

157 FERC ¶ 61,204
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Alliance Pipeline L.P.

Docket Nos. RP15-1022-000
RP16-581-000
(Consolidated)

Docket Nos. RP16-292-000
RP16-240-000
RP16-986-000
RP16-1045-000
(Not Consolidated)

ORDER ON CONTESTED SETTLEMENT AND
REMANDING ISSUE FOR HEARING

(Issued December 15, 2016)

1. On September 6, 2016, the Presiding Administrative Law Judge (ALJ) issued a certification of a contested settlement.¹ The settlement was filed by Alliance Pipeline L.P. (Alliance) on July 7, 2016. The settlement is intended to resolve all issues in the above-captioned proceedings including, among other things, all rate-related issues, issues concerning the provision of Authorized Overrun Service (AOS), and issues concerning Alliance's proposed gas processing provisions. In addition, the settlement would allow Alliance to recover certain pipeline safety and greenhouse gas costs through a tracking mechanism that would be established in its tariff pursuant to the terms of the settlement. The settlement has been contested by Badlands NGLs, LLC (Badlands) and the Commission Trial Staff (Trial Staff). For the reasons discussed below, the Commission severs the gas processing issue from the settlement and remands the issue to the ALJ for hearing. The remaining portions of the settlement are approved as fair and reasonable and in the public interest, subject to the modifications on the standard of review language discussed below.

¹ *Alliance Pipeline L.P.*, 156 FERC ¶ 63,039 (2016).

I. Background

2. On May 29, 2015, Alliance filed revised tariff records to modify various Rate Schedules and provisions in the General Terms and Conditions (GT&C) of its tariff. By order issued June 30, 2015, the Commission accepted and suspended the revised tariff records to become effective December 1, 2015, subject to refund and further Commission action.² The Commission also established hearing procedures to address Alliance's proposed elimination of AOS, IT revenue crediting, and the maintenance of its existing recourse rates. By order issued November 19, 2015, the Commission stated that the June 30 order intended to set for hearing all issues related to the proposed tariff changes.³

3. On November 30, 2015, Alliance filed tariff revisions in Docket No. RP16-240-000. In an order issued December 30, 2015, the Commission accepted the most recent filed versions of each tariff record in Docket No. RP16-240-000.⁴ Alliance sought rehearing of the December 30, 2015 order with respect to a contract with BP Canada Energy Marketing Corp. (BP Canada). Rehearing was denied on April 29, 2016.⁵ Alliance filed a petition for review of the orders in Docket No. RP16-240-000 on June 28, 2016 in D.C. Cir. Case No. 16-1207.

4. On December 9, 2015, Alliance filed tariff revisions in Docket No. RP16-292-000 to comply with the Commission's November 19, 2015 order regarding the reinstatement of AOS. On March 3, 2016, the Commission accepted Alliance's December 9, 2015 filing.⁶ On April 4, 2016, BP Canada filed a request for rehearing of the March 3, 2016 order. On June 2, 2016, the Commission granted in part and denied in part BP Canada's request for rehearing.⁷ On June 29, 2016, Alliance filed an application for rehearing of the June 2, 2016 order. Alliance withdrew its request for rehearing on September 14, 2016.

² *Alliance Pipeline L.P.*, 151 FERC ¶ 6,271 (2015).

³ *Alliance Pipeline L.P.*, 153 FERC ¶ 61,195 (2015).

⁴ *Alliance Pipeline L.P.*, 153 FERC ¶ 61,362 (2015).

⁵ *Alliance Pipeline L.P.*, 155 FERC ¶ 61,119 (2016).

⁶ *Alliance Pipeline L.P.*, 154 FERC ¶ 61,159 (2016).

⁷ *Alliance Pipeline L.P.*, 155 FERC ¶ 61,232 (2016).

5. On February 2, 2016, Alliance filed tariff revisions in Docket No. RP16-581-000 that removed the language from the Alliance tariff identifying Aux Sable Liquid Products L.P. (Aux Sable) as the exclusive processor of natural gas transported on Alliance, and a generic reference to a “Processing Plant” was inserted in place of references to Aux Sable.

6. By order issued March 3, 2016, the Commission accepted the February 2, 2016 tariff revisions, stated that the issues associated with the RP16-581-000 tariff revisions are presented in the ongoing hearing, and consolidated Docket No. RP16-581-000 and Docket No. RP15-1022-000.⁸

7. On July 7, 2016, Alliance filed an offer of settlement. Parties filing comments in support of the settlement are: Alliance Canada Marketing L.P.; BP Canada Energy Marketing; Encana Marketing (USA) Inc. and Tenaska Marketing Ventures; and Pecan Pipeline (North Dakota), Inc. Adverse initial and reply comments were filed by Badlands and Trial Staff. Reply comments were also filed by Alliance. On September 6, 2016, the Presiding ALJ issued a certification of contested settlement.

8. On September 1, 2016, Alliance filed a motion to consolidate proceedings. On September 16, 2016, Badlands filed an answer in opposition to the motion. The Commission denies the motion for consolidation. The Commission agrees with Badlands that the motion is unsupported and unnecessary for the Commission’s consideration and disposition of the settlement.

II. Terms of the Settlement

9. The major provisions of the settlement are as follows.

10. Article I provides that Alliance shall implement the recourse rate reductions set forth on the *pro forma* tariff records in Appendix A of the Settlement, reflecting a 27 percent reduction in Alliance’s current transportation rates, effective April 1, 2016. Alliance shall also reduce its firm and interruptible transportation recourse rates on January 1, 2018, by 33 percent of existing rates, and on January 1, 2020, by 36 percent of existing rates.

11. Article II provides that Alliance shall file an NGA section 4 general rate case by April 1, 2020, *but not* before October 1, 2019. Prior to October 1, 2019, no party or

⁸ *Alliance Pipeline L.P.*, 154 FERC ¶ 61,160 (2016). On May 27, 2016, Alliance filed a revised tariff record to substitute for a version of the same record submitted on February 2, 2016, in Docket No. RP16-581-000. This was accepted by Letter Order Pursuant to § 375.307, *Alliance Pipeline L.P.*, Docket No. RP16-986-000 (June 17, 2016).

its affiliate shall seek or support a change or challenge to the Settlement via an NGA section 5 Complaint.

12. Article III states that Alliance shall file the *pro forma* tariff Pipeline Safety and Greenhouse Gas Cost Adjustment Mechanism attached as Appendix B of the Settlement, which will comprise Section 34 of the GT&C, to allow recovery of Pipeline Safety Costs and Greenhouse Gas Costs resulting from new legislation. Alliance may also, on or after October 1, 2019, file revised tariff records to replace the Pipeline Safety and Greenhouse Gas Cost Adjustment Mechanism with a cost recovery mechanism per the Commission's Policy Statement in Docket No. PL15-1-000.

