98 FERC ¶ 61, 018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Nornew Energy Supply, Inc. Docket Nos. CP01-94-000 and CP01-97-000

and

Norse Pipeline, L.L.C.

Nornew Energy Supply, Inc. Docket Nos. CP01-95-000 and CP01-96-000

ORDER ISSUING CERTIFICATES, DENYING LATE INTERVENTION, CLARIFYING PRIOR ORDER, AND REQUIRING NORSE PIPELINE, L.L.C. TO SHOW CAUSE

(Issued January 16, 2002)

On March 1, 2001, Nornew Energy Supply, Inc. (Nornew) and Norse Pipeline, L.L.C. (Norse) filed applications in Docket Nos. CP01-94-000, CP01-95-000, and CP01-96-000 pursuant to section 7(c) of the Natural Gas Act (NGA).[1] The applications seek the necessary certificate authorization for Nornew to transport natural gas for the Board of Public Utilities of Jamestown, New York (Jamestown BPU) to Jamestown BPU's Samuel A. Carlson Generating Station (Carlson Station). We find Nornew's proposal will serve the public interest by providing natural gas supply and transportation service to Jamestown BPU's Carlson Station to fuel a gas-fired electric generation unit, thereby enabling Jamestown BPU to achieve a dual-fuel capability for its Carlson Station. As a

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[1]These filings were submitted in response to the jurisdictional findings set forth by the Commission in its order issued on December 14, 2000 in Docket No. CP99-600-000. See National Fuel Gas Distribution Corporation, 93 FERC ¶ 61,276 (2000), reh'g denied, 94 FERC ¶ 61,136 (2001).

result, Jamestown BPU will be able to switch between fuels based on price in order to provide electric service to its customers at the least cost. As discussed below, we find that Nornew's proposal is in the public convenience and necessity, and we will grant the requested authorizations, subject to the limitations and conditions set forth herein.[2] We are, however, denying Nornew's request to approve its lease agreement with Jamestown BPU as a nonconforming negotiated rate agreement, as explained herein.

In addition, the filing in Docket No. CP01-94-000 includes information submitted by Norse in support of its claim for continued gathering status for the remainder of Norse's system.[3] This information was submitted to satisfy the Commission's requirement in an order issued on December 14, 2000 (December 14 order) in Docket No. CP99-600-000 that Norse provide evidence that the primary function of any of its facilities continues to be gathering that is exempt from the Commission's jurisdiction pursuant to section 1(b) of the NGA. For reasons discussed herein, we find that Norse has failed to provide information sufficient to permit the Commission to conclude that its remaining facilities perform the primary function of gathering. Accordingly, we are ordering Norse to show cause why the Commission should not find that Norse is engaged in the interstate transportation of natural gas.

We are also clarifying our order issued on April 27, 2001, in Docket No. CP01-97-000 authorizing Nornew to acquire, construct, and lease facilities and granting limited-term certificate authority to operate such facilities to provide transportation service to Jamestown BPU, as discussed herein.

In Docket No. CP01-94-000, Nornew seeks certificate authorization: 1) to acquire from its affiliate, Norse, and to operate 19 miles of pipeline (approximately 14.67 miles of 12-inch and 4.33 miles of 8-inch pipeline) (the Mayville Line); 2) to construct (nunc

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[2] We are certificating the operation of the 7.63 miles of 8-inch pipeline constructed by Nornew, but we decline to grant retroactive construction authority. The Natural Gas Act requires prior certification of jurisdictional facilities. No purpose would be served in this case by granting retroactive authorization for construction of the facilities after they have been built.

[3] Additionally, Norse seeks in Docket No. CP01-94-000 authorization to abandon by sale to Nornew the Mayville Line and appurtenant facilities, and to abandon in place a 2000 foot line at the point where Norse's facilities connect to Nornew's 7.63 miles of eight-inch pipeline. However, as noted in our order issuing Nornew a limited term certificate, such authority is not needed. See Nornew Energy Supply, Inc. and Norse Pipeline, L.L.C., 95 FERC ¶ 61,134 at 61,420, n.2 (2001).

pro tunc) and operate approximately 7.63 miles of 8-inch pipeline;[4] 3) to lease two 360 hp compressors currently situated at Norse's Mayville, New York compressor site; and 4) to construct by rearrangement, certain compression and measurement facilities in Mayville, New York, as well as check valves and regulator devices designed to prevent the flow of gas from Nornew into Norse's gathering facilities located in the Town of Ellery, New York and Mayville, New York, for the purpose of transporting natural gas from Tennessee Gas Pipeline's (Tennessee) facilities in Mayville, New York to Jamestown BPU's Carlson Station, located in Jamestown, New York.

In Docket No. CP01-95-000, Nornew seeks a Part 284 blanket transportation certificate, including pro forma tariff provisions and rate schedules for service under Part 284 and cost support for its proposed rate. Nornew requests, as part of its blanket transportation certificate, the authority to enter into negotiated rate agreements. In connection with this request, Nornew asks that the Commission approve its lease agreement with Jamestown BPU as a nonconforming negotiated rate agreement. In addition, Nornew requests waiver of the reporting, accounting and other requirements imposed by the Commission's regulations.[5] In Docket No. CP01-96-000, Nornew seeks a blanket certificate pursuant to Subpart G of Part 157 authorizing eligible facilities and activities.

I. Background

Norse owns and operates approximately 325 miles of natural gas pipeline located in southwestern New York and northwestern Pennsylvania, which was purchased from Columbia Gas Transmission Corporation (Columbia) in June 1999.[6] Norse states that it gathers gas from local producers and delivers the gas into interstate transmission lines

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[4] In National Fuel Gas Distribution Corporation, 93 FERC ¶ 61,276 (2000), reh'g denied, 94 FERC ¶ 61,136 (2001), the Commission ruled that this 7.63 miles of eight-inch pipeline constructed by Nornew to serve Jamestown BPU was a jurisdictional facility requiring an NGA section 7(c) certificate.

[5] Specifically, Nornew seeks a waiver of the reporting and accounting requirements of Parts 201, 250, 260, and 284 of the Commission's regulations, and the Electronic Data Interchange, Electronic Delivery Mechanism, business practices and electronic communication requirements of the Industry Standards Board.

[6] See Columbia Gas Transmission Corporation and Norse Pipeline, L.L.C., 85 FERC ¶ 61,191 (1998) reh'g denied, 86 FERC ¶ 61,137 (1999), aff'd sub nom., Lomak Petroleum Inc. v. FERC, 206 F.3d 1193 (D.C. Cir. 2000).

and local distribution companies (LDCs). Norse also states that it also delivers small volumes to marketer pipelines and producer gathering systems, and that it does not permit gas transported by any interstate pipeline to enter its system.

Nornew, an affiliate of Norse, is a FERC regulated pipeline,[7] consisting of approximately 26.63 miles of pipeline located in Chautauqua County, New York.[8] Prior to the December 14 order, Nornew was a producer and gatherer of natural gas in New York and operated the Falconer gathering system in New York.[9]

A. The Bid for Service to Carlson Station

In June 1999, the Jamestown BPU issued requests for bids to provide natural gas supply and transportation service to its coal-fired Carlson Station in anticipation of adding a gas-fired electric generation unit.[10] As noted, with the installation of this generation unit, the Carlson Station will have dual-fuel capability which will allow it to switch between fuels based on price in order to provide the most economical electric service to its customers.

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[7] See Nornew Energy Supply, Inc. and Norse Pipeline, L.L.C., 95 FERC ¶ 61,134 (2001).

[8] In Exhibit D to Nornew's application in Docket No. CP01-94-000, Nornew indicated that it was 50 percent owned by Schanson Pipeline Partners, L.P. Nornew is now 100 percent owned by Strata Management Corporation (Strata).

[9] In an August 28, 2001 data response, Nornew explains that the Falconer gathering system was acquired from Nornew by Nornew, Inc., another affiliate wholly owned by Strata.

[10] Jamestown BPU initiated its public bid process under Section 100-a of the New York State General Municipal Law. The Jamestown BPU specified that it wanted to consider the total cost of gas delivered to the Carlson Station, including prices to the primary point of delivery as well as the cost to transport the gas from the primary point of delivery to the point of consumption. The Jamestown BPU also requested bids for the commodity cost of gas. Five bids were received. Two evaluations of the bids were performed. Evaluation of the bids determined that the lowest total gas transportation was through Nornew at $0.6190 per Dth as compared to $0.7701 per Dth for NFGD. Both of the evaluations performed on the bids concurred in recommending Nornew as the least expensive transporter. Neither Nornew nor any affiliate of Nornew bid to provide the gas supply. National Fuel has unsuccessfully challenged the public bid process.

Both Nornew and National Fuel Gas Distribution Corporation (National Fuel) filed bids in response to the Jamestown BPU's proposal. Nornew was the successful bidder. Nornew's accepted bid relied on moving gas from Mayville, New York (where Norse has an interconnection to deliver local production into Tennessee's interstate system) through the Mayville Line,[11] and then through a new 7.3- mile line to be constructed by Nornew, to deliver the gas to the Carlson Station. The bid specifications required that all of the capacity of Nornew's new 7.63-mile pipeline be leased to the Jamestown BPU for twenty years, with lease payments beginning October 1, 2000.

On July 23, 1999, following the award of the Jamestown BPU's transportation bid to Nornew, the Jamestown BPU and Nornew entered into a Gas Facilities Lease Agreement (JBPU lease). The total transportation price to the Carlson Plant incorporates Nornew's costs of arrangements with Norse for transporting the gas to Nornew's new 7.63-mile delivery line, plus Nornew's costs of building, maintaining and operating the pipeline to be leased to Jamestown BPU.

Upon winning the bid, on July 27, 1999, Nornew filed an application with the New York Public Service Commission (NYPSC) to construct and operate a single-purpose, 7.63-mile, 8-inch pipeline extending from an interconnection with Norse, at or near Ellery, New York to the Carlson Station. The NYPSC granted Nornew's application on January 13, 2000 and Nornew constructed the 7.63 miles pipeline between July 27, 2000 and October 8, 2000.

The gas supply contract for the new gas-fired generator was awarded to Texaco Natural Gas, Inc. (Texaco). Under that contract, the gas will be shipped by Texaco on Tennessee's interstate pipeline system to Tennessee's interconnection with Norse at Mayville, New York.

B. Docket No. CP99-600-000

On August 13, 1999, National Fuel filed a petition in Docket No. CP99-600-000 for a declaratory order requesting that the Commission resolve certain issues regarding the jurisdictional status of Norse and Nornew resulting from Nornew's agreement to provide transportation service for the Jamestown BPU using its new 7.63 mile pipeline and Norse's existing facilities. Nornew's new 7.63 mile pipeline interconnects with the

[11] The Mayville Line was owned and historically operated by Norse to move local gas production in New York to Norse's interconnection with Tennessee at Mayville, New York.

Mayville Line owned by Norse and historically operated by Norse to move local gas production in New York to Norse's interconnection with Tennessee at Mayville, New York. National Fuel contended that while Norse and Nornew had theretofore limited their activities to gathering, exempt from the Commission's jurisdiction under section 1(b) of the NGA, Norse's and Nornew's services under the agreement with the Jamestown BPU amount to transportation of gas in interstate commerce.

Simply stated, Norse's and Nornew's position was that no gas previously transported in interstate commerce would physically enter either Norse's system or Nornew's new pipeline; only local production would enter its facilities.[12] Norse and Nornew maintained that the Commission's NGA jurisdiction over natural gas transportation is based on the physical flow of gas across a state line through its system. Norse and Nornew argued that by not allowing gas transported on an interstate pipeline to enter into their systems they should be able to retain their non-jurisdictional gathering status.

In the December 14 order, the Commission found that, notwithstanding Norse's and Nornew's claim that only local supplies would be delivered to the Jamestown BPU and no interstate gas would flow into its system, Nornew had constructed the 7.63 mile, 8-inch diameter pipeline to transport natural gas in interstate commerce for the Jamestown BPU without the requisite certificate authorization under section 7(c) of the NGA. Additionally, the Commission found that under the supply arrangement at issue Norse also would be engaging in jurisdictional transportation service.

The Commission found that Jamestown BPU contracted to purchase gas supplies from Texaco, and that those supplies would be shipped on Tennessee's interstate system with Tennessee's designated point being its interconnection with Norse at Mayville, New York. However, Norse only had the ability to deliver gas into, not to receive gas from, Tennessee's system at that interconnection. Based on the undisputed facts in the record the Commission agreed with National Fuel's conclusion that the Jamestown BPU's gas is to be delivered by Tennessee to Norse by means of a backhaul arrangement, a form of transportation service by displacement.[13]

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[12] Norse emphasized that its interconnection with Tennessee's interstate system at Mayville, New York, is not a point for the delivery of gas from Tennessee's system into Norse's system.

[13] Section 284.1(a) of the Commission's regulations defines "transportation" to include "storage, exchange, backhaul, displacement or other methods of transportation."

(continued...)

Specifically, the Commission concluded: (1) that New York and Pennsylvania production gathered by Norse and which, but for the arrangement with the Jamestown Board, would continue to be delivered into Tennessee's system instead will be diverted into Nornew's new delivery line to the Jamestown BPU's Carlson Station; and (2) that Tennessee will retain the Jamestown BPU's Texaco volumes to meet the contract demands of the purchasers of the diverted local production. Thus, while gas will not physically flow from Tennessee's system into Norse's system, Tennessee will effect delivery to Norse by means of displacement (in this case, by reducing flow from Norse's system into Tennessee's system).

