153 FERC ¶ 61,195
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Alliance Pipeline L.P. Docket No. RP15-1022-001

ORDER ON REHEARING

(Issued November 19, 2015)

1. On May 29, 2015, Alliance Pipeline L.P. (Alliance) filed revised tariff records to modify its service offerings, and make other changes. On June 30, 2015, the Commission issued an order (June 2015 Order) accepting and suspending the tariff records, subject to refund, and establishing a hearing.[1] Indicated Shippers[2] and Pecan Pipeline (North Dakota), Inc. (Pecan) filed requests for rehearing or expedited consideration of Alliance's proposal to eliminate Authorized Overrun Service (AOS) and IT Revenue Crediting. Alliance also requested rehearing. Badlands NGL's, LLC (Badlands) also sought rehearing on an issue related to gas processing.[3] We grant in part and deny in part the parties' requests for rehearing, as explained below.

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[1] *Alliance Pipeline, L.P.*, 151 FERC ¶ 61,271 (2015) (June 2015 Order).

[2] Indicated Shippers in this proceeding is comprised of BP Canada Energy Marketing Corp. (BP), Hess Trading Corporation (Hess), and Chevron U.S.A., Inc. (Chevron).

[3] On August 11, 2015, Pecan filed an answer to Alliance's rehearing request. On August 14, 2015, Alliance filed an answer to Badlands' rehearing request. Section 713(d) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.713(d) (2015)), prohibits answers to requests for rehearing. Accordingly, we reject Pecan and Alliance's answers, and we also reject Badlands answer to Alliance's answer.

I. Background

2. Alliance is an interstate natural gas pipeline that commenced service on December 1, 2000. It extends from the Canadian border to two receipt points in North Dakota, two ethanol plants in North Dakota, one ethanol plant in Iowa, and eight delivery points near Chicago, Illinois. Alliance was initially contracted under 15-year Rate Schedule FT-1 negotiated rate firm transportation agreements, executed by the original shippers and their successors, both referred to in this proceeding as legacy shippers.

3. The original Alliance tariff provided legacy shippers with access to both firm capacity up to their contractual maximum daily quantity and all of the additional capacity Alliance could make available on a best efforts, or interruptible basis. The legacy shippers' entitlement to such additional capacity was provided as AOS. Legacy shippers paid a negotiated usage charge for AOS of $0.00/Dth for the 15-year initial terms of their agreements. Thus, AOS was provided to legacy shippers at no charge, other than the provision of fuel in-kind.

4. In 2010, 92 percent of the Alliance legacy shippers gave notice of their intent not to extend the terms of their firm transportation agreements beyond the November 30, 2015 expiration date. Alliance held a broadly publicized service offering beginning in August 2013 for capacity on Alliance which would become available on December 1, 2015. Alliance Canada also conducted a service offering, providing potential new shippers new transportation services to the service historically provided.

5. Through the service offering process in the United States, Alliance obtained contractual commitments from certain shippers under new Precedent Agreements for various levels of firm contract capacity for terms of approximately one to seven years in duration, beginning December 1, 2015, for a new negotiated reservation charge of $11.7273 per Dth per month. By contrast, three legacy shippers – Tidal Energy Marketing (U.S.) LLC, Alliance Canada Marketing L.P. (ACM), and BP – extended their firm contracts beyond November 30, 2015. Also, two non-legacy shippers with North Dakota receipt points – Pecan and Hess – would continue to receive service after December 1, 2015 under their original FT-1 negotiated rate contracts. These non-legacy shippers' negotiated rates for AOS service are substantially below Alliance's recourse rate for that service.

6. Alliance's May 29, 2015 filing proposed to revise the tariff's terms and conditions of service to discontinue the AOS service classification, and to remove the requirement that it credit IT revenues to its shippers. Alliance did not propose to modify its tariff's transportation rates, but the effect of the removal of AOS from the tariff meant that those with contracts for AOS service would no longer find a corresponding AOS service in the tariff, but would need to use the stated Interruptible Transportation (IT) rate for service formerly provided under AOS. Alliance asserted that its existing recourse rates would not over-recover its cost of service, despite the proposed tariff changes. Alliance also

proposed various other tariff changes, including changes to its tariff provisions concerning gas quality, creditworthiness, reservation charge crediting, bumping of IT service, and imbalance resolution. Alliance requested that the Commission suspend the effectiveness of the tariff records until December 1, 2015, so that the revised terms and conditions of service would take effect upon the expiration of the legacy shippers' existing service agreements.

7. Several parties protested the filing. In its answer to the protests, Alliance requested that the Commission deny all requests for technical conference or hearing procedures and asked again that the Commission accept and suspend the tariff sheets submitted in the original filing – with modifications explained in its answer – and permit them to become effective December 1, 2015.

8. In the June 2015 Order, the Commission accepted and suspended, to be effective December 1, 2015, subject to conditions, Alliance's proposed records reflecting elimination of AOS, IT revenue crediting, and the maintenance of existing recourse rates. The Commission set all issues related to the proposed tariff records for hearing, and directed Alliance to submit cost and revenue information for the most recent 12-month period available, including all the schedules required for submission of a general section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations. The Commission also denied Alliance's request for waiver of the Commission's policy requiring it to either credit revenues or allocate costs to IT service.[4] The Commission also accepted and suspended, to be effective December 1, 2015, Alliance's proposed changes to its gas quality provisions and required Alliance to provide additional support for that proposal.[5] The Commission accepted other proposed tariff changes, subject to Alliance making certain revisions it agreed to in its answer.

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[4] *Alliance Pipeline L.P.*, 151 FERC ¶ 6,271 (2015).

[5] On July 24, 2015, Alliance followed the Commission's direction by filing supplemental information in support of the proposed modifications to its gas quality tariff provisions. On August 5, 2015, Alliance submitted a letter explaining that it had met with Peoples Gas Light and Coke Company, who had authorized it to state that the concerns raised in its June 10, 2015 intervention had been satisfied. Subsequently, the Office of Energy Market Regulation issued a letter accepting the supplemental information and stating that Alliance had adequately justified its proposed revisions. *Alliance*, Docket No. RP15-1022-000, (Aug. 7, 2015) (delegated letter order).

II. Elimination of Authorized Overrun Service (AOS)

9. Alliance, Indicated Shippers, and Pecan all contend that the Commission erred in setting for hearing Alliance's proposal to eliminate its AOS service, including the issue of whether the proposal violates Alliance's agreements to provide that service at either a zero negotiated rate or a negotiated rate substantially below Alliance's recourse rate. Alliance contends that the Commission should have accepted its proposal to eliminate AOS service and held that any issue concerning whether it had violated its negotiated rate agreements should be addressed by the courts. Indicated Shippers and Pecan contend that the Commission should have rejected Alliance's proposal on the ground that it violates their negotiated rate agreements. As discussed below, the Commission grants rehearing of its decision to set these issues for hearing, and decides these issues on the merits in this order.

