137 FERC ¶ 61,060
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
John R. Norris, and Cheryl A. LaFleur.

Pine Prairie Energy Center, LLC — Docket Nos. CP11-1-001, RP11-2201-000

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 20, 2011)

1. On May 19, 2011, the Commission issued an order in Docket No. CP11-1-000 granting Pine Prairie Center, LLC (Pine Prairie) certificate authorization under section 7 of the Natural Gas Act (NGA) to construct and operate its proposed Phase III Expansion Project.[1] Among other things, the May 19 Order found that the Commission's policies related to open seasons and the solicitation of turn-back capacity applied to Pine Prairie's expansion project and required that Pine Prairie hold a new open season and solicit turn-back capacity offers. In addition, the Commission exercised its authority under section 5 of the NGA to require Pine Prairie to revise certain tariff language that provided Pine Prairie with discretion on whether to hold an open season for an expansion project.

2. Pine Prairie filed a timely request for rehearing of the May 19 Order. On June 20, 2011, Pine Prairie filed revised tariff records in Docket No. RP11-2201-000 to comply with the directives in the May 19 Order. As discussed below, this order denies rehearing of the May 19 Order, rejects Pine Prairie's proposed tariff records, and directs Pine Prairie to file further revisions to its tariff consistent with this order.

I. <u>Background</u>

3. The Pine Prairie Energy Center is a high deliverability salt dome natural gas storage project located near the Henry Hub, a major natural gas trading center in Southern Louisiana. The Pine Prairie Energy Center was originally certificated in 2004 as a three-cavern storage facility, with each cavern having a working gas capacity of 8.0 Bcf (for a total of 24 Bcf).[2] In 2009, the Commission authorized Pine Prairie's Phase II

[1] *Pine Prairie Energy Center, LLC*, 135 FERC ¶ 61,168 (2011) (May 19 Order).

[2] *Pine Prairie Energy Center, LLC*, 109 FERC ¶ 61,215 (2004), *certificate amended*, 116 FERC ¶ 61,316 (2006).

Expansion Project which expanded Pine Prairie storage facility's total working gas capacity from 24 Bcf to 48 Bcf by the addition of two new caverns and the expansion of two of the three original caverns.[3] Pine Prairie is authorized to charge market-based rates for its storage and hub services.

II. The May 19 Order

4. The May 19 Order approved Pine Prairie's Phase III Expansion Project which will increase the total working gas capacity of the Pine Prairie Energy Center by 32 Bcf from 48 Bcf to 80 Bcf. Specifically, the order authorized Pine Prairie to construct two additional caverns (Cavern Nos. 6 and 7), each with a working gas capacity of 12.0 Bcf and a total capacity of 15.4 Bcf and to increase the certificated working gas capacities of Cavern Nos. 2, 3, 4, and 5 by 2 Bcf each, resulting in individual working gas capacities for each cavern of 12 Bcf and total storage capacities of 15.4 Bcf. In addition, Pine Prairie will increase the total capacity of Cavern No. 1 from 9.6 Bcf to 10.2 Bcf by increasing the base gas from 1.6 Bcf to 2.2 Bcf, with no change to the 8 Bcf of certificated working gas capacity.

5. The May 19 Order also authorized Pine Prairie to (1) install two additional 5,750 horsepower (hp) electric motor drive compressor units in an expansion of an existing compressor building; (2) construct extensions of the existing natural gas, raw water, and brine pipeline systems and associated utility corridors in order to link the new proposed caverns; (3) construct and operate approximately 2.5 miles of 24/20/16-inch diameter brine disposal pipeline; and (4) increase the certificated daily deliveries/receipts quantities at the interconnections between Pine Prairie's header pipeline and two natural gas pipelines (Kinder Morgan Louisiana Pipeline LLC and Texas Gas Transmission, LLC).

6. BP Energy Company (BP) filed a limited protest to Pine Prairie's certificate application claiming that Pine Prairie failed to comply with the Commission's policy requiring a pipeline that is proposing an expansion to solicit offers from existing shippers to permanently turn back or release unneeded capacity that could be incorporated into the expansion. Pine Prairie responded that, among other things, the Commission's policies regarding open seasons generally, and turn-back open seasons in particular, were developed to deal with the circumstances of cost-of-service pipelines, not storage providers like Pine Prairie that have been granted market-based rates. Pine Prairie stated that the Commission has allowed market-based rate storage providers, including Pine Prairie, to incorporate provisions in their tariffs making open seasons optional, at the storage provider's discretion, for expansion projects.

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[3] *Pine Prairie Energy Center, LLC*, 128 FERC ¶ 61,136 (2009), *certificate amended*, 131 FERC ¶ 62,226 (2010).

7. The May 19 Order found that the bases of the Commission's open-season policies were applicable to not only cost-based storage providers, but to market-based storage providers, including Pine Prairie. Thus, the Commission required Pine Prairie to hold an open season to solicit turn-back capacity, as a condition of its certificate authorization. In addition, the Commission found that section 3.1 of the General Terms and Conditions (GT&C) of Pine Prairie's tariff that provides Pine Prairie with the discretion to hold an open season for expansion capacity prior to the in-service date of the facilities is unjust and unreasonable and unduly discriminatory under section 5 of the NGA. Pine Prairie was directed to make a compliance filing to revise this tariff language within 30 days of the issuance of the May 19 Order.