Based on its jurisdictional findings, the Commission directed Norse and Nornew to file within 60 days pro forma tariff sheets and applications for NGA section 7(c) certificates of public convenience and necessity to provide interstate natural gas transportation service to the Jamestown BPU. The Commission further required Nornew and Norse to seek authorization, pursuant to Subpart G of Part 284 of the Commission's regulations, to transport natural gas for others on an open access basis. The Commission also required Norse to provide evidence that the primary function of any of its facilities continues to be gathering that is exempt from the Commission's jurisdiction pursuant to section 1(b) of the NGA.[14]

C. Docket No. CP01-97-000

On March 1, 2001, Norse and Nornew filed a joint application in Docket No. CP01-97-000 pursuant to section 7 of the NGA seeking the necessary certificate authorizations for Nornew to transport natural gas for the Jamestown BPU for a limited-term, pending the Commission's actions in Docket Nos. CP01-94-000, CP01-95-000, and CP01-96-000.

In order to prevent delay in the testing and operation of the new gas-fired electric generation turbine being installed by the Jamestown BPU at the Carlson Station, the Commission issued an order on April 27, 2001 in Docket No. CP01-97-000 (April 27 order), granting Nornew authorization to acquire the 19 mile Mayville Line from Norse;

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[13](...continued)
18 C.F.R. § 284.1(a) (2000). A "backhaul" is a form of "transportation by exchange" where transportation service is in a direction opposite to the aggregate physical flow of the gas in the pipeline.

[14]In a notice issued by the Commission's Office of the Secretary, Norse and Nornew were granted an extension until March 1, 2001, to make their compliance filings.

to construct 500 feet of six-inch pipeline to interconnect Nornew's system with Tennessee; to construct two check valves and regulator devices at the Town of Ellery, New York, and at Mayville, New York, to operationally segregate Norse's and Nornew's systems; and to construct a four-inch delivery tap to connect Nornew's pipeline with the Carlson Station. The April 27 order also granted Nornew a limited-term certificate to lease two 360 hp compressors from Norse and to operate all the proposed facilities and Nornew's existing 7.63-mile pipeline to provide natural gas service to the Carlson Station for the Jamestown BPU. These authorizations were granted to Nornew for a limited term which was to terminate six months from the date of issuance of the April 27 order or, if earlier, thirty days after the date of issuance of an order by the Commission addressing Nornew's applications in Docket Nos. CP01-94-000, et al.[15]

During the effective term of the limited-term certificate, Nornew will transport natural gas in accordance with the terms of the JBPU lease. That agreement requires Nornew to transport supplies sold by Texaco to the Jamestown BPU and tendered by Texaco at Norse's and Tennessee's existing Mayville, New York interconnection.[16] The application for limited-term service authority stated that the supplies transported by Nornew will include gas received by Nornew from both Tennessee and Norse, including gas gathered by Norse in Pennsylvania and New York.

II. Nornew's Proposal

A. Overview and facilities involved

Nornew and Norse state that in light of the jurisdictional determination described above, they have re-arranged their business activities to enable Norse to remain an exempt gatherer pursuant to section 1(b) of the NGA, and to allow Nornew to provide interstate transportation pursuant to section 7(c) of the NGA. Specifically, Nornew and

[15] On October 26, 2001, the Commission issued an order extending the limited-term certificate authorization until January 26, 2002 or until thirty days after the issuance date of any order addressing Nornew's applications in this proceeding, whichever date first occurs. By letter order dated October 30, 2001, Nornew was granted an extension until January 26, 2002 or until thirty days after the issuance date of any order addressing Nornew's applications in this proceeding, whichever date first occurs to complete the construction of the interconnecting facilities with Tennessee and to acquire necessary compression.

[16] Upon completion of the requested construction authority, Nornew will have the ability to receive gas at this point directly from Tennessee.

Norse have agreed that, subject to Commission approval, Nornew will purchase from Norse the Mayville Line and appurtenant facilities extending from an interconnection with Norse in Mayville, New York to the 7.63-mile, 8-inch pipeline Nornew constructed for service to the Carlson Station. Additionally, Nornew states that it will lease from Norse the two 360 hp compressors currently situated at the Norse compressor site at Mayville, New York.

Nornew states that the entire pipeline, from Mayville to Jamestown, will be approximately 26.63 miles in length. According to Nornew, these facilities will enable it to receive natural gas from Norse in Mayville, New York and Ellery, New York,[17] and from Tennessee in Mayville, New York,[18] and to transport and redelivier such gas to the Carlson Station, located in Jamestown, New York. Nornew states that it will install check valves and regulator devises near Ellery and Mayville to prohibit gas flow from Nornew into Norse's gathering facilities. Nornew states that it plans to use the pipeline solely to deliver natural gas owned by the Jamestown BPU to the Carlson Station for the generation of electric energy.[19]

Additionally, Nornew states that it will construct approximately 300 feet of 6-inch pipeline leading from Tennessee's facilities to two 360 hp compressors currently leased by Norse to deliver gas into Tennessee at Mayville. Nornew will also construct approximately 200 feet of 6-inch pipeline from the compressor to Nornew's mainline. All of the construction will take place within existing rights of way and within the current Norse compressor area at Mayville.[20] The compressors will compress gas to approximately 720 p.s.i. Norse will continue to use three other compressors currently used to deliver gas to Tennessee. Nornew aserts that its facilities would transport 6,000 Dt/d on an average day and 15,000 Dt/d during peak electric demand periods.

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[17]The gas received at Ellery will be subject to pressure regulation or future compression.

[18]Nornew states that to permit Nornew to receive gas from Tennessee, Norse has requested Tennessee to reconfigure and operate a delivery tap at its existing station in Mayville, NY, the cost of which will be borne by Nornew.

[19]Nonetheless, Nornew states that it is proposing to offer open-access transportation services because the Commission directed it to seek a Part 284 blanket transportation certificate.

[20]Nornew states that it acquired the rights-of-way from landowners along the route of the 7.63 mile pipeline without resort to eminent domain.

Specifically, Nornew's pipeline will proceed east from the Mayville compressor station through the 14.67 miles of 12-inch pipeline segment of the Mayville Line to a point near Ellery, New York. At this point, the 12-inch pipe connects to the 4.56 mile, 8-inch Mayville Line segment.[21] The pipeline proceeds south from Ellery, New York then southeast, connecting to Nornew's 7.63 mile, 8-inch pipeline to the Carlson Station. The pipeline will terminate on the Carlson Station site at a location near the combustion turbine equipment.

The agreed purchase price for the facilities being transferred from Norse to Nornew is $1,133,886. In addition, Nornew states it is assuming Norse's obligation to pay an outstanding $646,000 for the recent construction of 4.33 miles of the 8-inch pipeline that is being acquired. Nornew maintains that the facilities' value was established as a result of negotiations with Columbia, an unaffiliated third party holding a lien on the facilities. Nornew states that Columbia's agreement to release its lien based on the stated price is evidence that the purchase price was fair.

According to Norse, upon its sale of facilities to Nornew, Norse's remaining facilities (approximately 1,655,393 feet of 2-12 inch pipe) will have the same primary function of gathering as when acquired from Columbia in 1999.[22]

B. Authorizations Requested

Nornew seeks in Docket No. CP01-94-000, certificate authorization: 1) to acquire from its affiliate, Norse,[23] and to operate approximately14.67 miles of 12-inch and 4.33 miles of 8-inch pipeline; 2) to construct (nunc pro tunc) and operate approximately 7.63 miles of 8-inch pipeline;[24] 3) to lease two 360 hp compressors currently situated at

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[21]4.33 miles of the 8-inch pipeline was recently installed by Norse to replace 4-inch pipeline.

[22]Norse has submitted in a March 1, 2001 filing its explanation and evidence of its exempt gathering status, as directed in the December 14 order.

[23]Nornew was granted authority to acquire Norse's facilities in the April 27 order in Docket No. CP01-97-000.

[24]As noted, in National Fuel Gas Distribution Corporation, 93 FERC ¶ 61,276 (2000) reh'g denied 94 FERC ¶ 61,136 (2001), the Commission ruled that this pipeline constructed by Nornew to serve Jamestown BPU was a jurisdictional facility requiring an

(continued...)

Norse's Mayville, New York compressor site; and 4) to construct by rearrangement, certain compression and measurement facilities in Mayville, New York, as well as check valves and regulator devices designed to prevent the flow of gas from Nornew into Norse's gathering facilities located in the Town of Ellery, New York and Mayville, New York,[25] for the purpose of transporting natural gas from Tennessee's facilities in Mayville, New York to Jamestown BPU's Carlson Station, located in Jamestown, New York. Additionally, Norse and Nornew have submitted, as part of their Docket No. CP01-94-000 filing, information and argument in support of their claim for continued gathering status for the remainder of Norse's system.

In Docket No. CP01-95-000, Nornew seeks a Part 284 blanket transportation certificate, including pro forma tariff provisions and rate schedules for service under Part 284 and cost support for its proposed rate. Nornew requests, as part of its blanket transportation certificate, the authority to enter into negotiated rate agreements. In connection with this request, Nornew asks that the Commission approve its lease agreement with Jamestown BPU as a "nonconforming, negotiated rate agreement."[26] In addition, Nornew requests waiver of the reporting, accounting and other requirements imposed by the Commission's regulations.[27] In Docket No. CP01-96-000, Nornew seeks a blanket certificate pursuant to Subpart of Part 157 authorizing eligible facilities and activities.

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[24](...continued)
NGA section 7(c) certificate.

[25]Nornew was granted authority to construct these check valves and regulator devises in the April 27 order in Docket No. CP01-97-000.

[26]Under appropriate circumstances, the Commission has allowed negotiated rates and nonconforming service agreements. We understand Nornew's request for approval of its lease with Jamestown BPU to include a request for approval of the lease as a nonconforming service agreement and the lease payment as a negotiated rate.

[27]Specifically, Nornew seeks a waiver of the reporting and accounting requirements of Parts 201, 250, 260, and 284 of the Commission's regulations, and the electronic Data Interchange, Electronic Delivery Mechanism, business practices and electronic communication requirements of the Industry Standards Board.

C. The JBPU Lease

The JBPU lease provides Jamestown BPU with capacity rights on what is now Nornew's 26.63 mile pipeline from Mayville, New York to Carlson Station for a period of 20 years. Nornew states that under the agreement, Jamestown BPU will nominate deliveries up to its transportation quantity and Nornew will deliver the gas to Carlson Station at the rates that were negotiated through the public bid process. Under the JBPU lease, the Jamestown BPU has leased all of the capacity in Nornew's pipeline, and the Jamestown BPU has agreed to pay Nornew monthly lease payments of $56,508. If deliveries to the Carlson Station exceed 2,000,000 Mcf in any year, the agreement requires the Jamestown BPU to pay Nornew $0.19 for the delivery of each additional Mcf of gas. Nornew asserts that the Jamestown BPU's lease payments to Nornew are based on Nornew's costs of transporting gas from the Mayville interconnect to the Carlson Station and incorporate Nornew's costs of building, maintaining, and operating its new pipeline in which all capacity is to be leased by the Jamestown BPU for twenty years.

Nornew asks the Commission to treat the JBPU lease as a "non-conforming, negotiated rate firm transportation agreement" so that it may honor its commitment to Jamestown BPU. Nornew explains, in further support for this request, that the JBPU lease was negotiated to meet the requirements of Jamestown BPU's public bid requirements, and prior to the Commission's requirement, as a result of the December 14 order, that Nornew must file an open-access tariff.

D. Negotiated Rates

Nornew requests, as part of its Part 284 blanket transportation certificate, the authority to enter into negotiated rate agreements. According to Nornew, this request is made pursuant to and consistent with the Commission's Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines (Alternative Rate Policy Statement).[28] Nornew states that it will abide by the Alternative Rate Policy Statement and any further Commission-established policies respecting negotiated rate transactions. Nornew has filed the JBPU lease as a non-conforming, negotiated rate agreement and has filed a copy of that agreement and reported the transaction in its pro forma FERC Gas Tariff.

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[28] 74 FERC ¶ 61,076 (1996).

E. Waivers sought

Nornew states that because it plans to use the proposed facilities solely to deliver natural gas owned by the Jamestown BPU for use at the Carlson Station, it would be appropriate that the Commission grant Nornew waivers of: (1) the accounting and reporting requirements pursuant to 18 C.F.R. Parts 201 (Uniform System of Accounts), 250 (Approved Forms), and § 260.2 (Form No. 2-A, Annual Report); and (2) all regulations to the extent that such waivers may be necessary in order to grant each of the requested authorizations.

F. Abandonment

Norse does not hold any certificates from the Commission. However, because the jurisdictional status of Norse's facilities has been called into question, Norse, out of an abundance of caution, filed in Docket No.CP01-94-000 an application for abandonment by sale of the facilities to be acquired by Nornew from Norse and for abandonment of two small pipeline segments previously connected to the facilities to be acquired by Nornew,[29] pursuant to section 7(b) of the NGA. As noted above, the abandonment authority sought by Norse in Docket No. CP01-94-000 is not needed.