10. Current section 2.5 of Alliance's Rate Schedule FT-1 provides that firm shippers may nominate transportation service in excess of their contracted capacity as AOS service, and section 2.6 provides that if the firm shippers' scheduling nominations for AOS service exceed available capacity, AOS will be allocated to firm shippers in accordance with GT&C section 12.3. GT&C section 12.1(b) provides that AOS service will have a lower priority than other service provided under Rate Schedule FT-1, but a higher scheduling priority than other interruptible services. GT&C section 12.3 provides generally that, if total AOS scheduling nominations exceed available capacity, each FT-1 shipper will be allocated a pro rata share of available capacity based on their contract demands. GT&C section 13.1 provides that AOS quantities under Rate Schedule FT-1 shall be deemed received from a shipper before interruptible quantities under Rate Schedule IT-1. GT&C section 15.3 and 15.4 provide that interruptible service will be curtailed before AOS.

11. The Statement of Recourse Rates in Alliance's tariff lists the AOS Charges under the Rate Schedule FT-1 Recourse Rates. The maximum recourse charge for AOS service other than on the Tioga Lateral is $0.5283/Dth. The maximum recourse charge for AOS service on the Tioga Lateral is $0.6253/Dth. The minimum AOS recourse charge is $0.00/Dth.[6] These AOS recourse rates are identical to Alliance's corresponding maximum and minimum recourse rates for interruptible service, wheeling, and park and loan service.[7]

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[6] Alliance Pipeline L.P., FERC Gas Tariff, Statement of Rates, Fifth Revised Sheet No. 10 (5.0.0).

[7] Alliance Pipeline L.P., FERC Gas Tariff, Statement of Rates, Fifth Revised Sheet Nos. 10 (5.0.0) & 10A (0.1.0).

12. In its May 29, 2015 filing, Alliance proposed to remove all references to AOS service from its FT-1 rate schedule and to remove the AOS charges from its Statement of Recourse Rates. Alliance also proposed to remove the provisions in its GT&C providing AOS service a higher scheduling and curtailment priority than other interruptible services.

13. Pecan and the two Indicated Shippers, BP and Hess, each have negotiated rates for firm service under Rate Schedule FT-1, including separate negotiated rates for AOS. BP's negotiated AOS rate is $0.00/Dth. Hess's negotiated rate is $0.00/Dth for quantities up to 15 percent of its contract demand and $0.4395/Dth for quantities in excess of that amount. Pecan's negotiated AOS rate is $0.2653/Dth. Each of these agreements will remain in effect after Alliance's proposed tariff records in this proceeding take effect of December 1, 2015.

14. Each of these agreements also contains an identical *Memphis* clause under the heading "Service to be Rendered," which matches the clause in Alliance's Form of Firm Transportation Agreement:

> Transporter shall perform and Shipper shall receive Firm Transportation Service in accordance with the provisions of Transporter's effective Rate Schedule FT-1 and the applicable [GT&C] of Transporter's FERC Gas Tariff on file with the [Commission] as the same may be amended or superseded in accordance with the Rules and Regulations of the Commission.[8]

A. Whether the Commission Should Decide the AOS Issue Now, Rather than Setting It for Hearing

15. In the June 2015 Order, the Commission found that Alliance's proposal to eliminate its AOS service, along with its proposal to remove IT revenue crediting while retaining its existing recourse rates, raised complex rate and tariff issues, and that it was unclear at this time whether Alliance can make certain of these changes contractually. Accordingly, the proposed tariff records were set for hearing, where the complex issues raised by the filing could be addressed.

1. The Parties' Procedural Arguments

16. Alliance, Indicated Shippers, and Pecan all seek rehearing of the decision in the June 2015 Order to set for hearing the issue of eliminating AOS, and instead request that

[8] Alliance Pipeline L.P., FERC Gas Tariff, Substitute Original Sheet No. 300 (0.1.0).

the Commission rule on the merits of Alliance's proposal to eliminate AOS before the end of the suspension period on December 1, 2015.

17. Pecan maintains that there are no material issues of fact in dispute as neither Alliance nor Pecan claim ambiguity exists in its negotiated rate agreement or Alliance's related tariff language. Therefore, Pecan asks the Commission to reach a decision on the elimination of AOS as a matter of law based on the parties' pleadings. Pecan further states that, at a minimum, the Commission should establish a hearing process whereby an ultimate decision can be reached prior to December 1, 2015. Pecan states that, absent resolution of this issue before the end of the suspension period, it will be irreparably harmed, because elimination of AOS will require it to take authorized overrun service under Alliance's Rate Schedule IT-1 at a higher rate than its negotiated AOS rate, and the IT-1 rate is not subject to refund. On October 16, 2015, Pecan filed a motion requesting that the Commission resolve the AOS issue expeditiously. Pecan quotes Alliance's counsel's statement during the July 13, 2015 prehearing conference, where he also asked for speedy resolution of the AOS issue: "We want a legal conclusion drawn as to these contracts. I don't believe there's any need…for facts or discovery. Here's a contract. Here's the Commission's policy. Rule."[9]

18. In its request for expedited consideration, Indicated Shippers assert that the proposal to eliminate AOS should be set for paper hearing with briefing, or for technical conference, and an order should be issued on the proposal before the end of the suspension period. Like Pecan, Indicated Shippers contend that the refund condition in the June 2015 Order does not provide an adequate remedy, if the Commission ultimately rejects Alliance's proposal to eliminate AOS after that proposal has gone into effect. Indicated Shippers also assert that final resolution of the proposal to eliminate AOS before the end of the suspension period will facilitate a more efficient review of Alliance's currently effective recourse rates, since eliminating AOS would alter the basis on which recourse rates were originally determined, and that Alliance's recourse rates would need to be recalculated based on the costs and revenues that reflect the altered service. Indicated Shippers further state that they have been authorized to state that Alliance does not oppose the request for expedited resolution of the AOS issue, even though Indicated Shippers and Alliance take opposite positions on that issue.

19. Alliance also contends that the Commission erred in setting the AOS issues for hearing. Alliance argues that issues concerning the interpretation of the AOS negotiated rate agreements are more appropriately decided by state courts. Alliance also argues that, even if the Commission were to address the AOS issue, a hearing is unnecessary because the plain language of the negotiated rate agreements clearly shows that they contemplated

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[9] Pecan Oct. 16, 2015 Request at 2, (citing July 13, 2015 Prehearing Conference Tr. 33:5-8 (Bill Williams, on behalf of Alliance)).

revisions to Alliance's tariff and thus its proposal to eliminate AOS from its tariff is contractually permissible.

20. Alliance argues that the negotiated rate agreements are not subject to review under Section 4 of the NGA for two reasons. First, judicially approved prior Commission orders have concluded that the legacy negotiated rate agreements do not provide for the resolution of contract law questions more appropriately addressed by a state court. Alliance states that, in the *Iberdrola* proceedings, a shipper requested the Commission review a proposed negotiated rate change on the ground that it violated the provisions of their negotiated firm transportation agreement. The United States Court of Appeals for the District of Columbia Circuit upheld the Commission's rejection of that request, and Alliance states that the court concluded that the shipper's right to NGA section 4 review had been bargained away.[10] While admitting that the current proceeding does not involve changes in negotiated rates, Alliance states that Indicated Shippers has requested the Commission to revisit the issue again and undertake the same section 4 review barred by *Iberdrola*.

