

129 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fayetteville Express Pipeline LLC

Docket No. CP09-433-000

ORDER ISSUING CERTIFICATES

(Issued December 17, 2009)

1. On June 15, 2009, Fayetteville Express Pipeline LLC (Fayetteville Express) filed, in Docket No. CP09-433-000, an application under section 7(c) of the Natural Gas Act (NGA) for authorization to construct and operate its proposed Fayetteville Express Pipeline System (Fayetteville Express Pipeline) in Arkansas and Mississippi. Fayetteville Express also requests a blanket construction certificate under Part 157, Subpart F of the Commission's regulations, and a blanket transportation certificate under Part 284, Subpart G of the Commission's regulations. Finally, Fayetteville Express seeks approval of its proposed recourse rates for transportation service.
2. For the reasons set forth below, we are granting the requested authorizations, subject to conditions.

Background and Proposal

3. Fayetteville Express is a new entity which will become a natural gas company subject to the jurisdiction of the Commission under the NGA upon acceptance of any authorizations issued by the Commission in this proceeding. Fayetteville Express is a limited liability company that is jointly owned by a subsidiary of Kinder Morgan Energy Partners, L.P. and a subsidiary of Energy Transfer Partners, L.P.
4. Fayetteville Express states that the Fayetteville Express Pipeline addresses the need for new pipeline infrastructure to link natural gas production from the Fayetteville Shale production area in Arkansas to markets in the Midwest, Southeast, and Northeast through interconnects with Natural Gas Pipeline Company of America LLC, (NGPL), Texas Gas Transmission LLC (Texas Gas), ANR Pipeline Company (ANR), and Trunkline Gas Company, LLC (Trunkline). Fayetteville Express states that of the

2,000,000 decatherms per day (Dth/d) of the project's design capacity, shippers have entered into precedent agreements for 1,850,000 Dth/d of firm capacity.

5. In this application, Fayetteville Express requests authorization to construct approximately 64.3 miles of 42-inch diameter pipeline with a capacity of 2,000,000 Dth/d and a maximum allowable operating pressure (MAOP) of 1,160 pounds per square inch gauge (psig) extending across Conway, Faulkner, and Cleburne Counties, Arkansas to the Russell Compressor Station in White County, Arkansas. The pipeline will then extend from the Russell Compressor Station via approximately 120.5 miles of 42-inch diameter pipeline with a capacity of 2,000,000 Dth/d at an MAOP of 1,480 psig through White, Woodruff, St. Francis, Lee, and Phillips Counties, Arkansas, crossing the Mississippi River near Helena, Arkansas and proceeding through Coahoma and Quitman Counties, Mississippi to its terminus in Panola County, Mississippi.

6. In addition to the pipeline facilities, Fayetteville Express proposes to install a total of 71,465 horsepower (hp) of compression at the Russell Compressor Station. Specifically, Fayetteville Express proposes to install seven Caterpillar G16CM34 natural gas-fired reciprocating engines, each rated at 8,180 hp, and three Caterpillar G3616 natural gas-fired reciprocating engines rated at 4,735 hp each, at a new 40-acre site.¹

7. The Fayetteville Express Pipeline will deliver natural gas at interconnects with NGPL in White County, Arkansas (542 million cubic feet per day (MMcf/d)), Texas Gas in Coahoma County, Mississippi (619 MMcf/d), ANR in Quitman County, Mississippi (1,351 MMcf/d), and Trunkline in Panola County, Mississippi (901 MMcf/d). Fayetteville Express estimates the cost of the Fayetteville Pipeline to be \$1,257,431,334.

1. Open Season

8. Fayetteville Express states that it held an open season from October 8 to November 7, 2008, offering capacity to potential shippers on non-discriminatory basis.² Fayetteville Express states that based upon the open season and subsequent negotiations

¹ Fayetteville Express states that it considered Interstate Natural Gas Association of America's White Paper, "Waste Heat Recovery Opportunities: Pipelines Present Energy Efficient Proposal" in its system evaluation process. Fayetteville Express states that, consistent with the White Paper's finding that internal combustion engines are not well-suited for waste heat recovery, the proposed internal combustion engines at the Russell Compressor Station compressors are not a viable candidate for waste heat recovery.

² Both negotiated and recourse rates were offered during the open season.

with shippers, it has entered into 4 precedent agreements with non-affiliated shippers for over 92 percent of the Fayetteville Express Pipeline's design capacity. Fayetteville Express additionally proposed two categories of shippers, Foundation Shippers and Standard Shippers.³

2. Proposed Rates

9. Fayetteville Express states that its system will be approximately 185 miles long and consist of a single zone rate. Shippers may pay either the recourse rate (including discounted rates) or negotiated rates.⁴ The Foundation and Standard Shippers that entered into precedent agreements elected to pay negotiated rates.⁵ Fayetteville Express states that its proposed initial maximum and minimum recourse reservation and commodity rates are set out in Rate Schedules FTS (firm transportation), ITS (interruptible transportation), and PALS (Parking and Loan Service).

10. Fayetteville Express proposes two sets of rates – rates for interim service and rates for when the pipeline is fully in service. Fayetteville Express states that its Interim Period rates are applicable if certain portions of its system go into service prior to the time the entire system is in service.⁶ Fayetteville Express states that it anticipates that it will be able to offer service on a portion of the pipeline upstream of the NGPL delivery point for delivery to NGPL on an interim basis during the fourth quarter of 2010. Fayetteville Express states it developed rates for the interim service based upon the minimum facilities required to be in service and the anticipated daily capacity that could be available. Fayetteville Express proposes to charge its full system rates for any additional interim service that may become available downstream of the NGPL delivery point prior to the system being fully in service.

11. Fayetteville Express proposes two-part recourse rates for firm transportation service under Rate Schedule FTS based on the applicable cost of service. For its firm and

³ Foundation Shippers are shippers that entered into agreements prior to the commencement of service for at least 375,000 Dth/d for a 10-year term. Standard Shippers are shippers that do not meet the criteria to be a Foundation Shipper.

⁴ If a pipeline enters into negotiated rate agreements, the pipeline must provide recourse rates as an alternative.

⁵ Details of the negotiated rate authority are contained in Fayetteville Express' General Terms & Conditions (GT&C) section 30.

⁶ Fayetteville Express does not propose interim rates for Rate Schedule PALS.

interruptible transportation rates, Fayetteville Express designed its rates using a capital structure of 50 percent equity and 50 percent debt, an 8.75 percent cost of debt, a 14 percent return on equity and a 3 percent depreciation rate. Fayetteville Express asserts that the 3 percent depreciation rate approximates a 33-year life, which exceeds the primary terms of all the executed precedent agreements.

12. Fayetteville Express states that it used a straight-fixed-variable rate design in allocating costs and designing rates. It avers that the rate design units are based on the design capacity of the entire system and include an allocation of costs for interruptible services. Fayetteville Express states that it designed rates for Rate Schedule ITS and its Authorized Overrun service based on a 100 percent load factor derivative of the Rate Schedule FTS reservation and commodity rates, consistent with Commission policy. Fayetteville Express states that Rate Schedule PALS is derived from the Rate Schedule ITS rate.