III. Docket No. CP11-1-001

A. Procedural Issues

8. On June 20, 2011, Enstor Operating Company, LLC (Enstor) filed a motion for late intervention together with a request for clarification or in the alternative rehearing. On June 27, 2011, Cardinal Gas Storage Partners LLC (Cardinal Gas) also filed a motion for late intervention. On July 12, 2011, Leaf River Energy Center LLC (Leaf River) filed a motion to intervene out of time and a request for leave to answer and answer in support of the requests for rehearing filed by Pine Prairie and Enstor. Enstor maintains that good cause exists for it to intervene at this time because it was not until the Commission issued the May 19 Order that it became clear that this proceeding presented issues of sweeping implication for the nation's storage operators. Enstor also claims that granting its intervention will not disrupt, or unduly delay the proceeding. Cardinal Gas and Leaf River assert that, prior to the issuance of the May 19 Order, they had no notice that issues concerning the conduct of open seasons and the treatment of turn-back capacity would be decided as matters of general Commission policy.

9. We find that Enstor, Cardinal Gas, and Leaf River have not shown good cause to intervene at this late stage of the proceeding. In ruling on a motion to intervene out-of-time, the Commission applies the criteria set forth in Rule 214(d),[4] and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a

[4] 18 C.F.R. § 385.214(d) (2011).

higher burden to demonstrate good cause for the granting of such late intervention.[5] The filing of late interventions after the issuance of the Commission order undermines the orderly processing of cases, depriving both the Commission and other parties of the opportunity to consider issues and arguments timely.[6] Here, none of these entities has met that higher burden.

10. Enstor, Cardinal, and Leaf River have failed to adequately explain why they waited until after the Commission issued the May 19 Order to seek intervention. The nature of an administrative proceeding allows for the risk that certain interests may be harmed by a final agency decision. Pine Prairie filed its certificate application on October 4, 2010; BP filed a timely protest on November 5, 2010, addressing the open season issues that movants raise in their pleadings. Despite the filing of a protest, and the passage of over five months, these movants did not seek intervention prior to the issuance of the Commission's May 19 Order on the merits. Under these circumstances, where the movants had notice of the issues raised in the proceeding but did not seek intervention until after the issuance of a dispositive order, we do not find good cause to grant their late intervention request. Accordingly, we deny the requests for late intervention filed by Enstor, Cardinal Gas, and Leaf River.

11. Since Enstor is not a party to this proceeding, as defined by Rule 102,[7] it cannot request rehearing.[8] Our rules do not permit answers to requests for rehearing.[9] We will reject Leaf River's request to file an answer to the rehearing requests because we do not find good cause to waive our rule.

B. <u>Rehearing Requests</u>

12. Pine Prairie asserts that the Commission erred in adopting a policy requiring storage providers lacking market power to conduct open seasons and solicit capacity turn-back offers before proposing expansion projects because the generalized policy considerations the Commission has advanced in support of this policy are not implicated by most storage capacity expansion projects. Specifically, Pine Prairie maintains that the

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[5] *See, e.g., Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 17-19 (2003); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

[6] *See*, *e.g.*, *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,200 (1992).

[7] 18 C.F.R. § 385.102 (2011).

[8] *See* 18 C.F.R. § 385.713(b) (2011).

[9] 18 C.F.R. § 385.713(d)(1) (2011).

policy underpinning the Commission's open-season and capacity turn-back requirements is the desire to prevent existing customers from subsidizing expansion project customers, which can occur if the costs of the expansion projects were included in the cost of service used to determine rates charged to those customers. Pine Prairie maintains that it demonstrated that this concern to prevent improper cross-subsidization is not relevant to storage providers authorized to charge market-based rates.[10] For this reason, Pine Prairie submits that the Commission's open-season policies have no rational application to expansions of market-based rate storage facilities.

13. Additionally, Pine Prairie asserts that the Commission's claimed interest in avoiding overbuilding by promoting proper sizing of expansions and to reduce environmental and landowner impacts is not implicated by the sort of expansion Pine Prairie has proposed in this proceeding. Pine Prairie claims that the Commission has not defined what it means by "overbuilding" in the context of expansion projects proposed by storage providers lacking market power, and has not shown how any such "overbuilding" if it were to occur, would harm any entity but Pine Prairie. Pine Prairie asserts that customers and other market participants would not be adversely affected if Pine Prairie were to expand its available capacity beyond the quantity of capacity the market currently requires. In fact, Pine Prairie claims that "customers would actually *benefit* from any such "overbuilding," since additional capacity beyond current market requirements, upon being placed into service, would provide additional competitive storage alternatives that would tend to reduce market rates for firm storage services."[11]

14. Pine Prairie also points out that the Commission acknowledged in the May 19 Order that the requirement to solicit turn-back capacity may not always result in a project sponsor revising the size of a proposed construction project. If this is true, Pine Prairie claims that the Commission's principal justification for the extension of its open-season/capacity turn-back policy is really no justification at all.

15. Pine Prairie also claims that that the Commission has not shown how requiring Pine Prairie to offer customers an opportunity to relinquish capacity will mitigate environmental and landowner impacts or help avoid the use of condemnation in the case of the Phase III Expansion Project because Pine Prairie asserts that its proposed project will not produce those adverse results. Pine Prairie states that the increased capacity of Cavern Nos. 2-5 will require construction of no new facilities, but rather will be accomplished by the continuation of cavern leaching facilities beyond their originally scheduled conclusion and, thus, will not yield any incremental environmental or landowner impacts requiring mitigation. According to Pine Prairie, even the construction

[10] Pine Prairie Rehearing at 12 (citing Motion for Leave to Answer and Answer of Pine Prairie to BP's Limited Protest filed on November 22, 2010, at 11-13).