13. Article IV provides that, effective April 1, 2016, the Alliance mainline transmission depreciation rate shall be 1.5 percent with an additional negative salvage rate of 0.1 percent, and the Tioga Lateral transmission depreciation rate shall be 2.58 percent with an additional negative salvage rate of 0.1 percent. Alliance will record negative salvage accruals in a subaccount to Account No. 108. This subaccount will function as a negative salvage reserve distinct from the depreciation reserve.

14. Article V states that on the first day of the first month following an order approving the settlement that is no longer subject to rehearing, Alliance shall withdraw its April 4, 2016 application for rehearing in Docket Nos. RP15- 1022 and RP16-581, and shall file a motion to dismiss its appeals in Case No. 16-1017 at the D.C. Circuit. Article VI provides that, following issuance of a final Commission order in Docket No. RP16- 1045, Alliance will withdraw the June 29, 2016 application for rehearing in Docket No. RP16-292-001 and the appeals pending in *Alliance Pipeline v. FERC*, D.C. Cir. Case Nos. 16-1120 and 16-1207.

15. Article VII prohibits Alliance from filing tariff records requiring shippers to execute extraction agreements solely and exclusively with any Alliance affiliate, or prohibiting shippers from executing extraction agreements with entities that are not Alliance affiliates. Alliance shall file revised *pro forma* GT&C Section 20.1 tariff records attached as Appendix C of the Settlement.

16. Article VIII states that the settlement is conditioned upon approval by the Commission without modification or condition, or upon approval by the Commission with modifications or conditions acceptable to Alliance. Article IX provides that the Settlement will terminate the effective date of a general rate case filed by Alliance pursuant to section 4 of the NGA or the effective dates of rates established by the Commission pursuant to section 5 of the NGA. Article X contains reservations that Alliance, parties supporting the Settlement and the Commission's order approving the Settlement shall not constitute approval or acceptance of any concept, theory, principle, or method underlying any of the rates or charges, or any other matter in this Settlement.

17. Article XI contains the standard of review. Once approved by the Commission, the standard of review for any proposed modifications to the settlement by the Commission or the unanimous parties will be the just and reasonable standard. The standard of review for any proposed modifications at the request of less than all the parties shall be the public interest standard.

III. Discussion

A. Introduction

18. The settlement has been contested by Badlands and Trial Staff. Both Badlands and Trial Staff request that the Commission sever the gas processing issue from the settlement and remand the issue to the ALJ for hearing. Badlands does not oppose the rate-related portions of the settlement. Trial Staff would support the approval of the rate-related portions of the settlement subject to certain modifications concerning the standard of review to be applied to future changes to the settlement and the proposed pipeline safety and greenhouse gas cost tracker.

19. The Commission's approval of the instant settlement is dependent on the outcome of three issues. First, should the entire settlement be approved, including the contested gas processing provision, or should gas processing issues be severed for further litigation and the remaining uncontested issues be approved? Second, should the Commission modify or clarify the standard of review that would apply to future changes to the settlement? Finally, is the proposed tracker to recover pipeline safety and greenhouse gas costs consistent with Commission precedent and policy?

B. Gas Processing Issues

20. The threshold issue to be addressed in this proceeding is whether the contested settlement should be approved as a whole, including Article VII of the settlement which presumes to resolve gas processing issues arising from Alliance's proposed changes to Section 20.1 of its GT&C. The Commission analyzes whether it can approve a contested settlement under four procedural alternatives discussed in *Trailblazer Pipeline Co.*⁹ The *Trailblazer I* approach allows the Commission to render a merits decision on the contested issues if there is substantial evidence in the record. The *Trailblazer II* approach allows the Commission to view the settlement as a package in which the overall result is just and reasonable and the settlement will leave the contesting party in no worse position than it would be if the case were litigated. The *Trailblazer III* approach allows the Commission to approve a settlement if the benefits of the settlement are deemed to

⁹ 85 FERC ¶ 61,345 (1998), *order on rehearing*, 87 FERC ¶ 61,110 (1999), *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

outweigh the nature of the objections, and the contesting party's interest is too attenuated such that the settlement may be approved under the fair and reasonable standard applicable to uncontested settlements. Finally, the *Trailblazer IV* approach involves severing the contested issues and permitting a limited litigated result, while approving the settlement as to the consenting parties. As will be discussed more fully below, Alliance asserts that the settlement should be approved under the *Trailblazer I, II* or *III* approaches. On the other hand, Badlands and Trial Staff assert that the *Trailblazer IV* approach is the only option available to the Commission in acting on the settlement. Since the only truly contested issue is the gas processing provision in proposed Section 20.1 of the GT&C, it is the implications of the provision that is the focus of the *Trailblazer* analyses of the parties.

1. Comments

21. Alliance states that all current shippers on the system support the settlement as an integrated package to resolve all issues in these proceedings. In the event the settlement is contested by Badlands, a party that is not currently, and has never been, an Alliance shipper, and/or the North Dakota Public Service Commission (North Dakota Commission),¹⁰ Alliance requests that the settlement be approved pursuant to three of the four options available under the Commission's *Trailblazer* policy.

22. Alliance states that in evaluating contested settlements, the Commission can address the merits of a contesting party's contentions if there is an adequate record on which to do so. If the Commission finds that each contention lacks merit, the Commission may approve the settlement on the merits. In the instant proceeding, to the extent that Badlands and the North Dakota Commission pursue objections to GT&C Section 20.1, Alliance submits that these objections have been fully addressed by the filing in Docket No. RP16-581-000 and Appendix C to the Stipulation. Alliance submits

¹⁰ In its comments, the North Dakota Commission states the tariff language, which initially caused concern has been addressed and cleansed. However, Badlands has continued to allege discriminatory practices by Alliance and Aux Sable. The North Dakota Commission states that exclusive arrangements and practices, if shown, may be indicative of barriers and discrimination that North Dakota customers and industries face while attempting market entry, and may place the interests of the state at an unreasonable disadvantage as compared to those of other states. While recognizing that the commercial arrangements and practices surrounding Alliance, Alliance Canada, and Aux Sable are beyond the North Dakota Commission's resources to fully review, the North Dakota Commission requests that if there may be merit to Badland's claims of undue preference and discriminatory conduct that it be allowed a separate proceeding to fully develop and examine the facts in a manner that would allow North Dakota customer interests to be taken into consideration.

that all issues associated with GT&C Section 20.1 may therefore be resolved on the merits in an order approving this settlement.