13. Fayetteville Express states that its shippers will also be responsible for charges related to the Annual Charge Adjustment (ACA) surcharge, when that surcharge goes into effect, and for applicable fuel gas, booster compression fuel, and lost and unaccounted-for gas.

Notice and Interventions

14. Notice of the Fayetteville Express Pipeline application was published in the *Federal Register* on July 7, 2009 (74 Fed. Reg. 32138). Trunkline, Southwestern Energy Services Company, Chesapeake Energy Marketing, Inc., and Chevron U.S.A. Inc. filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁷

Discussion

15. Because the facilities proposed by Fayetteville Express will be used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, their construction and operation are subject to the requirements of section 7(c) of the NGA.

⁷ 18 C.F.R. § 385.214 (2009).

A. The Fayetteville Express Pipeline Facilities

1. Certificate Policy Statement

16. The Certificate Policy Statement provides guidance as to how the Commission will evaluate proposals for certificating new construction.⁸ 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 explained that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's 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, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

17. 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, the Commission 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 the Commission then proceed to complete the environmental analysis where other interests are considered.

18. As the Fayetteville Express Pipeline is a new natural gas pipeline, it has no existing customers. Thus, Fayetteville Express' project meets the threshold test that its existing customers not subsidize the project. Furthermore, the project can not degrade any present services to existing customers. The project will likewise have no adverse impact on existing pipelines or their captive customers as the new facilities will be transporting new domestic sources of gas so that the project will not replace existing customers' service on existing pipelines.

⁸ *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).

19. We are also satisfied that Fayetteville Express has taken appropriate steps to minimize adverse impacts on landowners. Fayetteville Express states that its facilities and outreach efforts have been designed and implemented in a manner to maximize information and education and to minimize the impact to landowners and the environment. Specifically, the pipeline route parallels an existing utility corridor for 84 percent of the first 166 miles and parallels existing roads for 10 percent of the remaining 19 miles. Fayetteville Express states that it is continuing to work with landowners to address their concerns and make design changes to the extent feasible.⁹ Fayetteville Express asserts that it will work to ensure that restoration and timely follow-up actions are completed satisfactorily and according to servitude and easement agreements. Fayetteville Express states that it will negotiate to acquire rights-of-way whenever possible and will seek to minimize the use of eminent domain procedures.

20. The Fayetteville Express Pipeline project, as conditioned, will provide an important new outlet to the interstate market for natural gas from capacity constrained production areas that are expected to serve as rich supply sources. The project will likewise help create market alternatives, and enhance gas supplies available to customers on other connected pipelines. Therefore, based on the benefits the project will provide and the minimal adverse effects on other pipelines and their captive customers and landowners and surrounding communities, we find, consistent with the criteria discussed in the Certificate Policy Statement and section 7(c) of the NGA, that the proposed project is required by the public convenience and necessity, subject to the conditions discussed below.

2. Fayetteville Express' Initial Rates

21. Fayetteville Express proposes to offer cost-based firm (Rate Schedule FTS) and interruptible (Rate Schedules ITS and PALS) open-access transportation services on a non-discriminatory basis under Part 284 of the Commission's regulations.¹⁰ Fayetteville Express states that it will offer negotiated rates as an option pursuant to section 30 of the GT&C of its pro forma tariff. The pro forma tariff has been developed in consultation with the shippers that have entered into precedent agreements supporting the construction of the project.

⁹ As discussed *infra*, we are requiring Fayetteville Express to incorporate the Norris Variation to reduce residential impacts, avoid clearing of vegetative screening, increase use of recently-disturbed land, and prevent the residences along a 1.4-mile-long section from being bounded on two sides by pipeline corridors.

¹⁰ See Fayetteville Express' FERC Gas Tariff, Pro Forma Original Volume No. 1.

22. Fayetteville Express has filed two separate sets of rates, including: (1) Interim Period Rates which would be applicable if and when certain portions of the Fayetteville Express system go into service (no Interim Period Rates are being established for PALS service); and (2) rates to be applicable when the entire Fayetteville Express system goes into service.

23. The proposed recourse rates for the fully operational system are derived using a \$251,216,141 cost of service¹¹ and annual FTS reservation billing determinants of 2,000,000 Dth/d of capacity. The proposed maximum cost-based FTS reservation rate is \$10.43 per Dth. Fayetteville Express estimates a Commodity Cost of Service of \$788,981 and Annual Commodity Volumes of 730,000,000 Dth, resulting in a proposed FTS commodity rate of \$0.0011 per Dth.

24. The proposed maximum ITS rate is \$0.3441 per Dth and the proposed minimum ITS rate is \$0.0011 per Dth. Fayetteville Express proposes to recover its fuel gas, including lost and unaccounted-for gas, through a tracker mechanism defined in section 36 of the pro forma tariff.

Rates for Interim Service

25. Fayetteville Express intends to construct its pipeline using multiple construction teams, simultaneously laying pipe along different sections of the route. Fayetteville Express states that it anticipates that it will be able to offer interim service on the portion of the pipeline upstream of the NGPL delivery point for delivery to NGPL during the fourth quarter of 2010. Consequently, Fayetteville Express has proposed Interim Period rates to be charged for service on the segment of the pipeline upstream of the NGPL delivery point if such service is available before the in-service date for the entire system. The Interim Period Rates are derived in the same manner as the recourse rates. However,

¹¹Fayetteville Express' proposed cost of service consists of \$5,127,566 of operation and maintenance expenses, \$37,649,440 of depreciation expenses, \$140,333,591 of return allowance (at a 14.0 percent rate of return on equity based on a capital structure of 50 percent equity and 50 percent debt, and an 8.75 percent return on debt), \$55,403,782 of income taxes, \$14,701,763 of taxes other than income taxes, and a \$2,000,000 credit for interruptible services for a total cost of service of \$251,216,141. Fayetteville Express reflects a proposed rate base comprised of gross plant investment of \$1,257,431,334, less average accumulated depreciation of \$18,824,720, resulting in a Net Plant in Service of \$1,238,606,614, less average deferred income taxes of \$4,904,718 for a total rate base of \$1,233,701,896.

compression will not be installed during the interim period.¹² Additionally, PALS service will not be available for interim service.

26. We have reviewed the proposed Interim Period rates and the underlying cost of service and find them reasonable for interim service on the portion of the Fayetteville Express pipeline upstream of the NGPL delivery point for delivery to NGPL.

27. As noted above, should any additional interim service become available downstream of the NGPL delivery point prior to the full system being placed into service, Fayetteville Express proposes to charge its full system rates. Delivery points downstream of the NGPL delivery point include Texas Gas (at milepost (MP) 165.5), ANR (at MP 181.1), and Trunkline (at MP 184.7, the terminus of the system). Service to these delivery points would involve use of the proposed compression and at least 89 percent of the total proposed pipeline length.¹³ Because service to either the Texas Gas or ANR delivery points would utilize such a large percentage of the total facilities, we find that use of the full system rates for any interim service to these delivery points is appropriate.