III. Interventions, Protests, and Answers

Notice of the application in Docket Nos. CP01-94-000 and CP01-96-000 was published in the Federal Register on April 6, 2001 (66 Fed. Reg. 16,050) and notice of the application in Docket No. CP01-95-000 was published in the Federal Register on April 8, 2001 (66 Fed. Reg. 16,217). A timely motion to intervene in Docket Nos. CP01-94-000 and CP01-96-000 was filed by the Public Service Commission of the State of New York (NYPSC).[30] A timely motion to intervene in Docket No. CP01-95-000 was filed by Enron North America Corp.

The Town of Busti, New York (Busti) filed an untimely intervention on August 8, 2001, in which it complained about a noisy compressor station within the town. Nornew

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[29] A 200 foot line at the point the former Norse facilities connect to Nornew's eight-inch line was capped-off east of the Nornew tie-in and a four-inch Norse line west of the Nornew tie-in was blind-flanged and left in place. The producers using those facilities opted to move their production through other gathering systems.

[30] Timely unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2001).

filed an opposition to this motion in which it stated that does not own any pipeline or compression facilities in the town of Busti. Nornew further states that the facilities complained of are owned by South Jamestown Gathering Company, a non-jurisdictional gatherer regulated by the NYPSC. Nornew states that since Busti is not a customer of Nornew, is not located near any of the proposed project facilities, Busti has no direct interest in these proceedings and should not be permitted to intervene. Nornew's opposition is supported by the maps indicating the location of Nornew's project facilities. Busti has not alleged that it is a consumer, customer, competitor, nor a security holder of a party. Moreover, it has not otherwise shown that it may be affected by the proposal such that the public interest requires its participation in these proceedings. Accordingly, we will deny Busti's late intervention in these proceedings.

On April 10, 2001, National Fuel filed a protest, motion to intervene, motion to require compliance filing by Norse, protest and conditional motion to modify Nornew's certificate and motion to require supplemental information in Docket Nos. CP01-94-000 and CP01-96-000, and a protest, motion to intervene, motion to condition certificate, and motion to require supplemental information in Docket Nos. CP01-95-000.

On April 25, 2001, Nornew filed an answer to National Fuel's motion to condition certificate and motion to require supplemental information. On May 10, 2001, National Fuel filed a reply to Nornew's answer. The details of National Fuel's protest and other comments, and of Nornew's answer are discussed below. To the extent that Nornew's answer to National Fuel's motion addresses National Fuel's protests, such answers are prohibited by the Commission's procedural rule. However, we may, for good cause shown, waive this provision.[31] We find good cause to do so in this instance in order to insure a complete record in this proceeding.

IV. Discussion

Since the applications pertain to facilities used for the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission, Nornew's proposal is subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

A. Project Need and the Certificate Policy Statement

On September 15, 1999, the Commission issued its Certificate Policy Statement to provide guidance as to how we will evaluate proposals for certificating new

[31] 18 CFR § 385.13(a)(2).

construction.[32] The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. Our goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

As noted, most of the facilities in question have already been constructed and for those facilities we will issue a certificate only for their operation. Nevertheless, because of the unusual circumstances of this case, we will consider the proposal to operate the facilities under the provisions contained in the Certifiate Policy Statement. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers.

The Commission also considers potential impacts of the proposed project on other pipelines in the market and those existing pipelines' captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

As stated, Nornew's proposed pipeline will provide natural gas service to the Carlson Station, making it possible for the Jamestown BPU to fuel its new, recently installed gas-fired electric generation unit to provide flexibility in fuel supply for the Carlson Station. As a result, the Carlson Station will be able to serve its wholesale and

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[32] Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement), 88 FERC ¶ 61,227 (1999); order clarifying statement of policy, 90 FERC ¶ 61,128 (2000); order further clarifying statement of policy, 92 FERC ¶ 61,094 (2000).

retail customers in New York and provide additional electric power in the open market at the lowest cost, utilizing state-of-the-art technology.

1. Subsidization and adverse impact on existing customers.

Nornew is a new interstate pipeline which will provide transportation service for a single firm customer, the Jamestown BPU. Nornew has no existing customers. Therefore, there will be no subsidization by existing customers. Moreover, since there are no existing customers, there will be no existing Nornew customers adversely impacted by its proposal.[33]

2. Other adverse impacts

a. other pipelines and their captive customers

We are satisfied that Nornew's proposed project will have no adverse impact on existing pipelines in the market and their captive customers. None of the firm demand to be served by Nornew is attributable to turned back capacity on other pipelines in the market. The market demand to be served by Nornew represents new gas demand related to the Jamestown BPU's decision to install a gas-fired turbine unit at its Carlson Station electric generation facilities. The gas supplies needed for the Carlson Station's new turbine represent new gas demand. Although National Fuel currently distributes gas in the City of Jamestown, it was not selected to provide service to meet the new demand at the Carlson Station. Instead, Nornew's proposal was selected through the public bid process.

National Fuel has argued Nornew won the Jamestown BPU's bid because Norse was going to provide the portion of the transportation service over the Mayville Line at a preferential rate. However, following the Commission's assertion of jurisdiction, Norse agreed to sell the Mayville Line to Nornew at a price which, as discussed herein, the Commission finds reasonable. Further, Nornew has stated that it intends to honor its commitment to the Jamestown BPU at the agreed upon rate. While the Commission is rejecting the JBPU lease, as discussed herein, the Commission is approving a Part 284 recourse rate and providing sufficient authority for Nornew to charge rates that will be equivalent to the agreed-upon lease payments.

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[33]As discussed, infra, we dismiss National Fuel's claim that Nornew's project will be subsidized by existing customers.

In view of these circumstances, we do not find it necessary or appropriate to deny the Jamestown BPU the benefit of its bargain by refusing to certificate Nornew's long-term service based on now moot arguments regarding whether Norse originally agreed to provide part of the service at an unduly preferential rate.

b. affected landowners and communities

Nornew's project will utilize the Mayville Line, an existing pipeline that was part of Norse's gathering system. Nornew obtained the necessary rights-of-way for the 7.63-mile section of new pipeline. All other related construction activities, including the rearrangement of pipe in the Mayville compressor areas and the regulators to be installed at Ellery and Mayville, are within existing rights of way. Therefore, we find that certificate of the facilities for long-term service will not have any impacts on existing landowners and the surrounding community that are not outweighed by the benefits of the service for the Jamestown BPU.

3. Benefits

Granting Nornew's applications will permit Nornew to deliver natural gas supplies on a long-term basis for Jamestown BPU's new gas-fired electric generation unit at the Carlson Station. This dual-fuel capability will permit the Jamestown BPU at the least cost to generate electricity for its customers. In addition to providing electricity for the Jamestown BPU's wholesale and retail electric customers in New York, installation of the new, gas-fired turbine will provide additional electric power that the Jamestown BPU can sell on the open market. The Jamestown BPU conducted a competitive bidding process resulting in the selection of Nornew's proposal to transport the gas supplies needed for the turbine. In view of the above, we find that Nornew's proposal is in the public interest, subject to Nornew's acceptance of the rate and open access conditions set forth below, that the benefits of Nornew's proposal will outweigh any potential adverse effects and therefore will be consistent with the Certificate Policy Statement. Thus, we find that the public convenience and necessity require issuance of the certificate authorizations to Nornew.

B. The JBPU Lease as a Non-Conforming Service Agreement/Negotiated Rate

1. National Fuel's Protest

National Fuel asserts that for a number of reasons the Commission should not approve the JBPU lease in Nornew's open access tariff. First, National Fuel argues that the JBPU lease is a true lease of pipeline facilities.[34] National Fuel states that because a lease grants the right to use and possession of the facilities, it is a jurisdictional instrument of interstate transportation, significantly different from a Part 284 contract for firm transportation service. National Fuel claims that no transportation agreement provides these rights or characterizes the shipper as having "possession of property."

National Fuel states that the Commission has recognized important distinctions between leases and transportation contracts. National Fuel states that leases of pipeline capacity are subject to certificate applications under Section 7(c) of the NGA, and that an entity leasing interstate pipeline capacity must provide transportation service pursuant to its own filed open access rates and tariffs. Citing TriState Pipeline, L.L.C.[35] National Fuel asserts that when one pipeline leases capacity to another pipeline, "its transportation is of a different character than its transportation under a traditional service agreement with its own shipper,"[36] because "under a traditional contract for transportation, the transporting pipeline has signed a service agreement with the shipper who holds title to the gas and is shipping the gas subject to the rates, terms and conditions of its own tariff."[37] National Fuel further notes that, in contrast, the Commission held that,

> [a] lease, on the other hand, represents an interest that the lessee pipeline acquires in the capacity of the lessor's pipeline. Thus, when the lessee pipeline uses the leased capacity to transport its shipper's gas, the lessee is subject to the rates, terms and

[34] In this regard, National Fuel refers to selected language in the JBPU lease which reflects the parties' intent that the agreement is a true lease. For example, the JBPU lease provides that "Lessee does not have and will not, at any time, acquire any right, title, equity or other interest in the property, except the right to possession and use as provided in this Lease." Additionally, the agreement states that the JBPU, "is entitled to the use of the leased property during the Lease term, provided Lessee is not in default of any provision of the Lease." National Fuel also points out that the lease provides a "Schedule A" of "property leased by the Lessor to the Lessee." Moreover, National Fuel notes that the City of Jamestown maintained in several judicial submissions that the JBPU lease is a "true lease" as distinguished from National Fuel's competing tariff service proffered in the bidding process.

[35] 88 FERC ¶ 61,328 (1999); order vacated, 90 FERC ¶ 61,258 (2000).

[36] 88 FERC at 62,002.

[37] Id.

> conditions of its own tariff or operating statement, not the tariff or operating statement of the lessor pipeline.[38]

National Fuel concludes that allowing a pipeline to establish special rights for shippers through a "lease" would establish a precedent undermining the Commission's policies. In particular, National Fuel asserts that permitting a new project to premise its principal service on a capacity lease would open the door to breaches of the uniform, open access obligations that the Commission has rigorously and uniformly enforced since Order No. 636.

National Fuel also claims that Nornew provides no justification for its request to treat the JBPU lease as a "nonconforming negotiated rate." National Fuel maintains that service by Nornew to the JBPU is possible without the specific, and highly irregular regulatory approach proposed by Nornew of treating the JBPU lease as non-conforming service/negotiated rate agreement. For instance, suggests National Fuel, the JBPU lease could be operated as a true lease, with Jamestown BPU subject to a limited jurisdiction certificate, or alternatively, Nornew's service to Jamestown BPU should be reflected in a separate, generally-applicable Part 284 rate schedule.

However, National Fuel states that, even if considered as a transportation service contract, the JBPU lease would violate the Commission's policy against negotiated terms and conditions. Specifically, National Fuel asserts that the JBPU lease deviates in many fundamental respects from the General Terms and Conditions for firm transportation in Nornew's proposed Part 284 tariff, and there is no generally-applicable open access tariff upon which the terms and conditions in the JBPU lease can be based. National Fuel contends that, under Order No. 637, "negotiated rate agreements can include the price, the term of service, the receipt and delivery points, and quantity," and the JBPU lease clearly goes beyond this standard.

National Fuel contends that Nornew's proposal poses precisely the problem identified in Order No. 637 – i.e., a single shipper having the leverage to extract concessions from the pipeline that are unavailable to other shippers. National Fuel maintains that the disadvantaged shippers in this case include both later shippers transporting under Nornew's proposed open access tariffs and shippers on Norse and Falconer, who are not recognized as interstate shippers in Nornew's filing. National Fuel concludes that the Commission has rejected proposed negotiated rate deals that

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[38] Id.

materially deviate from those set forth in the rate schedule under which they were provided, and that the Commission should do so here.

2. Nornew's Answer

Nornew claims that National Fuel seeks to place Nornew in a classic "Catch-22." Nornew maintains that in the December 14 order, the Commission declined to treat the JBPU lease as a property interest sufficient to find Nornew to be exempt from NGA jurisdiction under the Commission's plant line doctrine, because Jamestown BPU leases capacity but does not own the pipe or have any operational control over the line. According to Nornew, the Commission found that the JBPU lease has indicia of a firm transportation service agreement when it observed that "[t]he Jamestown Board, on the other hand, leases the capacity but does not own the pipe itself and has no operational control over the line at all.[39] Now, Nornew claims, National Fuel asks the Commission to ignore the transportation components of the JBPU lease, and find that the JBPU lease creates in Jamestown BPU a sufficient property interest to require the Jamestown BPU to obtain a limited jurisdiction certificate. Nornew maintains that neither the Commission's certificate regulations nor its open access transportation regulations require this result.

Nornew emphasizes that the agreement between the JBPU and Nornew resulted from a public bid process in which Nornew made a market responsive bid to provide natural gas delivery service to Jamestown BPU. Nornew contends that for National Fuel now to claim that treating the lease as a non-conforming service agreement/negotiated rate permits a single shipper to extract concessions from the pipeline that are unavailable to other shippers is inconsistent with the public bid process, a process that National Fuel participated in, albeit unsuccessfully. Further, Nornew claims that National Fuel incorrectly asserts that Nornew's pro forma tariff lacks rules for such non-conforming service/negotiated rate agreements. On the contrary, states Nornew, both Rate Schedule FT, paragraph 4.7 and Rate Schedule IT, paragraph 4.5 of Nornew's proposed tariff expressly provide such rules. Moreover, Nornew states that the Commission should not be misled by National Fuel's transparent claim that by arguing against the treatment of the lease as a non-conforming service agreement, it is protecting the interests of Norse's gathering customers. In fact, states Nornew, none of Norse's customers have protested, much less intervened in this proceeding. Nornew asserts that National Fuel is seeking to protect only its own limited interests as a utility competitor.