[11] Pine Prairie Rehearing at 13.

of two new caverns (Cavern Nos. 6 and 7) will involve only minimal environmental impacts, and none of these will extend beyond the areas in which the Commission has previously found Pine Prairie's construction activities will produce only environmental impacts that are acceptable. Based on these statements, Pine Prairie concludes that the Commission's extension of its open-season/capacity turn-back policy to address concerns relating to overbuilding and the minimization of environmental and landowner impacts are inapplicable in the case of the Phase III Expansion Project.

16. Additionally, Pine Prairie asserts that the Commission erred in finding that Pine Prairie's existing tariff provision governing sales of capacity is unjust, unreasonable, and unduly discriminatory in providing Pine Prairie discretion whether to conduct an open season before proposing a capacity expansion. In finding fault with section 3.1 of its tariff, Pine Prairie asserts that the Commission has done little more than rely on selected portions of its Certificate Policy Statement[12] without analyzing that policy in the context of Pine Prairie's circumstances, the specific environmental and landowner impacts (or absence of such impacts) associated with the Phase III Expansion Project, and the market realities which storage providers such as Pine Prairie that lack market power face. Thus, Pine Prairie claims that the Commission's decision here suffers from the same failure to support application of a policy to the facts of this case that have led to reversal of the Commission's application of section 5 in other proceedings.[13]

17. Finally, Pine Prairie asserts that requiring storage providers that lack market power to conduct pre-expansion open seasons and to solicit capacity turn-back offers may seriously harm individual storage providers and will adversely affect storage markets generally. Specifically, Pine Prairie claims that, unlike the typical interstate gas pipelines that charge cost-based rates and have at least some customers who lack alternatives, storage providers like Pine Prairie are 100 percent at risk for the recovery of their costs. Therefore, Pine Prairie asserts that such storage providers are 100 percent exposed to the possibility that, given the opportunity, storage customers will attempt to re-trade their firm storage service agreements where the market had moved in the customers' favor. Pine Prairie also claims that requiring storage operators to give existing customers an opportunity to escape their contractual commitments will almost certainly delay the introduction of needed storage capacity into the market because storage providers will defer their expansions until a storage capacity shortage exists. Pine Prairie also maintains

[12] *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).

[13] Pine Prairie Rehearing at 16-19 (citing *Florida Gas Transmission Co*. v. FERC, 604 F.3d 636 (D.C. Cir. 2010); *Algonquin Gas Transmission Co. v. FERC,* 948 F.2d 1305 (D.C. Cir. 1991)).

that the Commission's new requirements will place interstate storage companies regulated under the NGA at a significant competitive disadvantage relative to intrastate storage companies that provide interstate services pursuant to section 311 of the Natural Gas Policy Act.

18. Pine Prairie also requests that the Commission clarify, or acknowledge through its acceptance of the revised tariff language Pine Prairie is separately filing, that its open-season/capacity turn-back policy will not apply to those elements of a storage expansion project proposed by a storage provider authorized to charge market-based rates that do not require construction of significant additional facilities and therefore will not have any meaningful adverse environmental or landowner impacts.

C. Commission Determination

19. We deny Pine Prairie's request for rehearing. We affirm that our open-season/turn-back capacity requirements apply to new construction projects that create capacity regardless of whether the resultant service will be provides at cost-based or market-based rates. Therefore, we find that our open-season policies apply to Pine Prairie's proposed Phase III Expansion Project.

20. As we explained in the May 19 Order, there are two elements of our open-season policies that have been developed through our orders and opinions. The first requires that that new interstate pipeline[14] construction be preceded by a fair open-season process through which potential shippers may seek and obtain firm capacity rights.[15] The second element applies to expansion projects, and requires pipelines to solicit turn-back capacity, so that any turn-back capacity may substitute for the expansion capacity.[16]

21. On rehearing, Pine Prairie contends that the basis of our open-season/turn-back capacity policies is aimed at preventing cross subsidization and therefore only applies to cost-of-service companies. In support, Pine Prairie references arguments that it made in its Answer to BP.[17] Pine Prairie's arguments only address the second element of the

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[14] Section 284.1(a) of the Commission's regulations defines transportation as including storage. Thus, storage is subject to our open-season policies and other requirements of Part 284 for interstate pipelines.

[15] *See, e.g., Algonquin Gas Transmission, LLC,* 120 FERC ¶ 61,072, at P 58 (2007); *Gulf South Pipeline Co.,* 95 FERC ¶ 61,132, at 61,415 (2001).

[16] *See, e.g., Algonquin Gas Transmission, LLC*, 120 FERC ¶ 61,072 at P 66; *Natural Gas Pipeline Co. of America,* 101 FERC ¶ 61,125, at P 40 (2002).

[17] Pine Prairie's Rehearing at 12.