23. Alliance contends that the revised GT&C Section 20.1 filed by Alliance on February 2, 2016, as described above, fully responded to Badlands protest which, as Badlands stated in an August 21, 2015 pleading, represents its only concern in this proceeding. Alliance states that the February 2, 2016 tariff records removed the language from GT&C Section 20.1 identifying Aux Sable Liquid Products as the exclusive processor of natural gas transported on Alliance. Alliance inserted instead a generic reference to “Processing Plant” in GT&C Section 20.1, thus curing Badlands’ allegations of any anticompetitive or unduly discriminatory consequences. In addition, Alliance asserts that the revised tariff records in Appendix C further revise GT&C Section 20.1 to remove in its entirety the language that Badlands asserted represents its only concern in this proceeding, and remove the reference to “sole and exclusive” in the definition of “Extraction Agreement” in the GT&C of Alliance’s tariff. Accordingly, Alliance contends a sufficient record exists for the Commission to approve GT&C Section 20.1 on the merits and dismiss Badlands’ protest and deny any Badlands or the North Dakota Commission anticipated request for a hearing on these matters.

24. Alliance states that if the Commission finds that the overall result of the settlement as a whole is just and reasonable, the Commission may approve a contested settlement, including a “black box” rate settlement. Alliance states that *Trailblazer II* involves a balancing of the benefits of the settlement against the costs and potential effect of continued litigation. Under the *Trailblazer II* approach, the Commission need not find that the settlement rates are equal to the rates that the Commission would establish on the merits after litigation. Rather, just and reasonable rates under *Trailblazer II* are rates within a zone of rates that are just and reasonable.

25. Alliance states that it filed a cost and revenue study, which justified recourse rates in excess of the currently effective rates, and two rounds of supporting testimony. Alliance states that the “black box” settlement rates represent a 27 percent reduction from existing rates, effective April 1, 2016, two years earlier than lower rates could be ordered following litigation of this case. Additional reductions are implemented on January 1, 2018 (a 33 percent reduction from existing rates) and January 1, 2020 (a 36 percent reduction from existing rates). Alliance asserts that the “black box” phased rate reductions approach in this settlement falls squarely within the *Trailblazer II* rationale. Alliance states that all current shippers, and FERC trial staff have agreed to the rates in Appendix A to the Stipulation. Alliance asserts that no reasonable basis exists for the Commission to decline to approve these rates and an overall settlement that allows for such lower rates to become effective several years in advance of a litigated outcome.

26. Alliance states that under *Trailblazer III* the Commission can find that objecting parties’ interests are sufficiently attenuated so that approval is appropriate over their objections. Alliance asserts that with all current shippers in support, this case represents

exactly the type of case where a potential shipper such as Badlands, not likely to become a shipper until 2020 or beyond, should not be permitted to upset an otherwise uncontested settlement especially where, as here, Badlands' principal complaint has been fully addressed and its current interests are clearly attenuated.

27. *Trailblazer III* involves a three-part test: (1) the contested party's interest is sufficiently attenuated to permit analysis under a fair and reasonable standard; (2) the settlement directly benefits the settling parties and real parties in interest; and (3) the contested party has another forum in which to raise its concerns. Alliance asserts that all three are met in this case.

28. Alliance asserts that it is far from certain whether Badlands will ever build a North Dakota plant and an in service date in 2020 is highly unlikely. Less than one year ago, Badlands announced that the first plant it plans to build will not be in North Dakota, but at an undisclosed site dubbed "Shangri-La." Only after "Shangri-La" is up and running will a North Dakota plant begin to become a reality.¹¹ More recently, Badlands' CEO announced that a North Dakota plant would be the *third* plant Badlands plans to build.¹² Alliance contends that no plant will be built in North Dakota, at "Shangri-La" or anywhere, unless Badlands obtains a source of ethane, another critical aspect of Badlands' North Dakota business plan which similarly appears unlikely to materialize in the near future.

29. Alliance states that the ethane entrained in the Alliance gas stream in North Dakota is already committed by its owners (producers and shippers). Since 2000, western Canadian producers have chosen to take their ethane to Chicago via Alliance or extract it in western Canada and transport lean gas on other systems. Alliance states North Dakota producers similarly spurned the North Dakota market for their ethane -- they transport purity grade ethane to Alberta.¹³ Alliance asserts that although Badlands has claimed that it has secured a source of ethane under a precedent agreement with Continental Resources,¹⁴ Continental has not announced any deal at all and Badlands has

¹¹ Settlement Transmittal Letter Attachment A at 1 citing Bakken Conference and Expo, July 2015 presentation of Badlands' CEO William Gilliam.

¹² See interview with Badlands' CEO William Gilliam, Settlement Transmittal Letter Attachment B at 15.

¹³ See Pembina Pipeline Corporation February 10, 2015 press release, Settlement Transmittal Letter Attachment A at 2-7, stating that it has entered into agreements to expand the Vantage pipeline to 68,000 bpd to allow Bakken producers to transport ethane from Tioga, North Dakota to Empress, Albert.

¹⁴ See Settlement Transmittal Letter Attachment A at 12.

not indicated that the precedent agreement that it touts is anything more than a soft agreement to agree on something in the future. Finally, Alliance asserts that Badlands states that it will require \$70/BBL oil for the foundation of a “base case” in North Dakota, not expected to occur “for a few years,”¹⁵ adding further to what Mr. Gilliam described last year as the “formidable challenges” facing the North Dakota plant.¹⁶ Alliance contends that those challenges were reaffirmed in the May 25, 2016 radio interview.¹⁷

30. Alliance asserts that Badlands’ current target for a source of ethane appears to be Northern Border Pipeline. Alliance states that Mr. Gilliam predicts that Northern Border will soon confront a “tsunami” of ethane that must be removed from Northern Border so that its shippers can meet downstream pipeline gas quality specifications.¹⁸ Alliance states that Badlands’ CEO goes so far as to suggest that the “tsunami” on Northern Border may prompt ethane owners to pay Badlands to take 30-35 percent of the ethane on Northern Border that may eventually be needed for the third Badlands’ plant in North Dakota.¹⁹ Alliance submits that it is difficult to imagine such a farfetched scenario and Mr. Gilliam acknowledges that a robust petrochemical industry occupied by Dow, Shell and NOVA Chemicals currently exists in Alberta.²⁰ Alliance contends that those companies purchase ethane, including the amounts transported by Pembina and sourced in North Dakota, and Mr. Gilliam’s prediction that ethane owners will soon pay Badlands to take their ethane off Northern Border is no more than wishful thinking.

31. Alliance asserts that adding further to the uncertainty of a Badlands plant sourcing ethane from Alliance are the recently acknowledged doubts concerning where a plant will be located, if anywhere, in North Dakota. Alliance states that “Shangri-La” may be built on the Gulf Coast,²¹ but apparently the prospect of obtaining ethane and being paid to

¹⁵ See Settlement Transmittal Letter Attachment A at 1.

¹⁶ See Settlement Transmittal Letter Attachment A at 10.

¹⁷ See Settlement Transmittal Letter Attachment B at 20.

¹⁸ See Attachment A at 25-35, 44 and Attachment B at 4-7, and 9.

¹⁹ Attachment B at 19.

²⁰ *Id.* at 7.