Return on Equity and Capital Structure

28. Fayetteville Express proposes a capital structure of 50 percent equity and 50 percent debt. Fayetteville Express states that the capital structure, as well as the debt and equity return rates, are consistent with that granted to other new pipeline projects.¹⁴ The overall rate of return of 11.375 percent incorporates a return on equity of 14.0 percent based upon the project's business and financial risk. We find that Fayetteville Express' proposal to finance the instant project is consistent with other recent projects approved by the Commission for new pipeline companies.¹⁵ Accordingly, we will approve

¹² Fayetteville Express proposes to charge only a Lost and Unaccounted For Gas charge of 0.15 percent.

¹³ The interconnection with Texas Gas is located downstream of 89 percent of the pipeline. Approximately 98 percent of the pipeline is upstream of the ANR delivery point.

¹⁴ See, e.g., *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165 (2008); *Corpus Christi LNG, L.P.*, 111 FERC ¶ 61,081 (2005) (order approving initial rates reflecting 14 percent rate of return on equity); *T.W. Phillips Pipeline Corporation*, 126 FERC ¶ 62,132 (2009) (order approving initial rates reflecting 14 percent rate of return on equity).

¹⁵ See, e.g., *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 (2009); *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008); *Gulf Crossing Pipeline Co. LLC*,

(continued...)

Fayetteville Express' proposed capital structure and rate of return on equity.

Interruptible Services Revenue Crediting

29. Fayetteville Express proposes a \$2,000,000 credit to the cost of service for interruptible services. Our policy regarding new interruptible services requires the pipeline to either credit 100 percent of the interruptible revenues, net of variable costs, to firm and interruptible customers or to allocate costs and volumes to these services.¹⁶ Fayetteville Express' crediting of \$2,000,000 to the cost of service in the design of initial rates has the same effect as allocating costs to interruptible services, therefore, Fayetteville Express' crediting is in compliance with our policy. Accordingly, Fayetteville Express will not be required to credit any interruptible revenues to its shippers.¹⁷

Rate Changes and Three-Year Filing Requirements

30. If Fayetteville Express desires to make any rate changes not specifically authorized by this order prior to placing its facilities into service, it must file an amendment to its application under NGA section 7(c). In that filing, Fayetteville Express will need to provide cost data and the required exhibits supporting any revised rates. In addition, any such filing should be made sufficiently in advance of the proposed in-service date to allow the Commission adequate time to analyze and act on the filing. After the facilities are constructed and placed in service, Fayetteville Express can only change its rates, including to reflect any revised construction and operating costs, through a NGA section 4 filing.

31. Consistent with our precedent, we will require Fayetteville Express to file a cost and revenue study at the end of its first three years of actual operation to justify its existing cost-based firm and interruptible recourse rates.¹⁸ In its filing, the projected units of service should be no lower than those upon which Fayetteville Express' approved

123 FERC ¶ 61,100 (2008); *Creole Trail LNG, L.P. (Creole Trail)*, 115 FERC ¶ 61,311 (2006).

¹⁶ See, e.g., *Creole Trail*, at P 27 (2006); *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, at P 51 (2005).

¹⁷ However, as described below, Fayetteville Express has agreed to credit Foundation Shippers some portion of interruptible revenues.

¹⁸ See, e.g., *Empire State Pipeline*, 116 FERC ¶ 61,074, at P 133 (2006); *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, at P 52 (2005).

initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the Commission's regulations to update cost of service data.¹⁹ After reviewing the data, the Commission will determine whether to exercise its authority under NGA section 5 to establish just and reasonable rates. In the alternative, in lieu of this filing, Fayetteville Express may 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 proposed facilities.

B. Pro Forma Tariff Issues

Section 2 – Priority of Service

32. Section 2.1(c)(3) of the GT&C of Fayetteville Express' tariff states that if there are two or more pending competing bids for available firm capacity that are of equal value at any time prior to September 30, 2013, and any of these bids is submitted by a Foundation Shipper and meets the applicable requirements set forth in such Foundation Shipper's agreement, Fayetteville Express shall award the subject capacity to the Foundation Shipper. In the past, we have recognized that sponsoring shippers are allowed to receive certain rate incentives to induce such shippers to commit to a project.²⁰ However, section 2.1(c)(3) of Fayetteville Express' GT&C gives preferential treatment to Foundation Shippers in obtaining available capacity and falls outside of the rights we have given Foundation Shippers. Therefore, we will require Fayetteville Express to revise section 2.1(c)(3) so as not to provide Foundation Shippers with priority in acquiring available capacity.

Section 12- Creditworthiness

33. Fayetteville Express proposes creditworthiness provisions at section 12 of its GT&C which, among other things, specify the procedures for reviewing a shipper's creditworthiness when a shipper becomes non-creditworthy and the collateral requirements a shipper must provide when it becomes non-creditworthy. Section 12 provides the collateral requirements for non-creditworthy shippers that subscribe to capacity after the pipeline is in service as well as for non-creditworthy Foundation Shippers and shippers that subscribed to capacity prior to the pipeline being in service. Specifically, in sections 12.1(b)(1)(i), 12.1(b)(1)(ii), 12.1(b)(1)(iii), and 12.1(b)(1)(iv), Fayetteville Express requires Foundation Shippers and those shippers that subscribed to

¹⁹ 18 C.F.R. § 154.313 (2009).

²⁰ See e.g., *Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100 (2008); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006).

capacity prior to the pipeline being in service who become non-creditworthy to provide collateral equal to 30 months of service.

34. We have recognized that pipelines constructing new or expanded facilities may require higher collateral requirements in order to satisfy lending arrangements. However, we have found that collateral requirements between the pipeline and its expansion shippers should be contained in precedent or other agreements between the pipeline and the shippers, and not in the tariff's GT&C, which apply to all shippers.²¹ The collateral requirement in the precedent or other agreements can continue after the pipeline project is in service.²²

35. Accordingly, Fayetteville Express is directed to remove the provisions of its tariff at sections 12.1(b)(1)(i), 12.1(b)(1)(ii), 12.1(b)(1)(iii), and 12.1(b)(1)(iv) which provide for different collateral requirements for Foundation Shippers and to include those provisions in the precedent or other agreements.

Section 30 - Negotiated Rates

36. Fayetteville Express' pro forma tariff includes a provision in GT&C section 30 that would allow Fayetteville Express to enter into negotiated rate agreements consistent with Commission policy. Section 30 states that Fayetteville Express will file with the Commission all negotiated rate service agreements and an affirmation that the negotiated rate agreement does not deviate in any material aspect from the applicable form of service agreement in Fayetteville Express' tariff.

37. We will approve negotiated rate authority for Fayetteville Express and accept the proposed tariff language in section 30 concerning negotiated rate provisions. In certificate proceedings, we establish initial recourse rates, but do not make determinations regarding specific negotiated rates for proposed services.²³ In order to

²¹ *Policy Statement on Creditworthiness of Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking, FERC Statutes and Regulations* ¶ 31,191, at P 18 (2005) (Policy Statement on Creditworthiness); *Southeast Supply Header, LLC*, 119 FERC ¶ 61,153 (2007).

²² *Id.* P 19 (2005).

