

138 FERC ¶ 61,179  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company

Docket Nos. CP11-44-001  
and RP11-1597-001

ORDER ON REHEARING

(Issued March 15, 2012)

1. On November 3, 2011, the Commission issued an order<sup>1</sup> addressing: (1) an application by Tennessee Gas Pipeline Company (Tennessee) in Docket No. CP11-44-000 for authorization under section 7(b) of the Natural Gas Act (NGA) to abandon, by sale to Kinetica Partners, LLC (Kinetica), certain onshore and offshore facilities in the Gulf of Mexico and Louisiana; (2) Kinetica's request in Docket No. CP11-47-000 for a declaratory order determining the jurisdictional status of the subject facilities; and (3) Tennessee's request in Docket No. RP11-1597-000 for approval of a settlement agreement with certain of its shippers regarding the proposed accounting and rate treatment for its sale of the facilities.<sup>2</sup> In the November 3 order, the Commission granted Tennessee authorization to abandon by sale to Kinetica the facilities determined to primarily perform gathering functions, exempt from the Commission's jurisdiction under NGA section 1(b). The order denied Tennessee's request for authority to abandon the facilities determined to be jurisdictional transmission facilities. The order also dismissed

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<sup>1</sup> *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,105 (2011) (November 3 Order).

<sup>2</sup> Under the terms of the settlement agreement, Tennessee would make a limited filing under section 4 of the NGA to reduce its currently effective Part 284 transportation rates to reflect the removal of plant-related costs associated with the facilities to be sold, plus \$5 million of annual operating-cost savings. The settlement agreement also provided for Tennessee to amortize and recover over 20 years a regulatory asset account amount equal to the difference between the net book values and the sales proceeds from the subject facilities.

as moot Tennessee's settlement agreement regarding rate and accounting treatment for the sale of the facilities.

2. On December 5, 2011, Tennessee filed a request for rehearing of the November 3 Order's requirement that Tennessee refunctionalize for accounting purposes, from transmission to gathering, the facilities found to primarily perform gathering functions.<sup>3</sup> In addition, Tennessee also requested rehearing of the November 3 Order's dismissal of Tennessee's offer of settlement as moot.

3. For the reasons discussed below, with one exception, we deny rehearing of both the November 3 Order's requirement that Tennessee refunctionalize its facilities as gathering and the order's dismissal of Tennessee's offer of settlement.

### **I. November 3 Order**

4. Because Tennessee's proposal to transfer the subject facilities to a gatherer as non-jurisdictional gathering facilities was protested, the Commission analyzed how the facilities function currently as operated by Tennessee.<sup>4</sup> Applying the "primary function

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<sup>3</sup> Tennessee also filed a separate request for stay, pending Commission action on its rehearing request, of the November 3 Order's requirement that, with respect to the facilities found to be gathering facilities, Tennessee "refunctionalize the original cost of those facilities from transmission accounts to gathering accounts, effective the date of this order." *Id.* P 107. On February 2, 2012, the Commission issued an order clarifying that the November 3 Order's requirement that Tennessee refunctionalize costs "*effective* the date of this [November 3] order" did not mean that Tennessee was required to actually implement the accounting change *on* the date of the order, and that Tennessee was not required to actually implement any accounting changes before the Commission acted on its request for rehearing of the November 3 Order. *Tennessee Gas Pipeline Co.*, 138 FERC ¶ 61,082 (2012). In view of this clarification, the February 2, 2012 order dismissed Tennessee's request for stay as moot.

<sup>4</sup> November 3 Order at P 33. While the November 3 Order noted how Kinetica intended to change the operation of some of the facilities so that they would qualify as gathering facilities if acquired by Kinetica (e.g., by reversing the direction of flow on a particular facility or disconnecting a receipt point so that it would no longer receive gas from an upstream jurisdictional facility), our primary function analysis in the November 3 Order focused on whether particular facilities perform a transmission function as currently operated by Tennessee. *See id.* at n.54.