²¹ Attachment A at 38 and Attachment B at 11 and 14.

take it has introduced a greater level of uncertainty than a year ago as to where in North Dakota a third plant may be built.²²

32. Badlands states that the Alliance system transports rich gas, which must be processed (*i.e.*, the NGLs extracted) to meet downstream quality specifications. Badlands states that Alliance has entered into a Heat Content Management Agreement granting Aux Sable Liquid Products LP (Aux Sable), its affiliate, the *sole and exclusive* right to extract all NGLs from the rich gas stream. Badlands states that Alliance Canada requires, as a condition of service, shippers to execute Extraction Agreements granting Aux Sable the *sole and exclusive* right to extract NGLs from rich gas transported first by Alliance Canada and later by Alliance. As a result of the Alliance Companies' efforts, all shippers on Alliance have executed an Extraction Agreement giving Aux Sable the *sole and exclusive* right to extract NGLs from gas transported by Alliance. Badlands states that the Extraction Agreement is effective as long as a shipper transports any gas on Alliance and then for another two years. Accordingly, Badlands asserts that the Alliance Companies and Aux Sable have created a perpetual arrangement in which Aux Sable will always have the *sole and exclusive* right to extract all NGLs transported by Alliance.

33. Badlands contends that the organizational structure is intended to mask the true nature of the bundled service and limit regulatory oversight. Badlands asserts that Alliance recently boasted to its lenders that Aux Sable's "right to extract NGL's from natural gas transported on Alliance provides a unique, high value, total energy delivery system."²³ Badlands submits that this "total energy delivery system" and in particular, the sole and exclusive processing arrangement between the Alliance Companies and Aux Sable, is anticompetitive, unduly discriminatory, and contrary to the Commission's open access rules and regulations. Badlands states that while Alliance may claim that the roles played by Alliance Canada and Aux Sable in this "total energy delivery system" are separate and distinct from that performed by Alliance and that the Commission should not examine the competitive impacts and total cost of the bundled transportation and processing service, that's not the story Alliance tells its lenders.

34. Badlands states it is developing a multi-billion dollar polyethylene facility (PE Facility) in North Dakota and requires supplies of ethane (an NGL) as a feedstock and has requested a delivery point interconnection with Alliance. Alliance that asserts because of the "closed access" Alliance System, Badlands cannot take deliveries of rich gas transported by Alliance, nor can it connect to the pipeline and build a straddle plant to NGLs, unless Aux Sable consents.

²² Attachment B at 18.

²³ Gilliam Affidavit, Exhibit No. 41 (Alliance Noteholder Update) at 16.

35. Badlands states that this consolidated proceeding involves, among other things, tariff changes proposed by Alliance to protect its sole and exclusive processing arrangement with Aux Sable. Badlands asserts that Alliance never complied with the Commission's regulations to support any of the changes. Badlands states that, initially, Alliance tried (in Docket No. RP15-1022-000) to create a Commission-enforceable obligation for shippers of Canadian gas to execute an Extraction Agreement with Aux Sable. Badlands states that after it objected, Alliance tried (in Docket No. RP16-581-000) to mask the affiliate arrangement by replacing tariff references to Aux Sable with "Processing Plant." Badlands objected again.

36. Badlands states that in Docket No. RP15-1022-000, the Commission found that the proposed tariff changes "have not been shown to be just and reasonable, and may be unjust, unreasonable and unduly discriminatory or otherwise unlawful," suspended all the tariff records, and set for hearing all issues related to those proposed tariff changes. Badlands states that the Commission made the same finding regarding the proposed tariff changes in Docket No. RP16-581-000 and consolidated the two proceedings.

37. Badlands states that during the initial stage of the hearing process, Alliance filed its Stipulation. Article VII (Resolution of the Issues Raised by Badlands) purports to resolve all concerns with the sole and exclusive processing arrangement with two promises. Badlands states that first, Alliance promises not to file during the term of the settlement two patently illegal tariff changes: (1) require shippers to contract with its affiliate and (2) prohibit shippers from contracting with unaffiliated processors. Second, Badlands states that Alliance promises to amend its tariff by withdrawing the unsupported tariff change from Docket No. RP15-1022-000 and making a few cosmetic changes to the tariff (i.e., identifying Alliance Canada and Aux Sable as affiliates and removing "sole and exclusive" from the definition of Extraction Agreement).

38. Badlands contends that Article VII of Alliance's Stipulation does not resolve Badlands' concerns, but instead makes things worse. Badlands states that the sole and exclusive processing arrangement with Aux Sable remains unchanged, because of contractual rights and obligations resulting from the Alliance Companies' exercise of market power. Further, Badlands asserts that approval of Article VII would constitute approval of the sole and exclusive processing arrangement. It would terminate the evidentiary hearing, and the moratorium provisions in Article II would extinguish for three years Badlands' rights under Section 5 of the Natural Gas Act.

39. Badlands asserts that under Rule 602(h)(2), the Presiding Judge cannot certify Alliance's contested Stipulation because (1) Badlands has raised material issues of fact with regard to Article VII and (2) there is not substantial record evidence for the Commission to make a reasoned decision on the merits of the contested issues, because when filing the proposed processing changes Alliance failed to submit the required supporting information.

40. However, Badlands asserts that acting under Rule 602(h)(2)(iv), the Presiding Judge could sever Article VII and natural gas processing issues, but certify the remainder of Alliance's Stipulation as uncontested. This may be the only way Alliance's Stipulation can be certified. Badlands submits that Article VIII would appear to prohibit severance of the natural gas processing issues. Upon closer inspection, however, severance is contemplated because Article VIII also provides Alliance with the right to approve any modifications. Badlands contends that severance is the best possible outcome: it allows Alliance and consenting parties to enjoy their negotiated benefits, but Badlands to litigate its concerns.

41. Badlands states that the Commission, under Rule 602(h) of its Rules of Practice and Procedure, may only decide a contested settlement "if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact." Badlands asserts that neither option is available (at least with regard to the entire Stipulation).

42. Badlands states that when confronting a contested settlement, under *Trailblazer* the Commission has four options under which it could approve the settlement, only one of which may be appropriate here. First, Badlands asserts that the Commission cannot render a merits decision on each contention of Badlands because there is an inadequate record (at least with regard to natural gas processing issues and Article VII). Badlands states that the reason is simple: Alliance filed in both Docket Nos. RP15-1022-000 and RP16-581-000 tariff revisions involving natural gas processing, but never submitted the information required under § 154.204. Badlands contends that there is simply insufficient record evidence for the Commission to resolve the ultimate contested issue – the lawfulness of the sole and exclusive processing arrangement.

43. Second, Badlands asserts that Alliance's Stipulation cannot be viewed as a "package" in which the overall result is just and reasonable because the package would include (1) unsupported tariff changes which the Commission previously determined were not shown to be just and reasonable and (2) approval of the sole and exclusive processing arrangement, which the Commission in *Tennessee*²⁴ found unlawful. Even more important, Badlands states that it would fare much worse under Alliance's Stipulation than under litigation: approval of the Alliance/Aux Sable sole and exclusive processing arrangement would ensure that Badlands cannot obtain an interconnection to accept rich gas deliveries or construct a straddle plant to extract NGLs (unless Aux Sable consents), and it would prevent Badlands from filing an NGA Section 5 complaint challenging the Alliance/Aux Sable relationship.