²³ *Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100, at P 97 (2008); *ANR Pipeline Co.*, 108 FERC ¶ 61,028, at P 21 (2004); *Gulfstream Natural Gas System, LLC*, 105 FERC ¶ 61,052, at P 37 (2003); *Tennessee Gas Pipeline Co.*, 101 FERC ¶ 61,360, at n.19 (2002).

comply with the Alternative Rate Policy Statement,²⁴ and our decision in *NorAm Gas Transmission Co.*,²⁵ we direct Fayetteville Express to file any negotiated rate contracts not less than 30 days, or more than 60 days, prior to the commencement of service stating for each shipper the negotiated rate, the applicable gas volume to be transported, and an affirmation that the affected service agreements do not deviate in any material respect from the form of service agreement in Fayetteville Express' pro forma tariff. Fayetteville Express must also disclose all consideration received that is associated with the agreement. In addition, Fayetteville Express must maintain separate and identifiable accounts for volumes transported, billing determinants, rate components, surcharges, and revenues associated with its negotiated rates in sufficient detail so that they can be identified in Statements G, I, and J in any future section 4 or 5 rate case.

C. Precedent Agreements

38. The precedent agreements filed by Fayetteville Express contain the particular agreements between Fayetteville Express and the various shippers supporting the project. According to Fayetteville Express, these agreements define the negotiated rates shippers will pay, spell out certain rights parties have prior to the Fayetteville Express system going into service, and provide limited rights as to future capacity becoming available on the Fayetteville Express system. Shipper rights may vary depending on whether the shipper qualifies as a Foundation Shipper or a Standard Shipper.

39. Fayetteville Express states that the precedent agreements it filed represent the financial support for the project and that absent these commitments the project could not go forward. Therefore, other shippers or potential shippers cannot be viewed as similarly situated to these initial shippers. In addition, according to Fayetteville Express, none of the provisions in the precedent agreements affects the actual terms of any service and none of these contract provisions creates the risk of undue discrimination. For these reasons, Fayetteville Express does not believe that any aspect of the precedent agreements results in a material deviation from the pro forma service agreements contained in the tariff. However, Fayetteville Express believes that if the Commission determines that a deviation exists, that deviation should be acceptable and not material.

²⁴ *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) (Alternative Rate Policy Statement).

²⁵ 77 FERC ¶ 61,011 (1996).

Therefore, Fayetteville Express seeks a predetermination that even if some contractual provisions could be construed to constitute a material deviation from the form of service agreement, none of the provisions are unduly discriminatory. The non-conforming provisions are discussed below.

Most Favored Nation Provision for Rates

40. Foundation Shipper precedent agreements contain a most favored nation provision such that, if Fayetteville Express offers a negotiated, discount, or recourse rate to another shipper more favorable than the negotiated rates in the Foundation Shippers' precedent agreements, Fayetteville Express must provide the favorable rate to the precedent agreement shipper. Fayetteville Express states that this provision reflects the expectation of the expansion shippers that Fayetteville Express will not place them in the position of subsidizing other competing shippers for the purchase and sale of gas. Fayetteville Express states that the Commission has previously accepted this type of rate provision.²⁶

Liquidated Damages Provision

41. One Foundation Shipper precedent agreement allows for liquidated damages in the event Fayetteville Express fails to meet a specified in-service date or other such conditions. Since this arrangement pre-dates the actual construction of the Fayetteville Express system, Fayetteville Express states that it is reasonable that Fayetteville Express and a shipper share the construction and start-up risk through a liquidated damages provision. Fayetteville Express notes that liquidated damages in no way affect the terms of service once the Fayetteville Express system goes into operation.

Termination Rights

42. Shippers entering into precedent agreements are permitted to terminate their contracts under certain circumstances prior to the in-service date. Fayetteville Express states that these rights have no effect on the nature of service once the Fayetteville Express system becomes operational and the termination provisions are a reasonable means to address the risks being taken by these shippers during the certification and construction phase in contracting for capacity on the new pipeline.

Interruptible Revenue Crediting

43. In Foundation Shipper precedent agreements, Fayetteville Express has agreed to provide an additional credit for interruptible revenues. Fayetteville Express notes that all

²⁶*Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008).

shippers benefit in the form of lower rates from the costs Fayetteville Express has allocated to interruptible services in the design of its recourse rates and that it is reasonable as part of a negotiated rate agreement that shippers can negotiate in the precedent agreement to obtain some additional benefit if interruptible shippers utilize the capacity which the contractual commitments of the firm shippers make possible.

Fuel Caps

44. Certain precedent agreements set out a cap on the fuel gas and lost and unaccounted-for gas which may be assessed. Fayetteville Express states this represents a negotiated fuel arrangement, which is permissible under Commission policy, and that the Commission has accepted negotiated rate tariff provisions which encompass the negotiation of fuel rates.²⁷ Consistent with Commission policy, Fayetteville Express states it will calculate fuel and lost and unaccounted-for percentages on the assumption that full volumes will be achieved from all shippers and that no other shipper will be subsidizing these negotiated rate arrangements.

Future Capacity

45. Commencing October 8, 2009 through October 7, 2013, a Foundation Shipper has the right under Fayetteville Express' capacity award procedures to acquire available unsubscribed firm capacity on the Fayetteville Express system or any expansion of the Fayetteville Express system. Fayetteville Express states that this right is for a minimum term coincident with the then-remaining primary term of the Foundation Shipper's existing FTS agreement at the negotiated rates provided for in such agreement.

Conclusion

46. We find that the above non-conforming provisions as described by Fayetteville Express would constitute material deviations from Fayetteville Express' pro forma service agreements. However, in other proceedings, we have found certain non-conforming provisions necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of the project.²⁸ Here, with the exception of the future capacity provision, Fayetteville Express has adequately supported the need for each provision to secure the necessary financial commitments for construction of the project or clearly stated how the

²⁷ See, e.g., *Florida Gas Transmission Co.*, 93 FERC ¶ 61,203 (2000), citing *Noram Gas Transmission*, 77 FERC ¶ 61,011, at 61,035 (1996).

²⁸ See, e.g., *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 78 (2006).

provision will not affect the terms of service once the pipeline goes into service. In addition, several of these rights have no effect once the system becomes operational. The future capacity provision, however, which provides Foundation Shippers with priority over other shippers in obtaining available capacity, provides Foundation Shippers with rights that are not available to all shippers. Although, as noted above, we have clarified that pipelines may provide incentives to induce sponsoring shippers to commit to a project, we did not extend this policy to include non-rate considerations.²⁹ Providing certain shippers with priority to obtain capacity that other shippers may equally value is contrary to Commission policy. Therefore, as discussed above, we will require changes to section 2.1 (c)(3) of Fayetteville Express' GT&C. Accordingly, with the exception of the future capacity provision, we find that the proposed non-conforming provisions permissible in that they do not present a risk of undue discrimination, and will not affect the operational conditions of providing service, nor result in any customer receiving a different quality of service from that available to Fayetteville Express' other customers.³⁰

47. When a contract deviates materially from the form of service agreement, the contract must be filed and made public.³¹ We require disclosure of contracts with material deviations because the public disclosure of these agreements prevents undue discrimination through secret rates or terms. Accordingly, Fayetteville Express must file not less than thirty days, or more than 60 days before the in-service date of the proposed facilities an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations. In addition, we emphasize that the above determination relates only to those items as described by Fayetteville Express in its application and not to the entirety of the precedent agreements or the language contained in the precedent agreements.