21. Alliance states that second, apart from *Iberdrola's* specific bar, it would be improper for the Commission to decide any AOS-related contractual issues because, under the three-part *Arkla* test for determining whether contract disputes belong under the Commission's consideration, the dispute belongs in state court.[11] Alliance states that, under the *Arkla* test, first, the interpretation of the negotiated rate agreements would not require the special expertise of the Commission because the plain language of the agreements controls and eliminates the need for the Commission's expertise; second, no need of uniformity of interpretation exists because the agreements involve only Alliance and four shippers and will not have an industry-wide impact; and third, resolution of the contract issue is not sufficiently important to the Commission's regulatory responsibilities because the dispute involves negotiated rate agreements unique to Alliance and only four shippers.

2. <u>Discussion</u>

22. The Commission grants rehearing of the June 2015 Order's decision to set for hearing Alliance's NGA section 4 proposal to remove AOS from Rate Schedule FT-1 and revise its GT&C to remove the scheduling and curtailment priority for AOS service. Instead, we resolve that issue on the merits in this order. The rehearing applicants all

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[10] Alliance Request at 13 (citing *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010) (*Iberdrola*)).

[11] Alliance Request at 14 (citing *Ark. La. Gas Co.*, 7 FERC ¶ 61,175, at 61,322 (1979) (*Arkla*)).

state that no material issues of fact exist that require a hearing before an Administrative Law Judge, and they request that we resolve the AOS issues on the merits before the end of the suspension period on December 1, 2015.

23. Alliance requests that we approve its proposed tariff revisions concerning AOS, but find that issues concerning its contractual authority to propose those tariff changes should be left for a state court to decide. However, as discussed in the next section, the contract interpretation issue raised here is whether the *Memphis* clauses in the subject contracts, which permit Alliance to propose tariff changes, authorize Alliance to revise its tariff to eliminate AOS and thus deprive the shippers of the benefit of their AOS negotiated rates. Thus, in order to determine whether Alliance's proposal to remove AOS from its tariff satisfies the just and reasonable standard in the NGA, we must address the contract interpretation issues raised by the parties.

24. Alliance's reliance on the court's decision in *Iberdrola* is misplaced. The *Iberdrola* court held that the Commission did not act arbitrarily or capriciously by rejecting Iberdrola's protest of an annual filing by Alliance to recalculate its negotiated rates pursuant to the formula set forth in the negotiated rate agreements. The court affirmed the Commission's holding that the negotiated rate agreements contained no provision for Commission review of Alliance's filings to incorporate changes in its operating costs pursuant to the agreed-upon negotiated rate formula.[12] Here, we also face a contract interpretation question, but the facts are different. In this case, Alliance is not filing to recalculate its negotiated rates pursuant to the formula set forth in its negotiated rate agreements. Rather, it is filing pursuant to NGA section 4 to modify its generally applicable tariff to remove its AOS service offering from Rate Schedule FT-1. The contract interpretation issue here is relevant to determining whether that proposed change in Alliance's generally applicable tariff is just and reasonable, not whether Alliance has correctly recalculated its negotiated rates pursuant to the formula in those agreements. Thus, we are within our authority under section 4 of the NGA in deciding the contract interpretation issues.

25. Second, we find that the *Arkla* test for asserting jurisdiction over contract issues is met in this case. In *Arkla*, the Commission created a jurisdictional litmus test:

> Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the

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[12] *Iberdrola*, 597 F.3d 1299 at 1305.

> type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[13]

26. In *Arkla*, the Commission deliberated whether it should exercise jurisdiction over a contract dispute focused on an indefinite price escalation clause in a contract between a group of independent natural gas producers and Arkansas-Louisiana Gas Company. The Commission found that it did not need to exercise its jurisdiction because, under the first prong, the case involved no question requiring the special technical expertise of the Commission; under the second prong, there was no need for uniform interpretation of such clauses because the meanings depended upon the intention of the parties to the contract and the parties entered into the contracts before the Commission ever became concerned with indefinite price escalation clauses; and under the third prong, the case was not important to the regulatory responsibilities of the Commission because it involved small gas producers who were not required to file for rate increases authorized by contract.[14]

27. Our current case, by contrast, involves parties and agreements of an entirely different nature. Most significantly, the contract interpretation issue raised in this case is important to our regulatory responsibilities, because that issue is relevant to deciding whether a section 4 tariff proposal filed by Alliance is just and reasonable. The NGA gives us exclusive jurisdiction to decide that issue. In addition, as discussed in the next section, the Commission has experience interpreting *Memphis* clauses in other contracts, and thus has precedent concerning the types of unilateral tariff changes generally permitted by those clauses. Thus, the Commission has special expertise with respect to the interpretation of *Memphis* clauses. Finally, there is a need for uniformity of interpretation of the *Memphis* clauses in these negotiated agreements. The clauses are in Alliance's form of service agreement and thus appear in all of its service agreements. Therefore, the resolution of the contract interpretation issue in this case will create precedent potentially affecting Alliance's rights to propose future tariff changes affecting the contracts of other shippers on its system. Accordingly, we reject Alliance's contention that the contract interpretation issues should be left to a state court to decide: the contractual issues here are inextricably linked with the question of whether the proposed tariff changes are just and reasonable, and that is a question which only the Commission can answer.

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[13] *Arkla*, 7 FERC ¶ 61,175 (1979).

[14] *Id*.

28. We thus grant the requests to remove the AOS issue from the hearing and resolve that issue prior to the end of the suspension period, as discussed below. However, we keep the questions related to IT revenue crediting, appropriate recourse rates, and other issues raised by the filing in the hearing.

B. Merits Decision on AOS

1. The Parties' Substantive Arguments

29. In its May 29, 2015 filing, Alliance proposed to remove AOS service from Rate Schedule FT-1, along with the provisions in its GT&C providing that AOS service would have priority over other interruptible service, on the ground that those provisions were contrary to Commission policy. Alliance stated that the Commission has repeatedly held that authorized overrun service and IT service are both interruptible services and must be treated as having equal priority.[15]

30. Alliance states that, even if the Commission holds that Alliance's contracts are subject to review under section 4 of the NGA, the plain language in both the legacy contracts and the post-2000 contracts clearly shows that revisions to the Alliance tariff were contemplated by the contracts and the elimination of AOS from the tariff is in fact contractually permissible. Specifically, Alliance maintains that, absent the inclusion of off-tariff negotiated terms and conditions in nonconforming transportation agreements separately approved by the Commission, Alliance and its legacy shippers did not negotiate terms and conditions as part of their contracts. Moreover, Alliance argues that the legacy shippers did not execute nonconforming agreements for AOS, but that AOS was reflected in the tariff, and that the tariff governs the service. Alliance also argues that the contracts clearly contemplated that changes in the tariff approved by the Commission would govern FT-1 transportation service as section 1 of the FT-1 contracts executed by the four shippers provides that Firm Transportation Service shall be provided in accordance with the "applicable General Terms and Conditions as the same may be amended or superseded in accordance with the Rules and Regulations of the Commission." Alliance contends that the contracts contain no language requiring a continuation of the AOS entitlement beyond December 1, 2015.