²⁴ *Tennessee Gas Pipeline, L.L.C.*, 143 FERC ¶ 61,128, at P 59 (2013) (Commission held that an exclusive processing arrangement with a pipeline's affiliate violated the Commission's interconnection policy).

44. Third, Badlands contends that the Commission cannot determine that the limited benefits of Alliance's Stipulation outweigh the nature of Badlands' objections. Badlands asserts that limited interruptible rate relief cannot outweigh the negative aspects of approving unsupported tariff provisions involving natural gas processing, much less insulating, protecting and approving the illegal "sole and exclusive" processing arrangement between Alliance and Aux Sable. Badlands submits its interests in this proceeding are significant and real: approval of Alliance's Stipulation would harm Badlands, which has filed an interconnection request, but will never be able to take deliveries of rich gas or construct a straddle plant to extract NGLs, unless Aux Sable consents.

45. Fourth, Badlands states that the Commission can allow consenting parties to receive the benefit of the settlement, but sever Article VII (Resolution of Issues Raised by Badlands) and natural gas processing issues. For the same reasons severance makes sense for certification, Badlands asserts that it makes sense for Commission approval of Alliance's Stipulation. Badlands asserts that severance is the best possible outcome: it allows Alliance and consenting parties to enjoy their negotiated benefits, but Badlands to litigate its concerns.

46. Trial Staff states that Rule 602(f)(4) requires that any comment that contests a settlement "by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact...." Trial Staff submits that Badlands has more than satisfied this requirement.

47. Trial Staff submits that Badlands' claim that it has asserted facts which, if true, demonstrate violations of the Commission's regulations and policies is credible and warrants the Commission providing an evidentiary forum for Alliance and Badlands (and other parties) to submit evidence to determine their truth or falsity. Trial Staff asserts that Badlands has fulfilled the requirements of the Commission's Rules and demonstrated the existence of genuine issues of material fact which cannot be resolved based on the current state of the evidentiary record.

48. Trial Staff asserts that a cursory review of the Extraction Agreement lends strong support to Badlands assertions with respect to: i) the sole and exclusive processing arrangement between Alliance and Aux Sable and ii) that the Alliance companies are one "giant corporate family that acts as a single entity providing a bundled service consisting of transportation and processing rich gas containing liquids."²⁵

49. Trial Staff states that Alliance USA has executed a Heat Content Management Agreement with Aux Sable Extraction and Aux Sable Liquid Products. Badlands states

²⁵ Initial Comments of Badlands and Exhibit No. 11, Extraction Agreement at 2.

in its Initial Comments that this Agreement vests in Aux Sable the *sole and exclusive right* to extract all natural gas liquids transported by Alliance. Trial Staff asserts that the question of whether Alliance USA contractually granted its affiliate Aux Sable the *sole and exclusive right* to extract all natural gas liquids transported by Alliance constitutes an additional issue of material fact. If correct, it is unclear how any revisions to Alliance's tariff which remove references to Aux Sable as a natural gas liquids processor would interact with Alliance's underlying contractual obligation to allow *only* Aux Sable to extract natural gas liquids from the gas it transports. Trial Staff contends that the Heat Content Management Agreement is a critical document to secure a complete and accurate understanding of the natural gas processing issue. It is not part of the evidentiary record.²⁶ Trial Staff submits that severing this issue and providing for development of the record through a hearing would provide the opportunity for the Commission to review this document and fully understand its implications in arriving at a reasoned decision based on substantial evidence.

50. Trial Staff states that in its July 7, 2016 cover letter to the settlement, Alliance suggested that the settlement could be approved pursuant to the *Trailblazer I, II or III* approaches. Trial Staff urges the Commission to adopt the *Trailblazer IV* approach. Trial Staff contends that *Trailblazer I, II, and III* are simply not applicable to the facts in the instant matter.

51. Trial Staff states that the Commission's description of the applicability of the *Trailblazer IV* approach appears "hand-tailored" for the facts in this proceeding:

In some cases, it is impossible to impose the settlement on the contesting parties under any rationale due to the nature of the contesting parties' objection. This may be because the record is not sufficient to reach a merits decision or the objection raises a legal bar to the settlement. In such circumstances, the Commission nevertheless may be able to preserve the settlement for the consenting parties by severing the contesting parties, and approving the settlement as uncontested for the consenting parties. This permits the contesting parties to obtain a litigated result on the merits while the consenting parties receive the benefits of their bargain.²⁷

²⁶ While Alliance filed the Heat Content Management Agreement with its reply comments, this does not change the fact that a hearing is still needed to address the many material facts in dispute.

²⁷ *Trailblazer*, 85 FERC at 62,334 (1998).

Trial Staff contends that while the Commission language quoted above discusses severing contesting parties - and Badlands is requesting that the gas processing issue be severed - the reasoning underlying Commission's finding is equally applicable to the relief sought by Badlands. Trial Staff submits that there is almost no record evidence on the natural gas processing issue addressed by Article VII of the settlement; there is unquestionably not substantial record evidence sufficient for the Commission to reach reasoned decision on these issues. Nevertheless, as provided by the *Trailblazer IV* approach and stated above, the Commission may preserve the benefit of the settlement for the consenting parties by severing the Article VII gas processing issues and approving the remainder of the settlement as fair and reasonable and in the public interest.²⁸

2. Commission Decision

52. The Commission has reviewed the extensive pleadings and associated exhibits filed concerning the gas processing provision of the settlement and has determined that there are genuine issues of material fact in dispute that require examination at an administrative hearing. Alliance and Badlands have painted completely different pictures concerning gas processing on the Alliance pipeline. The Commission finds that an administrative hearing is the only appropriate option that will provide all interested parties the opportunity to engage in discovery, to scrutinize exhibits and documents and to cross-examine witnesses for the purposes of establishing an adequate evidentiary record. Accordingly, pursuant to the *Trailblazer IV* option, the Commission will sever gas processing issues arising from Article VII of the settlement and remand the issue to the ALJ for the purposes of conducting a hearing. The Commission wishes to make clear that it is severing the gas processing issue and not Badlands. Thus, Badlands, Trial Staff as well as any other interested parties can participate in the hearing. As Trial Staff states:

Such an outcome would give any contesting party or parties an opportunity to develop a factual record for the Presiding Judge and Commission's consideration on a variety of important and difficult legal and factual issues (where no such detailed factual record currently exists) while preserving the benefit of the rate reductions provided by the Settlement to the non-contesting parties.²⁹

²⁸ Trial Staff asserts that the settlement contemplates such a result. Article VIII provides in relevant part that if the Commission modifies or conditions the settlement, "this Stipulation shall be deemed withdrawn unless Alliance, within five business days of the Commission's initial order addressing this Stipulation notifies all parties that the modifications or conditions are acceptable to Alliance."