D. Accounting

Allowance for Funds Used During Construction (AFUDC) Rate

48. Fayetteville Express, a newly created company, proposes to calculate its AFUDC based on its proposed debt and equity capital structure. This approach is consistent with

²⁹ See *Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100 (2008).

³⁰ See, e.g., *Gulf South Pipeline Co., L.P.*, 115 FERC ¶ 61,123 (2006); and *Gulf South Pipeline Co.*, 98 FERC ¶ 61,318, at p. 62,345 (2002).

³¹ 18 C.F.R. § 154.1(d) (2009).

the accounting guidance the Commission has given other newly created companies.³² Consistent with Commission precedent, Fayetteville Express is required to capitalize the actual costs of borrowed and other funds for construction purposes, not to exceed the amount of debt and equity AFUDC that would be capitalized based on the overall rate of return approved.³³ This will ensure that the amounts of AFUDC are properly capitalized in this project.

AFUDC Accrual State Date

49. Fayetteville Express filed its application for a certificate of public convenience and necessity to construct and operate the project on June 15, 2009. Fayetteville Express proposes to start the accrual of AFUDC beginning April 2009, or more than two months prior to filing its certificate application, and continuing through December 2010. The amount of AFUDC accrued prior to filing the certificate application is approximately 1.6 million.³⁴

50. Under the Commission's accounting regulations, a company may begin accruing AFUDC on project costs when the costs are continuously incurred on a planned progressive basis, but for a company constructing a natural gas pipeline, AFUDC should not be accrued for the period of time prior to the date application is filed with the Commission for a certificate to construct facilities unless specifically justified. This ruling is in accordance with the requirements of Accounting Release No. 5 (Revised) (AR-5),³⁵ Capitalization of Interest During Construction, which states, in relevant part:

Interest during construction may be capitalized starting from the date that construction costs are continuously incurred on a planned progressive basis. Interest should not be accrued for the period of time prior to: . . . the date of the application to

³² See, e.g., *White River Hub, LLC*, 124 FERC ¶61,132 (2008), *Southeast Supply Header, LLC*, 119 FERC ¶ 61,153 (2007); *Port Arthur Pipeline, L.P.*, 115 FERC ¶ 61,344 (2006); *Cheniere Creole Trail Pipeline, L.P.*, 115 FERC ¶ 61,331 (2006); *Golden Pass Pipeline, L.P.*, 112 FERC ¶ 61,041 (2005).

³³ *Id.*

³⁴ See Fayetteville Express's August 21, 2009, response to staff's August 13, 2009 data request, question no. 1.

³⁵ *Accounting Release No. 5 (Revised), Capitalization of Interest During Construction*, Effective January 1, 1968, FERC Stats. & Regs. IV ¶ 40,005.

the Commission for a certificate to construct facilities by a natural gas company. Interest accruals may be allowed by the Commission for the period prior to the above dates if so justified by the company.³⁶

51. Fayetteville Express has not provided any support to justify the accrual of AFUDC prior to filing its certificate application. Accordingly, the Commission rejects Fayetteville Express's proposed accrual of AFUDC prior to the date of filing for a certificate to construct the facility. Fayetteville Express is directed to reverse the AFUDC accrued between April 2009 and June 15, 2009, the date of the certificate application filing. Additionally, Fayetteville Express is directed to adjust all cost of service items dependent upon Gas Plant in Service such as income taxes, depreciation expense, return, and interest expense to appropriately reflect the effects from the reversal of the AFUDC accrued prior to the date of the certificate application filing. As discussed above, Fayetteville Express is required to file its revised rates and work papers with sufficient time for the Commission to act on the revised rates prior to filing the tariff sheets to implement those rates.³⁷ We have decided this issue based on the record in this proceeding. However, the question of whether the Commission should generally permit the accrual of AFUDC prior to the filing date of a certificate application has been raised in several recent proceedings. Therefore, the Commission initiated a general examination of the AFUDC issue in a technical conference held on December 15, 2009.³⁸

Contribution in Aid of Construction (CIAC)

52. Fayetteville Express proposes to capitalize an \$8.2 million CIAC that Fayetteville Express will pay to third party interconnecting pipelines to facilitate the delivery of gas off the Fayetteville Express system. Fayetteville Express proposes to record the CIAC in Account 303, Miscellaneous Intangible Plant, and amortize it at a rate of 3.00 percent per

³⁶ Id.

³⁷ See *Southern Natural Gas Co.*, 128 FERC ¶ 61,198, at P 40-45 (2009), *reh'g pending*; and *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224, at P 86-92 (2009), *reh'g pending*.

³⁸ See Notice of Technical Conference on Commission Policy on Commencement of Accrual of Allowance for Funds Used During Construction, issued in Docket No. AD10-3-000 on December 2, 2009. Additional comments regarding the AFUDC issue may be filed in Docket No. AD10-3-000 and also, as pertinent, in any on going proceedings, as well, no later than 5:00 pm, December 29, 2009.

year³⁹ in Account 108, Accumulated Provision for Depreciation of Gas Plant in Service. Consistent with the Commission's Uniform System of Accounts,⁴⁰ Fayetteville Express is directed to amortize the CIAC by debiting Account 404.3, Amortization of Other Limited -Term Gas Plant, and crediting Account 111, Accumulated Provision for Amortization and Depletion of Gas Utility Plant. This accounting treatment is approved for accounting purposes only.⁴¹ The inclusion of the contribution in Fayetteville Express's rate base will be subject to scrutiny in a future rate filing just like any other cost.

E. Engineering

53. We have analyzed Fayetteville Express' proposal to construct and operate the Fayetteville Express Pipeline. We conclude that Fayetteville Express has properly designed its project to provide the requested services.

F. Environment

54. The Commission staff initially began its environmental review of the Fayetteville Express Pipeline project following Commission approval for Fayetteville Express to use the pre-filing process on November 25, 2008, in Docket No. PF09-4-000. As part of the pre-filing review, our staff issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI) on January 30, 2009. The NOI was sent to about 980 entities, including affected landowners; federal, state, and local officials; agency representatives; conservation organizations; Native American tribes; local libraries and newspapers; and other interested parties. Subsequent to the issuance of the NOI, our staff conducted three

³⁹ See Fayetteville Express's August 21, 2009 response to staff's August 13, 2009 data request, question no. 2, where FEP provides that the 3.00 % represents an amortization period of approximately 33 years and it is representative of the depreciable life requested by FEP in the filed certificate application.

⁴⁰ 18 C.F.R. Part 201 (2009).

