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UNITED STATES OF AMERICA 99 FERC ¶ 61,327
FEDERAL ENERGY REGULATORY COMMISSION

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

Williston Basin Interstate Pipeline Company | Docket Nos. RP00-463-002
RP00-463-003
and RP00-600-001

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued June 17, 2002)

On February 27, 2002, the Commission issued an order[1] on Williston Basin's revised filing to comply with Order No. 637.[2] The order accepted Williston Basin's filing with some modifications and required the pipeline to file actual tariff sheets. Among other things, the Commission required that Williston Basin implement segmentation on its system and adopt a new discount policy which permits shippers to retain discounts when they use alternate points. Williston Basin asks for rehearing on these two aspects of the Commission's order. For the reasons stated below, the Commission denies the requests for rehearing. Williston Basin also made a filing to comply with the February 27 order. The Commission accepts this filing with the modifications noted below.

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[1]Williston Basin Interstate Pipeline Co., 98 FERC ¶ 61,212 (2002).

[2]Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,091 (February 9, 2000); order on rehearing, Order No. 637-A, FERC Stats. & Regs, Regulations Preambles (July 1996-December 2000) ¶ 31,099 (May 19, 2000); order denying reh'g, Order No. 637-B, 92 FERC ¶ 61,062 (2000); aff'd in part and remanded in part, Interstate natural Gas Associatino of America v. FERC, 285 F.3d 18 (D.C. Cir. 2002) (INGAA).

Request for Rehearing

On March 29, 2002, Williston Basin filed a request for rehearing in Docket Nos. RP00-463-002 and RP00-600-001 of the February 27 order with respect to segmentation and discounting.

A. Segmentation

Background

In Order No. 637, the Commission required pipelines to permit shippers to segment their capacity to the extent operationally feasible. [3] Williston Basin did not propose to provide segmentation on its system. It contended that segmentation is not operationally feasible on its system because it is a reticulated pipeline with no physical paths to segment and because segmented transactions would be detrimental to the operation of its system.

The Commission, however, required Williston Basin to make a segmentation proposal. The Commission found Williston Basin's existing tariff limits segmentation, contrary to Order No. 637. The tariff provides for its firm shippers to obtain firm rights to capacity at points, but does not give shippers any firm contract demand over any particular portion of Williston's mainline pipeline. The Commission found the result was that on Williston Basin, segmentation, whether for a shipper's own use or as part of a capacity release, required the shipper to divide its point capacity and that the resulting segmented transactions could not exceed the amount of the original contract demand at the original receipt and delivery points.[4] The Commission stated that, by contrast, on a pipeline where shippers have firm contract demand on the mainline, a shipper can divide up its mainline contract demand and schedule a number of simultaneous transactions, each using the full mainline contract demand.[5]

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[3]18 C.F.R. § 284.7(d) (2001).

[4]For example, if the original maximum daily receipt quantity (MDRQ) and the original maximum daily delivery quantity (MDDQ) of the releasing shipper was 100 Dt, the releasing shipper must divide its point capacity and the subsequent segmented transactions of the releasing and replacement shippers could not exceed 100 Dt.

[5]In this situation, a shipper with 100 Dt of mainline contract demand could divide its mainline contract demand at several points and could ship 100 Dt in each segment.

In its ruling, the Commission recognized that given the reticulated nature of Williston Basin's system, there are operational constraints on the nature of the segmentation rights that it can provide its shippers.[6] The Commission noted it had recognized in Order No. 637-A that segmentation could present difficulties for reticulated pipelines if replacement shippers flow gas at different points than existing shippers, but found this was not reason enough to forgo segmentation altogether and required reticulated pipelines to provide the ability to segment while devising appropriate mechanisms to ensure operational stability. Order No. 637-A at 31,591.

The Commission held Williston Basin must devise a way to implement a capacity segmentation plan which is suitable to its system characteristics and that will not degrade the maximization of its pipeline capacity in order to comply with Order No. 637. It found that Williston Basin's refusal to permit segmentation was based on the mistaken belief that segmentation would require it to physically dedicate specific flow paths to specific shippers, but that this is not necessary. The Commission cited two segmentation plans on reticulated pipelines that do not involve specific physical flow paths. In Dominion Transmission Inc.,[7] the Commission approved a segmentation plan where segmentation would be allowed on a "virtual path" basis. In Colorado Interstate Gas Company (CIG), [8] the Commission approved a segmentation proposal on the reticulated portions of CIG's system based on an assumed "primary flow path" subject to a 20-day prior review by the pipeline to ensure that existing operations and firm service will not be adversely affected. In both, the Commission stated the segmentation plans should allow shippers the opportunity to segment their capacity, subject to whatever operational constraints may exist on the pipeline systems. The Commission stated Williston Basin should also be able to devise a way to implement a capacity segmentation plan that is suitable to its pipeline system characteristics as a reticulated pipeline that will avoid degrading transportation services.