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[39] 94 FERC ¶ 61,136 at 61,522 (2001).

Nornew contends that the Commission has, in Transok, Inc. (Transok),[40] construed leases of capacity as firm transportation agreements. There, Nornew states, the Commission found that "the KansOk lease functions much more like a firm transportation contract than a lease".[41] Nornew claims it will provide open access interstate transportation service to the JBPU through the lease in a fashion similar to that in Transok.

Nornew states that the provision of the JBPU lease permitting the parties to mutually increase the firm transportation quantity is not inconsistent with Commission policy, as National Fuel suggests. Nornew claims that if the Jamestown BPU seeks to increase its quantity in the future, Nornew will evaluate that request in light of its then-available capacity. Additionally, Nornew maintains the assignment provision is not unusual, and that assignments of capacity will be accomplished pursuant to the rules in Nornew's tariff. Moreover, Nornew states the Jamestown BPU will not have an undue preference in the unlikely event of a curtailment of Nornew's system. In short, Nornew concludes, none of National Fuel's criticisms of the arrangements between Nornew and the Jamestown BPU have merit, because the Commission will be able to ensure that Nornew does not provide undue preferences to the Jamestown BPU.

Nornew states that the Commission should also reject National Fuel's proposed alternative treatment of the JBPU lease, i.e., to treat it as a separate, open access rate schedule. Nornew asserts that service under the lease will be provided to the Jamestown BPU under Nornew's open access tariff and the regulations under Part 284. Nornew states that if, in the future, it receives a request for service from a similarly situated shipper, it will be required to offer similar terms of service. Nornew notes that National Fuel has never approached Nornew to request transportation service on Nornew's pipeline, nor has Nornew had inquiries from other electric generators seeking a 20-year agreement for firm transportation service from Mayville, NY to Jamestown, NY. Nornew states that different load profiles, shorter terms, the use of different facilities, or other legitimate distinguishing factors may affect Nornew's determination whether a particular shipper is similarly situated to the Jamestown BPU. Nornew claims that the Commission's regulations and open access policies require nothing more of Nornew.

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[40] 70 FERC ¶ 61,177 (1995).

[41] Id at 61,563.

3. National Fuel's Reply to Nornew's Answer

National Fuel asserts that Nornew 's reliance on Transok as support for its expansive claim that "[t]he Commission has construed leases of capacity as firm transportation agreements" is misplaced. National Fuel states that in Transok, the Commission addressed a petition for rate approval under the Natural Gas Policy Act (NGPA) § 311 by an intrastate pipeline. One of the ratemaking disputes involved how to treat the revenues and costs attributable to an "operating lease" of substantial Transok capacity by another pipeline, KansOk Partnership. National Fuel points out that the Commission defined the question in Transok to involve only the proper rate treatment of the lease by the lessor, and did not include the use or status of the leased capacity. Specifically, states National Fuel, the Commission explained that "[i]n this proceeding, the Commission's examination of the KansOk lease is confined to its treatment in Transok's cost of service and rate design. Concerns regarding how KansOk uses the lease are not at issue here."[42]

National Fuel maintains that the ultimate jurisdictional treatment of the KansOk lease and associated Transok capacity in Transok strongly supports the result sought by National Fuel in this proceeding. National Fuel asserts that KansOk used the lease to provide its own, Commission-regulated § 311 open access transportation service, under Commission-approved rates. National Fuel states that the Commission initially concluded that the KansOk lease of Transok capacity discriminated in favor of two major customers, and required that the leased capacity be reassigned to customers. However, on rehearing, National Fuel notes, the Commission permitted the lease to remain in effect, but required that the leased capacity be available to the new interstate pipeline's customers on an open access basis. Moreover, the Commission also required that the pipeline leasing capacity for use under NGPA § 311 obtain a limited jurisdiction NGA § 7(c) certificate to operate the capacity as a lease. For these reasons, National Fuel concludes that Transok, and the subsequent KansOk/Kansas Pipeline cases, support its argument that leases of capacity to provide interstate transportation are jurisdictional in nature, and cannot be treated as firm service agreements.

4. Commission Response

In our April 27 order, we issued to Nornew a limited term certificate authorizing it to provide service to the Jamestown BPU only as an interim measure while Nornew's certificate application in Docket No. CP01-94-000, et al., was being considered.

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[42] Id.

Although we recognized in the April 27 order the need to act quickly, and to ensure that the Jamestown BPU continued to receive gas supplies, we did not intend, or even suggest, that we intended to continue to allow Nornew to render service to the Jamestown BPU under their lease arrangement, once the Commission accepted a Part 284 open-access transportation tariff and rates.[43]

As noted above, Nornew emphasizes that the JBPU lease was the result of a public bid process in which Nornew made a market responsive bid to provide natural gas delivery service to Jamestown BPU. Presumably, when the Jamestown BPU and Nornew entered into this lease agreement, they were not guided by our regulatory requirements. In fact, Nornew's maintained that its "market responsive" bid was not within the Commission's NGA jurisdiction. However, as we determined in our December 14 order, Nornew's original proposal, as to both Nornew's and Norse's facilities, constituted interstate transportation of natural gas subject to the Commission's jurisdiction and, therefore, was subject to the Commission's open-access requirements contained in Part 284 of the regulations. Accordingly, Nornew's explanation fails to respond to National Fuel's concerns that the lease allows the Jamestown BPU to exercise control over much of Nornew's capacity, that it provides Jamestown BPU with preferential rights to increase its firm transportation capacity, and that it is otherwise contrary to the Commission's non-discriminatory, open-access policies. We agree with National Fuel's concerns that, as written, the JBPU lease allows terms and conditions of service not provided for in Nornew's proposed tariff. While the Commission allows pipelines to negotiate rates, we do not permit pipelines to negotiate terms and conditions of service.[44] They must be offered as part of the pipeline's generally applicable tariff.[45]

In addition, we note that Jamestown BPU, as lessee of Nornew's interstate pipeline capacity, has not sought any authorization to acquire Nornew's capacity through

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[43]In fact, we stated in that order that the "grant of limited-term certificate service authority for Nornew does not limit the Commission's discretion, findings, or action in the order it will issue to address Nornew's application in Docket No. CP01-94-000, et al." 95 FERC at 61,419.

[44]See Tennessee Gas Pipeline Company, 97 FERC ¶ 61,225 (2001); Columbia Gas Transmission Corporation, 97 FERC ¶ 61,221 (2001); ANR Pipeline Company, 97 FERC ¶ 61,223 (2001); ANR Pipeline Company, 97 FERC ¶ 61,224 (2001).

[45]Of course, if Nornew wants to provide services different that it has proposed in its pro forma tariff, then Nornew must file proposed tariff provisions reflecting such proposed services.

the subject lease arrangement. Instead, Nornew (and apparently Jamestown BPU) apparently assume that the certificate authorization sought by Nornew is sufficient. It is not. In the Commission's view, a lease of interstate pipeline capacity is an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline. As such, the lessee of interstate pipeline capacity is required to obtain appropriate NGA section 7(c) authorization.[46] While in every case we are aware of the capacity in question has been leased by a pipeline, we recently stated in Texas Eastern Gas Transmission Corp.,[47]

> since the Commission views leased capacity as an acquisition of a property interest, a pipeline seeking to lease capacity on another pipeline must file an NGA section 7(c) application describing the proposal and its rate consequences. These leased acquisitions will continue to be analyzed on a case-by-case basis. We do not believe this approach conflicts with the Court's reasoning that similarly situated shippers should be treated equally, since the same requirement applies to anyone who seeks to acquire pipeline capacity through a lease arrangement.[48]

Nevertheless, we will continue to allow the JBPU lease to remain in effect for no longer than 60 days after the date of the order issued in this proceeding. We believe that 60 days is sufficient time for Nornew and the JBPU to negotiate and file a service agreement consistent with Nornew's open access tariff. When Nornew files actual tariff sheets, it shall modify Tariff Sheet No. 4A, deleting the agreement with the JBPU, which is listed on the pro forma tariff sheet as a non-conforming service agreement.

C. The JBPU Lease and Open Access Rate Schedules

National Fuel protests that several provisions of the JBPU lease violate Commission policies regarding open access rate schedules. Nornew filed an answer

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[46] See, e.g, Transok, et al., 97 FERC ¶ 61,362 (2001). Because we are rejecting the lease on other grounds explained above, we need not decide whether or under what circumstances Jamestown BPU, a municipality, could acquire authorization to lease capacity on an interstate pipeline, since municipalities are not subject to the provisions of the Natural Gas Act. See 15 U.S.C. § 717(a)(2).

[47] 94 FERC ¶ 61,139 (2001).

[48] Id. at 61,530-531.

addressing certain aspects of National Fuel's protest. However, for reasons stated above, we are not accepting the JBPU lease as a non-conforming service agreement. Accordingly, National Fuel's protests that provisions of the lease violate Commission policies regarding open access rate schedules are rendered moot.

D. Billing Determinants

1. National Fuel's Protest

National Fuel challenges Nornew's use of the contract maximum daily throughput of 15,000 Mcf/day to calculate its generally-applicable transportation rates. However, National Fuel contends that based on its own expert assessment[49] and Nornew's Exhibit G to its application, the physical capacity of the pipeline is approximately 20,000 Mcf/day. National Fuel asserts the Commission should use the physical maximum capacity of 20,000 Mcf/day for purposes of calculating rates, rather than the 15,000 Mcf/day contract volume used by Nornew.

2. Nornew's Answer

Nornew responds that the Commission should reject as baseless National Fuel's argument that Nornew's billing determinants should be based on 20,000 Mcf per day. According to Nornew, its proposed billing determinants take into account the fact that the pipeline it acquired from Norse is larger in diameter than a newly constructed pipeline from Mayville to Jamestown would have been. Nornew maintains that if it had constructed an 8-inch pipeline from Mayville to Jamestown, just as it constructed an 8-inch line from Ellery to Jamestown, the capacity would have been approximately the 15,000 Mcf used by Nornew as billing determinants in its filing in Docket No. CP01-94-000. Nornew asserts that National Fuel should have challenged Nornew's rates in that docket, rather than in Docket No. CP01-95-000. Moreover, Nornew argues that National Fuel's maximum throughput figure assumes that Nornew operates at capacity 24-hours a day, seven days a week. Nornew states that such assumptions are not reasonable or possible. Nornew also notes that the Jamestown BPU is Nornew's only customer and that it is unclear whether there are other potential customers or what rate they will pay for Nornew's service. Nornew accepts that it will be left to the rigors of the marketplace, and that it will not be able to charge $0.50 per Dth if a competitor charges $0.49.

[49]See Affidavit of Raymond C. Witte, Attachment B to Nornew's Protest in Docket No. CP01-95-000.

Nornew argues that the ratemaking process is not an exact science, and that the Commission has sufficient discretion to permit adjustments.

3. National Fuel's Reply to Nornew's Answer

In reply, National Fuel states that Nornew has failed to support its claimed billing determinants with any engineering analysis to support its proposed 15,000 Mcf figure. Moreover, states National Fuel, Nornew fails to explain why the Commission should depart from its longstanding general requirement that initial recourse rates for newly certificated pipelines be set at the level of maximum throughput, rather than existing contracts. Finally, National Fuel maintains that Nornew's approach would place the risk of underutilization on future shippers utilizing its open access recourse rates during the effective period of the initial rates. National Fuel concludes that this proposal should be rejected and the rates should be based on physical deliverability.

4. Commission Response

Upon reviewing Nornew's application, as well as Nornew's November 13, 2001 data response (November 13 data response) to our staff's November 5, 2001 data request, and after comparing the information contained in the application with that contained in the data response, we make the following observations:

- In Nornew's application and attendant Exhibits, Nornew's rates are predicated on billing determinants of 3,000,000 Mcf, based on an annual volumetric throughput. An annual throughput of 3,000,000 Mcf is roughly equal to a daily throughput of 8.2 MMcf, which, we note, is the same daily amount as Nornew's current maximum contractual obligation to the Jamestown BPU. However, in its November 13 data response, Nornew asserts it had 3.5 to 4.5 MMcf of unsubscribed capacity, which indicates to us that 3,000,000 Mcf does not represent Nornew's maximum throughput capability.

- In the December 14 order, we found that Nornew's daily contractual obligation under the JBPU lease could be as much as 15 MMcf per day. At 15 MMcf per day, Nornew's annual throughput would be approximately 5,475,000 Mcf.

- In Nornew's November 13 data response, Nornew states that at 80% efficiency, maximum daily throughput would be 18.5 MMcf (or 6,752,500 Mcf annually); at 85% efficiency, maximum daily throughput would be 19.6 MMcf (or 7,154,000 Mcf annually); and at 90% efficiency, maximum daily throughput would be 20.8

MMcf (or 7,592,000 Mcf annually). We note that this last figure is consistent with National Fuel's analysis.

- Finally, our staff's engineering analysis concludes that Nornew's maximum daily capacity is 19.5 MMcf, or an annual throughput of 7,117,500 Mcf.