²⁹ Trial Staff Initial Comments at 2.

53. While the Commission is approving the settlement pursuant to the *Trailblazer IV* option, the Commission will also explain why the other *Trailblazer* options do not apply to the facts of this case. A merits decision under the *Trailblazer I* option is not possible because, as already discussed above, there are genuine issues of material fact in dispute and there is no adequate record upon which to make a decision based upon substantial evidence. Under the *Trailblazer II* option, the Commission can approve a contested settlement if it finds the settlement provides an overall just and reasonable result and the contesting party is in no worse position than if the case were litigated. That is certainly not the case here. Badlands, as supported by Trial Staff, raise serious issues concerning the potential preferential and discriminatory nature of the gas processing provision of the settlement. Moreover, Badlands would be in a worse position than it would be if the case were litigated because, under the settlement moratorium, Badlands could not pursue a complaint on any issue, including gas processing, for nearly three years until October 1, 2019.

54. Finally, under the *Trailblazer III* option the Commission can approve a contested settlement if the benefits of the settlement outweigh the nature of the objections and the contesting party's interests are too attenuated. In this case, because Badlands is only contesting the gas processing provision of the settlement, the benefits of the settlement, including rate reductions, will be realized by all shippers. In addition, Alliance's current gas processing provisions and arrangements would continue and there could be no changes until litigation is concluded. The Commission also does not find that Badlands' interests are too attenuated. Badlands indicates that it wants to be a shipper of Alliance and has submitted a request for interconnection to the pipeline.³⁰ It has discussed its plans to build a plant in North Dakota that requires ethane and natural gas from Alliance. The fact that Alliance may disagree with or have criticisms of Badlands' business plans does not diminish Badlands' interest in the proceeding.

C. Standard of Review

55. Article XI, Standard of Review, of the Alliance settlement reads as follows:

Once approved by the Commission, the standard of review for any proposed modifications to the provisions of the Stipulation by the

³⁰ There is also a dispute of fact concerning the interconnection request. Alliance asserts that Badland's request was not complete. Alliance Settlement Transmittal Letter at 8. Badlands contends Alliance's representative discouraged its pursuit of an interconnection request and indicated that it would not be granted. Badlands Initial Comments at 22-26.

Commission acting *sua sponte* or the parties and/or their affiliates in these proceedings acting unanimously, will be the just and reasonable standard as described in *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002). The standard of review for any proposed modifications to the provisions of the Stipulation at the request of one or more but less than all parties and/or their affiliates in these proceedings or any other person will be the “public interest” standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the “*Mobile-Sierra* doctrine”). See also *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008); *NRG Power Marketing, LLC v. Maine Public Util. Comm’n*, 130 S. Ct. 693 (2010).

1. Comments

56. Badlands asserts that if the Commission approves the settlement (and thereby denies Badlands the opportunity to litigate the issues set for hearing), Article II of the settlement would extinguish Badlands’ NGA Section 5 rights because this moratorium provision prohibits section 5 challenges prior to October 1, 2019. Badlands states that Supporting Parties obtained concessions from the pipeline and may not be inclined to challenge the settlement. Badlands asserts that even if the concerns with Article II could somehow be mitigated, the “heightened” standard of review in Article XI makes any challenge almost impossible.

57. Trial Staff contends that it is unclear what Alliance means when it states that the standard of review for the Commission acting *sua sponte* or the parties acting unanimously will be the just and reasonable standard as described in *El Paso Natural Gas Co. (El Paso)*.³¹ Trial Staff asserts that it is not clear whether the citation to *El Paso* is intended to make the more stringent *Mobile-Sierra* “public interest” standard applicable to the Commission and the parties acting unanimously. Trial Staff argues that the distinction that Alliance is attempting to draw is unclear because in *El Paso*, the Commission chose to apply the *Mobile-Sierra* standard of review to its analysis of whether it could modify contracts that were the product of a settlement.³² Trial Staff submits that later orders from the Commission are more instructive and should be considered when determining the standard of review applicable to the settlement.

³¹ Trial Staff Initial Comments at 13 (citing *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002) (*El Paso*)).

³² *Id.* (citing *El Paso*, 99 FERC ¶ 61,244 at 62,005).

58. Trial Staff asserts the instant settlement establishes recourse rates and other general tariff provisions, not contract rates, which will be generally applicable to all present and future (recourse rate) customers and not just the parties to the settlement. Trial Staff submits that, not surprisingly, Alliance has not alleged any “compelling circumstances” such as those found in *Devon Power*; such circumstances do not exist. Accordingly, Trial Staff argues, based on the Commission’s findings in *HIOS* and *Petal Gas Storage*,³³ as well as guidance provided in *Devon Power*,³⁴ the facts present here do not warrant application of the more stringent “public interest” standard to modifications to the settlement by the Commission acting *sua sponte* or third parties. Trial Staff maintains that, in light of the lack of clarity present in Alliance’s provision, the Commission should specify the standard of review it intends to apply to future changes to the settlement if proposed by the Commission itself when acting *sua sponte* as well as third parties. Trial Staff suggests that the following provision replace the ambiguous language proposed in Article XI.³⁵

Once approved by the Commission, the standard of review for any proposed modifications to the provisions of the Settlement by the Commission acting *sua sponte*, the Settling Parties acting unanimously, or third parties will be the just and reasonable standard. The standard for review for any proposed modifications to the provisions of the Settlement at the request of one or more but less than all Settling Parties will be the “public interest” standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* and *Federal Power Commission v. Sierra Pacific Power Co.* (the “*Mobile-Sierra doctrine*”). *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

59. Trial Staff argues that this language clearly states the applicable standard of review for the Commission, non-settling parties, and settling parties whether acting unanimously or not. Trial Staff states this language also comports with Commission precedent regarding the facts and circumstances necessary to apply the more stringent “public interest” standard of review. Accordingly, Trial Staff asserts that the

³³ *Id.* at 16 (citing *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at PP 22-25 (2011) (*HIOS*); *Petal Gas Storage L.L.C.*, 135 FERC ¶ 61,152, at PP 16-18 (2011)).

³⁴ *Id.* (citing *Devon Power LLC*, 137 FERC ¶ 61,073, at P 37 (2011)).

³⁵ Trial Staff states that this is identical language to that included in Article XVIII Section 6 of the recent Florida Gas Transmission Company LLC Stipulation and Agreement. *Id.* (*Florida Gas Transmission Company, LLC*, 153 FERC ¶ 61,279 (2015)).

Commission should either direct Alliance to replace Article XI as suggested or, at a minimum, clarify which standard of review applies to itself, third parties and the settling parties.