⁴¹ See, e.g., *Northern Natural Gas Company*, 127 FERC ¶61,133 (2009), *Kinder Morgan Interstate Gas Transmission LLC*, 122 FERC ¶61,154 (2008), *Trunkline Gas Company, LLC*, 122 FERC ¶61,050 (2008), *Kern River Gas Transmission Company*, 99 FERC ¶ 61, 085 (2002), *Georgia Strait Crossing Pipeline LP*, 98 FERC ¶ 61, 271 (2002), *Kern River Gas Transmission Company*, 98 FERC ¶ 61, 205 (2002), and *Horizon Pipeline Company, L.L.C.*, 92 FERC ¶ 61, 205 (2000).

public scoping meetings in communities along the proposed pipeline route.⁴²

55. We received written and verbal comments from landowners, concerned citizens, and government agencies. A total of 11 written comments were received in response to the NOI, including two responses raising no substantive environmental concerns,⁴³ four comments from affected landowners; and five agency or elected official comments from the Arkansas State Historic Preservation Office (SHPO), the U.S. Department of Health and Human Services, the Central Arkansas National Wildlife Refuge Complex, the Yazoo-Mississippi Delta Levee Board, and the U.S. Army Corps of Engineers (COE) Little Rock District. After Fayetteville Express filed its application in this proceeding, we received additional scoping comments from three affected landowners and the National Park Service (NPS).

56. To satisfy the requirements of the National Environmental Policy Act of 1969,⁴⁴ our staff prepared an environmental assessment (EA) for the Fayetteville Express Pipeline project. The COE participated in the preparation of the EA as a cooperating agency. The EA was issued on October 15, 2009 for a 30-day public comment period and placed into the public record of this proceeding.⁴⁵ The EA was mailed to federal, state, and local agencies; elected officials; local newspapers and libraries; interveners; and other interested parties. The EA addressed geology and soils, water resources, fisheries and wetlands, vegetation and wildlife, land use, recreation and visual resources, socioeconomics, environmental justice, cultural resources, air quality and noise, reliability and safety, cumulative impacts, and alternatives. As summarized below, the EA also addressed all substantive issues raised in the scoping comment period. The EA comment period ended on November 16, 2009.

57. In the scoping comments, one private landowner in White County, Arkansas expressed concerns about erosion control near the Fayetteville Express Pipeline crossing of a tributary to Big Creek on his property. Another property owner in Conway County, Arkansas expressed concerns about wildlife impacts and vegetation loss on her property

⁴² The public scoping meetings were held in Searcy and Forrest City, Arkansas, and Batesville, Mississippi on February 17, 18, and 19, 2009, respectively.

⁴³ These comments include those from the U.S. Army Corps of Engineers Memphis District and one private landowner.

⁴⁴ 42 U.S.C. §§ 4321-4370f (2006).

⁴⁵ A Notice of Availability was published in the Federal Register on October 22, 2009. 74 *Fed. Reg.* 54,560 (2009).

caused by installation of the proposed pipeline. In response to these landowners' concerns, the EA analyzed the proposed route and the potential impacts on water resources, vegetation, and wildlife in these areas of White and Conway Counties. The EA concluded that Fayetteville Express' proposal to minimize tree clearing and its adherence to the *Fayetteville Express Pipeline Upland Erosion Control, Revegetation, and Maintenance Plan (Plan)* and the *Fayetteville Express Wetland and Waterbody Construction and Mitigation Procedures (Procedures)* would minimize these impacts.

58. Mr. Wiley Norris submitted scoping comments, on behalf of himself and his neighbors, concerning potential adverse impacts on their residential and agricultural properties, including mature landscaping, ponds, vegetative screening, and productive hay fields. Mr. Norris also suggested alternatives to the proposed route to avoid his stated impact concerns. Mr. Norris' neighbors, Kenneth and Rita James, also filed comments concerning the construction-related impacts on their pond, safety issues, and being bounded on two sides by pipeline corridors.

59. The EA analyzed the route variations recommended by Mr. Norris, on behalf of himself and his neighbors. On July 8, 2009, our staff conducted a publicly-noticed site visit of the properties. During the site visit, our staff reviewed the proposed route and route variations on the ground with each landowner. The EA found one of the route variations, known as the Norris Variation, to be environmentally preferable to the proposed route because it would reduce residential impacts, avoid clearing of vegetative screening, increase use of recently-disturbed land, and prevent the residences along this 1.4-mile-long section from being bounded on two sides by pipeline corridors. As recommended in the EA, the Appendix to this order includes environmental condition 18 requiring Fayetteville Express to incorporate the Norris Variation into the proposed route.

60. The Arkansas SHPO provided scoping comments on the cultural resources in the project area and acknowledged that an appropriate cultural survey was being conducted. During the EA comment period, Fayetteville Express filed cultural resources addendum reports for Arkansas and Mississippi covering the areas remaining to be surveyed, as identified in the EA. The addendum survey of extra work space, access roads, and one realignment in Arkansas identified two archaeological sites, both recommended as not eligible for the National Register of Historic Places (NRHP). In a letter dated October 8, 2009, the Arkansas SHPO concurred with this recommendation. The addendum survey for Mississippi identified one archaeological site recommended as not eligible for the NRHP. In a letter dated September 25, 2009, the Mississippi SHPO concurred. We agree with the SHPOs and have modified environmental mitigation measure 16 from the EA, included in the Appendix herein as environmental condition 16, to reflect the current status of surveys. The Norris Variation, described above, was covered in its entirety by previous surveys; therefore, environmental condition 16 also addresses the need for surveys of newly identified areas prior to beginning any construction.

61. The U.S. Department of Health and Human Services' scoping comments recommended that the EA address the general topics of: air quality impacts, water quality impacts, wetland and flood plains impacts, hazardous material and solid wastes impacts, noise impacts, safety, land use and housing impacts, and environmental justice. These resource areas were discussed in the EA which concluded that no significant impact would result from the construction and operation of the Fayetteville Express Pipeline.

62. The Central Arkansas National Wildlife Refuge Complex recommended that the pipeline avoid the Cache River National Wildlife Refuge. It acknowledged, however, that the proposed route would not cross the refuge. As discussed in the EA, the Fayetteville Express Pipeline avoids and would not impact this refuge.

63. The Yazoo-Mississippi Delta Levee Board provided requirements for crossing the east Mainline Mississippi River levee in Coahoma, Mississippi. The EA clarified that Fayetteville Express has agreed to design the levee crossing according to the levee board requirements.

64. The NPS raised concerns regarding the proposed Cadron Creek crossing. As discussed in the EA, Fayetteville Express committed to adhere to the NPS recommendations. The EA also stated that Fayetteville Express agreed to file any additional requirements recommended by the Arkansas Department of Environmental Quality (ADEQ) and Arkansas Game and Fish Commission regarding the temporary portage route during construction at Cadron Creek and post-construction restoration.

65. Mr. Bowen filed letters on behalf of affected landowners Scott and Kelly Curd and Bobby Burns. These landowners requested that the proposed pipeline be relocated further from their houses. Mr. Burns was also concerned about the noise during construction in the vicinity of his house. The EA found that the construction right-of-way would be about 150 feet from the landowners' houses. Fayetteville Express' proposed route on these properties is immediately adjacent to an existing pipeline right-of-way for Texas Gas' Fayetteville Lateral pipeline.⁴⁶ The EA concluded that an alternate pipeline location would increase the amount of new disturbance and clearing of trees and did not recommend the pipeline route be moved.