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[6]It also found that segmentation was not possible on the Mapleton Extension, a straight-line portion of the system, because there is no receipt point on the Mapleton Extension. Segmentation requires a separate receipt point where gas can be injected in to the system for a transaction downstream of where gas involved in another transaction was removed from the system. Citing Paiute Pipeline Co., 96 FERC ¶ 61,167 at 61,749 (2001).

[7]Dominion Transmission Inc., 95 FERC ¶ 61,316 (2001).

[8]Colorado Interstate Gas Co., 95 FERC ¶ 61,321 (2001) (CIG); reh'g, 97 FERC ¶ 61,011 (2001); reh'g denied, 98 FERC ¶ 61,118 (2002).

The Commission found Williston Basin had not fully complied with the Commission's regulations regarding capacity segmentation and required Williston Basin to file a segmentation proposal that would be comparable to those adopted in CIG and Dominion.[9] The Commission also required Williston Basin to propose evaluation factors for a segmentation request, similar to those of CIG, for those portions of the segments within its reticulated system and include the evaluation factors in its tariff.

Rehearing Request on Segmentation

Williston Basin asserts the Commission's requirement that it segment capacity on its system is arbitrary, capricious, not reasoned decision making, and contrary to Section 5 of the NGA.

First, Williston states that segmentation would result in multiple simultaneous transactions and that, for operational reasons, it is not able to craft a capacity segmentation plan that would allow firm shippers to engage in these multiple transactions without degrading its current services and the rights of existing shippers. Williston Basin states that most of its line segments (20 out of 25 accounting for 90 percent of its volumes) have contracted flows that go in opposite directions. These flows result in null points which migrate within the segment and sometimes between segments. It states the actual physical paths for the gas of specific customers cannot be identified and that most gas delivery takes place through displacement. It also states that it maximizes flows and system usage by managing its system, including storage, so that deliveries can take place through displacement and flows can be bi-directional.

Williston Basin also contends a shipper can obtain multiple rights to transport its contract quantity through segmenting. Williston Basin states this occurs because of its reticulated nature and the fact that it has a postage stamp rate. Its system is, in effect, one zone and a shipper pays the same rate regardless of where its receipt and delivery points are located. Williston Basin asserts segmentation would permit a shipper to obtain additional receipt and delivery points that are not related to the actual physical flow of gas and would not be divisions of any actual physical path of gas flow. Instead, the shipper could obtain additional receipt and delivery points through segmentation and transport its contract quantity several times while only paying to transport its contract quantity once. Williston Basin contends that if a segmenting shipper obtains multiple

[9]The Commission originally required the proposal to be filed within 45 days of the order, by April 15, 2002. This date was subsequently extended to April 29, 2002 on Williston Basin's motion.

service rights, this, in turn, would interfere both with its ability to maximize throughput and with the rights of existing shippers because segmenting shippers would use capacity that is now being used to increase flows and manage the system. Williston Basin contends the Commission did not take into account its detailed explanation concerning why segmentation is not possible on its system.

Williston Basin asserts the burden is on the Commission under Section 5 of the NGA to show that Williston Basin's current tariff provisions regarding segmentation are unjust and unreasonable and that it has not done so. Williston Basin also asserts the Commission must show under Section 5 that the Commission's segmentation policies are appropriate in the specific factual context of the Williston Basin system. It asserts the Commission did not analyze whether plans adopted for CIG and Dominion are suitable for Williston Basin's system and did not show that a segmentation proposal comparable to those plans will avoid degrading Williston Basin's transportation services. Williston Basin asserts the Commission has neither found any of Williston Basin's tariffs concerning segmentation are unjust and unreasonable nor fixed the tariff provisions to be observed, but has, instead, required the pipeline to "come up with something"[10] so that the Commission has not met its burden of proof under Section 5.