60. Alliance asserts that Badlands and Trial Staff are wrong on the standard of review for changes to the settlement. Alliance states that it proposed to place a reasonable limitation on the Commission's ability to modify the settlement, acting *sua sponte*, or at the request of third parties not involved in the current proceedings, under the just and reasonable standard. Because this is the lowest bar on the scale, Alliance states it inserted a citation to *El Paso*, to ensure that something beyond a change in the Commission's ratemaking policies or a policy change no longer favoring "black box" settlements would be required to support subsequent modifications of the settlement under a just and reasonable standard. Alliance's intent was not to graft the highest *Mobile-Sierra* bar onto such Commission actions but to gain some assurance that the Commission would remain faithful to what it said in *El Paso*.

61. Alliance states that in *El Paso*, the Commission stated that "the Commission is extremely reluctant to alter a settlement during its term."³⁶ Alliance submits because circumstances had "changed drastically since the [El Paso] Settlements were executed" and one party suggested that El Paso was "in a crisis," the Commission found that it was appropriate to modify a settlement during its term. Alliance states that the Commission did not modify the rate aspects of El Paso's settlement.³⁷ Alliance is asking that those same assurances be provided in the Commission's order approving the settlement with respect to both *sua sponte* Commission action and efforts by third parties to attack, and potentially lower, the recourse rates agreed to by Alliance or the Appendix B cost tracking mechanism.

2. Commission Decision

62. Because the settlement appears to invoke what Alliance intends to be a heightened version of the just and reasonable standard (though not amounting to the *Mobile-Sierra* "public interest" standard of review) with respect to the Commission acting *sua sponte*, and could be read as invoking the *Mobile-Sierra* "public interest" presumption with respect to third parties, we will analyze the applicability here of those more rigorous applications of the just and reasonable standard.

63. The *Mobile-Sierra* "public interest" presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on

³⁶ Alliance Reply Comments at 57 (citing *El Paso*, 99 FERC at 62,008).

³⁷ *Id.* at 58 (citing *El Paso*, 99 FERC at 62,008).

whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either:

(1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,³⁸ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory "just and reasonable" standard of review on future changes to agreements that fall within the second category described above.

64. The settlement establishes recourse rates and other general tariff provisions, which will be generally applicable to all present and future recourse rate customers and not just the parties to the settlement. Consequently, Alliance's settlement does not embody "contract rates, terms, or conditions that *necessarily* qualify for a *Mobile-Sierra* presumption."³⁹

65. As we have stated recently, in the context of reviewing settlements that do not involve "contract rates," the Commission has discretion as to whether to approve a request to impose on third parties the more rigorous application of the statutory "just and reasonable" standard of review that is often characterized as the *Mobile-Sierra* "public interest" standard of review.⁴⁰ The Commission also stated in these orders that it will not approve imposition of that more rigorous application of the statutory "just and reasonable" standard of review on future changes to an agreement sought by non-settling third parties, absent compelling circumstances such as were found to exist in *Devon Power*. Alliance has not alleged any "compelling circumstances" and we find that the circumstances presented here do not satisfy that test. Thus, we find it unjust and unreasonable to impose a more rigorous application of the statutory "just and reasonable" standard of review in the instant proceeding with respect to future changes to the

³⁸ *New England Power Generators Ass'n. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

³⁹ *Panhandle Eastern Pipe Line Co.*, 143 FERC ¶ 61,041, at P 84 (2013); *Entergy Arkansas, Inc.*, 143 FERC ¶ 61,299, at P 92 (2013).

⁴⁰ See, e.g., *MidAmerican Energy Co.*, 138 FERC ¶ 61,028, at P 7 (2012) (citing *Devon Power, LLC*, 134 FERC ¶ 61,208, *order on reh'g*, 137 FERC ¶ 61,073 (2011) (*Devon Power*), *aff'd*, *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364 (D.C. Cir. 2013); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *HIOS*, 135 FERC ¶ 61,105 at P 24).

settlement sought by a non-settling third party. Similarly, on the record here, we find it unjust and unreasonable to impose Alliance's proposed more rigorous application of the statutory "just and reasonable" standard of review in the instant proceeding with respect to future changes to the settlement sought by the Commission acting *sua sponte*.

66. With the exception of the standard of review and gas processing provision issues which are being severed for further litigation, the uncontested portions of the settlement appear to be fair and reasonable and in the public interest.⁴¹ As such, the settlement is conditionally approved subject to the settling parties filing, within 30 days of the date of this order, a revised settlement agreement reflecting a revision to the standard of review provision that applies to the Commission acting *sua sponte* and to third parties.

D. Pipeline Safety and Greenhouse Gas Cost Tracker

67. The settlement proposes to include as a new Article 34 of the GT&C, a Greenhouse House Gas and Pipeline Safety tracker (GHG/PS Tracker) to "set forth the procedures Transporter shall use to recover the Cost of Service associated with Pipeline Safety Costs and Greenhouse Gas Costs."⁴² Article 34 defines these costs as costs incurred by Alliance to comply with new pipeline safety and greenhouse gas legislation and regulations that were not effective on March 31, 2016. Article 34 further defines the "Transmission Cost of Service" used to calculate the surcharge as follows:

"Transmission Cost of Service" shall mean with respect to facilities in service during the period of the surcharge, for each Annual Period, the sum of (A) the cost of service attributable to capital expenditures that are Pipeline Safety Costs or Greenhouse Gas Costs in the transmission function, determined by multiplying such capital expenditures (net of any applicable accumulated deferred income taxes and accumulated depreciation) by the sum of (i) a pretax rate of return of 14.84 percent and (ii) the applicable depreciation and amortization rates; (B) operation and maintenance expenses that are Pipeline Safety Costs or Greenhouse Gas Costs in the transmission function, and (C) the transmission portion of the administrative and general expenses that are related to Pipeline Safety Costs or Greenhouse Gas Costs.

⁴¹ Likewise, the Commission's approval of the settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

⁴² Settlement, Article III and Appendix B at 9-12.

This cost of service is capped at \$20 million for each annual period, and Alliance may not make a filing to implement a GHG/PS surcharge unless the cost of service exceeds \$10 million. The surcharge must terminate by the effective date of Alliance's next general NGA section 4 rate case, which will not be later than April 1, 2020.