Commission's open-season policy, the requirement to solicit turn-back capacity. In the May 19 Order, we explained that the open-season requirement is intended to provide transparency to the market concerning potential new capacity, ensure that new capacity is allocated in a not unduly discriminatory manner, and provide information regarding market interest that can be utilized to properly size the project.[18] In its rehearing request, Pine Prairie has not even addressed, much less supported, why these considerations are not applicable to storage projects that charge market-based rates. In fact, Pine Prairie held an open season for its Phase III Expansion Project and states in its rehearing petition that "[i]t used the results of this open season to demonstrate the need for the Phase III Expansion Project."[19]

22. As to the second element of our policy, the requirement to solicit turn-back capacity, Pine Prairie maintained in its Answer to BP that while it is true that the Commission has observed that capacity turn-back requirements can encourage the optimal sizing of facilities, the Commission's real focus of requiring pipelines to offer capacity turn-back open seasons has consistently been on the adverse impact that costly facilities construction can have on the cost-based rates paid by captive customers. In support, Pine Prairie states that turn-back open season requirement was adopted in the Commission's 1995 Pricing Policy Statement[20] as being necessary to protect customers from construction related cost impacts in light of the then-current presumption favoring rolled-in pricing. According to Pine Prairie, turn-back open seasons were the principal means by which the Commission sought to limit the extent to which captive customers could be exposed to excessive rate increases resulting from the roll-in of new construction costs. Pine Prairie asserts that the Commission continued to link its policies requiring the conduct of capacity turn-back open seasons to rate related concerns in the Certificate Policy Statement where the Commission announced a new presumption of incremental pricing and imposed a "Threshold Requirement of No Financial Subsidies." In applying the Certificate Policy Statement threshold requirement, Pine Prairie states that the Commission has recognized that by definition, storage providers authorized to charge market-based rates meet the "no financial subsidies" standard because the market-based rates of existing customers are fixed by contract and cannot be affected by the cost of expansion facilities.

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[18] May 19 Order, 135 FERC ¶ 61,168 at P 30.

[19] Pine Prairie Rehearing at 8.

[20] *Pricing Policy for New and Existing Facilities Constructed By Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241 (1995); *reh'g denied,* 75 FERC ¶ 61,105 (1996) (1995 Pricing Policy Statement).

23. In the May 19 Order,[21] we acknowledged that the Commission's policy requiring the solicitation of turn-back capacity in conjunction with proposed expansions was first established in the 1995 Pricing Policy Statement[22] which, among other things, established a presumption of rolled in rates when the rate effect on existing customers would not be substantial. In this context, we agreed with Pine Prairie that solicitation of turn-back capacity was viewed as a means of reducing project costs by ensuring that new projects are properly sized, thus moderating the potential rate shock to existing customers that might result from pricing expansions on a rolled-in basis.[23] However, contrary to Pine Prairie's claims, the Commission's continuation of its requirement to conduct capacity turn-back open seasons under the policies established in the Certificate Policy Statement is not based on concerns related to subsidization by existing customers.

24. In the Certificate Policy Statement, the Commission established a threshold requirement that existing pipelines proposing expansion projects must be prepared to financially support the expansion project without relying on subsidization from existing customers.[24] This underlay a change from the then-current pricing policy of a presumption of rolled-in pricing to a presumption of incremental pricing. The Commission's change to an incremental rate policy addressed and *eliminated* the potential for expansion projects to result in rate shock to existing customers. Thus, the Commission's requirement to solicit turn-back capacity is no longer required to mitigate rate increases or rate shock to existing customers as a result of an expansion project.

25. The Commission, however, continues to require capacity turn-back open seasons for other non-rate related purposes that work to ensure projects proposed to and authorized by the Commission are truly in the public convenience and necessity. These include promoting the proper sizing of new facilities and mitigating the potential for overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain.[25] In its Order Clarifying Statement of Policy,[26] the Commission explained:

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[21] May 19 Order, 135 FERC ¶ 61,168 at P 28.

[22] 71 FERC at 61,915.

[23] *Id.* at 61,917.

[24] Certificate Policy Statement, 88 FERC at 61,746.

[25] *Id.* at 61,737.

[26] 90 FERC at 61,392.

> The Commission has a two-step process for determining whether the market finds an expansion project economically viable. *The first step, which occurs prior to the certificate application, is for the pipeline to conduct an open season in which existing customers are given an opportunity to permanently relinquish their capacity. The first step ensures that a pipeline will not expand capacity if the demand for that capacity can be filled by existing shippers relinquishing their capacity. The open season policy was not changed by the recent [Certificate] Policy Statement*. The second step is that the expansion shippers must be willing to purchase capacity at a rate that pays the full costs of the project, without subsidy from existing shippers through rolled-in pricing. (Emphasis added) (Footnote omitted).

26. Thus, under the Certificate Policy Statement, we require interstate pipelines proposing an expansion to solicit offers from existing customers so that projects are properly sized, in addition to imposing the threshold requirement of no subsidies. For example, in *Natural Gas Pipeline Company of America*,[27] the Commission found that the project satisfied the threshold requirement that the project will not be subsidized by its existing customers because the pipeline proposed to charge an incremental rate. Nevertheless, in response to a protest, the Commission required the pipeline to hold a new open season to solicit turn-back capacity from its existing customers in order "to ensure that the construction is properly sized and that the new construction is actually needed."[28] Similarly, in *Columbia Gas Transmission Corporation*,[29] the Commission rejected Texas Eastern Transmission Corporation's contention that it was not required to solicit capacity turn-back from its customers for the proposed project because it was not proposing to roll the costs of the proposed lease facilities into its system-wide rates. The Commission found that the proper sizing of the facilities was still at issue and required the pipeline to hold an open season and solicit capacity release offers and modify its proposal if appropriate.

27. Considerations related to the proper sizing of new facilities, mitigating unnecessary disruption of the environment, and the unneeded exercise of eminent domain, apply to all expansion projects regardless of whether they are authorized to charge market-based or cost-based rates. Thus, we find that Pine Prairie's contention that

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[27] 101 FERC ¶ 61,125 at P 22.

[28] *Id.* P 40.