test” to the facilities that Tennessee proposed to abandon,<sup>5</sup> the Commission determined that over half of the facilities primarily perform a jurisdictional transmission function, and that the remaining facilities primarily perform non-jurisdictional gathering functions. Ordering Paragraph (C) of the November 3 Order provided that, “[i]n its next section 4 rate case, Tennessee shall refunctionalize, from transmission to gathering, any facilities found herein to be gathering facilities if it has not yet abandoned the facilities.” In anticipation of rate adjustments in its rate case to reflect the refunctionalization of any gathering facilities still retained by Tennessee at that time, the November 3 Order also required Tennessee to “refunctionalize the original cost of those facilities from transmission accounts to gathering accounts, effective the date of this order.”<sup>6</sup>

5. Although the November 3 Order granted Tennessee authority to abandon by sale to Kinetica the facilities determined to be gathering facilities, the order denied abandonment authorization with respect to any jurisdictional transmission facilities because Kinetica had not filed an application for certificate authority to acquire and operate those facilities to provide interstate transportation service on an open-access basis.<sup>7</sup>

6. Since Tennessee’s application indicated that the offer of settlement was contingent on Tennessee receiving a final non-appealable order approving its proposed abandonment of all the facilities at issue, the November 3 Order dismissed Tennessee’s offer of settlement as moot.

## **II. Tennessee’s Request for Rehearing**

7. Tennessee seeks rehearing of the November 3 Order’s finding that certain of its facilities proposed for abandonment currently perform a gathering function and thus, regardless whether the sale of those facilities to Kinetica goes forward, must be changed from transmission to gathering for Tennessee’s own accounting and ratemaking purposes, effective the date of the order, i.e., November 3, 2011. Tennessee emphasizes that although Kinetica requested a declaratory order on the jurisdictional status of the subject

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<sup>5</sup> The “primary function test” is a legal test developed by the Commission to determine which facilities are non-jurisdictional gathering facilities and which facilities are jurisdictional transmission facilities. See *Amerada Hess Corp.*, 52 FERC ¶ 61,268 (1990) and *Farmland Industries, Inc.*, 23 FERC ¶ 61,063 (1983).

<sup>6</sup> November 3 Order at P 107.

<sup>7</sup> *Id.* P 101.

facilities, Tennessee only applied for approval under section 7(b) of the NGA to abandon its facilities by sale to Kinetica and for approval under section 4 of the NGA of its offer of settlement regarding the accounting and rate treatment for the sale of its facilities. Tennessee states that it did not request any redetermination regarding the jurisdictional function of the facilities to be abandoned, and that it did not attempt to build a record as to the functional status of the facilities at issue in its application. Tennessee believes that, to the extent the November 3 Order undertook an analysis and made a determination of jurisdiction that no party requested (and further, imposed immediately-effective refunctionalization and accounting requirements based on that determination), the Commission acted either arbitrarily and capriciously, or beyond its authority under the Natural Gas Act.

8. In any event, Tennessee argues the Commission misapplied the primary function test when it analyzed the jurisdictional status of Tennessee's facilities proposed to be abandoned. Tennessee asserts, assuming the Commission was correct that it was appropriate to analyze the jurisdictional status of the facilities based on how they are currently operated by Tennessee, the Commission erred by failing to consider and give weight to non-physical factors that can be taken into account under the primary function test, such as the general business activity of the owner of the facilities and the current jurisdictional status of the facilities. Tennessee claims that in view of the Commission's failure to address these non-physical factors, the Commission should grant rehearing to vacate its jurisdictional findings that some of the subject facilities perform gathering functions as currently operated by Tennessee and, thus, eliminate any basis for requiring Tennessee to refunctionalize those certificated facilities now, regardless of whether they are eventually sold to Kinetica.

9. Tennessee's request for rehearing also asks the Commission to reverse the November 3 Order's dismissal of the settlement agreement regarding Tennessee's accounting and rate treatment for its sale of the facilities at issue. Tennessee claims that the Commission was mistaken in interpreting the agreement as contingent on a final order approving the entirety of Tennessee's abandonment application. Tennessee claims that it has the discretion under the terms of the settlement to partially implement the agreement to the extent it decides to exercise the abandonment authorization that was granted in the November 3 Order. Thus, Tennessee asserts the Commission should not have dismissed the settlement as moot.