31. Alliance dismisses the notion that section 3 of the negotiated rate agreements setting forth the negotiated rates for AOS is a basis for requiring Alliance to continue to provide AOS after December 1, 2015. Rather, Alliance maintains that section merely

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[15] Citing *Petal Gas Storage, L.L.C.*, 142 FERC ¶ 61,119, at P 54 (2013); *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at P 72 (2009); *MoBay Storage Hub LLC,* 126 FERC ¶ 61,241, at P 19 (2009); and *Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077, at P 340 (2006).

provides that the rates charged for transportation service will be established in accordance with the Rate Principles set forth in the agreement. Alliance argues this language does not create a perpetual right of shippers to receive AOS but only addresses the rate to be charged in the event AOS is available. Alliance claims that the shippers are attempting to avoid the consequences of not signing nonconforming transportation agreements that would have assured continuation of AOS. Alliance also reiterates that continuation of AOS with a higher priority than IT contravenes well-established Commission policy that AOS and IT are both interruptible services that should have equal priority.

32. Finally, Alliance references Canada's National Energy Board's decision that found that the shippers who renewed their contracts with Alliance Canada did not have a right to AOS service after the effective date of the revised Board-approved tariff eliminating AOS service, because the Board stated that "[t]he contracts themselves explicitly contemplate toll and tariff changes that may be approved by the Board from time to time."[16] Alliance urges the Commission to give the Board's decision great weight because the Board dealt with the same issue on the Canadian portion of the Alliance pipeline and focused on virtually identical contract and tariff language.

33. In its rehearing request, Pecan makes several arguments for maintaining AOS in its particular case. As an initial matter, Pecan distinguishes its contract from those of legacy shippers, explaining that it entered into a nonconforming transportation agreement for firm transportation with Alliance in 2009, in which Pecan obtained an AOS rate of $0.2653/Dth (reflecting 50 percent of the 100 percent load factor Reservation Rate, plus fuel, based on Pecan's negotiated FT-1 rate). Pecan notes that the Commission approved the agreement.

34. First, Pecan argues that AOS, as well as the FT-1 Negotiated Reservation Charge and the terms of these services, are listed as "Essential Elements" of the agreement; that the agreement containing the AOS terms was negotiated by Pecan and Alliance, approved by the Commission, and was for specific rates and for a specific term of years; and that Alliance's proposal would render the AOS rates in the Pecan agreement meaningless. Pecan asserts that therefore the *Mobile Sierra* doctrine should control the Commission's consideration of the proposal, and as Alliance has not pointed to any "unequivocal public necessity" or "extraordinary circumstance" which requires the Commission to abrogate the contract, the Commission should reject Alliance's proposed tariff sheets intended to eliminate AOS.

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[16] *See* Reasons For Decision, *Alliance Pipeline Ltd. as General Partner of Alliance Pipeline Limited Partnership*, National Energy Board, Docket No. RH-002-2014, at 15 (July 2015).

35. Pecan disputes Alliance's assertion that the negotiated rates, and not the underlying transportation service, are the only essential elements. In support, Pecan cites the D.C. Circuit's decision in *Transcontinental Gas Pipe Line Corp. v. FERC*[17] where Pecan states the court was incredulous that a pipeline could be allowed to negotiate with an agreement that sets specific rates for distinct services for a specific term and then be allowed to unilaterally terminate the underlying service at any given moment. Pecan also draws an analogy to *CHS Inc., et al. v. Enterprise TE Products Pipeline Co.*, where an oil pipeline and shippers entered into a settlement agreement which stated that the established rates "shall remain in effect" for the settlement term, and the Commission rejected the pipeline's attempt to terminate the underlying service via a tariff filing.[18]

36. Turning to specific language, Pecan notes that Appendix B, appended to the Pecan agreement states the following: "[t]his Agreement provides for the negotiated Reservation, Commodity, and AOS Rates and negotiated Reservation Charge Credits pursuant to Section 39 of Transporter's FERC Gas Tariff."[19] Pecan argues that this language, rather than the *Memphis* clause in its transportation agreement, controls. Pecan states that the Commission has held that if parties negotiate an exception to the GT&C then that exception should apply regardless of future modifications.[20] Pecan argues that is the case here, where Pecan and Alliance negotiated specific rates, and that changes to the GT&C may not change these terms. Pecan argues that Section 1 of the agreement, which it calls a *Memphis* clause, does not provide Alliance with the authority to eliminate essential elements or portions of the services agreed to in a contract.[21]

37. Pecan also distinguishes its situation from that described in the *Sea Robin* case, in which Pecan states *pro forma* agreements allowed unilateral cancellation by either party upon thirty-days' notice, and the Commission found that a rate agreement may be

[17] Pecan Request at 9 (citing *Transcontinental Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172, 1179 (D.C. Cir. 2007)).

[18] Pecan Request at 10 (citing *CHS Inc., et al. v. Enterprise TE Products Pipeline Co.*, 145 FERC ¶ 61,056 (2013) (*CHS*)).

[19] Pecan Request at 11.

[20] Pecan Request at 11 (citing *Tenn. Gas Pipeline Co.*, 65 FERC ¶ 61,224, at 62,126 (1993)).

[21] Pecan Request at 12 (citing *Transcontinental Gas Pipe Line Corp. v. FERC*, 485 F.3d at 1178).

conditioned on the pipeline's continued operation of the underlying service.[22] Pecan states that this agreement, by contrast, is a transportation agreement, not merely a rate schedule; the agreement and related tariff sheet firmly establish that Pecan and Alliance negotiated specific rates associated with two distinct services for a set period of time which the tariff itself characterizes as "Essential Elements;" and further, the agreement restricts the conditions under which "pregranted abandonment of service" may occur, directly overriding Section 15.1 of the GT&C.

38. Pecan also states the Commission should have summarily denied the proposal to eliminate AOS, and the reasoning of Canada's National Energy Board should not apply to Pecan, because the Board appears to have considered legacy contracts, which are markedly different from the Pecan agreement. Moreover, Pecan states that, unlike the Board, the Commission has the authority to resolve contract disputes.

39. Pecan also suggests, even if the Commission were to find that the existence of AOS runs counter to public policy, it would only be necessary to modify the terms of the contract so that AOS priority is comparable to IT priority.