[29] 78 FERC ¶ 61,030, at 61,123, *reh'g denied*, 79 FERC ¶ 61,160.

the requirements to conduct an open season and solicit turn-back capacity for expansion projects are only applicable to storage providers charging cost-based rates is without support.

28. Pine Prairie's claim that the May 19 Order failed to explain what type of "overbuilding" the Commission's policy is intended to avoid is without merit. The Commission's policy requires a pipeline proposing an expansion to give existing customers an opportunity to permanently relinquish their capacity in order to ensure that a pipeline will not expand capacity if the demand for that capacity can be filled by existing shippers relinquishing their capacity. If new demand can be met through relinquished capacity, construction of additional capacity that is not needed, i.e., "overbuilding," can be avoided. Moreover, we disagree with Pine Prairie's assertion that we have not shown that this "overbuilding" will cause harm. The basis of our turn-back capacity open season requirement is to properly size expansion projects in order to avoid the harm inherent in *unnecessary* disruption to the environment and impacts to landowners, and the *unneeded* exercise of eminent domain.

29. While it is possible that a project sponsor may incorporate relinquished capacity into its project and not revise the size of a proposed project,[30] this does not invalidate the appropriateness of our policies, as Pine Prairie claims. As we explained in the May 19 Order, whether a project sponsor has been willing to incorporate relinquished capacity into the sizing of its project is an important factor in our assessment of whether a project is in the public convenience and necessity and whether it will be approved.[31] Our policies promote the proper sizing of new expansion projects and have resulted in project sponsors incorporating relinquished capacity into their projects in order to meet demand, thereby avoiding unneeded construction.[32]

30. We also disagree with Pine Prairie's assertion that the Commission has not shown how a policy requiring Pine Prairie to offer customers an opportunity to relinquish capacity will mitigate environmental and landowner impacts or help avoid the use of condemnation in the case of the Phase III Expansion Project because Pine Prairie's proposed project will not produce those adverse results. As proposed, the Phase III Expansion project would increase the certificated capacity of the Pine Prairie Energy Center by 32 Bcf by constructing two new caverns and physically expanding the volume of four existing caverns.[33] Additional new facilities include two new compressor units,

[30] For example, this may be due to economies of scale for a specific project.

[31] May 19 Order, 135 FERC ¶ 61,168 at P 34.

[32] *See, e.g., Southern Natural Gas Co.*, 115 FERC ¶ 61,328, at P 9 (2006); *Dominion Cove Point LNG, LP, et al.*, 115 FERC ¶ 61,337, at P 30 (2006).

[33] This increase in storage capacity would require approximately 180 million

(continued…)

extensions of the existing brine pipeline system, and construction of 2.5 miles of brine disposal pipeline. The EA issued in this proceeding discusses, among other things, the impact of Pine Prairie's proposal on aquifers used as a source of drinking water and on surface water, the long-term temporary impacts to nearby Palustrine forested wetlands,[34] increases to greenhouse gas emissions, and increases to the noise levels of nearby noise sensitive areas. The May 19 Order found that approval of Pine Prairie's proposed expansion "would not constitute a major federal action significantly affecting the quality of the human environment" if the project was "constructed and operated in accordance with Pine Prairie's application and supplements, and in compliance with the environmental conditions" listed in the order's appendix.[35] Although the Commission required the adverse impacts to be mitigated to an extent that will reduce the impacts to a less than significant amount, these impacts will not be entirely eliminated. Thus, Pine Prairie's claim that the Phase III Expansion project will not produce adverse impacts is not supported by the record.

31. Further, Pine Prairie's argument that its proposed project, at most, involves only minimal environmental impacts and none of these will extend beyond the areas in which the Commission has previously found Pine Prairie's construction activities will produce only environmental impacts that are not significant, misses the point. The purpose of our turn-back capacity requirement is to determine whether relinquished capacity can reduce the project size thereby eliminating the environmental and landowner impacts associated with the construction of new facilities. Therefore, requiring a capacity turn-back open season is a valid precursor to our finding that an expansion project is in the public convenience and necessity. For this reason, we are requiring Pine Prairie to conduct an open season to solicit turn-back capacity as a condition of the certificate authorization granted in the May 19 Order.

32. We do not share Pine Prairie's concern that our open-season policy for expansion projects that charge market-based rates may seriously harm individual storage providers and will adversely affect storage markets generally. Pine Prairie's assertion that individual storage providers like Pine Prairie will be seriously harmed because market-based rate providers are 100 percent at risk for the recovery of their costs is unpersuasive given our holding that a storage provider can establish reasonable terms in order to keep

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barrels of water for cavern salt leaching. Environmental Assessment (EA) at 12.

[34] Palustrine forested wetlands are characterized by woody vegetation that is approximately 18 feet tall or taller and normally include an overstory of trees, an understory of young trees or shrubs, and a herbaceous layer. EA at 19.

