primary receipt points on Midcontinent's lease facilities is not prohibited by Commission policy or precedent. Depending on the operational characteristics of the pipeline, it is possible that a pipeline may be able to provide service with a pooling point as a primary receipt point.<sup>46</sup> In

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<sup>45</sup> Apache cites *El Paso Natural Gas Co.*, 94 FERC ¶ 61,225, at 61,824 (2001); *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244, at 61,997 (2002); *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 160 (2006) (collectively the *El Paso* case); *Transcontinental Gas Pipe Line Corp.*, 76 FERC ¶ 61,021, at 61,063 (1996) (*Transco*)

<sup>46</sup> See, e.g., Northern Natural Gas Company, FERC Gas Tariff, Fifth Revised Volume No. 1, Eighth Revised Sheet No. 206; Dominion Transmission, Inc., FERC Gas

(continued...)

addition, there are no capacity allocation issues related to service on Midcontinent's lease facilities, and in addressing Apache's allegation of discrimination, as discussed above, we find that Apache will not suffer undue harm.

34. Our approval of capacity leases is not restricted to simple operational circumstances where the lease is a point-to-point lease on a single asset. Pipeline systems, such as Enogex's, are operationally complex. Our analysis in the July 25, 2008 Order of the engineering information supplied by Enogex and Apache led us to conclude that in a system with a web-like configuration such as Enogex's, where gas flow changes direction regularly depending on market demands, there is no dominant flow pattern.<sup>47</sup> In such a situation, it may not be operationally feasible to implement physical pathing, even if physical receipt and delivery points are specified.<sup>48</sup> Indeed, as the July 25, 2008 Order noted, some pipelines with configurations such as Enogex do not identify any specific gas flow path in their contracts and, therefore, a specific contract path was not required.<sup>49</sup>

### **III. Midcontinent's Clarification Request**

35. The July 25, 2008 Order required Midcontinent to make a filing to justify its existing cost-based firm and interruptible rates within three years after its in-service date.<sup>50</sup> Midcontinent seeks clarification that the three-year period is to be measured from the Project's full and "actual operation," which is the in-service date of the fully operational phase, and not from the start of any possible but uncertain partial interim service.

### **Commission Response**

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Tariff, Third Revised Volume No. 1, First Revised Sheet No. 1098.

<sup>47</sup> July 25, 2008 Order, 124 FERC ¶ 61,089 at P 137.

<sup>48</sup> *Id.* at P 62.

<sup>49</sup> *See, e.g., Gulf South Pipeline Company, LP*, 98 FERC ¶ 61,278 (2002); *Dominion Transmission, Inc.*, 95 FERC ¶ 61,316 (2001).

<sup>50</sup> In the alternative, Midcontinent has the option to make an NGA section 4 filing to propose alternative rates to be effective no later than three years after the in-service date for its facilities.

36. The Commission requires a cost and revenue study three years after a pipeline begins service in order to test, after gaining actual operating experience, whether the cost of service estimates made by the pipeline prior to construction provide for an appropriate rate for service.<sup>51</sup> The Commission grants Midcontinent's request for clarification that the appropriate time to file the study would be three years after the pipeline becomes fully operational and not three years after the start of any interim service Midcontinent is able to provide.

The Commission orders:

Apache's request for rehearing of the July 25, 2008 Order is denied, and Midcontinent's clarification request is granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>51</sup> See, e.g., *Trunkline LNG Co.*, 82 FERC ¶ 61,198 (1998), *aff'd*, 194 F.3d 68 (D.C. Cir. 1999).