Commission Ruling

The Commission adopted segmentation as a policy in Order No. 636 in order to enhance the value of firm transportation to shippers and to permit capacity release to compete more effectively with the pipeline's capacity. In Order No. 637, the Commission found pipelines had not consistently implemented the policy and promulgated a rule requiring pipelines to permit segmentation to the extent operationally feasible.[11] In Order No. 637, the Commission made a generic finding that the failure to permit segmentation where operationally feasible is unjust and unreasonable because it restricts efficient use of capacity without adequate justification.[12] It stated that it would determine whether any particular pipeline's tariff is unjust and unreasonable in the

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[10]Request for Rehearing at 14.

[11]Order No. 637 at 31,301-04; 18 C.F.R. § 284.7(d) (2001).

[12]Order No. 637 at 31,303-04; Order No. 637-A at 31,590-91; INGAA, 285 F.3d 18, 37-38 (D.C. Cir. 2002).

individual pipeline's compliance proceeding.[13] In INGAA,[14] the D.C. Circuit affirmed Order No. 637's requirement that pipelines permit segmentation where operationally feasible, upholding the Commission's finding that such a requirement is "necessary for reasonable pursuit of the Commission's policy of enhancing competition by increasing the flexibility of capacity releases."[15]

Thus, there can be no question that Williston Basin's failure to adopt segmentation to the extent it is operationally feasible is unjust and unreasonable. Not permitting operationally feasible segmentation inhibits the efficient use of capacity, denies shippers the same flexibility that pipelines had prior to Order No. 636, prevents competition, and inhibits the formation of market centers. As the Commission stated in Order No. 637-A: "In the case of a reticulated pipeline charging a postage stamp rate, firm shippers are paying for the use of the entire pipeline in their rates. The pipeline, therefore, has the obligation to optimize the system so that firm shippers can make the most effective use of the capacity for which they pay." Order No. 637-A at 31,591. Also, allowing shippers currently on the pipeline the option to release different segments of capacity increases competition in the sale of pipeline capacity by giving purchasers of capacity greater options for obtaining the capacity they need.

Thus, the key issue in acting under NGA Section 5 to require Williston Basin to permit segmentation boils down to whether the required segmentation is operationally feasible. Williston Basin continues to argue that it cannot offer segmentation, because it cannot define the actual physical path over which its firm shippers' gas flows from their primary receipt points to their primary delivery points. Williston Basin asserts that, without such an identifiable gas flow path, no segmentation should be permitted. The Commission recognizes that, given the bidirectional gas flows on most of Williston's line

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[13]In an opinion on Order No. 637, the Court of Appeals held the Commission's requirement that reticulated pipelines permit segmentation to the maximum extent possible given the configuration of their systems was not ripe for review because the requirement was too vague. INGAA, 285 F.3d 18, 42-43 (D.C. Cir. 2002). The Court noted that whatever the requirement means, it is qualified by the criterion that any segmentation must be operationally feasible. The Court also held it was too soon to review whether segmentation on reticulated pipelines with postage stamp rates would result in multiplying a segmenting shipper's capacity rights. The Court held such claims would have to wait until the segmentation requirement is implemented.

[14]INGAA, 285 F.3d 18 at 36-38 (D.C. Cir. 2002).

[15]INGAA, 285 F.3d 18 at 38 (D.C. Cir. 2002).

Sections and the fact there are null points that move depending upon operational conditions, a shipper's physical gas flow is not readily or consistently identifiable on Williston's system. However, these operational conditions are generally true on all reticulated pipelines. To accept Williston's contention that it should be exempted from allowing any segmentation simply because a consistent physical gas flow cannot be identified for its firm shippers would mean that all reticulated pipelines would be exempt from offering segmentation. That would be contrary to the Commission's holding in Order No. 637-A that the reticulated nature of a pipeline is not a reason for it to refuse to provide any ability to segment.

As the Court recognized in INGAA, the purpose of the Commission's segmentation policies established in Order No. 636 and 637 is to promote competition in the secondary market between firm shippers releasing capacity and pipelines as well as between releasing shippers themselves. While a reticulated pipeline may not be able to offer the full segmentation rights offered by straight line pipelines, that does not mean they should be permitted to deny any segmentation, thereby completely eliminating the intended competitive benefits of the Commission's segmentation policies. In fact, as Williston recognizes in its rehearing request, other reticulated pipelines have implemented segmentation. In Dominion Transmission Inc., [16] the Commission approved a segmentation plan where segmentation would be allowed on a "virtual path" basis. In CIG, [17] the Commission approved a segmentation proposal on the reticulated portions of CIG's system based on an assumed "primary flow path" subject to a 20-day prior review by the pipeline to ensure that existing operations and firm service will not be adversely affected.