[35] May 19 Order, 135 FERC ¶ 61,168 at P 72.

the company financially whole.[36] Similarly, Pine Prairie's claim that we are allowing existing customers to escape their contractual commitments which will delay the introduction of needed storage capacity into the market is unfounded. As we have explained, our requirement to solicit turn-back capacity will not directly result in any financial impacts to the company's existing revenue stream. Therefore, these policies should not impact the timing of the construction of new storage where the project sponsor is confident there is sufficient unmet demand to support moving forward with the project. Finally, Pine Prairie's mere statement that our policies will place interstate storage companies regulated under the NGA at a significant competitive disadvantage relative to intrastate storage companies that provide interstate services pursuant to section 311 of the Natural Gas Policy Act[37] is unavailing given Pine Prairie's ability to keep itself financially whole.[38]

33. We reject Pine Prairie's request that the Commission clarify, or acknowledge through acceptance of the revised tariff language Pine Prairie proposes in its compliance filing, that its open-season/capacity turn-back policy will not apply to those elements of a storage expansion project proposed by a storage provider authorized to charge market-based rates that do not require construction of significant additional facilities and therefore will not have any *meaningful* adverse environmental or landowner impacts. Based on our experience, we find that most expansion projects involve impacts to the environment and/or impacts to landowners sufficient to support our open-season policies. Moreover, it is difficult, if not impossible, to articulate or identify on a generic basis what projects would involve "significant additional facilities that would not have any meaningful adverse environmental or landowner impacts." Thus, we find it is not administratively feasible or beneficial to differentially apply our open-season policies to different elements of a single proposed project, as Pine Prairie proposes. For these reasons, we believe that our open-season policies will generally apply to all expansion projects.[39]

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[36] *See* May 19 Order at P 35 (c*iting Cheyenne Plains Gas Pipeline Co.*, 121 FERC ¶ 61,273, at P 35-37 (2007); *Algonquin Gas Transmission Co*., 87 FERC ¶ 61,262, at 61,990-91 (1989)).

[37] The Commission does not regulate the construction of new facilities by NGPA section 311 pipelines. *See* 18 C.F.R. § 284.3 ("The Natural Gas Act shall not apply to facilities utilized solely for transportation authorized by section 311(a) of the NGPA").

[38] *See supra* n. 36.

[39] A project sponsor can always seek to demonstrate that the facts relating to a particular project or proceeding warrant waiver of any otherwise-applicable Commission requirement.

34. Finally, contrary to Pine Prairie's claim, we have met our NGA section 5 burden and demonstrated that section 3.1 of the GT&C of its tariff, which provides Pine Prairie with the discretion on whether to hold an open season, is unjust and unreasonable. It is important to note that Pine Prairie does not contest the reasonableness of our open-season policies in general, but only the applicability of these policies to storage providers charging market-based rates. We have explained that our open-season policies are based on non-rate-related factors and apply to all jurisdictional natural gas companies regardless of whether they charge cost-based or market-based rates. As we have stated, our requirement to hold an open season is necessary to provide transparency, ensure that new capacity is allocated in a not unduly discriminatory manner, and determine whether there is a need for a project. Pine Prairie has not addressed, much less explained, how it would accomplish these requirements if it elected not to hold an open season for an expansion project. Our capacity turn-back requirement is premised on ensuring that projects are needed and correctly sized and unnecessary environmental and landowner impacts are avoided. Based on the record in this proceeding, we have found that Pine Prairie's Phase III Expansion Project will have environmental impacts that may be avoided if relinquished capacity can be substituted for part of the proposed expansion capacity. Moreover, as we explained above, based on our long-standing experience with expansion projects, we find that most expansion projects will involve impacts to the environment and/or impacts to landowners that would support our open-season requirements. For these reasons, we find that the generally applicable provision in section 3.1 of Pine Prairie's tariff that would permit Pine Prairie to go forward with an expansion project without holding an open season or soliciting turn-back capacity is directly at odds with our open-season policies and is therefore unjust and unreasonable. The Commission will address requests from project sponsors to be exempt from our open-season policies on a case-by-case basis based on the record developed in the proceeding.

IV. Compliance Filing in Docket No. RP11-2201-000

35. The May 19 Order found that section 3.1 of the GT&C of Pine Prairie's tariff that provides Pine Prairie with the discretion whether to hold an open season for expansion capacity prior to the in-service date of the facilities is unjust and unreasonable and unduly discriminatory. On June 20, 2011, Pine Prairie submitted revised tariff records in Docket No. RP11-2201-000 in response to the Commission's directives in the May 19 Order.[40]

[40] Pine Prairie designated it tariff records as: GT&C, 6.3 Request of Service, 2.0.0, FERC NGA Gas Tariff, First Revised Volume No. 1. Notwithstanding the designation, the tariff record actually contains section 3.1 in the GT&C portion of Pine Prairie's tariff.

A. Notice, Comment, and Interventions

36. Notice of Pine Prairie's filing was published in the *Federal Register* on July 8, 2011 (76 Fed. Reg. 40,349). Enstor, and Leaf River 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.[41] BP filed a motion to intervene one day late.[42] The Commission finds that at this early stage of the proceeding, late intervention will not prejudice the interests of any party, and will grant the late intervention pursuant to Rule 214. Enstor filed comments and BP filed a protest to the filing. Pine Prairie filed a motion for leave to file and answer and answer to BP's protest. Answers to protests are prohibited under the Commission Rules of Practice and Procedure[43] and Pine Prairie has not established any need for an exception to this rule. Accordingly, we reject Pine Prairie's answer to BP's protest. The issues raised by BP and Enstor are addressed below.

B. Pine Prairie's Proposal

37. Pine Prairie proposes major revisions to its existing tariff to incorporate detailed procedures that would govern the conduct of an open season and the solicitation of turn-back capacity for expansion capacity. Revised GT&C section 3.1 establishes mechanisms by which Pine Prairie will solicit expressions of interest in new capacity that it proposes to construct, and offer existing firm storage service customers an opportunity to offer to turn firm storage capacity back to Pine Prairie.

38. Section 3.1(a) (Applicability) defines expansion capacity as sales of capacity made available through construction of "new cavern wells and related facilities that will expand [Pine Prairie's] storage capacity beyond the aggregate quantity of working gas storage capacity then certificated."