### **III. Discussion**

#### **A. Refunctionalization Requirement**

10. Tennessee asserts that the Commission's requirement that Tennessee refunctionalize facilities currently recorded on Tennessee's books as transmission but found by the Commission to be gathering in the November 3 Order was arbitrary and capricious and beyond its NGA authority. In support, Tennessee claims it did not seek a

gathering determination, and it thereby did not assume any risk of having to refunctionalize the facilities contained in its abandonment application. Rather, Tennessee emphasizes that it was Kinetica that petitioned for a declaratory order that all of the facilities would qualify as gathering facilities if acquired and operated by Kinetica. Thus, according to Tennessee, the Commission may only determine what the jurisdictional status of the facilities would be if operated by Kinetica, and not what the facilities' primary functions and jurisdictional status are as currently operated by Tennessee.

11. The Commission rejects Tennessee's request for rehearing. The Commission generally has not analyzed the primary function of facilities as they are currently operating in abandonment by sale proceedings where there are no continuity of service issues.<sup>8</sup> However, in situations such as this – where the application is protested and the proposed abandonment is by transfer of the facilities to an entity that would be a non-jurisdictional gatherer – it is Commission policy to analyze the facilities as they currently exist and operate to determine whether they are performing a jurisdictional transmission function.<sup>9</sup> If the facilities are found to be currently performing a jurisdictional transmission function, then the pipeline has a greater burden of proof, as discussed below, to show that the public convenience or necessity permit its abandonment of the facilities.

12. Tennessee argues that the Commission erred in imposing the refunctionalization requirement because it was Kinetica, not Tennessee, that requested a jurisdictional determination. Tennessee further argues that, regardless whether it was appropriate for the Commission to apply the primary function test to the subject facilities, a pipeline's application for abandonment authority under section 7(b) of the NGA does not provide a basis for the Commission to force the pipeline to refunctionalize certificated facilities from transmission to gathering.

13. In essence, Tennessee argues that it is not appropriate for the Commission to consider whether facilities proposed to be abandoned by a jurisdictional entity are in fact

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<sup>8</sup> See, e.g., *Columbia Gas Transmission, LLC*, 133 FERC ¶ 61,082, at P 18 (2010); *Columbia Gas Transmission, LLC*, 129 FERC ¶ 61,029, at P 18 (2009); *Colorado Interstate Gas Co.*, 128 FERC ¶ 61,122, at P 22 (2009).

<sup>9</sup> See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 129 FERC ¶ 61,255, at P 42 (2009) (“when an interstate pipeline's proposed abandonment of facilities is protested, the Commission first analyzes the function of the facilities as they currently operate as part of the interstate pipeline's system, not how they would operate if the proposed abandonment were approved and the facilities were acquired and operated by another company as part of the latter's existing system or as a stand-alone system.”); *Southern Natural Gas Co.*, 126 FERC ¶ 61,246, at PP 38–43 (2009).

performing a jurisdictional function absent a specific request by the company that it do so. We do not agree. Whether or not facilities that are the subject of a protested abandonment application are currently performing a jurisdictional transmission function is certainly relevant to the Commission's consideration of whether the public convenience or necessity will permit the abandonment of facilities. To the extent the Commission finds that the facilities are currently primarily performing a gathering function, the Commission cannot deny a pipeline's request for authorization to abandon them.<sup>10</sup>

14. Further, while Tennessee argues that it did not "assume the risk" that the Commission would make a determination on an issue for which it did not request action, Tennessee itself raised questions regarding the current function of the facilities proposed for abandonment, alleging in its application changed circumstances, including changes in regulatory requirements, changing market demand for transportation services, changes in its business objectives, and changing sources of production, as factors supporting its proposal.<sup>11</sup> However, Tennessee's abandonment application was protested by some of its shippers that still rely on Tennessee's facilities for what they believed was interstate transmission service. Having initially filed its proposal, Tennessee must, under the theory of the NGA, shoulder the hazards incident to its action.<sup>12</sup>

15. Tennessee next argues that the NGA does not provide a basis for the Commission to order it to reflect the Commission's functionalization findings on its books and records. The Commission disagrees with this as well.

16. Section 8 of the NGA provides the Commission with the authority to require that pipelines keep any information that may be needed by the Commission to exercise its statutory responsibility and regulatory oversight under the NGA. NGA section 8(a) states, in part, "[t]he Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of account for each class."<sup>13</sup> After notice and hearing, the Commission "may determine by order the accounts in which particular outlays or receipts shall be entered,

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<sup>10</sup> See, e.g., *Southern Natural Gas Co.*, 126 FERC ¶ 61,246, at P 38.