Williston complains that segmentation would allow its shippers to schedule multiple transactions, each simultaneously using at different receipt and delivery points the shipper's full contract demand for mainline service. However, that is the essence of segmentation, and what is permitted on all pipelines permitting segmentation. Williston's firm customers pay rates designed to recover the costs of the pipeline's mainline facilities not allocated to interruptible service. They should be entitled to make full use of the facilities for which they pay. The ability to schedule multiple transactions is key to increasing competition. To the extent the pipeline loses interruptible throughput to this increased competition, the pipeline may file a general Section 4 rate case to revise its rates to reflect the lowered interruptible throughput.

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[16] 95 FERC ¶ 61,316 (2001).

[17] 95 FERC ¶ 61,321 (2001).

Of course, a reticulated pipeline such as Williston Basin may impose conditions on its offering of segmentation rights necessary to avoid operational problems and degrading service to other firm customers. The February 27 order simply found, pursuant to NGA Section 5, that Williston's failure under its existing tariff to allow any segmentation is unjust and reasonable. Instead of proceeding immediately to determine the remedy to be imposed under NGA Section 5, i.e., fixing the just and reasonable terms under which Williston must permit segmentation, the Commission allowed Williston to make a filing proposing the conditions under which it would permit segmentation. Thus, the February 27 order left open the issue of what limits Williston may need to place on segmentation to avoid any operational problems and does not require Williston to provide services which are not operationally feasible.

On April 29, 2002, Williston Basin made a filing to comply with the Commission's February 27 order that included a segmentation proposal. In that compliance filing, Williston Basin proposes a number of conditions on its allowance of segmentation designed to address its concerns about the operational impact of permitting segmentation. That filing is addressed below in the section of this order on Williston's filing to comply with the February 27 order.

B. Discounting

Background

In Order No. 637-A, the Commission stated that the current policy permitting a pipeline to limit discounts to particular points needed to be reexamined in the compliance filings, as part of the examination of restrictions on capacity release and segmentation.[18] In CIG/Granite State,[19] the Commission adopted a new policy that permits a shipper to retain a discount when it moves to segmented points or secondary points through a streamlined request process in which the pipeline processes requests for discounts within two hours. The Commission reasoned that its discount and segmentation policies can best be balanced by adoption of a policy under which a shipper with a discounted rate that seeks to use an alternate receipt or delivery point (whether through segmentation, capacity release, or its own exercise of flexible receipt and delivery point rights) can continue to receive a discounted rate if the pipeline has granted a discount to a similarly

[18] Order No. 637-A at 31,595.

[19] Colorado Interstate Gas Company, 95 FERC ¶ 61,321 (2001); Granite State Gas Transmission, Inc., 96 FERC ¶ 61,273 (2001) reh'g denied, 98 FERC ¶ 61, 019 (2002).

situated transaction at the alternate point.[20] As the Commission explained in CIG, "this policy is an application of the general requirement that pipelines must not engage in undue discrimination,"[21] by ensuring that a shipper with a discounted contract can continue to receive a discount at points where it is similarly situated to other shippers receiving a discount. This policy allows a shipper to better compete with the primary capacity offered by the pipeline and with other shippers holding contracts for capacity at these points.

Under the new discount policy, there is a rebuttable presumption that a shipper holding a discount at a point will retain a discounted rate if it chooses to segment, release capacity, or use its flexible receipt and delivery point rights to move gas to another point at which the pipeline has granted discounts for its firm or interruptible transportation services.[22] The pipeline can rebut this presumption by demonstrating that the segmented or secondary point transaction is not similarly situated to the transactions receiving the discount at the secondary point. The Commission placed the burden on the pipeline to justify a denial of a discount, because the Commission was concerned that pipelines may not have the same incentive to offer discounts to segmented transactions or to secondary points that compete directly with their sale of primary capacity.

In order to comport with the Commission's requirement to ensure nomination equality,[23] the Commission further has required pipelines to process requests for discounts within two hours of the time the request is submitted.[24] This processing

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[20]See Paiute Pipeline Company, 96 FERC ¶ 61,167, at 61,750 (2001) (explaining that the CIG discount policy applies to the use of secondary points whether through capacity release transactions, segmentation, or the use of flexible receipt or delivery points).