40. Indicated Shippers argue that Alliance is contractually obligated to provide AOS under the existing negotiated rate agreements. Indicated Shippers reference the agreements signed by BP and Hess appended to their request. Indicated Shippers highlight that the Rate Principles in Section 13 of Appendix B of the agreement provide that the AOS rate will exist "for the primary term and any extension of the primary term of the Firm Transportation Agreement."[23] Indicated Shippers argue that, therefore, Alliance failed to address their argument that Alliance is contractually required to offer AOS under the existing negotiated rate agreements. Indicated Shippers also reference language from Hess's nonconforming negotiated rate agreement that splits the AOS rate between $0.000/Dth and $0.4395/Dth depending on volume. Indicated Shippers reference Alliance's counsel's statement that Shippers should have filed nonconforming agreements creating a right to AOS if they wanted the contractual entitlement to AOS.[24] Indicated Shippers state that, though they disagree that filing nonconforming agreements was necessary to preserve the right to AOS, filing a nonconforming agreement "along these lines" is what Hess did.[25] Indicated Shippers assert that the existing negotiated rate

[22] Pecan July 24, 2015 Request at 12 (citing *Sea Robin Pipeline Co.*, 133 FERC ¶ 61,140, at P 4 (2010)).

[23] Indicated Shippers Request at 7.

[24] Indicated Shippers Request at 8 (citing July 13, 2015 Prehearing Conference Tr. 28:16-20).

[25] Indicated Shippers Request at 8.

agreements contemplate the existence and availability of a proportionate share of AOS for the primary term of the agreements through the end of any extensions of the primary term, and that some shippers, including BP, signed one-year contract extensions over the last few years, extending their agreements into 2020, and therefore Alliance should not be allowed to violate the rate principles in the original contract.[26]

41. Indicated Shippers further argue that Alliance places too much weight on section 1 of the negotiated rate agreements, and also that the June 2015 Order, contrary to Alliance's characterization, did not eliminate AOS. Like Pecan, Indicated Shippers also assert that elimination of AOS would violate the *Mobile-Sierra* doctrine.[27] Indicated Shippers further maintain that the Commission should have rejected the proposal to eliminate AOS, rather than accepting and suspending the proposed tariff changes, and that even if the Commission determines that Alliance can change the AOS rate as a matter of contract interpretation, the issue of whether AOS can be eliminated, or simply have a reduced priority, can be addressed at hearing.

42. Indicated Shippers also argue that AOS is a fundamental component of the negotiated rate agreements and its elimination is not just and reasonable. To support this assertion, Indicated Shippers cite the following provisions: the Rate Principles attached to the Open Season Precedent Agreement distributed to shippers in 1996, which provide that "the rate for [AOS] will be the negotiated commodity charge, plus fuel, for the primary term and any extension of the primary term of the Transportation Agreement;"[28] Exhibit P of Alliance's certificate application, which stated that "the combined Contracted capacity and AOS service are billed on the basis of a single reservation rate;"[29] and the original certificate order, in which the Commission stated that AOS for negotiated rate customers is included in the negotiated reservation charge.[30] Indicated Shippers reiterate that the existing negotiated rate agreements also specifically contemplate the existence and continued availability of AOS as a component of firm service, that the plain language of the agreements provide that shippers are entitled to AOS under their existing FT-1 service for both the primary term and any extension, and

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[26] Indicated Shippers Request at 9 (citing *CHS*, 145 FERC ¶ 61,056 at P 31).

[27] Indicated Shippers Request at 10-11.

[28] Indicated Shippers Request at 12 (citing *Alliance Pipeline L.P.*, Docket No. CP97-168-000, Exhibit I, Schedule C (Dec. 24, 1996)).

[29] *Id.* (citing *Alliance Pipeline L.P.*, Docket No. CP97-168-000, Exhibit P, Rates – Explanatory Note (Dec. 24, 1996)).

[30] *Id.* (citing *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149, at 61,592 (1997)).

that the certificate application and the Rate Principles attached to its Open Season Precedent Agreement include AOS as an element included in the negotiated rate.

43. Indicated Shippers also underline that shippers currently utilize AOS, and that AOS was a factor they evaluated when deciding to enter into and then to renew the negotiated rate agreements. Indicated Shippers further state that the Commission considers AOS and interruptible service as identical and has required parties to revise their tariffs to give them the same scheduling priority.[31] Indicated Shippers also discount Alliance's argument that Commission regulations do not require pipelines to offer AOS, and state that, while Commission policy requires a pipeline simply to provide firm and interruptible service, this does not preclude other services from being offered or require that pipelines eliminate AOS.

2. <u>Discussion</u>

44. The Commission finds that Alliance's proposal to modify sections 12, 13, and 15 of its GT&C to remove the scheduling and curtailment priority for AOS service over other interruptible service is consistent with Commission policy and therefore just and reasonable. However, the Commission finds that Alliance's negotiated rate agreements with BP, Hess, and Pecan require Alliance to provide AOS service to those shippers at the agreed-upon negotiated rates for the remaining terms of those contracts. Therefore, the Commission rejects Alliance's proposal to remove AOS from Rate Schedule FT-1 and requires Alliance to modify GT&C sections 12, 13, and 15 to provide that AOS and Rate Schedule IT-1 service will have the same scheduling and curtailment priorities.

45. We agree with Alliance that its existing tariff provisions in GT&C sections 12, 13, and 15 – giving AOS a scheduling and curtailment priority over other interruptible services – are unjust and unreasonable. The Commission's longstanding policy is that, "although authorized overrun service is associated with a firm service contract, nevertheless, it is still an interruptible service. The overrun service is, therefore, indistinguishable from other interruptible service."[32] For this reason, the Commission has in a number of cases required that authorized overrun and interruptible services have

[31] Indicated Shippers Request at 13 (citing *Petal Gas Storage, L.L.C., et al.*, 142 FERC ¶ 61,119 (2013), *order on reh'g*, 143 FERC ¶ 61,272 (2013); *MoBay Storage Hub LLC*, 126 FERC ¶ 61,241 (2009); *Central N.Y. Oil & Gas Co., LLC*, 114 FERC ¶ 61,105 (2006) (*Central New York*)).

[32] *Central New York*, 114 FERC ¶ 61,105 at PP 9-11.

the same scheduling and curtailment priority.[33] Moreover, in *Central New York*, the Commission recognized that Alliance's tariff is inconsistent with Commission policy. In that case, Central New York sought to justify its proposal to give authorized overrun storage service a higher scheduling and curtailment priority than interruptible storage service by stating that Alliance and Tennessee provided such a priority for authorized overrun service in their tariffs. The Commission nevertheless rejected Central New York's proposal, explaining that, "[w]hile Tennessee's and Alliance's tariffs do provide for a priority for authorized overrun over interruptible services, the orders approving those particular tariff provisions did not specifically address the inconsistency with Commission policy and we will not follow that inconsistency in this case."[34]

46. However, in its section 4 filing in this case, Alliance has not simply proposed to revise GT&C sections 12, 13, and 15 to provide that AOS will have the same scheduling and curtailment priority as other interruptible service. Instead, Alliance proposes to remove AOS from its tariff altogether, including all references to AOS in Rate Schedule FT-1 and the GT&C. This proposal would have the effect of forcing Alliance's firm shippers to obtain authorized overrun service under Rate Schedule IT-1, thus depriving its negotiated rate shippers of the right to obtain authorized overrun service at their AOS negotiated rates. Indeed, Alliance's transmittal letter for its filing makes clear that this is the purpose of its filing. In that letter, Alliance stated, "the key elements of this filing are *the removal of the free Authorized Overrun Service* and IT revenue crediting provisions from the Alliance tariff."[35] Alliance's existing tariff includes a maximum recourse rate for AOS equal to the $0.5283/Dth maximum recourse rate for IT service.[36] Thus, Alliance's generally applicable tariff does not provide for free AOS. The only free AOS which Alliance provides is the authorized overrun service it provides pursuant to its AOS negotiated rate agreements with BP and Hess. It follows that Alliance's statement that it