1. Comments

68. Trial Staff supports the inclusion of the GHG/PS Tracker in Alliance's tariff because it provides a means for Alliance to collect certain costs incurred to address greenhouse gas and pipeline safety issues. However, the proposed provision above does not limit the recoverable costs to those that are one-time or non-recurring. As a result, Trial Staff states the provision appears to permit Alliance to recover greenhouse gas and pipeline safety related costs that are beyond those contemplated by the Commission as outlined in the policy statement on *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*.⁴³

69. Trial Staff states that in defining the costs eligible to be recovered under such trackers or surcharges, the Commission stated that such costs "should generally be limited to (1) one-time capital costs incurred to modify or replace existing facilities on the pipeline's system to comply with safety or environmental regulations issued by PHMSA, EPA, or other federal or state government agencies, or (2) other one-time capital costs shown to be necessary for the safe or efficient operation of the pipeline."⁴⁴ Trial Staff states that the Commission stated that it does not intend for capital costs the pipeline incurs as part of its *ordinary, recurring* system maintenance requirements to be included.⁴⁵ The Commission declined, however, to impose a "blanket prohibition" on non-capital costs.⁴⁶

70. Trial Staff contends that the language proposed by Alliance does not limit the inclusion of such non-capital costs to those that are non-recurring and therefore appears to be inconsistent with the *Policy Statement* that repeatedly refers to generally includable costs that are non-recurring or one-time costs.⁴⁷ In addition, there is no language in the

⁴³ 151 FERC ¶ 61,047, at PP 31-34 (2015) (*Policy Statement*), *clarification denied*, 152 FERC ¶ 61,046 (2015).

⁴⁴ *Id.* P 63.

⁴⁵ *Id.*

⁴⁶ *Id.* P 65.

⁴⁷ *See id.* PP 31, 34, 63, 65.

settlement that further clarifies that the scope of the costs that can be collected under the GHG/PS Tracker would be limited to those that are non-recurring as the settlement simply states that the GHG/PS Tracker allows Alliance to file to recover “qualifying costs” without further indication of what comprises such costs.⁴⁸ Accordingly, Trial Staff asserts that the GHG/PS Tracker language as proposed should be modified to bring the costs eligible for recovery pursuant to Article 34 of the GT&C in line with Commission policy.

71. To confine the recoverable costs to those that are “non-recurring” as specified by the Commission in the *Policy Statement*, Trial Staff suggests that the word “non-recurring” be inserted as shown below:

(B) non-recurring operation and maintenance expenses that are Pipeline Safety Costs or Greenhouse Gas Costs in the transmission function, and (C) the non-recurring transmission portion of the administrative and general expenses that are related to Pipeline Safety Costs or Greenhouse Gas Costs

72. Trial Staff submits that its proposed revisions clarify that the costs recoverable pursuant to Article 34 of the GT&C should be limited to those that are non-recurring consistent with the guidance in the *Policy Statement*. Trial Staff asserts that its proposed revision also addresses the Commission’s intent to omit ordinary, recurring system maintenance requirements from inclusion in the modernization cost tracker.⁴⁹

73. Alliance asserts that Trial Staff’s proposed modifications to the cost tracking mechanism should be rejected. Alliance submits that the proposed changes fail to recognize the purpose of the settlement’s Appendix B tariff mechanism and incorrectly characterize the mechanism as one which must meet the requirements of the Commission’s April 16, 2015 *Policy Statement* related to modernization costs. Alliance submits that Trial Staff’s objections provide no basis for the Commission to modify the GHG/PS Tracker.

74. Alliance states that the Appendix B mechanism has one purpose: Because of the significant rate reductions and the extended moratorium in the settlement, Alliance requires protection against significant cost increases arising from safety or greenhouse gas compliance under *new* rules of general applicability. Alliance submits that the Appendix B mechanism provides that protection. Alliance states that it recovers only costs associated with “New” requirements, defined in Section 34.2(f) as effective on or

⁴⁸ Settlement at 7.

⁴⁹ See *Policy Statement*, 151 FERC ¶ 61,047 at P 63.

after March 31, 2016. Alliance contends that the Appendix B mechanism is not a PL15-1 *Policy Statement* mechanism, and therefore need not comply with the requirements set forth in that *Policy Statement*. In fact, Alliance asserts that Article III of the settlement provides that, after the moratorium ends on October 1, 2019, Alliance may then (but not before) file a PL15-1 tracking mechanism. Until that date, however, Alliance may recover only costs related to “New” requirements under the settlement’s mechanism and may not recover costs through increased recourse rates associated with the broader modernization categories contemplated in PL15-1.

75. Alliance argues that Trial Staff’s proposal to insert the term “non-recurring” to limit the costs that may be recovered under the Appendix B mechanism would defeat the core purpose of the mechanism. Alliance asserts that all “New” costs, recurring or not, must be eligible for recovery to provide Alliance the protection it bargained for with all active parties in the case. Alliance states that nothing beyond costs resulting from “New” requirements may be recovered and all parties may challenge whether any costs properly qualify for recovery under the Appendix B mechanism. Alliance concludes that the Appendix B addition to the GT&C of Alliance’s tariff should therefore be approved without modification.⁵⁰

2. Commission Decision

76. The Commission has examined the proposed GHG/PS tracker proposed by Alliance and declines to make the modifications requested by Trial Staff. The Commission has consistently approved tracker mechanisms to recover pipeline safety and environmental costs in the context of uncontested settlements, including before issuance of the *Policy Statement* on modernization costs.⁵¹ Moreover, the *Policy Statement* emphasized that the Commission “continues to favor settlements” and that the *Policy Statement* would “provide pipelines and their customers wide latitude to reach agreements” on methods to recover pipeline safety and environmental costs.⁵² Thus, the Commission did not intend the *Policy Statement* to restrict the ability of parties to reach uncontested settlements concerning tracker mechanisms for the recovery of these costs

⁵⁰ Alliance submits that a similar mechanism was included in the September 25, 2015 Supplemental Stipulation approved by the Commission in *National Fuel Gas Supply Corp.*, 153 FERC ¶ 61,170, (2015) (*National Fuel*) and in *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,182 (2011) (*Tennessee*).

⁵¹ See, e.g., *Granite State Gas Transmission, Inc.*, 136 FERC ¶ 61,153 (2011); *Florida Gas Transmission Co.*, 109 FERC ¶ 61,320 (2004); *Tennessee*, 137 FERC ¶ 61,182.

⁵² *Policy Statement*, 151 FERC ¶ 61,047 at P 94.

that do not strictly conform to the guidelines in the Commission's *Policy Statement* on modernization costs.

77. The instant tracker has been agreed to by all parties to the proceeding and allows Alliance to recover pipeline safety and greenhouse gas costs for a defined period subject to a minimum threshold and a cap. The tracker was designed to protect Alliance against certain cost increases in exchange for the rate reductions and stability contained in the settlement. Alliance can only file to establish a mechanism pursuant to the *Policy Statement* on modernization costs after the October 1, 2019 moratorium in the settlement ends. Furthermore, the GHG/PS Tracker is substantially similar to mechanisms approved by the Commission in *National Fuel* and *Tennessee*.⁵³ In fact, the *National Fuel* tracker was approved after the Commission issued *Policy Statement* on modernization costs.

The Commission orders:

(A) The gas processing issues contained in Article VII of the settlement are severed and remanded to the ALJ for hearing, as discussed in the body of this order.

(B) The uncontested portions of the settlement are approved as fair and reasonable and in the public interest subject to Alliance filing to modify the standard of review contained in the settlement within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵³ *National Fuel*, 153 FERC ¶ 61,170; *Tennessee*, 137 FERC ¶ 61,182.