<sup>11</sup> Tennessee's application at pp. 3-4, 8-9.

<sup>12</sup> *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962).

<sup>13</sup> 15 U.S.C. § 717g(a) (2006).

charged, or credited.”<sup>14</sup> The November 3 Order’s direction to record gathering plant in the appropriate gathering plant account was entirely consistent with this authority.

17. In addition, pipelines are required to classify investment gas plant facilities in the appropriate property accounts (Account Nos. 301 to 399) prescribed for gas plant in service based upon the function performed by the item as described in the instructions of these plant accounts. Accordingly, gas plant facilities performing a gathering function must be recorded in the appropriate gas plant accounts for gathering plant.

18. Further, consistent with Commission precedent, if a change in the jurisdictional status of the gas plant facilities is before the Commission for consideration, the Commission generally will require that its findings regarding the facilities’ jurisdictional status as currently operated be given effect by the pipeline for accounting purposes.<sup>15</sup> This general policy applies to any company that owns an interest in the facilities, regardless whether that pipeline owner requested a jurisdictional determination or not. For instance, *Southern Natural Gas Co. (Southern)* involved a request by Southern, an interstate pipeline, to abandon by sale certain certificated facilities that included facilities in which other interstate pipelines also owned interests.<sup>16</sup> In considering Southern’s protested application, the Commission found that the co-owned facilities were functioning as gathering facilities. Thus, the Commission’s order granting Southern’s request for abandonment authority placed Southern and the other interstate pipeline co-owners of the facilities on notice that it would be necessary for them to refunctionalize their interests in the facilities as gathering for rate and accounting purposes in their next general section 4 rate cases.<sup>17</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> While it is the Commission’s general policy in rate proceedings to require that its jurisdictional determinations regarding facilities be reflected in a pipeline’s accounting, the Commission does not necessarily require such treatment for ratemaking purposes. For example, in *El Paso Natural Gas Company*, 79 FERC ¶ 61,028 (1997), the Commission held that, regardless whether certain facilities were gathering facilities, the provisions regarding functionalization of facilities in a previous rate settlement agreement should not be changed since they were an integral part of the overall agreement reached by all consenting parties. *Id.* at 61,130.

<sup>16</sup> *Southern Natural Gas Co.*, 79 FERC ¶ 61,076, at 61,379 (1997).

<sup>17</sup> *Id.* at 61,380. The Commission also placed the co-owners on notice that if their interests in the facilities had been certificated they would need to file for abandonment authority if they wanted to transfer their interests in the facilities at some later time. *Id.*

(continued...)

19. *GPM Gas Corp. v. El Paso Natural Gas Co.* also involved a similar functionalization issue.<sup>18</sup> In that case, based on a complaint of improper functionalization, the Commission, without a request by El Paso Natural Gas Co. (El Paso), applied the primary function test to El Paso's South Carlsbad compression station and determined, among other things, that the station served a gathering function and must be refunctionalized by El Paso as such.<sup>19</sup> El Paso did not request the Commission to determine the primary function or jurisdictional status of the facilities at issue, nor did El Paso request the subject facilities be refunctionalized as gathering for accounting purposes.

20. In Tennessee's request for stay, Tennessee raises the issue as to when it should reflect the Commission's findings on its books and records. The February 2, 2012 Order recognized that since Tennessee's request for rehearing was pending, immediately implementing the accounting change might result in a needless expenditure of effort. Above, we have rejected Tennessee's arguments regarding our lack of authority to review the jurisdictional status and functionalization of the facilities at issue in this proceeding. Below, we reject Tennessee's arguments that the Commission misapplied our standards of review in determining the facilities' jurisdictional status. Having thus affirmed the findings of our November 3 Order, we expect Tennessee to transfer the gas plant facilities determined to perform a gathering function to the appropriate gathering plant accounts immediately for accounting purposes. In addition, Tennessee must transfer the accumulated provision for depreciation carried in the account for the refunctionalized property between functions in accordance with Gas Plant Instruction No. 12 of the Commission's Uniform System of Accounts.<sup>20</sup> The amount of accumulated depreciation associated with the refunctionalized gas plant to transfer between functions must be