Based on the above information, we believe that Nornew's proposed billing determinants of 3,000,000 Mcf annually is too low, and further, find the proper billing deterimants to be 7,117,500 Mcf annually, or 19.5 MMcf per day.[50] Nornew's system is comprised of older, acquired twelve-inch pipeline, and newly constructed eight-inch pipeline. If Nornew's entire system were twelve-inch pipeline, Nornew would have more capacity than 20 MMcf daily, but if Nornew's entire system were only eight-inch pipeline, Nornew would still have a maximum capacity of about 7,117,500 annually, or 19.5 MMcf daily. Consistent with the Commission's practice of establishing billing determinants for newly constructed pipelines at or near the maximum capacity, we find that 7,117,500 Mcf should be used as the appropriate billing determinants. As noted above, this finding is supported by our own engineering analysis. Nornew is further directed that in future filings, it should express its billing determinants in thermal units (Dth), or advise the Commission what the conversion factor is to convert volumetric units to thermal units.

E. Available Capacity

In its November 13 data response, and as noted above, Nornew asserts it has unsubscribed capacity -- as much as 3.5 to 4.5 MMcf per day. Accordingly, we direct Nornew to post this unsubscribed capacity on its web site, along with its tariff and affiliate transactions.

F. Rates

1. Nornew's Proposal

According to Nornew's application, as supplemented by its November 13 data response, Nornew proposes to provide firm transportation under its new Rate Schedule FT. Nornew proposes to charge its FT transportation customers a maximum monthly

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[50] We find no merit to Nornew's suggestion, without further explanation or support, that National Fuel should not be permitted to challenge Nornew's rates because it did so in Docket No. CP01-95-000, rather than in Docket No. CP01-94-000.

reservation rate of $18.30, and a maximum usage rate of $0.00. Under Rate Schedule FT, Nornew proposes to charge a maximum Authorized Overrun Rate of $0.6017. Nornew also proposed to provide interruptible transportation under its new Rate Schedule IT, and proposes to charge a maximum IT Rate of $0.6017. Nornew presents its total rate base as $4,624,535, and its total cost of service as $1,805,241. Nornew propose an overall 11.50% return on rate base.

2. National Fuel's Protest

National Fuel states that the scanty data on cost and revenue underlying the proposed rates raise many questions, and that the chief issue raised by the proposed rates stems from their bottom line results - i.e., based on Nornew's own figures, the new pipeline will lose money at the outset of its operations.

Specifically, National Fuel conducted its own analysis of the cost/revenue data,[51] according to which, Nornew will lose money over the short term and also over the projected 20 year economic life of the principal business. National Fuel asserts that even under Nornew's own figures and projections, the project will almost certainly never recover its investment, even if volumes and revenues increase in each year following the projected first year of operation presented by Nornew. In fact, National Fuel states, Nornew cannot avoid economic loss unless either it includes only cost of the newly constructed, 7.63-mile segment, financed by debt cost only, without any allocation of plant or operational costs on the segment acquired from Norse, or Nornew's service to the Jamestown BPU is subsidized by the captive customers of Nornew's affiliate, Norse, because Norse and Nornew operate as one.

National Fuel concludes that scanty as the the rate, cost and revenue data Nornew provided is, it nonetheless demonstrates that Nornew must be evaluated and regulated as one component in a larger pipeline system. Because Nornew, standing alone, will operate at a loss, National Fuel claims that the Norse/Nornew system should be presumed to recover the shortfall from other shippers. National Fuel asserts that, in addition, the data support strongly National Fuel's original assessment that a very substantial affiliate company discount for transportation service from Norse was originally embedded in the lease.

[51] See Affidavit of Eric Meinl, and accompanying report, Exhibit 1 thereto, Attachment C to Nornew's Protest in Docket No. CP01-95-000.

Consequently, National Fuel argues that Nornew's proposed rates would violate the Certificate Policy Statement's "no-subsidy" rule. National Fuel acknowledges that this analysis applies to "existing" pipelines; however, National Fuel surmises that this is based largely on the implied premise that only existing pipelines have customers that might subsidize new construction. National Fuel maintains that in this case, Norse and Nornew (and other affiliates) operate existing facilities to serve a mix of gathering and transportation customers, and the subsidy necessarily would come from those customers. National Fuel concludes that the Commission must therefore closely scrutinize the impact of the project on both shippers on Nornew and shippers on its affiliates.

National Fuel suspects that if the Commission reviewed the full cost picture after a the submission of complete cost/revenue data, the Commission would find that other shippers are subsidizing the service to the Jamestown BPU. Furthermore, National Fuel has, at all times, maintained that the JBPU lease was premised on an unlawfully low rate by Norse for the benefit of its affiliate, Nornew.[52]

3. Nornew's Answer

Nornew insists that National Fuel's "economic analysis" that Nornew will operate at a loss is unfounded and irrelevant to the Commission's review of Nornew's open access tariff. Nornew repeats that it was the successful bidder in a public bid process to provide delivery service to the JBPU; that after Nornew's bid was accepted, a contract was entered; and that Nornew will honor the terms of that contract. Nornew states that the Commission's requirement that Nornew file a cost of service and base rates on that cost of service does not change Nornew's contractual obligation to the Jamestown BPU.

Furthermore, Nornew states, the Certificate Policy Statement's "no-subsidy" rule does not apply here. Nornew states that there are no existing shippers on Nornew, and that it is a new facility that has yet to deliver gas. Nornew also notes that the Jamestown BPU is Nornew's only customer. Moreover, Nornew claims that Norse is a separate entity, whose customers' rates are unaffected by Nornew's rates. Nornew states that in addition to the fact that it cannot recover its costs from Norse's customers, Norse's rates are market-based gathering rates, not subject to cost of service regulation under the NGA.

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[52]Mr. Meinl has concluded that, based on the as-filed data, and based on the levelized cost of service for Nornew at incremental costs stemming from the new construction, the cost of transportation attributable to the portion of Norse sold to Nornew is $.02/Mcf.

4. Commission Response

Under the Certificate Policy Statement's "no subsidy" rule, the threshold question in determining whether to grant a certificate for new construction is whether the project can proceed without subsidies from the pipeline's existing customers. National Fuel has not convinced us that the Certificate Policy Statement's "no subsidy" rule should be expanded in this case to apply to a new pipeline with no existing customers because customers of the new pipeline's affiliates may be subsidizing the project. National Fuel's claim that Nornew is being subsidized by its affiliate, Norse, is based on speculation. National Fuel asks us to join it in presuming that if Nornew's project cannot stand economically, other existing customers of its affiliates must be making up the difference.

We have reviewed the various Exhibits in Nornew's filings, including Exhibits K and P, as supplemented by the information submitted by Nornew in its November 13 data response, and we find that Nornew has adequately addressed National Fuel's claims that Nornew will lose money over both the short term and over the projected 20 year economic life of the principal business. Specifically, Nornew states that the cash flow from the Jamestown BPU will be sufficient to enable Nornew to pay back all of its debt and fund operating expenses over a ten year period. Nornew also states that revenues from the sale of gas from ten natural gas producing wells (the costs of which are excluded from Nornew's cost of service) contribute to its overall earnings. Additionally, Nornew states that if it is successful in obtaining new customers, it will have an opportunity to recover its costs and earn a return on its regulated investment. Finally, in our view, Nornew correctly states that whether or not Nornew will operate at a loss is irrelevant to the review of Nornew's open access tariff, as long as Nornew is able to continue to provide service. Of course, we have an obligation to ensure that a certificate applicant under NGA section 7(c) is "able and willing" to perform the proposed service. National Fuel has not shown why we should not accept Nornew's assertion that it is capable and willing to comply with this requirement .

However, based on the supplemental information Nornew has provided in its November 13 data response, and based on the adjustment in Nornew's billing determinant that we are requiring, as discussed above, we are adjusting Nornew's proposed recourse rates, as discussed below.

In its initial application, Nornew proposed a total for Administrative and General (A&G) expenses of $484,000. In its November 13 data response, Nornew reflects an actual A&G expense for the twelve months ending September 30, 2000, of $69,695. We will use Nornew's amended figure of A&G expenses of $69,695.

In its initial application, Nornew proposed a capital structure of 50% Long-term Debt, with a weighted cost of 4.5%, and 50% Common Equity, with a weighted cost of 7%. Nornew's total Return, as proposed, was 11.5%. However, in its November 13, 2001 data response, Nornew reflects a theretofore unreported additional element of its capital structure, namely, a $1,280,443 interest-free loan from its shareholders. Recalculating Nornew's capitalization, including this interest-free loan, we determine that Long-Term Debt actually constitutes 61% of Nornew's capitalization, with a weighted cost of 3.52%; and Common Equity constitutes 39% of Nornew's capitalization, with a weighted cost of 5.48%. Consequently, we find that Nornew's actual return on rate base should be 9.01%.

We note that these adjustments in Nornew's cost of capital will correspondingly reduce Nornew's tax expenses. Nornew had proposed a Federal tax expense of $174,309. Based on these adjustments, we compute that Nornew's Federal taxes should be $133,099. Nornew had proposed a state tax expense of $49,255; Nornew's recomputed state taxes should be $37,610.

Consistent with the adjustments in Nornew's expenses and cost of capital, we determine Nornew's total cost of service to be $1,212,348. Based on this cost of service of $1,212,348 and billing determinants of 7,117,500 Mcf, as discussed above, Nornew is directed to file revised tariff sheets reflecting new recourse rates. Specifically, under Nornew's Rate Schedule FT, the maximum monthly reservation rate should be the equivalent of $5.18 per Mcf, and the maximum Authorized Overrun Rate should be the equivalent of $0.1703 per Mcf. For the same reasons, under Nornew's Rate Schedule IT, the maximum volumetric rate should be the equivalent of $0.1703 per Mcf. While we are expressing these rates "per Mcf," Nornew is directed to express its rates in its tariff per thermal unit, or "per Dth."

5. Negotiated Rate Authority

In Section 4.7 of Nornew's proposed FT Rate Schedule, and again in Section 4.5 of Nornew's proposed IT Rate Schedule, is the following:

> Notwithstanding any provision of Transporter's effective FERC Gas Tariff to the contrary, Transporter and Shipper may mutually agree in writing to rates, rate components, charges or credits for service under this Rate Schedule that differ from those rates, rate components, charges or credits that are otherwise prescribed, required established or imposed by this Rate Schedule or by any other applicable provision of Transporters's effective FERC Gas Tariff. If Transporter agrees to such differing rates, rate components, charges or credits ("Negotiated Rates") then

> the Negotiated Rate(s) shall be effective only for the period agreed upon by Transporter. During such period, the Negotiated Rate shall govern and apply to the Shipper's service and the otherwise applicable rate, rate component, charge or credit, which the parties have agreed to replace with the Negotiated Rate, shall not apply to, or be available to, the Shipper. At the end of such period, the otherwise applicable maximum rates or charges shall govern the service provided to Shipper. Only those rates, rate components, charges or credits identified by Transporter and Shipper in writing as being superseded by a Negotiated Rate shall be ineffective during the period that the Negotiated Rate is effective; all other rates, rate components, charges or credits prescribed, required, established or imposed by this Rate Schedule or Transporter's Tariff shall remain in effect. Transporter shall make any filings at the FERC necessary to effectuate a Negotiated Rate.

In its comments on the construction of new facilities, National Fuel protests that Nornew's tariff provides no rules for the use and nondiscriminatory application of non-conforming negotiated rates. We find that protest to be applicable with regard to Nornew's proposed language governing negotiated rates as well. Therefore, we direct Nornew to modify its negotiated rates provisions to include appropriate language that provides protections to recourse rate customers.

Further, in Trailblazer Pipeline Company,[53] we ordered that Trailblazer must distinguish between negotiated rate shippers and recourse rate or discounted rate shippers at the time the parties enter into the transaction, i.e. there must be a meeting of minds over whether they are receiving discounted or negotiated rates, with the understanding that they may not switch back once they commit to the transaction. Nornew must likewise ensure there is a meeting of minds between itself and a given customer whether the customer is receiving discounted or negotiated rates.

Otherwise, the Commission finds the above proposed language to be similar to language we have accepted and approved in some other pipelines' tariffs. In accepting Nornew's proposed language above, we are authorizing Nornew to charge negotiated rates pursuant to our Alternative Rates Policy Statement. Both the Policy Statement and this order require that Nornew file either the contract or tariff sheets identifying and describing the transaction when implementing a negotiated rate contract.

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[53] 79 FERC ¶ 61,274 (1997).

G. Requests for Waivers

Nornew requests a waiver of the Commission's reporting and accounting requirements in Parts 201, 250, 260, and 284 of the Commission's regulations. Nornew claims the Commission has previously granted such a waiver to a small, single purpose pipeline.[54]

Additionally, Nornew requests a waiver of the GISB standard Electronic Data Interchange, Electronic Delivery Mechanism, and business practice and electronic communications requirements. Nornew claims that the cost of complying with such requirements would be prohibitive, particularly given the fact that Nornew has only one shipper and one transaction. Nornew claims the Commission has granted such waivers in the past.[55]

Finally, Nornew requests a waiver of the requirements in Order Nos. 587-G and 587-I that it establish an interactive web site. Nornew claims that the cost and burden of establishing and maintaining such a web site would be prohibitive to be reasonable, given Nornew's single shipper and transaction. Nornew claims the Commission has granted such a waiver on the condition that the pipeline comply with the requirement at such time as a Part 284 customer requests that it offer transactions via its web site.[56]

1. National Fuel's Protest

National Fuel notes that Nornew requests that various accounting, reporting and GISB compliance requirements should be waived, largely on the grounds that it is a

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[54] Nornew cites Transcontinental Gas Pipe Line Corp., et al., 91 FERC ¶ 61,180 (2000) (granting waivers to the Santee Cooper pipeline); USG Pipeline Co., 81 FERC ¶ 61,039 at 61,214 (1998); see also, USG Pipeline Co., 89 FERC ¶ 61,121 at 61,326 (1999) (clarifying that waiver of Part 284 reporting requirements in effect until pipeline renders Part 284 service).