66. With regard to construction-related noise, the EA concluded that given the distance from Mr. Burns' house to the right-of-way and the temporary nature of pipeline construction, the project will not result in a significant impact. However, as discussed in

⁴⁶ Texas Gas installed its Fayetteville Lateral pipeline in 2008, as part of its Fayetteville/Greenville Expansion Project, Docket No. CP07-417-000.

the EA, to avoid affecting Mr. Burns with the loudest noise events, Fayetteville Express offered to temporarily relocate Mr. Burns during any blasting operations that are necessary on the right-of-way near his house. Mr. Burns did not submit comments on the EA and we are not aware if Mr. Burns accepted the offer to be relocated during such blasting operations.

67. The EA addressed the scoping comment received from Mrs. Mode regarding relocation of the pipeline on her property. The land in the vicinity of Mrs. Mode's property is residential with a mixed use for agricultural purposes, but is also crossed by multiple natural gas transmission pipeline and natural gas production wells. Our staff did not find relocation of the proposed alignment on Mrs. Mode's property to be environmentally advantageous because of the space constraints created by the different land uses. Mrs. Mode also filed comments expressing her opposition to the Yogi Meter Station on her property. As discussed in the EA, Fayetteville Express moved the meter station to another location west of Mrs. Mode's property, which adequately addressed her concerns. However, because staff was unable to determine whether the landowner of the newly-proposed site was agreeable to having a meter station sited on their property, the EA recommended that Fayetteville Express file its final configuration and dimensions for the Yogi Meter Station and provide documentation of its consultation with the landowner regarding acquisition of this site. Fayetteville Express subsequently filed its final configuration and dimensions for the Yogi Meter Station on November 12, 2009, and documented the landowner's agreement to the use of this site. Fayetteville Express's filing satisfies the EA's recommendation 20, and we have omitted it from the list of environmental conditions in the Appendix.

68. Following issuance of the EA, we received comments from the ADEQ, Fayetteville Express, and the Arkansas SHPO.⁴⁷ The ADEQ stated that wetland crossings would require a 404 permit from the COE and a 401 certification by ADEQ, rather than environmental approval from the Director of the Office of Energy Projects (OEP). We agree that the COE and ADEQ retain responsibility for issuing authorizations for the wetland crossings associated with the Fayetteville Express Pipeline project. We note that the EA's recommendation, which is included in the Appendix as environmental condition 11, does not imply that permit approval from the Director of OEP is needed for crossing these wetlands. Rather, environmental condition 11 requires that Fayetteville Express file the configurations and dimensions for each component of the proposed project because Fayetteville Express had not finalized its proposal for crossing these wetlands

⁴⁷A number of the comments filed in ADEQ's letter were pro forma and editorial in nature. We will respond to those substantive comments which require further discussion.

prior to issuance of the EA. Our interest is in ensuring that Fayetteville Express adheres to its *Plan* and *Procedures* and that the environmental impacts reflected in the EA are mitigated to the maximum extent possible.

69. Lastly, the ADEQ's letter asserts that a stormwater permit is required for construction of the Fayetteville Express Pipeline where Fayetteville Express has stated in its *Plan* that the project construction-related activities are exempt from the National Pollutant Discharge Elimination System regulations. Item 3 in Fayetteville Express' letter requested an update to EA recommendation 11 which required Fayetteville Express to prepare a Stormwater Pollution Prevention Plan (SWPP Plan). Fayetteville Express maintains that, in accordance with Title 40 of the Code of Federal Regulations, Part 122.26, the construction activities associated with the Fayetteville Express Pipeline are exempt from the construction stormwater permit requirements and the preparation of a SWPP Plan. Based on correspondence with the EPA, we acknowledge that the Fayetteville Express Pipeline project is exempt from the construction stormwater permit requirements and the preparation of a SWPP Plan. Thus, the mitigation measure recommended in the EA is not included in this order.

70. In its comments on the EA, Fayetteville Express clarified that Cadron Creek would be crossed using an open-cut method, rather than the flume crossing method identified in the EA. Cadron Creek is listed on the National Rivers Inventory and Fayetteville Express received concurrence from the NPS on its proposed open-cut crossing method on July 16, 2009.

71. Fayetteville Express also commented on a statement in the EA indicating that Fayetteville Express would perform full-width topsoil segregation in non-saturated wetlands. Fayetteville Express clarified that it would not perform full-width topsoil segregation in non-saturated wetlands, which is identified in its application and is consistent with Fayetteville Express' *Plan* and *Procedures*. Rather, Fayetteville Express would appropriately conduct topsoil segregation over the trenchline in non-saturated wetlands.

72. The Arkansas SHPO indicated that the EA accurately addressed the cultural resources work conducted for the project, and identified an additional potential cultural resource (an "Indian mound") that may be in the project area. The SHPO indicated that Fayetteville Express is currently investigating this, and the SHPO anticipated receiving a report of the findings in the near future. Environmental condition 16 herein addresses additional reporting and ensures that project activities in this area will not begin until the process is complete.

73. The Commission has reviewed the information and analysis contained in the record, including the EA, regarding the potential environmental effect of the project. Based on our consideration of this information, we agree with the conclusions presented in the EA and find that if constructed and operated in accordance with Fayetteville

Express' application, as supplemented, and the conditions imposed herein, approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

74. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.⁴⁸ Fayetteville Express 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 Fayetteville Express. Fayetteville Express shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

E. Blanket Certificates

75. Fayetteville Express requests a Part 157, Subpart F blanket certificate which is generally applicable to all interstate pipelines. A Part 157, Subpart F blanket certificate accords a natural gas company certain 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 Fayetteville Express will become an interstate pipeline with the issuance of a certificate to construct and operate the proposed facilities, we will issue the requested Part 157, Subpart F blanket certificate.

76. Fayetteville Express also requests a Part 284, Subpart G blanket certificate, in order to provide open-access transportation services. A Part 284, Subpart G blanket certificate provides a natural gas pipeline certain automatic NGA section 7 natural gas transportation authorizations for individual customers under the terms of its contract and tariff. Under a Part 284 blanket certificate, Fayetteville Express will not require individual authorizations to provide transportation services to particular customers. Fayetteville Express filed a pro forma Part 284 tariff to provide open-access transportation services. Since a Part 284 blanket certificate is required for Fayetteville Express to offer these services, we will grant Fayetteville Express a Part 284, Subpart G blanket certificate, subject to the conditions imposed herein.

⁴⁸ See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

F. Conclusion

77. At a hearing held on December 17, 2009, the Commission on its own motion received and made a part of the record all evidence, including the application, as supplemented, and exhibits thereto, submitted in this proceeding and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Fayetteville Express pursuant to section 7(c) of the NGA and Part 157 of the Commission's regulations to construct, install, and operate natural gas facilities as described and conditioned herein, and as more fully described in the application.

(B) A blanket construction certificate is issued to Fayetteville Express under Subpart F of Part 157 of the Commission's regulations.

(C) A blanket transportation certificate is issued to Fayetteville Express under Subpart G of Part 284 of the Commission's regulations.