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The Commission further explained that if a co-owner pipeline's interest in the facilities had not been certificated but its capacity in the facility nevertheless had been used for gathering in connection with its pipeline's jurisdictional services, then the pipeline would have to file under section 4 of the NGA to terminate its gathering services over the facilities before transferring the facilities to another company. *Id.* See also *Transcontinental Gas Pipe Line Corp.*, 111 FERC ¶ 61,090, at n.13 (2005) (stating that co-owners of the facility at issue must functionalize their interests in the facility in their next NGA section 4 rate cases consistent with the Commission's determination that the facility performs a jurisdictional transmission function).

<sup>18</sup> 81 FERC ¶ 61,208 (1997).

<sup>19</sup> *Id.* at 61,889.

<sup>20</sup> 18 C.F.R. Part 201 (2011).

determined by using the actual recorded amount of accumulated depreciation on a vintage basis.<sup>21</sup>

21. Finally, Tennessee claims that the November 3 Order erred in requiring that facilities found to perform a gathering function must be treated as gathering in Tennessee's next rate case.<sup>22</sup> The Commission grants rehearing on this point. The Commission's objective with its statement at footnote 101 was to require any Tennessee rate filing to reflect gathering costs as they are accounted for on its books. Tennessee may propose to allocate and recover those costs from services other than gathering, and the Commission and others are free to examine such proposals. No clarification is necessary for Ordering Paragraph C, which did not repeat the error in footnote 101.

22. With the exception noted above, we affirm our finding in the November 3 Order that it is appropriate to require Tennessee to refunctionalize facilities for accounting purposes from transmission to gathering consistent with our jurisdictional findings in this proceeding. Therefore, Tennessee's request on rehearing for elimination of the refunctionalization requirement is denied. Further, since our discussion below also denies Tennessee's rehearing request based on its assertion that we erred in the manner in which we applied the primary function test in our November 3 Order, we will require that Tennessee comply with the refunctionalization requirement for accounting purposes and notify the Commission of such compliance within sixty days of the issuance of this order on rehearing.

### **B. Primary Function Test Analysis**

23. Even if it was appropriate for the Commission to look at how the facilities that Tennessee proposed to abandon currently function, rather than how they would function if acquired by Kinetica, Tennessee argues that the Commission nevertheless erred in finding that Tennessee should be required to refunctionalize any of the facilities because as currently operated by Tennessee they "are certificated facilities used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission."<sup>23</sup> Tennessee's argument fails to recognize that "the historical classification of facilities does not necessarily dictate their actual function."<sup>24</sup> Prior to the Commission's open

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<sup>21</sup> See *Transwestern Pipeline Co.*, 72 FERC ¶ 61,085, at n.17 (1995).

<sup>22</sup> November 3 Order at n.101 and Ordering Paragraph C.

<sup>23</sup> Tennessee's rehearing request at page 15.

<sup>24</sup> *Dominion Transmission, Inc.*, 117 FERC ¶ 61,233, at P 14 (2006) (citations omitted).

access policies requiring unbundling of pipeline services, there was no need, as a practical matter, to review pipelines' applications for certificate authority to ascertain whether the proposed facilities included gathering facilities. Thus, in many instances, gathering facilities were constructed under certificate authority and the costs associated with those facilities were part of the rate base of the pipeline's sales rates. During and subsequent to unbundling, many of these facilities were found by the Commission to perform a gathering function. Additionally, circumstances may change how the facilities are operated.<sup>25</sup>

24. Here, Tennessee applied for certificate authority to construct all of the subject facilities and constructed them prior to the Commission's decision that its goal of achieving a more competitive market would be best served by requiring pipelines to unbundle their services.<sup>26</sup> Hence, before the November 3 Order, the Commission never had the occasion to analyze the jurisdictional status of these facilities under its primary

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<sup>25</sup> *Equitrans, L.P.*, 109 FERC ¶ 61,209, P 59 (2004), *reh'g denied*, 111 FERC ¶ 61,091 (2005).