[33] *MoBay Storage Hub LLC*, 126 FERC ¶ 61,241, at P 19 (2009); *Portland Natural Gas Transmission Sys.*, 106 FERC ¶ 61,289, at P 50 (2004); *TriState Pipeline, L.L.C.*, 88 FERC ¶ 61,328, at 62,006 (1999); *Puget Sound Energy, Inc.*, 84 FERC ¶ 61,347, at 62,516 (1998); *CNG Transmission Corp.*, 81 FERC ¶ 61,346, at 62,592 (1997); *National Fuel Gas Supply Corp.*, 63 FERC ¶ 61,291, at 63,024 (1993); and *Tennessee Gas Pipeline Co.*, 62 FERC ¶ 61,250, at 62,676 (1993).

[34] *Central New York*, 114 FERC ¶ 61,105 at P 9.

[35] May 29, 2015 Transmittal Letter at 5 (emphasis supplied). Alliance also stated that under its proposal, "Shippers will no longer have access to additional quantities of free AOS as part of the Rate Schedule FT-1 entitlements."

[36] The maximum recourse rate for AOS on the Tioga Lateral is $0.6253/Dth.

proposes to remove "the free Authorized Overrun Service" can only mean that Alliance proposes to terminate its contractual obligations to provide authorized overrun service at the AOS negotiated rates in its negotiated rate agreements.

47. Alliance contends that its proposal to remove all references to AOS from its tariff does not violate its negotiated rate agreements, because its service agreements with its negotiated rate shippers contain *Memphis* clauses.[37] Consistent with Alliance's "Form of Firm Transportation Agreement,"[38] section 1 of each of the subject service agreements, entitled "Service to be Rendered," provides:

> Transporter shall perform and Shipper shall receive Firm Transportation Service in accordance with the provisions of Transporter's effective Rate Schedule FT-1 and the applicable [GT&C] of Transporter's FERC Gas Tariff on file with the [Commission] *as the same may be amended or superseded in accordance with the Rules and Regulations of the Commission* [emphasis supplied].

48. Alliance contends that this provision permits it to propose unilateral changes to its tariff and provides that any such tariff changes the Commission approves will govern the Rate Schedule FT-1 service it provides to its firm shippers, including the negotiated rate shippers. Alliance contends that AOS is currently set forth in its Rate Schedule FT-1. As such, Alliance argues, the elimination of AOS is a tariff change contemplated by its service agreements. Alliance states that Indicated Shippers and Hess have not cited any provision in their negotiated rate agreements that restrict its right under NGA section 4 to remove AOS from its tariff.

49. The Commission has held that a *Memphis* clause, such as the one in Alliance's service agreements, authorizes a pipeline to make unilateral section 4 filings with the Commission proposing changes in the generally applicable maximum and minimum rates and other terms and conditions set forth in its tariff. If the Commission finds such changes to be just and reasonable, the *Memphis* clause automatically incorporates them into the shippers' service agreements.[39] However, the Commission has also held that

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[37] *United Gas Pipeline Co. v. Memphis Light, Gas, & Water Division*, 358 U.S. 103 (1958).

[38] Alliance Pipeline L.P., FERC Gas Tariff, Original Sheet No. 300 (0.1.0).

[39] *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 46 (2002), *reh'g denied*, 106 FERC ¶ 61,088, at PP 64-65 (2004), *aff'd sub nom., American Gas Ass'n v. FERC,* 428 F.3d 255, 263 (D.C. Cir. 2005) (*AGA v. FERC*).

"*Memphis* clauses do not authorize the pipeline to make unilateral changes in the individually negotiated provisions of a particular service agreement, such as a customer's discounted rate or its contract demand."[40]

50. The Commission agrees with Alliance that the *Memphis* clause in the BP, Hess, and Pecan service agreements permits it to modify sections 12, 13, and 15 of its GT&C to provide that AOS will have the same scheduling and curtailment priority as interruptible service under Rate Schedule IT-1. Those provisions of Alliance's GT&C are generally applicable provisions of Alliance's tariff affecting service to all shippers, and Indicated Shippers and Pecan have not pointed to any provisions in their service agreements requiring Alliance to continue to provide them a special scheduling priority for their unauthorized overrun service that is contrary to longstanding Commission policy.

51. However, the Commission cannot agree with Alliance that the *Memphis* clauses in the BP, Hess, and Pecan service agreements permit it to terminate its contractual obligation to provide AOS to those shippers at their negotiated rates before the expiration of the subject negotiated rate contracts. Section 3 of each of those agreements includes a negotiated rate for AOS provided by Alliance to the subject shipper pursuant to Rate Schedule FT-1. In each case, the negotiated rate for AOS is to remain in effect for the entire primary term of the subject agreement and any extension of that term.

52. Specifically, section 3 of the BP service agreement states that BP will pay the negotiated rates set forth in Appendix B to the BP agreement. Paragraph 13 of that appendix states, "The rate for Authorized Overrun Service will be the negotiated commodity charge, plus fuel, for the primary term and extension of the primary term of the Firm Transportation Agreement." That negotiated commodity charge is zero. Section 3 of the BP service agreement also provides that the parties "each agree not to take any action to frustrate the continued ability of such rates to be charged for transportation service under this Firm Transportation Agreement." Section 3 of the Hess service agreement specifies that "the Negotiated AOS Charge Rate shall be the following," and then provides a zero rate for AOS equal to up to 15 percent of Hess's contract demand and a negotiated rate of $0.4395/ Dth for AOS in excess of that level. Section 2 of the Hess service agreement provides that it shall be effective for a ten year primary term, with one year extensions thereafter for up to another ten years. Section 3 of the Pecan service agreement provides that Pecan will pay the negotiated rates set forth in Appendix B to the Agreement. Paragraph 12 of Rate Principles in that appendix states, "The rate for Authorized Overrun Service will be 50% of the 100% load factor

[40] *Bay Gas Storage Co.*, 131 FERC ¶ 61,034, at P 45 (2010) (*Bay Gas*) citing *Transcontinental Gas Pipe Line Corp*., 104 FERC ¶ 61,171 (2003), *order on reh'g*, 107 FERC ¶ 61,156 (2004), *aff'd sub nom., ExxonMobil v. FERC*, 430 F.3d 1166, 1173 (D.C. Cir. 2005)). *See also Sea Robin Pipeline Co.*, 143 FERC ¶ 61,129, at P 153 (2013).

Reservation Rate, plus fuel, for the primary term and any extension of the primary term of the Firm Transportation Agreement."