[21]95 FERC ¶ 61,321, at 62,121.

[22]The shipper seeking to move its point will pay the higher of its contractual rate or the discount rate being offered at the alternate point. See CIG, 95 FERC ¶ 61,321, at 62,121 n.38.

[23]18 C.F.R § 284.12 (c)(1)(ii) (2001).

[24]The Commission has further provided that "if a pipeline and its shippers can reach agreement on a standard processing period for discount requests that retains the nomination equality requirement of the Commission's regulations, such an agreement

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requirement ensures that shippers requesting the continuation of discounts can submit nominations at each of the four standard nomination opportunities provided by the pipeline.[25]

Williston Basin's current tariff does not provide for shippers using alternate points to retain discounts they have negotiated at primary points. Williston Basin's currently effective tariff provides that, should Transporter and Shipper negotiate a specific discount rate, such downward price adjustment for firm transportation shall be for a specific term.[26] A downward adjustment for interruptible transportation shall be for a specific term and shall apply only if one or more of the following instances occur: (1) specified volumes under such Service Agreement are achieved; (2) during specified periods of the year or for a specifically defined period; and/or (3) to specified receipt/delivery points, subsystem(s) and/or other defined geographical area(s).[27] In addition, Section 12.6.2 provides Williston will not automatically grant a rate discount at an alternate point that was granted at the initial primary point.[28] However, Williston's granting of discounts at alternate receipt and delivery points must be non-discriminatory.

In its Order No. 637 compliance filing, Williston Basin did not propose any pro forma tariff language changes relating to the discount provisions of its current tariff. No comments and/or protests concerning discounting on Williston Basin's system were filed.

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[24](...continued)
also could be an acceptable method of implementing the discount policy." Granite State Gas Transmission Inc., 98 FERC ¶ 61, 019.

[25]Pipelines, of course, can choose shorter periods for processing. The Commission has recognized that pipelines may not have staff to process discount requests overnight. Therefore, pipelines must act on overnight requests to retain discounts received after 4 p.m. by no later than 8:30 a.m. CCT the next business day, and need not process requests on weekends. National Fuel Gas Supply Corporation, 98 FERC ¶ 61,123 (2002). Pipelines providing for additional nomination opportunities after the 6:00 p.m. Evening Nomination cycle need not process corresponding discount requests for nominations coming after the 6:00 p.m. standard nomination time period until 8:30 a.m. the next business day.

[26]Section 3.3, Rate Schedule FT-1, Substitute Second Revised Sheet No. 32.

[27] Section 3.3, Sheet Nos. 91 and 91A, Section 3.3.

[28]Second Revised Sheet No. 237.

The Commission required Williston Basin to comply with the new policy in Williston Basin's Order No. 637 compliance order by filing actual tariff sheets implementing the rebuttable presumption policy along with a procedure for processing requests to retain discounts at each scheduling opportunity provided by the pipeline.

Williston Basin seeks rehearing of this requirement, asserting generally that the Commission's new requirement that it extend discounts to shippers using alternate points (whether through capacity release, segmentation, or flexible points) is arbitrary, capricious, not reasoned decision making, contrary to Section 5 of the NGA, and violates Due Process.[29]

Discussion

For the reasons discussed below, the Commission denies Williston Basin's request for rehearing on this issue.

In its rehearing request, Williston Basin first argues that the Commission's policy has been to allow selective discounting limited to specific receipt and delivery points. It asserts the Commission has changed its policy regarding selective discounting in orders in the CIG and Granite State orders, without permitting an opportunity to examine the new requirement or to evaluate it in the light of the circumstances of a reticulated pipeline as the Commission stated it would in the Order No. 637 orders. Williston Basin asserts the Commission's failure to follow its procedures violates Due Process.

The Commission is considering the new discount policy in individual pipeline Order No. 637 proceedings. As the Commission explained in Granite State, it may develop policy through individual cases.[30] It is considering the specific factual conditions on each pipeline in that pipeline's Order No. 637 proceeding.[31] That is the

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[29]In INGAA, 285 F.3d at 43-44 (D.C. Cir. 2002), the Court of Appeals held that the issue of discounting was not ripe for review and that the legality of the Commission's possible departure from discounting restricted to specific points would be revealed in future proceedings.