<sup>26</sup> In Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (1992), the Commission clarified that while Order No. 636 required that pipelines unbundle any continuing sales services, it did not mandate that pipelines' gathering services be unbundled in all instances. The Commission emphasized that although it had a strong preference for fully unbundled services, which would include gathering services, the extent to which a pipeline's production area transportation services should be offered as separate services with separately charged rates was still a matter for individual pipeline rate proceedings. *Id.* at 30,609. Thus, if the gas supplies for one group of shippers on a particular pipeline's system were not being transported on that pipeline's production area facilities, those shippers could argue in the pipeline's Order No. 636 restructuring proceeding that their rates should no longer include costs associated with the production area facilities because they were subsidizing the rates of shippers that actually used those facilities. Further, as discussed above, the Commission explained during restructuring that it had concluded it was unnecessary to have its rate policy always turn on jurisdictional determinations regarding whether specific facilities are gathering or transmission facilities since under sections 4 and 5 of the NGA the Commission has jurisdiction over rates and charges "collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission," including the costs of gathering facilities. *Panhandle Eastern Pipe Line Co.*, 57 FERC ¶ 61,265, at 61,860 (1991).

function test.<sup>27</sup> After conducting an extensive review of the primary function of the facilities in the November 3 Order, the Commission determined that many of Tennessee's facilities currently perform gathering functions and should be refunctionalized by Tennessee as such.

25. The fact that all of the facilities that Tennessee included in its abandonment application were originally constructed under certificate authority does not change our finding that the primary function of some of the facilities currently function as gathering facilities. Nor do we agree with Tennessee's suggestion that our primary function analysis in the November 3 Order might have resulted in none of the facilities being found non-jurisdictional gathering facilities if we had given sufficient weight to Tennessee's general business activity as a natural gas company engaged in the business of transporting and storing natural gas in interstate commerce. Tennessee is correct that the Commission may look to non-physical factors, including whether the facilities were certificated and have been used historically by a jurisdictional company as part of its transportation system, when determining the primary function of facilities. However, we cannot give much weight to such factors or make them dispositive if the application of the physical factors clearly reveals the function of facilities.<sup>28</sup> Stated another way, under the primary function test, non-physical factors are secondary to physical factors and "generally only come into play if application of the physical factors results in a close call."<sup>29</sup>

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<sup>27</sup> Under the primary function test, which the Commission relies on to determine which facilities are non-jurisdictional gathering, the Commission considers several physical and geographical factors, including: (1) the length and diameter of the pipeline(s); (2) the extension of the facility beyond the central point-in-the-field; (3) the facility's geographical configuration; (4) the location of the compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the pipeline(s). See *Farmland Industries, Inc.*, 23 FERC ¶ 61,063 (1983). In addition, the Commission also considers the purpose, location, and operation of the facility, the general business activities of the owner of the facility, and whether the jurisdictional determination is consistent with the NGA and the Natural Gas Policy Act (NGPA). See *Amerada Hess Corp.*, 52 FERC ¶ 61,268 (1990). The Commission does not consider any one factor determinative and recognizes that all factors do not necessarily apply to all situations. See *Columbia Gas Transmission Corp.*, 93 FERC ¶ 61,278, at 61,913 (2000).

<sup>28</sup> *Equitrans, L.P.*, 111 FERC ¶ 61,091, at P 34 (2005).

<sup>29</sup> *High Island Offshore System, L.L.C.*, 128 FERC ¶ 61,292, at P 11 (2009) (citations omitted).

26. When we declined in the November 3 Order to examine any non-physical factors, we did not mean to suggest that non-physical factors can never be important in our analysis.<sup>30</sup> Non-physical factors were not relevant in reaching our findings in the November 3 Order because there were no close calls warranting review of any secondary non-physical factors, such as certification or Tennessee's status as a jurisdictional pipeline.<sup>31</sup>

### **C. November 3 Order's Dismissal of Settlement Agreement**

27. Tennessee and some of its shippers entered into a settlement, dated December 3, 2010, submitted for Commission approval in Docket No. RP11-1597-000. The settlement relates to the prospective rate and accounting treatment for Tennessee's proposed abandonment by sale of facilities to Kinetica. The settlement states that it is contingent on Tennessee receiving a final non-appealable order approving its proposed abandonment in its entirety. Because the Commission denied Tennessee's request for authorization to abandon the facilities found to be jurisdictional transmission facilities, the November 3 Order dismissed the settlement as moot and it did not address the parties' comments.