53. Alliance cannot relieve itself of its contractual obligation to provide authorized overrun service to these shippers at their individually negotiated rates by the expedient of removing AOS from its tariff and requiring these shippers to take authorized overrun service under Rate Schedule IT-1, instead of Rate Schedule FT-1. As the Commission found in *Central New York*,[41] "the Commission traditionally considers authorized overrun and interruptible service as identical," despite the fact authorized overrun service may be included in a firm rate schedule. Alliance, itself, has recognized that the two services are indistinguishable, by establishing identical maximum recourse rates for the two services, equal to a 100 percent load factor derivative of its Rate Schedule FT-1 rates for firm transportation service. In these circumstances, the only substantive purpose served by Alliance's proposal to remove all references to AOS from its tariff, rather than modify the tariff to give AOS the same scheduling priority as other interruptible services, is to nullify its contractually agreed-upon negotiated AOS rates with BP, Hess, and Pecan. Alliance's proposal does this by requiring those shippers to take the "identical" interruptible service to which the negotiated rate applies under a different rate schedule not referenced in the negotiated rate agreement. Such a nullification of an existing individually negotiated rate is contrary to our finding in *Bay Gas* that "a *Memphis* clause does not ordinarily authorize a pipeline to unilaterally modify a contractually-agreed upon" rate.[42]

54. While Alliance states that it is revising its generally applicable tariff to be consistent with the Commission's policy that authorized overrun service should have the same scheduling priority as other interruptible services, it is not necessary for Alliance to remove AOS from its tariff, including Rate Schedule FT-1, in order to accomplish this goal. Alliance can give the two services the same scheduling priority by modifying Alliance's GT&C so as to include AOS in the same scheduling category as other interruptible services, while retaining AOS in Alliance's tariff. In fact, when the Commission has required pipelines to modify their tariffs to provide the same scheduling priority for the two services, it has generally only required that the two services be given the same scheduling priority, not that all references to authorized overrun service be removed from their tariffs.

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[41] 114 FERC ¶ 61,105 at P 9 (emphasis supplied).

[42] *Bay Gas*, 131 FERC ¶ 61,034 at P 45. Alliance's action also violates its obligation under section 3 of the BP service agreement "not to take any action to frustrate the continued ability of such rates to be charged for transportation service under this Firm Transportation Agreement."

55. The Commission concludes that, while section 1 of the BP, Hess and Pecan service agreements permits Alliance to propose changes to the generally applicable provisions of its tariff "in accordance with the Rules and Regulations of the Commission," Alliance's proposal to entirely remove AOS from its tariff is not in accordance with the Commission's rules and regulations. That proposal is not just and reasonable, because it would result in a modification of individually negotiated rates without justification.[43] Therefore, the Commission rejects Alliance's proposal to remove AOS as a service offering under Rate Schedule FT-1.

56. However, as Alliance recognizes, the existing provisions in GT&C sections 12, 13, and 15 providing a scheduling and curtailment priority for AOS are unjust and unreasonable. Therefore the Commission directs Alliance to modify those sections of its GT&C to provide that AOS will have the same scheduling and curtailment priorities as interruptible transportation service under Rate Schedule IT-1.

III. Whether the June 2015 Order Appropriately Applied a Refund Condition

A. Alliance's Arguments

57. Alliance contends that the Commission erred by accepting the proposed tariff records subject to refund. Alliance argues that it did not propose a rate increase under section 4 of the NGA, and thus section 4 of the NGA does not give the Commission authority to impose a refund condition. Specifically, Alliance states that the Commission has repeatedly recognized that it may only require pipelines to refund rate increases above the level of prior rates.[44] Alliance states that it has not proposed to increase the per unit recourse rates set forth in its tariff for any of its service. Alliance also asserts that NGA section 5 does not provide refund authority, but merely allows the Commission to lower rates prospectively. Alliance states that, while the June 2015 Order stated that its section 4 filing potentially increases Alliance's revenues, NGA section 4 only provides for refunds of rate increases, not revenue increases. Therefore, Alliance contends that the

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[43] ACM has a negotiated rate agreement similar to BP's. The holdings in this order apply to all of Alliance's negotiated rate agreements with its shippers which contain provisions similar to the negotiated rate agreements discussed above.

[44] Alliance Request at 9 (citing *Transcontinental Gas Pipe Line Corp.*, 140 FERC ¶ 61,251, at P 30 (2012)). Alliance also cites the following cases to support its conclusion that the Commission erred in exercising its refund authority: *Wyo. Interstate Co., Ltd.*, 89 FERC ¶ 61,303, at 61,938 (1999); *Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110, at 61,437 n.7 (1999); *Williston Basin Interstate Pipeline Co.*, 81 FERC ¶ 61,318, at 62,456 (1997); *Tenn. Gas Pipeline Co.*, 71 FERC ¶ 61,399, at 62,584 (1995); *S. Natural Gas Co.*, 55 FERC ¶ 61,161, at 61,520 (1991).

order provides no legally sustainable basis to attach a refund obligation. Alliance adds that any increased revenues resulting from its proposed elimination of IT revenue crediting is also speculative, given uncertainty around IT revenues and costs associated with other tariff changes that will become effective December 1, 2015. Alliance further warns of adverse impacts on Alliance's capital and debt costs if the refund condition is not removed.

58. Alliance adds that, practically speaking, it would be difficult to identify what revenues would be subject to refund, and which shippers would be eligible. Alliance states that GT&C Section 39.9 in the Alliance tariff provides that Alliance shall not be required to refund to shippers amounts collected for service to which negotiated rates apply, unless the parties agree otherwise; and that the Precedent Agreements executed by shippers for transportation service commencing December 1, 2015 expressly state that "revenue from interruptible transportation service will not be credited to firm transportation service shippers' rates."

B. **Discussion**

59. We find that the refund condition created by the June 2015 Order is appropriate. NGA section 4(e) provides that, "where increased rates or charges are . . . made effective" following the suspension period, the Commission may order the pipeline "to refund, with interest, the portion of the increased rates or charges by its decision found not justified." In this case, we have suspended Alliance's proposal to remove section 34 of its GT&C from its tariff, as requested by Alliance.[45] That section requires Alliance to credit all its IT revenues to its firm shippers. While Alliance has not proposed to increase the per unit recourse rates set forth in its tariff, the removal of the IT revenue crediting provision constitutes an increased rate or charge within the meaning of NGA section 4(e).

60. When designing a pipeline's rates in a section 4 rate case, IT revenue crediting is an alternative to allocating a portion of the pipeline's cost of service to interruptible service based upon projected units of service. If a pipeline allocates costs to interruptible service in a section 4 rate case, the per unit rates determined in that rate case are lower than they otherwise would be. If such a pipeline proposes in its next rate case to reduce its allocation of costs to interruptible service, any resulting increase in its per unit rates would be subject to refund. The same analysis applies when a pipeline credits IT revenues, rather than allocating costs to that service. Any proposed reduction in IT revenue crediting, without an offsetting allocation of costs to interruptible service, potentially increases the pipeline's overall charges to its shippers. Therefore, NGA

[45] May 29, 2015 Transmittal Letter at 1.

section 4(e) permits the Commission to impose a refund condition when it accepts and suspends that proposal.[46]

61. In this case, Alliance's proposal to eliminate the requirement that it credit IT revenues to firm shippers, without any offsetting allocation of costs to interruptible service, is essentially a proposal to increase its charges to its firm shippers through an increased allocation of costs to those shippers. Such a proposal is subject to refund, if rejected. Alliance cannot avoid that refund obligation simply by structuring its proposal so as to eliminate a tariff provision requiring IT revenue crediting to firm shippers, as opposed to increasing its per unit rates for those shippers. When pipelines propose to reallocate costs, the Commission can order refunds to those customers whose rates increased as a result of the proposal.[47] Therefore, we reaffirm our imposition of a refund condition in the June 2015 Order. Issues concerning the calculation of any refunds that might be required at the conclusion of this proceeding can be addressed at that time.