[55] See, e.g., Kansas Pipeline Co., 92 FERC ¶ 61,029 at 61,066 (1999) (providing a second one-year waiver); USG Pipeline Co., 89 FERC ¶ 61,121 at 61,325-26 (1999) (granting EDI and EDM waiver to small pipeline with limited known and foreseeable customer base and granting other GISB waivers until a Part 284 customer requests transactions via website).

[56] See, e.g., Sumas International Pipeline, 90 FERC ¶ 61,055 at 61,225 (2000); USG Pipeline Co., 89 FERC ¶ 61,121 (1999).

small, single purpose pipeline. National Fuel contends that this request is unsupported, contrary to the public interest and should be denied. National Fuel states that waivers that impede the open access and other regulatory goals of the Commission are disfavored except in unusual circumstances.

National Fuel also notes that Nornew asserts its modest request for only partial waiver of the Commission's regulations resembles the successful waiver requests made by "single use industrial" operations, because as Nornew argues, it "plans to use the proposed pipeline solely to deliver natural gas owned by the Jamestown BPU for the Carlson Generating Station." National Fuel maintains that neither the facts nor the cases relied on by Nornew[57] support the requested waivers.

National Fuel contends that the common thread in the cases Nornew relies on is generally the existence of a short segment of pipeline in interstate commerce serving only a single customer with no likely or initially foreseen additional customers. National Fuel states that in several cases, the Commission made the waiver in effect contingent upon the absence of any new customer requests for service or for the waived obligations. National Fuel asserts that Nornew does not fall into this category, and even if it resembled these "industrial operations," special circumstances militate against the broad waivers sought.

First, National Fuel points out, that although the Jamestown BPU is the only customer recognized in the Nornew's application, Nornew is far more likely to transport on behalf of others than a true, single-purpose pipeline. National Fuel notes that Nornew has requested an open access blanket certificate, with accompanying tariff, that will permit any other shippers to transport from a contemplated interconnection with a major interstate pipeline (Tennessee). Moreover, National Fuel contends, that two of the interconnections requested by Norse late in January 2001 to National Fuel's system are now located on Nornew, raising the potential that Nornew might develop interconnections with National Fuel. Furthermore, National Fuel states that Nornew, in coordination with Norse and its "Falconer Pipeline" division, appears already to be carrying gas for other end-use customers on the former Norse segment between Mayville and Ellery, New York. National Fuel contends that Nornew and "Falconer" have aggressively sought additional customers in the Jamestown area.

[57]Nornew cites Shell Western E&P Inc., 72 FERC ¶ 61,002, reh'g denied, 73 FERC ¶ 61,362 (1995) and USG Pipeline, 89 FERC ¶ 61,121 (1999).

National Fuel contends that the integrated nature of Nornew, Norse, Falconer, South Jamestown Gathering, LLC and other affiliates strongly support close scrutiny of Nornew's operations. National Fuel maintains that goal would be greatly hindered in the absence of appropriate accounting tools and annual reports for public and Commission review and analysis.

National Fuel asserts that the cost data submitted thus far by Nornew raises serious ratemaking and jurisdictional questions, making it even more important that Nornew's financial records be kept in a manner that permits orderly review of its costs, revenues and allocations. Moreover, National Fuel contends that Nornew does not, and likely cannot, present any argument that maintaining its accounts in accordance with Part 201 presents any undue burden or hardship. National Fuel states that Dual GAAP/Uniform System of Account bookkeeping is routine in the industry.

National Fuel contends that with regard to GISB waivers, as a pipeline proposing to be connected to Tennessee and to receive Tennessee volumes, Nornew should be required to ensure that its system is functionally integrated with the interstate pipeline grid, as mandated by the policies of Order No. 636.

National Fuel maintains that Nornew's suggestion that its small size supports the waiver requests is meritless. National Fuel notes that the annual throughput projected by Nornew after start-up, using solely JBPU lease volumes, is 11 times the minimum reporting size for Form 2-A. National Fuel states that smaller companies than Norse file Form 2-A annual reports and follow the Uniform System of Accounts.

2. Nornew's Answer

Nornew submits that it fully justified its waiver requests in its application. Nornew contends that its waiver requests are based on waivers granted to other similarly situated pipelines, and are fully justified. Nornew maintains that its size, resources, and single customer provide ample justification for the requested waivers. Nornew concludes that National Fuel's objections are designed merely to increase Nornew's regulatory burden and operating costs.

3. Commission Response

Nornew's request for a waiver of the Commission's reporting and accounting requirements in Parts 201, 250, 260, and 284 of the Commission's regulations is denied. While the Commission has previously granted such waivers to small, single purpose pipelines, we are aware that Nornew has considerable unsubscribed capacity, and appears likely to provide service to additional customers. Further, given that Nornew seeks to provide Part 284 open-access transportation service and to charge cost-based rates, Nornew will need to present appropriate and complete information to justify the continued use of, or any requested changes in, such cost-based rates. Accordingly, we believe waivers of these accounting requirements to be inappropriate.

We will, however, grant Nornew's request for a waiver of the GISB standard Electronic Data Interchange, Electronic Delivery Mechanism, and business practice and electronic communications requirements, subject to the condition that Nornew comply with these requirement at such time as a Part 284 customer requests to engage in Electronic Data Interchange, Electronic Delivery Mechanism, and any other business practice or electronic communications.

Finally, we deny Nornew's request for a waiver of the requirements in Order Nos. 587-G and 587-I that it establish an interactive web site. While we have granted waiver of this requirement for small, single-service pipelines, we agree with National Fuel that Nornew is far more likely to take on additional customers and transport gas on behalf of others, and therefore would not qualify as a single-service pipeline. As provided herein, we are directing Nornew to comply with the requirements of Order Nos. 587-G and 587-I, and post, inter alia, its tariff, unsubscribed capacity and affiliate transactions on an interactive web site.

H. Nornew's Compliance With Affiliate Regulations

1. National Fuel's Protest

National Fuel claims to have presented detailed evidence that Nornew and Norse operate under common management and control with other natural gas producing, gathering, marketing and distributing entities that were not disclosed in Nornew's application.[58] National Fuel contends that, in light of these affiliated entities, Nornew and Norse should be required to observe closely the Commission's regulations regarding affiliates, including the restrictions under Part 161 of the Commission's regulations. National Fuel maintains that Nornew's pro forma tariff does not discuss compliance with the affiliate rules. National Fuel states that Nornew and Norse should be required to submit and observe the Commission's Standards of Conduct with regard to affiliates, including the separation of operating, management and marketing personnel of affiliated

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[58] See Affidavit by Robert Sprague, Attachment B to National Fuel's Protest filed in Docket No. CP01-95-000.

companies. National Fuel contends that the Commission may have to regulate Norse, Nornew and other affiliates together in order to ensure that nondiscriminatory, open access transportation is available for interstate transportation by these companies.

2. Nornew's Answer

Nornew agrees that it will be required to observe the Commission's regulations, including the marketing affiliate rules in Part 161. However, Nornew states that currently it has no marketing affiliate, as that term is defined in Part 161. If, in the future, an affiliate that would otherwise qualify as a marketing affiliate becomes a shipper on Nornew's system, Nornew states that it will amend its tariff to comply with Part 161.

3. National Fuel's Reply to Nornew's Answer

National Fuel contends that Nornew's terse claim that it has no marketing affiliates is not an adequate response to National Fuel's detailed factual demonstration that Norse and Nornew operate as part of a small but integrated, commonly owned and controlled network of affiliates engaged in the production, marketing, transportation and distribution of interstate natural gas. National Fuel contends that an interstate pipeline that interconnects with an affiliated company that both gathers gas and transports interstate gas (Norse) and, indirectly, interconnects with "gathering" companies that distribute (Falconer Pipeline) and gather (South Jamestown Gathering) natural gas, and whose system has been used by affiliated production and marketing companies, should provide a more detailed response than this blanket denial.

National Fuel asserts that the Commission's key concern in construing its marketing affiliate regulations has been whether the marketing affiliates are under common control and management. National Fuel states that in clarifying whether certain companies are affiliates, the Commission in Iroquois Gas Transmission[59] looked at whether the party could "direct partnership policies by casting a negative vote"[60] and whether the alleged affiliates engaged in marketing or brokering activities on Iroquois's system. National Fuel notes that Nornew does not even attempt to deny that these companies are under common ownership, control and operation.

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[59] 78 FERC ¶ 61,108 (1997).

[60] Id. at 61,379.

National Fuel maintains that the purpose of these rules is to determine whether there is an incentive and ability to engage in affiliate preferences, and to prevent collusion and preferential treatment. National Fuel contends that such affiliate preferences exist in the present case. Specifically, National Fuel alleges that Nornew's system is built around the JBPU lease, which provides a return so low that it cannot stand as a stand-alone transaction; the only rational conclusion is that Nornew somehow is being bosltered economically by Norse and possibly other affiliated companies.

4. Commission Response

In the December 14 order, the Commission found insufficient evidence in the record to make a finding in agreement with National Fuel's suggestion that Nornew and Norse may have violated the Commission's marketing affiliate rules. That conclusion still stands.

The Commission's marketing affiliate rule[61] is intended to prevent collusion and preferential treatment by mandating that interstate pipelines that engage in transportation transactions with affiliated marketing or brokering entities adhere to the standards of conduct, record keeping, and disclosure requirements specified in sections 161.3 and 250.16 of our regulations. Recognizing that pipelines "have incentives to show undue preferences toward their marketing affiliates,"[62] the Commission instituted certain standards for interstate pipelines with marketing affiliates. In Order No. 497-A, the Commission clarified the types of transactions with a marketing affiliate that make a pipeline subject to its marketing affiliate regulations, stating that pipelines that do not conduct transportation transactions with an affiliate are exempt from the rule. The Commission reasoned that if a pipeline does not transport on behalf of an affiliate, there is no opportunity for it to provide the affiliate a preference in transportation.[63]

Consequently, Part 161 of our regulations applies to "any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 ... and is affiliated in any way with a natural gas marketing or brokering entity and conducts

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[61] 18 C.F.R. § 161.1, et seq.

[62] Order No. 497, FERC Stats and Regs., ¶ 30,820 at 31,129 (1988).

[63] See FERC Stats. and Regs., ¶ 30,868 at 31,590.

transportation transactions with its marketing or brokering affiliate" (emphasis added).[64] Nornew's proposal to transport natural gas for the Jamestown BPU is not a transportation transaction on behalf of an affiliate, marketer or otherwise. Accordingly, as to the discrete proposal that is the subject of this certificate proceeding, we conclude that there was no collusion or preferential treatment of the type that Part 161 is intended to prevent. Consequently, we are in this order granting certificate authorization under which it is possible for Nornew to provide long-term transportation service for the Jamestown BPU.

Additionally, we also stated in Order 497-A that whenever a pipeline and its marketing or brokering entity share overlapping economic interests, the potential arises that the pipeline may grant its affiliate a preference in order to benefit the corporate whole. However, we did not intend to include producers, gatherers or processors, acting in their traditional roles, that sell gas solely from their own production, gathering or processing facilities within the scope of this rule.[65] As noted, in this regard, National Fuel alleges that affiliates of Nornew may be acting in capacities that require Nornew to submit and observe the Commission's Standards of Conduct with regard to affiliates. National Fuel contends that the Commission may have to regulate Norse, Nornew and other affiliates together in order to ensure that nondiscriminatory, open access transportation is available for interstate transportation by these companies. Also noted above, Nornew acknowledges that it is required to observe the Commission's marketing affiliate rules in Part 161. However, Nornew states that currently it has no marketing affiliate, as that term is defined in Part 161and that it will amend its tariff to comply with Part 161 if, in the future, an affiliate that would otherwise qualify as a marketing affiliate becomes a shipper on Nornew's system. National Fuel is free to file a formal complaint with the Commission if it has information that Nornew is in violation of any of the Commission's open-access rules, including those governing marketing affiliates.

Finally, as noted above, National Fuel's concerns that Norse may have given Nornew an unduly preferential rate for transporting the Jamestown Board's gas, therefore reducing the charges to be paid by the Jamestown Board to Nornew and increasing the likelihood that Nornew would have the winning bid for such service, have been mooted by Nornew's purchase of the Mayville Line at a price which National Fuel has not shown to be unfair or unreasonable.

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[64] 18 C.F.R. § 161.1; see also, Pine Needle LNG Company, LLC, 75 FERC ¶ 61,121 at 61,413 (1996).

[65] FERC Stats. and Regs., ¶ 30,868 at 31,593.