28. Tennessee's request for rehearing asserts the Commission erred in the November 3 Order by dismissing the settlement agreement. Tennessee claims that the Commission was mistaken in interpreting the settlement as being contingent on a final order approving the entirety of Tennessee's abandonment application. Tennessee claims that it has the discretion under the terms of the settlement to partially implement the settlement to the extent it decides to exercise the abandonment authorization that was granted in the November 3 Order.<sup>32</sup> Thus, Tennessee asserts the Commission's determination in its November 3 Order did not make the settlement agreement moot.

29. The Commission denies Tennessee's request for rehearing regarding the settlement agreement. Regardless whether the settlement agreement gives Tennessee the

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<sup>30</sup> *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,105 at P 40.

<sup>31</sup> The court found in *Northwest Pipeline Corp. v. FERC* that "[the pipeline's] status in interstate transportation cannot alone transform the character of . . . particular facilities [into transmission]." 905 F.2d 1403, 1410 (10<sup>th</sup> Cir. 1990).

<sup>32</sup> Article II of Tennessee's settlement provides that "[t]he Offer of Settlement will become effective on the date the conditions precedent have all been met or otherwise have been waived by Tennessee in its sole discretion."

discretion to waive conditions precedent to the agreement at its sole discretion,<sup>33</sup> the Commission is not bound to speculate whether Tennessee ultimately will go forward with selling Kinetica any of the facilities included in its abandonment application in this proceeding and, if a sale does occur, how Tennessee might exercise any discretion it has to waive any terms of the settlement.<sup>34</sup>

30. The settlement provides for how Tennessee is to account for and recover costs related to Tennessee's proposed abandonment of its offshore facilities to Kinetica. In other words, the settlement presumes to resolve issues surrounding Tennessee's NGA section 7(b) application and further presumes that Tennessee's abandonment of facilities will be authorized as proposed. Based on those presumptions, the settlement attempts to prejudge a number of NGA section 4 ratemaking issues and NGA section 8 accounting issues, such as a net book value, making that net book value not subject to a prudency challenge,<sup>35</sup> the purchase price of Tennessee's facilities, certain liabilities, surety bond requirements associated with the facilities at issue, a cost of service reduction,<sup>36</sup> and numerous other specific accounting matters.

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<sup>33</sup> *Id.*

<sup>34</sup> *See, e.g., Panhandle Eastern Pipe Line Co.*, 62 FERC ¶ 61,029, at 61,217 (1993) (stating that the Commission may dismiss a settlement as premature).

<sup>35</sup> The net book value of the facilities is established in the settlement through reference to Exhibit Y of Tennessee's abandonment application in Docket No. CP11-44-000. Tennessee's settlement agreement at page 4.

<sup>36</sup> The following table lists the specific dollar data provided by the settlement agreement filed in this proceeding in Docket No. RP11-1597-000, which is premised upon the Commission granting Tennessee's abandonment application in its entirety:

<b>Item</b>	<b>Amount</b>	<b>Settlement Citation</b>
Purchase Price	\$10,000,000	Background
Property Damage Insurance	\$150,000,000	Article IV.B
Surety Bond payable to Tennessee	\$23,000,000	Article IV.B
BOEM bond	\$20,000,000	Article IV.B

(continued...)

31. Given the Commission's denial of Tennessee's request for authority to abandon those facilities found by the November 3 Order to be jurisdictional, major components of the settlement are in doubt. The Purchase and Sales Agreement (PSA), which is a supporting document to the settlement,<sup>37</sup> confirms this observation. PSA Section 5.7 provides for possible amendment or termination of the PSA in the event the Commission approves the sale of only a portion of the facilities. If the PSA is amended, it would be pure speculation as to what the new terms would be, including the list of facilities, the pricing of those facilities, the various financial security provisions, the level of net book value not subject to a prudency challenge, and the required accounting. In addition, under these speculative circumstances, there is no way for the Commission to evaluate potential rate impacts. Further, if the PSA is terminated, any Commission ruling on the settlement would have no application or precedential value.