62. Finally, we note that all issues raised by the parties concerning refunds with respect to Alliance's proposal to eliminate AOS have been rendered moot by our decision to reject that proposal before the end of the suspension period.

IV. Gas Processing and Exclusivity

A. Requests for Clarification and Rehearing, and Answers

63. On July 30, 2015, Badlands filed a request for clarification or, in the alternative, rehearing of the June 2015 Order's treatment of the proposed change to Alliance's tariff at GT&C section 20.1 concerning a shipper's warranty related to gas processing. Badlands states this change would require shippers to exclusively utilize Aux Sable Liquid Products LP, an affiliate of Alliance, for natural gas processing. Badlands also protests a provision granting Alliance discretion to approve shippers' processing arrangements in Rate Schedule FT-1 and Rate Schedule IT-1.

64. Badlands requests that the Commission clarify that the proposed tariff changes involving natural gas processing are subject to the evidentiary hearing established by the June 2015 Order. Badlands argues that the Commission's June 2015 Order's Appendix suspended and set for hearing all the filed tariff records, including the tariff records dealing with gas processing. It also submits that the June 2015 Order's language should

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[46] *E. Shore Nat. Gas Co.*, 134 FERC ¶ 61,069, at P 11 (2011).

[47] *See, e.g.*, *Fed. Power Comm'n v. Tenn. Gas Transmission Co.*, 371 U.S. 145 (1962).

be interpreted as setting all issues raised by the filing for hearing, not merely those discussed most extensively in the June 2015 Order.

65. Alternatively, Badlands submits that the Commission could, on rehearing, simply reject the proposed tariff changes involving gas processing. Badlands argues that the June 2015 Order erred by accepting the proposed processing changes despite Alliance's not complying with sections 154.7(a)(6) on procedural and substantive grounds.

B. Discussion

66. Badlands' request for clarification or rehearing is correct in asserting that the Commission in the June 2015 Order intended to set all issues raised by the filing for hearing. In the June 2015 Order, the mention of certain issues for examination at hearing was not intended to foreclose examination of other aspects of the filing at hearing. The June 2015 Order suspended all the tariff records, and intended to set for hearing all issues related to those proposed tariff changes, including, but not limited to, those related to the elimination of AOS, IT revenue crediting, and the maintenance of its existing recourse rates. Even possible contractual impediments barring Alliance from making certain of its tariff changes were subject to the hearing inquiry because on the initial record it did not appear possible to make an immediate determination, and extrinsic evidence of the parties' intent in entering into such agreements might be needed.[48]

67. Badlands also argues that the revisions to Schedule FT-1 and Schedule IT-1 that require that shippers' processing arrangements be *acceptable* to Alliance was too broad and place no limitations on Alliance's decision-making. The presiding judge should also consider the propriety of this proposed change in Alliance's Schedules FT-1 and IT-1, as it arguably seems to vest in the transporter broad discretion over a shipper's gas processing choices.

[48] Thus, had there been any statutory or regulatory impediment to crafting a remedy under the Natural Gas Act, a remedy for contract damages or other relief for breach of contract was to be considered by the presiding judge. *See CHS*, 145 FERC ¶ 61,065 (damages remedy for breach of agreement available even if remedy unavailable by statute). As discussed earlier, the Commission disagrees with Alliance's suggestion that to the extent contractual issues exist here, they should not be addressed by the Commission under the *Arkla* precedent. In any event, as further discussed above, no increase in the AOS rates is possible under the Commission's *Memphis* clause precedents.

V. Negotiated Rates/Creditworthiness

A. Request for Rehearing

68. On July 30, 2015, Indicated Shippers filed a request for rehearing and request for clarification, correctly pointing out that the June 2015 Order erroneously stated that Alliance's proposed revision to GT&C section 39.1 to allow negotiated rates below a zero minimum, was unprotested. Indicated Shippers' request is reasonable and warrants clarification of the June 30 Order as discussed below. Indicated Shippers also expressed concern with revised GT&C section 22.5, which allows Alliance to request additional information including audited and unaudited consolidated financial statements to evaluate a shipper's creditworthiness. Indicated Shippers assert that some shippers may not have such statements and it would be unreasonable to find them non-creditworthy on this basis alone.

B. Discussion

69. Alliance's proposed modification to GT&C section 39.1 provided that a shipper and Alliance may agree to a negotiated rate less than the minimum recourse rate, which Indicated Shippers point out could be less than zero. This is consistent with our policy that negotiated rates are not bound by either the maximum or minimum recourse rate and thus can be less than the minimum applicable recourse rate.[49] Therefore, that proposal is not unjust or unreasonable as far as it goes. However, if such a rate is negotiated, Indicated Shippers have the right to object that the rate in unjust and unreasonable. Accordingly, the Commission grants Indicated Shippers' request for clarification that acceptance of this revision does not prejudge the propriety on any specific negotiated rate transaction; thus, should Alliance file a negotiated rate with a rate less than the minimum rate, any party is free to protest the filing, raising arguments that the rates are discriminatory or that the rates may otherwise unreasonably harm other shippers.

70. With respect to Indicated Shippers' concern about the revision to the GT&C section 22.5 creditworthiness provisions, the Commission clarifies that lack of audited and unaudited consolidated financial statements is not of itself automatic grounds for a determination of non-creditworthiness. Rather, the Commission intends pipelines to have the right to require additional information and adequate data to make a creditworthiness determination, but pipelines must have a reasonable basis for requiring particular data in the particular case. Accordingly, if a shipper does not have certain data, but can offer

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[49] *See, e.g.*, *N. Nat. Gas Co.*, 105 FERC ¶ 61,299, at 62,445 (2003).

alternative satisfactory documentation consistent with Commission policy to establish creditworthiness, it should be allowed to do so.

The Commission orders:

(A) The requests for rehearing by Alliance, Pecan, and Indicated Shippers on the proposal to eliminate AOS from the tariff are granted in part and denied in part, consistent with the discussion above.

(B) Badland's request for clarification that the gas processing issue was set for hearing is granted, as discussed above.

(C) Indicated Shippers' request for rehearing and clarification of the July 30 Order's treatment of GT&C § 39.1 is granted, as discussed in the body of this order.

(D) Alliance shall, within 20 days of this order, file revised tariff records to be effective December 1, 2015, that implement the directives of this order concerning AOS.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.