I. Norse's Jurisdictional Status

National Fuel asks us to reject Norse's assertion that once it transfers the Mayville Line to Nornew, it will continue to be engaged primarily in non-jurisdictional gathering. National Fuel alleges that Norse, either alone or in conjunction with other affiliates such as South Jamestown, is engaged in the interstate transportation of natural gas.

The Norse gathering system was once known as Columbia's Project Penny System, consisting of approximately 336 miles of pipeline ranging from 2-12 inch diameter pipe. Norse purchased the Project Penny facilities from Columbia in June 1999. The Commission found these facilities to have a primary function of gathering in its November 4, 1998 order in Docket Nos. CP98-569-000 and CP98-568-000 (Project Penny Proceedings).[66] However, the November 1998 order stated that the Commission's finding was based on circumstances as they existed at the time of the order. Norse was put on notice that "if circumstances change," so that Norse was engaging in jurisdictional activities, Norse would be required to obtain the necessary NGA Section 7 certificate authority.

In its April 6, 2001 protest in Docket Nos. CP01-94-000 and CP01-96-000, National Fuel asserts that Norse has failed to justify its continued claim to exempt gathering status. National Fuel asserts that since Norse receives gas produced in one state and delivers it to an end-user or distribution company in another state, it is engaged in interstate transportation rather than gathering. National Fuel asserts that the NGA's gathering exemption should not shield Norse from Commission jurisdiction over these types of service. National Fuel contends while Norse does continue to provide certain gathering services, Norse is also engaged in and/or plans to expand, non-gathering functions, including delivery of gas to end-users or to affiliates that in turn deliver gas to end-users.

National Fuel alleges that services provided by Norse on its facilities constitute a substantial change from the activities declared gathering by the Commission's November 1998 order in the Columbia's Project Penny spin-off proceeding. National Fuel also argues that the degree of operational integration among Norse and its affiliates, including Nornew, Falconer Pipeline (Falconer), and South Jamestown Gathering System

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[66]See Columbia Gas Transmission Corporation and Norse Pipeline, LLC., 85 FERC ¶61,191 (1998), reh'g denied, 86 FERC ¶61,137 (1999).

(SJGS),[67] provides a basis for extension of the Commission's jurisdiction over Norse and other affiliates.

On August 10, 2001 the Commission staff sent a data request seeking clarification of the operations and activities of Norse's, Falconer's, and SJGS's systems. Norse did not respond fully to the questions in the August 10, 2001 data request. In order to resolve the issues raised by National Fuel in its pleadings, as well as the concerns underlying the August 10 data request, the Commission is directing Norse to show cause pursuant to section 5 of the NGA why it, independently or in conjunction with Falconer, SJGS or other affiliates, should not be found to be engaged in jurisdictional activities. Further, the Commission is again directing Norse to provide certain information requested by the August 10, 2001 data request.

Specifically, as previously requested, the Commission is directing Norse to identify the average daily and yearly volumes delivered to each specific entity at each delivery point. Norse shall provide sufficient information demonstrating the extent to which local, in-state production has been sufficient to make the deliveries at each of its delivery points. Norse shall describe the location of each delivery point as well as the direction of the flow of gas for each delivery point. Norse shall clarify the average volumes of gas gathered on its system. Norse shall identify the volumes of gas delivered to each of its affiliates, including Falconer and SJGS, and the volumes received into the Norse facilities from these entities.

Norse shall provide, as previously requested, a detailed map of its system depicting the local distribution companies, other third party gatherers, current end-users/customers, all potential end-users/customers that Norse and/or its affiliates have solicited to serve through Norse's facilities, and wells attached to the facilities. Norse's map shall depict how gas flows to its delivery points and through the Mayville line transferred to Nornew . Norse shall also provide a written description of its gas flow on its system, including all deliveries and receipts from and into its system.

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[67] Strata Management Corporation (Strata), is a private U.S. corporation based in Houston, Texas, whose wholly-owned subsidiaries include Norse, Nornew, Nornew, Inc., Falconer, SJGS, Quest Energy, Inc., Strategic Energy Corporation and MariCo Oil and Gas Corporation.

J. Tariff Deficiencies

1. National Fuel's Protest

National Fuel raises several issues regarding Nornew's pro forma tariff. First, National Fuel questions Nornew's implementation of its proposed tariff provisions regarding requests for new construction. Specifically, National Fuel refers to the applicable tariff language, which states that "Transporter is not obligated to construct facilities . . . that will place Transporter at risk for recovering cost of facilities built to satisfy individual shippers."[68] National Fuel contends that Nornew's construction of the 7.63-mile pipeline segment to serve JBPU is not consistent with that policy because JBPU is being served at below-cost rates.

Second, National Fuel claims that, while Nornew proposes to include the JBPU lease as a non-conforming negotiated rate agreement, Nornew's tariff provides no rules for the use and nondiscriminatory application of non-conforming negotiated rates. National Fuel contends that the Commission should require that Nornew include in its tariff protection to recourse rate customers similar to that found in other pipelines' tariffs.[69]

2. Commission Response

On Original Sheet No. 71, Nornew proposes the following:

> 22.1 Transporter will have no obligation to construct any facilities but if it elects to construct for Shippers under this tariff, it will do so on a non-discriminatory basis, provided, however, Transporter shall not be obligated to construct facilities hereunder that will result in the expansion or diminishment of Transporter's pipeline system or that will place Transporter at risk for recovering costs of facilities built to satisfy individual Shippers. Transporter will own and operate all facilities constructed.

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[68] General Terms & Conditions (GT&C), Original Page 71, Item 22.1of Nornew's pro forma tariff.

[69] National Fuel specifically refers to language in Wyoming Interstate Company Ltd.'s tariff that provides protections to recourse rate customers. See Article 32 of Wyoming Interstate Pipeline Company, Ltd.'s FERC Gas Tariff, Second Revised Volume No. 2, Third Revised Sheet Nos. 84 through 85B.

> 22.2 Shippers that request service that requires construction of facilities by Transporter shall reimburse Transporter for the costs of preparing facility cost estimates (including any engineering or related study costs) and for the costs of such facilities. Shipper shall pay the new facilities charge by lump sum payment, based on Transporter's estimated cost prior to any construction activity unless another form of payment is otherwise mutually agreed upon. Transporter may require Shipper to pay the estimated cost of preparing the facility cost estimate prior to Transporter's preparing such estimate. Such payments shall be applied to the actual cost of such new facilities; provided, however, any excess shall be returned to the Shipper and any amounts still owing shall be paid by the Shipper to Transporter within thirty days after final determination.

We agree with National Fuel's protest that Nornew's tariff provides no rules for the use and nondiscriminatory application of non-conforming negotiated rates. That is contrary to our policy. Therefore, we direct Nornew to modify its tariff to include appropriate language that provides protections to recourse rate customers. Nornew's revisions shall take into account Commission policy as expressed in the Policy Statement,[70] in Order No. 637 and in other recent orders.[71]

Further, we find that Nornew's proposed provisions regarding the construction of new facilities violate Commission policy in several respects. First, in Nornew's assertion that it "shall not be obligated to construct facilities . . . that will place [Nornew] at risk for recovering costs of facilities built to satisfy individual Shippers," we find the reference to "individual Shippers" to be vague, and gives Nonrew significant discretion in deciding which projects it may choose to build, even if the shipper agrees to reimburse Nornew for all costs of construction. As such, the provision is potentially discriminatory.

Further, Nornew's proposed language seems to limit construction to "Shippers" only. We have previously disallowed pipelines from limiting construction to shippers only; pipelines must construct new facilities for other entities such as storage companies

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[70] Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, and Regulation of Negotiated Transportation Services of Natural Gas Pipelines, 61 Fed. Reg. 4633 (February 7, 1996), 74 FERC ¶ 61,076 (1996).

[71] See Tennessee Gas Pipeline Company, 97 FERC ¶ 61,225 (2001); Columbia Gas Transmission Corporation, 97 FERC ¶ 61,221 (2001); ANR Pipeline Company, 97 FERC ¶ 61,222 (2001); ANR Pipeline Company, 97 FERC ¶ 61,223 (2001); ANR Pipeline Company, 97 FERC ¶ 61,224 (2001). These five orders were all issued on November 21, 2001.

and market centers where applicable.[72] Accordingly, we direct Nornew to modify its proposed language so that entities other than shippers might be allowed to interconnect with Nornew.

Additionally, it is our policy to allow a party desiring access to a pipeline to obtain an interconnection if it satisfies five conditions.[73] First, the party seeking the interconnection must be willing to bear the costs of the construction if the pipeline performs that task. In the alternative, the party seeking the interconnection could construct the facilities itself in compliance with the pipeline's technical requirements. Second, the proposed interconnection must not adversely affect the pipeline's operations. Third, the proposed interconnection and any resulting transportation must not diminish service to the pipeline's existing customers. Fourth, the proposed interconnection must not cause the pipeline to be in violation of any applicable environmental or safety laws or regulations with respect to the facilities required to establish an interconnection with the pipeline's existing facilities. Finally, the proposed interconnection must not cause the pipeline to be in violation of its right-of-way agreements or any other contractual obligations with respect to the interconnection facilities. When these conditions are met, the pipeline cannot deny an interconnection, regardless of whether it previously has allowed an interconnection for a similarly-situated shipper. Pipelines should develop reasonable time frames for responding to requests for interconnections.[74] Consistent with that policy, Nornew is directed to modify the above referenced language insofar as it indicates that Nornew has "no obligation to construct any facilities."

3. Other Tariff Deficiencies

Based on our review of Nornew's pro forma tariff, we have found additional deficiencies which Nornew needs to correct, as discussed below.

a. Incidental Charges

On Original Sheet No. 8 (FT Rate Schedule) and Original Sheet No. 14 (IT Rate Schedule) Nornew proposes the following:

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[72] See Panhandle Eastern Pipe Line Company 79 FERC ¶ 61,016, reh'g denied, 81 FERC ¶ 61,295 (1997).

[73] Id.

[74] Panhandle Eastern Pipe Line Company, 91 FERC ¶ 61,037 (2000).

> 4.3 Incidental Charges: In addition to the charges pursuant to Sections 4.1 1nd 4.2 of this Rate Schedule, Transporter may charge Shipper an amount to reimburse Transporter 100% for any filing or similar fees and, if applicable, sales or use tax that have not been previously paid by Shipper, which Transporter incurs in establishing or rendering service.

Only FERC-approved costs may be recovered by jurisdictional pipelines from their customers. Therefore, before any "incidental charges" by which Nornew seeks to recover certain costs are made to Nornew's customers, Nornew must first seek approval by the Commission. Nornew must modify the above provision to reflect this.

b. Revenue Credit

We have not found any language in Nornew's proposed tariff addressing the crediting of revenues received from providing interruptible transportation. The Commission's policy regarding new interruptible service requires either a 100 percent credit of the interruptible revenues, net of variable costs, to firm and interruptible customers or an allocation of costs and volumes to these services. Accordingly, Nornew shall revise its tariff to reflect an interruptible transportation crediting mechanism or propose an allocation of costs to interruptible service.

K. Compliance With GISB, Compliance With Orders No. 637, 587-K and 587-L and Electronic Tariff Sheets

1. Compliance With Orders No. 637, 587-K and 587-L

On Original Sheet No. 50 (GT&C), Nornew proposes the following language:

> 9.9 Imbalance Charge: If Shipper's deliveries to or receipts from Transporter differ from Scheduled Quantities and if satisfactory arrangements have not been made for the Delivering Pipeline or other capable entity to act as the balancing party, Shipper shall pay Transporter a penalty of $15 per Mcf in addition to any other applicable charges. No imbalance penalty will be imposed when a prior period adjustment applied to the current period causes or increases a current month penalty.

We are of the view that, for several reasons, the above proposed language is inconsistent with both our policy regarding penalties as explained in Order No. 637[75] and the requirements of section 284.121(c)(v) of our regulations. First, Nornew's proposed penalty is not shown to be reasonably necessary to prevent impairment of reliability of service. Second, there is no provision for crediting of penalties. Finally, there is no reference to Nornew's responsibility to provide shippers with timely imbalance information. If Nornew intends to retain a penalty provision in its tariff, it will have to revise its provision therefore to be consistent with our stated policy and regulations.

Other issues raised in Order Nos. 637, 587-K and 587-L are not discussed at all in Nornew's proposed tariff. While the issues in Orders No. 637, 587-K and 587-L tend to overlap, in general, the Order No. 637 issues include: (1) Segmentation, Flexible Delivery Point rights and Mainline Priority at Secondary Points; (2) Discount Policies; (3) Imbalance Services; (4) Operational Controls and OFOs; (5) Penalty Revenue Sharing; and (6) Cashout of Transportation Imbalances and Prior Period Adjustments. The Order No. 587 issues include: (1) the implementation of Operational Impact Areas; (2) the implementation of Operational Balancing Agreements (OBAs) and the resulting imbalance resolution options; and (3) the implementation of a netting and trading of transportation of imbalances.

Consequently, we require that when Nornew files its actual tariff in this proceeding, it must address all of the issues raised in Orders No. 637, 587-K and 587-L. Nornew's actual tariff sheets must comply with Orders No. 637, 587-K and 587-L, or Nornew must request waivers of the requirements of Orders No. 637, 587-K and 587-L.