32. Following issuance of the November 3 Order in this proceeding, the Commission issued a December 5, 2011 Order that approved a different settlement agreement, dated September 30, 2011, and filed by Tennessee in Docket No. RP11-1566. The Docket No. RP11-1566 settlement also contains provisions addressing the offshore facilities that are the subject of the instant proceeding.<sup>38</sup> That settlement provides, with limited exceptions, for a rate moratorium that ends on the effective date of the next general rate proceeding to be no earlier than April 1, 2014, nor later than November 1, 2015.<sup>39</sup> Article XIII of that settlement addresses an exception to the rate moratorium related to spin-downs or spin-offs. Article XIII provides:

A. Rate Adjustments for Spin-Downs and Spin-Offs

*Except as provided in Paragraph B below, if on or before the end of the Rate Moratorium, [Tennessee], pursuant to Commission approval, implements a spin-down or spin-off of production area*

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Net Book Value not subject to prudency challenge	128,300,000	Article IV.A
Cost of Service Reduction	\$5,000,000	Article III

<sup>37</sup> Settlement agreement in Docket No. RP11-1597-000, at pages 4–5.

<sup>38</sup> *Tennessee Gas Pipeline Company, LLC*, 137 FERC ¶ 61,182 (2011).

<sup>39</sup> Article XVI of settlement agreement in Docket No. RP11-1566 settlement.

facilities (a) in any single application (“Abandonment Application”) constituting \$10 million or more of net plant, or (b) in the aggregate (through two or more Abandonment Applications which may be, but need not be, authorized in the same year) constituting \$30 million or more of net plant, then [Tennessee] shall file to adjust the Settlement Rates to reflect the cost of service . . . .

#### B. Offshore Sale and MEPS Not Subject to Rate Adjustment

Neither [Tennessee’s] sale of production area facilities proposed in Docket Nos. CP11-44, *et al.* . . shall be subject to the rate adjustment provided for in this Article XIII.

33. Even if the Commission were to grant rehearing in this proceeding to approve Tennessee’s abandonment application in its entirety and also approve the related settlement agreement filed in Docket No. RP11-1597, Tennessee has provided no explanation as to whether the settlement filed in this proceeding would be superseded by the already approved settlement in Docket No. RP11-1566 with regard to restating Tennessee’s currently effective base rates.<sup>40</sup> If the approved settlement in Docket No. RP11-1566 supersedes, that would moot many provisions of the settlement filed in this proceeding. The Commission will not parse the two settlement agreements’ language or try to divine Tennessee’s and the consenting parties’ intent.

34. In dismissing the settlement in this proceeding, the November 3 Order did not rule upon its merits. If Tennessee proceeds to exercise the authority granted by the November 3 Order to abandon the facilities the Commission found non-jurisdictional by

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<sup>40</sup> Article III of the settlement filed in Docket No. RP11-1597-000 in this proceeding provides:

In the event Tennessee’s RP95-112 Settlement Rates have been superseded prior to the Effective Date by the effectiveness of rates proposed by Tennessee in its general rate case filing in Docket No RP11-1566-000 *et. al.*, Tennessee shall adjust the rates for its Part 284 transportation services established in such proceeding in the same manner described above, utilizing the cost allocation and rate design methodology underlying the then current rates, unless such cost reductions are specifically reflected in the cost of service determination underlying said general rate case filing. The rate adjustment shall remain in effect until the effective date of Tennessee’s next general rate proceeding under Section 4 or Section 5 of the [NGA].

spinning them off to Kinetica, Tennessee may file an NGA section 4 proceeding, within the constraints of the already approved settlement in Docket No. RP11-1566, to remove those costs. That application may include a settlement. If Tennessee files another application to abandon the facilities that the November 3 Order held to be jurisdictional, Tennessee may file an updated settlement, within the constraints of the settlement already approved in Docket No. RP11-1566, that addresses accounting and rate consequences of the abandonment.

The Commission orders:

(A) Tennessee's request for rehearing of the November 3, 2011 Order is granted and denied as discussed above.

(B) Tennessee shall implement necessary accounting changes to reflect functionalization of facilities for accounting purposes consistent with the Commission's jurisdictional findings and notify the Commission of such compliance within sixty days of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.