(D) The certificate authority in Ordering Paragraph (A) shall be conditioned on the following:

- (1) Fayetteville Express completing the authorized construction of the proposed facilities and making them available for service within one year of the issuance of this order pursuant to paragraph (b) of section 157.20 of the Commission's regulations;
- (2) Fayetteville Express' compliance with all applicable Commission regulations, including paragraphs (a), (c), (e), and (f) of section 157.20;
- (3) Fayetteville Express' compliance with the environmental conditions listed in the appendix to this order; and
- (4) Fayetteville Express' executing firm service agreements equal to the level of service represented in its precedent agreements with its customers for service prior to construction.

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

(F) Fayetteville Express' initial rates and tariff are approved, as conditioned and modified herein and as discussed in the body of this order.

(G) Fayetteville Express must file actual tariff sheets that comply with the requirements contained in the body of this order not less than 60 days and not more than 90 days prior to the commencement of interstate service. Specifically, Fayetteville is directed to revise GT&C section 2.1(c)(3) so as not to provide Foundation Shippers with priority in acquiring available capacity.

(H) Fayetteville Express is directed to file its negotiated rate agreements not less than 30 days and not more than 60 days before service commences.

(I) Within three years after its in-service date, as discussed herein, Fayetteville Express must make a filing to justify its existing cost-based firm and interruptible recourse rates. In the alternative, in lieu of such filing, Fayetteville Express may 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 proposed facilities.

(J) Fayetteville Express shall adhere to the accounting requirements discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix – Environmental Conditions

As recommended in the EA, as revised herein, this authorization includes the following conditions:

1. Fayetteville Express 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 EA, unless modified by the Order. Fayetteville Express must:
 - a. request any modification to these procedures, measures, or conditions in a filing;
 - 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 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 to the 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**, Fayetteville Express 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, and shall include the staff's recommended route variation identified on page 158 of the EA. **As soon as they are available and before the start of construction**, Fayetteville Express 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 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.

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

5. Fayetteville Express 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 would 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 **prior to construction in or near that area.**

This requirement does not apply to extra workspace allowed by the *Fayetteville Express Upland Erosion Control, Revegetation, and Maintenance Plan*, 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 acceptance of the certificate and before construction begins**, Fayetteville Express shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Fayetteville Express

must file revisions to the plan as schedules change. The Implementation Plan shall identify:

- a. how Fayetteville Express will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
 - b. how Fayetteville Express 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 per spread 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 location and dates of the environmental compliance training and instructions Fayetteville Express will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);
 - f. the company personnel (if known) and specific portion of Fayetteville Express' organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Fayetteville Express 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 environmental compliance training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. Fayetteville Express shall employ a team of EIs (i.e., two or more or as may be established by the Director of OEP) per construction spread. The EIs shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other 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. Beginning with the filing of its Implementation Plan, Fayetteville Express shall file updated status reports with the Secretary on a **weekly basis 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. an update of Fayetteville Express' efforts to obtain the necessary federal authorizations;
 - b. the construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. 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);
 - d. descriptions of corrective actions implemented in response to all instances of noncompliance, and their cost;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Fayetteville Express from other federal, state, or local permitting agencies concerning instances of noncompliance, and Fayetteville Express's response.
9. Fayetteville Express must receive written authorization from the Director of OEP **before commencing service** on each pipeline segment. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.
10. **Within 30 days of placing the certificated facilities in service**, Fayetteville Express 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 Fayetteville Express 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.
11. **Prior to construction**, Fayetteville Express shall file with the Secretary its final right-of-way configuration and dimensions for crossing of the wetlands at mileposts 73.7, 111.1, 127.1, and 151.0 for review and written approval by the Director of OEP.
 12. **Prior to construction**, Fayetteville Express shall complete its consultations with the COE, ADEQ, and the Mississippi Department of Environmental Quality to develop its Wetland Mitigation Plan and shall file the final plan (including any associated agency agreements or approvals) with the Secretary. This plan shall include details regarding the amount, location, and types of mitigation proposed; specific performance standards to measure the success of the mitigation; and remedial measures, as necessary, to ensure that mitigation is successful.
 13. Fayetteville Express shall not begin construction of the Cache River or Bayou De View crossings using a method other than the horizontal directional drill (HDD) until Fayetteville Express files with the Secretary a site-specific alternative waterbody crossing plan for the review and written approval of the Director of OEP. This plan shall include:
 - a. the specific reason that the HDD method was abandoned;
 - b. scaled drawing identifying all areas that would be disturbed by the alternative crossing method;
 - c. a description of the mitigation measures that would be implemented to minimize the extent and duration of impact on the respective waterbodies; and
 - d. approval or comments from the COE, the U.S. Fish and Wildlife Service (FWS), and the Arkansas Game and Fish Commission (AGFC) for both waterbodies, and the U.S. National Park Service for Bayou De View.
 14. Fayetteville Express shall not begin construction of the Mississippi River crossing using a method other than the HDD until Fayetteville Express files with the Secretary a site-specific alternative waterbody crossing plan for the review and written approval of the Director of OEP. This plan shall include:
 - a. the specific reason that the HDD method was abandoned;

- b. scaled drawing identifying all areas that would be disturbed by the alternative crossing method;
 - c. description of the mitigation measures that would be implemented to minimize the extent and duration of impact on the Mississippi River; and
 - d. approval or comments from the COE, the FWS, the AGFC, and the Mississippi Department of Wildlife, Fisheries, and Parks.
15. **Prior to construction**, Fayetteville Express shall file with the Secretary a site-specific avoidance plan for cultural resource sites 3Wo15 and 3Wo255, that includes procedures to be followed in the event of a frac-out (including, for example, stoppage of work, appropriate consultation, clean-up, site protection) and contingency procedures for avoidance/treatment in the event that open-cut trenching is necessary. Fayetteville Express shall also provide a copy of the plan to the Arkansas SHPO and file any SHPO comments on the plan.
16. Fayetteville Express **shall not begin construction** of facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:
- a. Fayetteville Express files with the Secretary:
 - (1) Arkansas SHPO's comments on the revised Phase I survey report;
 - (2) a Phase I survey report for any newly identified areas requiring survey, and the SHPO's comments on the report;
 - (3) Phase II testing reports, and the Arkansas and Mississippi SHPOs' comments on the reports; and
 - (4) any required avoidance or treatment/mitigation plans, and the SHPOs' comments on the plans;
 - b. The Commission staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Fayetteville Express in writing that it may proceed with treatment/mitigation and/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.”**

17. Fayetteville Express shall file a noise survey with the Secretary **no later than 60 days** after placing the Russell Compressor Station in service that includes measurements taken at the station fenceline in the direction of each NSA and the resulting station noise levels at each nearby NSA. If the noise attributable to the

operation of the Russell Compressor Station at full load exceeds a day-night sound level of 55 A-weighted decibels at any nearby noise-sensitive areas, Fayetteville Express shall install additional noise controls to meet the level **within one year** of the in-service date. Fayetteville Express shall confirm compliance with this requirement by filing a second noise survey **no later than 60 days** after it installs the additional noise controls.

18. **Prior to construction**, Fayetteville Express shall incorporate the Norris Variation between mileposts 14.6 and 16.0 into the Project route. Fayetteville Express shall file with the Secretary revised alignment sheets for this variation to show the pipe centerline, right-of-way width, and any additional temporary workspaces.