39. Section 3.1(b) (Sale of Expansion Capacity) provides that, prior to filing a section 7(c) application, Pine Prairie will conduct an open season and offer current customers under Rate Schedule FSS an opportunity to offer to relinquish Maximum Storage Quantity (MSQ) and associated Service Parameters. This section also provides that any existing customer that elects to submit a turn-back offer shall not be eligible to submit a bid in the same open season.

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[41] 18 C.F.R. § 385.214(c) (2011).

[42] BP states that it had assumed incorrectly that its status as an intervenor in the certificate proceeding meant that BP would automatically be an intervenor in the compliance filing proceeding in Docket No. RP11-2201-000.

[43] 18 C.F.R. § 385.213(a)(2) (2011).

40. Section 3.1(c) (Notice of Open Season) requires Pine Prairie to post notice of any open season conducted above on its Internet Web Site and sets forth the information the notice must contain. Section 3.1(d) (Duration) states that the open season will remain open for the period of time specified in the notice but such time shall not be less than five business days.

41. Section 3.1(e) (Evaluation of Open Season Bids) provides that Pine Prairie is permitted to reject a bid under certain circumstances (e.g., may be operationally detrimental, doesn't satisfy requirements of open season, and doesn't meet creditworthiness requirements of tariff).

42. Section 3.1(f) (Offers to Relinquish Capacity) sets forth various requirements for offers to turn-back capacity including: (1) the turn-back offer must be binding; (2) the effective date of turn back offer shall be the date specified in the open season notice as the date as of which Pine Prairie projects the expansion service will be placed in service; and (3) a binding commitment to make a turn-back payment. This section authorizes Pine Prairie to reject any turn-back offer under the following scenarios: (1) the offer fails to keep the company financially whole; (2) the relinquishment of MSQ and associated Service Parameters that does not reasonably correspond to the storage services, in terms of MSQ and associated Service parameters; or (3) the offer is inconsistent with the section 3.1 of the tariff or the open season procedures.

43. Section 3.1(f)(iii) sets forth the calculation of the Turnback Payment as follows:

> [Pine Prairie] shall calculate the Turnback Payment, if applicable, payable by each Customer relinquishing capacity as the sum of the present values, calculated as of the Turnback Payment Due Date (as defined below), of the Monthly Revenue Differences (as defined below) for each month beginning with the Turnback Effective Date for the capacity that is subject to the Turnback Offer and continuing through the end of the term of Customer's Storage Service Agreement. The "Monthly Revenue Difference" for a given month, which [Pine Prairie] shall calculate in a reasonable manner, shall equal the quantity of relinquished capacity for the applicable month multiplied by the positive difference, if any, between (1) the capacity reservation rate(s) payable by the applicable Customer under the Storage Service Agreement that is the subject of the Turnback Offer, multiplied by the Commodity Charge Adjustment Factor, described below, and (2) the weighted average capacity reservation rate(s) under the bona fide Open Season Bids received by [Pine Prairie] for reasonably comparable Service Parameters, excluding any bids rejected by [Pine Prairie] for the reasons set forth in this Section 3.1 (other than those rejected solely for the reason set forth in Section 3.1(e)(ii))(the rate in this clause (2) being referred to as the "Market Reservation Rate"). The "Commodity Charge Adjustment Factor" shall be an amount reasonably calculated by [Pine Prairie] that represents

> the positive difference, if any, between estimated revenues that would have been generated by commodity charges under Customer' Storage Service Agreement and estimated commodity charge revenues that would have been generated using the Service Parameters for the bids used to calculate the Market Reservation Rate. The Commodity Charge Adjustment Factor shall not exceed an amount equal to 1.05.

44. Section 3.1(f)(iv) provides that Pine Prairie shall calculate the present value of each monthly revenue difference by discounting such amount using the discount rate specified in the open season notice, which discount rate shall be reasonably determined by Pine Prairie in a non-discriminatory manner.

45. Section 3.1(g) addresses the sale of a capacity other than expansion capacity and provides that such capacity shall be allocated on a first-come, first-served basis or may at Pine Prairies' discretion, be offered through an open season. No open season procedures are proposed for non-expansion capacity.

C. <u>Comments and Protests</u>

46. BP filed a protest raising issues with many elements of Pine Prairie's proposal. First of all, BP objects to the proposed definition of Expansion Capacity that would be subject to an open season. BP asserts that all new or incremental increases in storage capacity must be treated as Expansion Capacity under the tariff, not only capacity resulting from construction of new caverns.

47. BP also asserts there are a number of issues with Pine Prairie's proposed methodology for calculating the Turnback Payment. BP states its primary objections relate to (1) an ambiguous methodology that may require a rate comparison between FSS stand alone service and unknown new storage services, and (2) an attempt to base valuations on commodity charges versus demand charges.

48. BP raises concerns with the language in section 3.1(f)(ii) of the tariff which allows Pine Prairie to reject any Turnback Offer that proposes the relinquishment of MSQ and associated Service Parameters that does not reasonably correspond to the storage services, in terms of MSQ and Associated Service Parameters, that Pine Prairie proposes to be made available through the proposed expansion. BP requests that the Commission find that Pine Prairie cannot require an existing FSS customer to turnback storage capacity consistent with the parameters of the new storage services being offered by Pine Prairie, including bundled storage/transportation services. BP also maintains that Pine Prairie should be required to disclose the Turnback Payment before requiring the relinquishing shipper to commit to agreeing to pay that amount.