[30]Granite State Gas Transmission, Inc., 98 FERC ¶ 61,019 at 61,054-55 (2002).

[31]"[I]n each individual Order No. 637 compliance proceeding, pipelines can raise specific factual conditions on their pipeline that they believe warrant a change in the application of the discount policy to their pipeline." Granite State Gas Transmission,

(continued...)

case here. Williston Basin has raised certain possible factual situations concerning its reticulated system, as discussed below.

Williston Basin asserts the new discount policy is harmful to its system and its shippers. It asserts the new policy invites shippers to misuse discounts by obtaining them for underutilized portions of the system and then engaging in short-term transactions (whether by segmentation, capacity release, or the use of secondary points) at entirely different receipt and delivery points that could reduce interruptible throughput in heavily utilized portions of the system while failing to increase flow at the points for which it was contracted and where it was needed. Williston Basin also avers that the new discount policy is harmful in the long-run because it limits its ability to grant discounts to obtain long-term firm service commitments that are consistent with a rational business plan for the development and maximization of its pipeline capacity and system utilization.

The Commission does not agree that shippers may obtain discounts in underutilized portions of Williston Basin's system and then use them to displace throughput in heavily utilized portions of the system. The firm shipper changing points would pay the greater of its own discounted rate or the prevailing discounted rate at the alternate point. Therefore, assuming Williston has been charging higher rates for service in the more heavily used portions of the system than it charges for the underutilized portion, a shipper on the less utilized portion of the system would not be able to shift its deeper discount to the more heavily utilized portion of the system. Consequently, if it were similarly situated to interruptible shippers at the alternate point on the more heavily utilized portion of the system, it would have to pay the same, higher rate as the other shippers on that portion of the system and could not take advantage of greater discounts received at other points. Williston Basin may be correct that the Commission's new discount policy will require changes in long-term contracting. The Commission has found, however, that the new policy is necessary to resolve the conflict between enhancing competition by adopting segmentation and flexible point rights and continuing to permit pipelines to restrict discounts to specific shippers at specific points.

Williston Basin asserts the Commission's new discount policy alters and undercuts Section 3.3 of Rate Schedule FT-1 of its tariff which provides that a discount shall apply only to specific points or to a specific geographic area. Williston Basin further asserts the Commission has summarily interfered with its existing contracts by abrogating

[31](...continued)
Inc., 98 FERC ¶ 61,019 at 61,055 (2002).

receipt and delivery point limitations to which the pipeline and various shippers have previously agreed. Yet, it asserts, the Commission has not shown that Section 3.3 or any other of its tariff provisions or its contracts as they relate to discounts are unjust, unreasonable, or unduly discriminatory. Williston Basin contends that, consequently, the Commission has not followed the procedures of Section 5 of the NGA and has violated that Section by requiring it to implement the new discount policy.

Contrary to Williston Basin's assertions, the Commission has determined that failure to provide a shipper's contract discount or the prevailing discount at an alternate point is discriminatory. In CIG the Commission found that requiring the pipeline to provide the shipper with a discount at alternate points was an application of the general requirement that pipelines must not engage in undue discrimination by ensuring that a shipper with a discounted contract can continue to receive a discount at points where it is similarly situated to other shippers receiving a discount.[32] The Commission has also found that it is unreasonable for a segmenting shipper with a discount to pay the maximum rate at alternate points regardless of market conditions.[33] The Commission found that if the shipper had to pay the maximum rate regardless of market conditions at the segmented points, the segmented transaction could not compete on an equal footing with pipeline capacity and competition would be unduly restricted. Thus, the Commission has found both that failing to provide discounts at alternate points is discriminatory and that it is unjust and unreasonable.

These holdings apply to all interstate pipelines, including Williston Basin. Thus, to the extent that Williston Basin's tariff provisions or contracts prohibit or prevent shippers from retaining discounts at alternate points where they are similarly situated to other shippers receiving discounts, those tariff provisions and contracts are discriminatory and unjust and unreasonable under Section 5 of the NGA. The Commission has followed the procedures under Section 5 of the NGA and has made the necessary findings to invalidate the portions of Williston Basin's tariff provisions and contracts that do not permit shippers to retain discounts at alternate points in its prior orders and in this proceeding.

Williston Basin also asserts the Commission is applying its new discount policy in ways that are inconsistent with prior Commission policy and precedent. It states that in Gulf South Pipeline Co., L.P., 98 FERC ¶ 61,278 at 62,169 (2002), the Commission determined that firm and interruptible shippers at a point are similarly situated for

[32] CIG, 95 FERC ¶ 61,321 at 62,121.