Original Sheet No. 72 (GT&C) of Nornew's proposed tariff refers to GISB Standards, Version 1.3. When Nornew made its filing in the instant proceeding, Version 1.3 was the currently effective version of GISB Standards. However, since May 1, 2001, the effective version of GISB standards is Version 1.4. Consequently, Nornew will have to revise its tariff to either incorporate verbatim or by reference the current version of all GISB standards in effect at the time it files its actual tariff. Additionally, Nornew must file a chart, identifying each GISB Standard and Definition and the location of the GISB Standards as incorporated verbatim or by reference in Nornew's tariff.

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[75] See Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. and Regs. ¶ 31,091 at 31,314-319 (2000).

2. Electronic Tariff Sheets

Nornew has not filed its tariff sheets electronically. At the time Nornew files its actual tariff, it must also file electronic tariff sheets.

L. Motion to Require Nornew to File More Supplemental Data

1. National Fuel's Protest

National Fuel contends that Nornew fails to justify inclusion of the "arms-length" purchase price in its rate base, and that Nornew fails to provide sufficient information to justify or assess its use of the so-called "arms-length" purchase price for the facilities transferred from Norse. National Fuel asserts that for two reasons Nornew's explanation that a lien holder, Columbia, blessed the purchase price, falls far short of meeting the Commission's standards for supporting an affiliate sales price in rate base. First, National Fuel maintains, the transaction between Norse and Nornew was an affiliate transaction that was not at "arm's length." National Fuel notes that the Commission has specifically stated that "[w]here a pipeline deals with an affiliate, it is not operating at arm's length."[76]

National Fuel's second reason why Nornew has failed to meet the Commission's standards for supporting an affiliate sales price in rate base, is that, as a general rule, a company purchasing a facility may pass on to its ratepayers only the depreciated original cost of acquired property as that cost appeared on the seller's books at the time of the sale of the facility. National Fuel states this rule is based on the requirements of section 4 of the NGA that a pipeline's rates must be just and reasonable. National Fuel contends that the inclusion of any excess of the purchase price over the depreciated original cost has only been allowed when the acquired facilities had never been devoted to gas utility.

In addition, National Fuel asserts that significant underlying cost data is absent from the filing, including information in conformance with the Uniform System of Accounts. National Fuel also states that relevant additional data would include working capital, deferred income taxes, accumulated depreciation and FERC Annual Charge Costs. National Fuel also contends that Nornew should also be required to supplement and more completely explain the data submitted in the following Exhibits: K, Cost of Facilities; L, Financing, whose unaudited balance sheets appear to show Nornew as owning "gathering" facilities otherwise undisclosed in the Application; and 0,

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[76] Citing Kentucky West Virginia Gas Company, 51 FERC ¶ 61,234 (1990).

Depreciation, which does not discuss depreciation or accumulated depreciation as to the transferred Norse facilities.

National Fuel adds that Nornew must file the following information and documents to allow proper evaluation of the correct rate base treatment of the transferred asset: 1) the complete set of documents relating to the sale, including disclosure of all interests of Columbia (which as lien holder is not a disinterested third party appraiser); 2) the February 8 release of lien by Columbia; 3) the February 13 agreement to sell and purchase the line, showing the actual purchase price, rather than the "Ten dollar" figure appearing in the Application; 4) the lease between Norse and Nornew that existed prior to the February 2001 transfer and reflected the level of costs underlying the original July 1999 JBPU lease that involved Norse facilities; and 5) the original cost and accumulated depreciation for the segment of line sold by Norse, and any ancillary agreements relating to any of the transferred properties. National Fuel asserts that without this information, it will not be possible to place a proper rate base value on the transferred segment.

2. Nornew's Answer

Nornew states that, as explained in its application, as supplemented, the price of the facilities it acquired from Norse was not a price dictated by Norse, but rather, was based on the payment agreed to by Columbia to release the facilities from its financing lien on Norse's pipeline. Nornew maintains that the agreed-upon payment is based on a simple formula: the total inch-miles of pipeline Norse acquired from Columbia in 1999 were compared to the inch-miles of the Mayville-Ellery pipeline to be sold by Norse to Nornew. Nornew states that the same ratio was applied to Norse's purchase price of $21,800,000 to obtain the pro rata value of the Mayville-Ellery facilities. Nornew contends that it will also pay Norse for the cost of construction on the Mayville-Ellery segment. Nornew maintains that, if anything, the depreciated original cost would be higher than the price paid because Norse originally acquired the facilities from Columbia for $8.6 million less than the depreciated original cost.[77] Nornew contends that it has not included an excess over the purchase price, and that the Commission should reject National Fuel's allegations as unsupported.

[77] Nornew cites Columbia Gas Transmission Corporation, 85 FERC ¶ 61,191 at 61,768 (1998).

3. National Fuel's Reply to Nornew's Answer

National Fuel asserts that the price of the transferred Norse segment remains inadequately supported. National Fuel states that this is the first time Nornew has advanced a cost justification for the acquisition price of the Norse segment, a sum which was justified in the certificate application simply as an "arms-length" transaction. National Fuel notes that Nornew's new cost justification is based on the proportion of the transferred inch-miles of pipeline relative to the original Norse system cost. National Fuel states it does not believe that this brief claim adequately supports the requested result. National Fuel asserts Nornew does not provide the original cost of the transferred segment, nor does it provide any actual calculations or workpapers to allow an examination of the price.

4. Commission Response

Upon review of all the information Nornew has submitted, including its November 13 data response, we find that Nornew sufficiently has explained the price of the facilities it acquired from Norse. Nornew demonstrates what were Columbia's original book values for each line and each right of way, what Norse paid Columbia, and finally what Nornew paid Norse. We find that Nornew has sufficiently explained the price of the facilities it acquired from Norse. Further, National Fuel has not provided sufficient evidence to support its claim that Nornew included any excess over the purchase price. However, as provided above, we are denying Nornew's request for waiver of the Commission's reporting and accounting requirements. Additionally, we direct Nornew to file a cost analysis after three years of operation to justify its existing transportation rates. At that time, the Commission, National Fuel and any other interested parties will have the opportunity to review Nornew's costs. In so doing we are denying National Fuel's request that we require Nornew to justify its rates in a filing 16 months following the commencement of service. Although National Fuel cites Kansas Pipeline Co., et al.,[78] in support if its request for a 16 month period, National Fuel concedes that our usual practice is to require that new pipelines file their costs and revenue studies after three years of operation.[79] As Nornew points out, Kansas Pipeline Company, though a newly jurisdictional pipeline, had the benefit of operating experience

[78] 83 FERC ¶ 61,107(1998).

[79] See, e.g., Southern LNG Inc., 89 FERC ¶ 61,314 (1999); Trunkline LNG, Co., 82 FERC ¶ 61,198 (1998); Alliance Pipeline, L.P., 80 FERC ¶ 61,149 (1997); and TransColorado Gas Transmission Co., 53 FERC ¶ 61,421 (1990).

and costs and Nornew doesn't. Moreover, as a non-ratepaying competitor, National Fuel has not shown a need for this information any earlier than we normally require.

M. Environmental

As discussed in the April 27 order, the Commission's staff prepared an environmental assessment (EA) addressing the construction of the 7.63-mile pipeline constructed by Nornew, as well as all of the construction activities authorized in that order. Those construction activities comprise all the construction activities included in Nornew's proposal and no new or additional construction is being authorized by this order.

Based on the discussion in the EA, we concluded in the April 27 order that if constructed and operated in accordance with Norse and Nornew's application and supplements filed on March 1,9, and 20, and April 16, 2001, and the environmental conditions in the appendix to that order,[80] approval of the proposal would not constitute a major Federal action significantly affecting the quality of the human environment. Accordingly, we are adopting by reference those conditions as conditions to the certificate authorizations granted herein.

Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[81] Nornew shall notify the Commission's environmental staff by telephone or facsimile of any environmental noncompliance identified by other Federal, state, or local agencies on the same day that such agency notifies Nornew. Nornew shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

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[80] See 95 FERC ¶ 61,134 at 61,426 (2001).

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

N. Nornew's Request for Clarification of the Limited-Term Certificate

On November 21, 2001, Nornew filed a request for clarification of the April 27 order's limited-term certificate. Nornew seeks clarification that the construction authorized for Nornew at Mayville, New York included installation of a meter and associated piping, located on Nornew's new pipeline connecting to Tennessee. Additionally, if necessary, Nornew requests supplemental authority to construct a 6' X 8' X 8' tall meter housing that is required by Tennessee prior to the initiation of service. According to Nornew, Tennessee has not yet completed its facilities, and Tennesse will not activate its connection to Nornew until it can install an electronic measurement device on Nornew's meter. In turn, Tennessee will not install the electronic measurement device until Nornew constructs the meter housing over its meter and meter piping. According to Nornew, neither National Fuel nor Enron North America Corporation opposes this clarification request.

Nornew requests in its application filed in Docket No. CP01-94-000, that the Commission grant among other things authorization "to construct, by rearrangement, and operate certain compression and measurement facilities in Mayville, NY". On April 16, 2001, Nornew in its data response includes a detailed map of the facilities at Mayville compressor station, which includes a depiction of the meter and the related piping as part of the certificated facilities to be owned and installed by Nornew. Nornew also includes in its data response the costs associated with installing the measurement facilities. The Commission's EA recognizes that the project includes measurement facilities in the Mayville compressor yard.

Based on the information provided by Nornew, we will clarify that the April 27 order includes authorization to construct measurement facilities in Mayville, New York. We also find that the construction of the meter housing is included in the authorization to construct the measurement facilities and, therefore, no supplemental authority is necessary.

At a hearing held on January 16, 2002, the Commission on its own motion, received and made a part of the record all evidence, including the applications and exhibits thereto submitted in this proceeding, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued in Docket No. CP01-94-000, authorizing Nornew (1) to operate approximately 7.63 miles of 8-inch pipeline; (2) to lease and operate two 360 hp compressors currently situated at

Norse's Mayville, New York compressor site; and (3) to operate the remaining project facilities as more fully described in the application in CP01-94-000 and in the body of this order.

(B) The certificate authorized in Ordering Paragraph (A) above and the rights granted thereunder are conditioned upon Nornew's compliance with all applicable Commission regulations under the NGA, particularly the general terms and conditions set forth in Parts 154 and 284 and paragraphs (a), (c), and (e), of section 157.20.

(C) Norse's request in Docket No. CP01-94-000 for a determination that upon the transfer of the Mayville Line to Nornew, Norse's remaining facilities are gathering facilities is denied, without prejudice, as detailed in the body of this order. Norse is directed to show cause under section 5 of the Natural gas Act why it should not be found to be engaged in jurisdictional activities. Further, Norse is directed to provide certain information as requested by the August 10, 2001 data request, and as more fully described in the body of this order.

(D) In Docket No. CP01-95-000, Nornew is issued a blanket certificate under Part 284, subpart G, of the Commission's regulations, as described and conditioned herein, authorizing Nornew to provide firm and interruptible transportation service for others, on an open-access and non-discriminatory basis.

(E) Nornew shall file actual tariff sheets within 30 days of the date of this order to bring its tariff in compliance with the revisions specified in the body of this order, including the current version of the GISB Standards, all requirements of Order Nos. 637, 587-K and 587-L, and subsequent orders in this proceeding and any other tariff regulations in effect at the time.

(F) Nornew's request that the JBPU lease be approved as a "nonconforming, negotiated rate agreement" is denied, as discussed in the body of this order; to continue to render service to the Jamestown BPU, Nornew must file a service agreement, consistent with the pro forma service agreement in Nornew's Part 284 open access tariff, within 60 days after the date of this order.

(G) As provided in the body of this order, the effective term of Nornew's limited term certificate issued in Docket No.CP01-97-000 and extended in Docket No. CP01-97-001 is further extended until the earlier of 60 days from the date of this order, or the effective date of a service agreement betwen Nornew and Jamestown BPU.

(H) Nornew's request to charge negotiated firm transportation rates is granted, as discussed and conditioned in the body of this order, and subject to the following conditions:

> (1) Nornew must file revised FT and IT recourse rates within 30 days, as discussed in the body of this order; and
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> (2) After three years of operation, Nornew must file a cost and revenue study, either justifying its existing recourse rates or proposing alternative rates. This cost and revenue study must be in the form specified in § 154.313, updating cost-of-service data, including the cost of plant-in-service, ITS revenue crediting and throughput.

(I) Nornew's request for waivers of 1) the Commission's reporting and accounting requirements in Parts 201, 250, 260, and 284 of the Commission's regulations, and 2) the requirements in Order Nos. 587-G and 587-I are denied, as discussed in the body of this order.

(J) Nornew's request for a waiver of the GISB standard Electronic Data Interchange, Electronic Delivery Mechanism, and business practice and electronic communications requirements, is granted, subject to the condition that Nornew comply with these requirement at such time as a Part 284 customer requests to engage in Electronic Data Interchange, Electronic Delivery Mechanism, and any other business practice or electronic communications.

(K) In Docket No. CP01-96-000, Nornew is issued a Part 157, subpart F blanket construction certificate authorizing it to undertake certain activities related to its pipeline facilities, as defined in the applicable regulations of subpart F or Part 157 of the Commission's regulations.

(L) Busti's late-filed motion to intervene is denied, as discussed in the body of this order.

(M) In Docket No. CP01-97-000, Nornew's request for clarification of the limited term certificate issued in the April 27 order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.