49. BP complains that the proposed tariff (section 3.1(f)(v)) gives Pine Prairie unlimited discretion in determining the discount factor to apply in calculating the Turnback Payment for the turn back of storage capacity. BP submits that the use of Pine

Prairie's return on equity would be a more objective and appropriate valuation of capacity on Pine Prairie.

50. Enstor notes how difficult and complex the implementation of the Commission's new policy will be for independent storage providers with market-based rates and requests that the Commission afford interested parties the opportunity to comment on these issues in a more generic forum.

D. Commission Determination

51. In the May 19 Order, the Commission found that to ensure non-discriminatory access and the proper sizing of new facilities, it would apply its open-season policies to all new construction projects, including market-based rate storage projects that create capacity. The Commission also found that section 3.1 of Pine Prairie's tariff that provides Pine Prairie with discretion to hold an open season for expansion capacity prior to the in service date of the facilities was inconsistent with this policy and therefore was unjust and unreasonable. Pine Prairie was directed to revise the language consistent with the Commission's discussion.

52. Pine Prairie interpreted this directive as requiring it to incorporate the specific requirements applicable to its conduct of an open season and the solicitation of turn-back capacity in relation to an expansion in its FERC Gas tariff. That was not our intent and we find that Pine Prairie's proposal is beyond the scope of the May 19 Order and inconsistent with our policies. To remove any ambiguity in our directive, we provide the following clarification. The Commission requires that the terms and conditions of service be established in a jurisdictional company's tariff. In contrast, as discussed in more detail below, the Commission has held that certain requirements for new construction projects should not ordinarily be included in a pipeline's generally applicable tariff because of the unique nature of these projects.[44]

53. Section 3 of the GT&C of Pine Prairie's existing tariff is entitled "Request for Service" and section 3.1(a) provides as follows:

> 3.1 Procedures for Sale of Capacity.
>
> (a) Sale of Capacity. Upon the availability of new storage capacity resulting from an expansion of [Pine

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[44] *See, e.g., Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs. ¶ 31,191, at P 18 (2005) (addressing collateral requirements for construction projects); *Northwest Pipeline Corp.*, 109 FERC ¶ 61,356, at P 7 (2004) (addressing open season policies for expansion projects).

> Prairie's] facilities, [Pine Prairie] shall sell such capacity to prospective Customers either via the open season procedures described in Sections 3.1(b)-(f) below or via the first-come, first-served procedures described in Section 3.1(g) below, with the selection of the procedures being at [Pine Prairie's] sole option. This section 3.1 shall apply to sales of capacity under Rate Schedules FSS, FP and FL.

54. The May 19 Order found that the language in section 3.1(a) that specifically provides Pine Prairie with the discretion to allocate expansion capacity via an open season or through a first-come first serve process was unjust and unreasonable. However, we also explained that the Commission has not required pipelines to sell existing capacity solely through open seasons. Rather, pipelines may elect to sell such capacity on a first-come, first-served basis. In order to comply with these policies, Pine Prairie must modify the language in section 3.1(a) that provides it with discretion to allocate capacity either through an open season or via a first-come first-serve procedure to apply only to existing capacity that becomes available, not to expansion capacity prior to the in-service date of the facilities. Moreover, Pine Prairie should retain the existing open season procedures set forth in sections 3.1(b)-(f) and the first-come, first-served procedures in section 3.1(g) for the allocation of existing capacity, as modified by any conforming changes necessitated by the elimination of the applicability of these provisions to expansion capacity.

55. As for expansion capacity, we do not require pipelines to have tariff provisions that govern the conduct of open seasons or the solicitation of turn-back capacity.[45] Because circumstances may differ from construction project to construction project, we find that the reasonableness of the specific terms of an open season or a reverse open season for expansion capacity are best left for consideration in the context of a proceeding under section 7 of the NGA, [46] rather than being governed by generally applicable provisions to be included in a pipeline's tariff. Therefore, we find that the specific terms of an open season and the solicitation of turn-back capacity should be established for each project and set forth in the open season notice for each expansion project and posted on Pine Prairie's Internet Web Site. For these reasons, we reject Pine Prairie's proposed provisions related to the conduct of an open season and solicitation of turn-back capacity for expansion projects. Pine Prairie is directed to file further revisions to its tariff to modify section 3.1(a) of its tariff consistent with this discussion within 15 days of this order. Because we find our open-season and capacity turn-back policies are

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[45] *See Northwest Pipeline Corp.*, 109 FERC ¶ 61,356 at P 7.

[46] *Id.* P 8.

best addressed on a case-by-case basis in individual certificate proceedings, we also reject Enstor's request that we establish a generic forum to address these issues.

56. Insofar as we are rejecting Pine Prairie's open-season proposal for expansion capacity, we find that BP's protest to the compliance filing is moot. This finding is without prejudice to BP retaining its right to raise these issues in response to Pine Prairie's posting of a notice of an open season for its Phase III Expansion Project, as required by the May 19 Order.

The Commission orders:

(A) Pine Prairie's request for rehearing is denied.

(B) In Docket No. CP11-1-001, the requests for late intervention filed by Enstor, Cardinal Gas, and Leaf River are denied.

(C) Pine Prairie shall file to revise section 3.1 of the GT&C of its tariff in accordance with the discussion herein within 15 days of issuance of this order.

(D) In Docket No. RP11-2201-000, the request for late intervention filed by BP is granted.

(E) The tariff record noted in footnote 36 is rejected.

By the Commission. Commissioner Spitzer and Moeller are not participating.

(S E A L)

Kimberly D. Bose,
Secretary.