[33] CIG, 95 FERC ¶ 61,321 at 62,121.

purposes of the policy, even though the Commission has previously distinguished between firm and interruptible service for purposes of rates, scheduling priority, curtailment, and discounting.[34] Williston Basin contends that, given the Commission's determination that firm and interruptible shippers are similarly situated, it cannot sell interruptible service at a point where there are already IT discounts because a firm shipper can offer firm service at that same point at the prevailing IT discount. The result will be, according to Williston Basin, that the firm shipper selling the superior product will pre-empt any further sales of interruptible transportation at that point. Williston Basin also asserts the Commission summarily reversed long-standing precedents regarding selective discounting and what constitutes a "similarly situated" shipper without a reasoned explanation.

Williston Basin is mistaken as to the Commission's determination. The Commission did not say that firm and interruptible shippers at a point are always similarly situated. The Commission stated, instead, that the mere fact that one shipper is using firm service while another is proposing to use interruptible service should not be an absolute bar in determining whether the shippers are similarly situated for the purpose of granting discounts.[35] In Order Nos. 636 and 637, the Commission has consistently held that a primary purpose of its capacity release program is to promote increased competition by allowing firm shippers to release their capacity in competition with the pipeline's interruptible service. If the fact a shipper is receiving firm service would always render it not similarly situated to a shipper receiving interruptible service, then capacity release transactions would always be considered not similarly situated to the pipeline's interruptible service. That would mean that a releasing shipper with a discount at one point would always lose its discount when it sought to release capacity in competition with a pipeline's sale of interruptible service using another point. This would discourage such releases and undercut the Commission's competitive goals. There may be times when a capacity release is not similarly situated to the pipeline's interruptible service and the presumption of similarity can be rebutted. For example, if the releasing shipper is selling released capacity on a non-recallable basis for a full year on a portion of the pipeline where interruptible service is often interrupted, the two services may well not be similar. But if the releasing shipper is selling capacity for only several days and at the same time reserving the right to recall it, the release transaction may well be similar to interruptible service sold by the pipeline. Accordingly, the

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[34]Williston Basin relies on Sea Land Service v. ICC, 738 F.2d 1311 (D.C. Cir. 1984) and Sunrise Energy Co. v. Transwestern Pipeline Co., 62 FERC ¶ 61,087 at 61,623 (1993), reh'g denied, 66 FERC ¶ 61,170 (1994).

[35]Gulf South Pipeline Co., 98 FERC ¶ 61,278 at 62,169.

Commission reaffirms that the pipeline must consider discounts to both firm and interruptible shippers at a point in determining whether the presumption applies that the shipper using the alternate point is similarly situated and will retain its discount.

As the Commission has noted previously, a firm shipper on a reticulated system with a postage stamp rate pays for use of the entire system, not just specific points. In addition, when the pipeline sells interruptible capacity, it is often selling firm capacity that is not being used and has not been released. Therefore, it is reasonable that the firm shipper retain its primary point discount if it moves to an alternate point at which it is similarly situated to another shipper that is receiving a discount. First, it has paid for the use of that point and has the right to use it. Second, the shipper has the right to release the capacity for which it has paid. In any event, if the shipper is similarly situated to interruptible shippers at the alternate point who are already receiving a discount, then the pipeline's interruptible service should be at least competitive with the firm shipper using or releasing capacity at that point. It will, in fact, be more attractive where interruptible shippers have a greater discount than the releasing firm shipper.[36] Interruptible service may also be more competitive with regard to the term of the contract. Williston Basin may also decide to increase the competitiveness of its interruptible service by offering a new customer a greater discount or increasing the scheduling priority of some of its interruptible service.

Compliance Filing

On April 29, 2002, Williston Basin made a filing to comply with the Commission's February 27 order in Docket No. RP00-463-003. There were no protests or comments on the compliance filing. The Commission accepts the filing with the modifications noted below.

Scheduling Equality

Section 284.12(c)(1)(ii) of the Commission regulations requires pipelines to "permit shippers acquiring released capacity to submit a nomination at the earliest available nomination opportunity after the acquisition of capacity. If the pipeline

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[36]The firm shipper using an alternate point only gets its contract discount at the alternate point. It does not get a bigger discount (and a lower rate) at the alternate point if similarly situated shippers are getting a bigger discount at that point. Gulf South Pipeline Co., 98 FERC ¶ 61,278 at 62,168 (2002).

requires the replacement shipper to enter into a contract, the contract must be issued within one hour after the pipeline has been notified of the release, but the requirement for contracting must not inhibit the ability of the replacement shipper to submit a nomination at the earliest available nomination opportunity." [37] In Order No. 637, the Commission explained that this rule will enable shippers to acquire capacity at any of the nomination or intra-day nomination times, and nominate gas coincident with their acquisition of capacity. NAESB[38] standard 1.3.2 establishes four nomination opportunities; one timely nomination opportunity and three intra-day nomination opportunities.

The Commission found that Williston Basin's August 15 filing complied with Commission requirements concerning the timing of nomination for biddable capacity releases, but not for prearranged capacity releases because it was unclear that the replacement shipper in a prearranged deal could nominate as soon as the pipeline was given notice of the prearranged deal. The Commission stated Williston Basin could implement the revised NAESB timelines in Version 1.5 of NAESB standard 5.3.2 to revise its scheduling equality provisions. The Commission also required Williston Basin to explain why it would permit shippers to nominate prior to execution of a contract only if offers and bids were submitted electronically.

The Commission recently adopted Version 1.5 of the NAESB standards in Order No. 587-O.[39] Version 1.5 of Standard 5.3.2 establishes a revised capacity release timeline, which the Commission found satisfies the scheduling equality provisions of Section 284.12(c)(1)(ii). Under this standard, biddable releases would be posted by 3:00 p.m (rather than at 5:00 p.m. as under the existing timeline), contracts would be issued within one hour of posting, and shippers would be able to nominate at the 5:00 p.m. Intra-day 2 nomination cycle or any following nomination cycle. Pipelines must be notified of non-biddable, prearranged deals one hour prior to the nomination deadline for each of the four NAESB nomination cycles. The Commission further found that pipelines can propose shorter prior notice requirements for prearranged non-biddable deals. To provide shippers with the utmost flexibility in scheduling, the Commission

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[37] 18 C.F.R. 284.12(c)(1)(ii) (2001).

[38] North American Energy Standards Board, formerly the Gas Industry Standards Board (GISB).

[39] Standards for Business Practices of Interstate Natural Gas Pipelines, Order No. 587-O, 67 Fed. Reg. 30,788 (June 7, 2002), III FERC Stats. & Regs. Regulations Preambles ¶ 31, 129 (May 1, 2002).

encouraged pipelines to reduce or eliminate the prior notice provision for prearranged, non-biddable deals as permitted by their scheduling system.

In its April 29 compliance filing, Williston Basin proposes to adopt the new NAESB capacity release timelines with respect to offers and bids that are made through electronic means of communication. Williston Basin's Sections 17.3.1 and 17.3.2 repeat the provisions of NAESB Section 5.3.2 verbatim. Williston Basin states in proposed Section 17.3.4[40] of its General Terms and Conditions (GTC)[41] that it will not be obligated to adhere to the offer, match, award, and/or posting provisions of Sections 17.3.1 and 17.3.2 with respect to offers and bids that are not made by means of electronic communication. Williston Basin explains that electronic submission is necessary to give the Company the ability to process an offer or bid for capacity release in time to meet the one hour contracting requirement of Sections 17.3.1 and 17.3.2.[42] The pipeline states further that it is not its intent that the electronic submission requirement should restrict a shipper's ability to nominate at the next available opportunity.

The Commission finds that Williston Basin's proposed Sections 17.3.1 and 17.3.2 adopt NAESB standard 5.3.2 of Version 1.5 and accepts them. The Commission also finds that it is reasonable for Williston Basin to require offers and bids to be submitted electronically. The Commission agrees that electronic submission will facilitate the contracting and nomination processes as now embodied in the Commission's regulation. The Commission notes that Section 17.3.4 permits the pipeline to deviate from the NAESB timelines if an offer or bid is not submitted electronically, but does not require it. The Commission encourages the pipeline to process non-electronic submissions within the NAESB timelines as well.

Segmentation Proposal

The Commission required pipelines to permit segmentation to the extent it is operationally feasible. In its August 15, 2000 filing, Williston Basin asserted segmentation was infeasible on its system because it is a reticulated system which operates by displacement and made no segmentation proposal. The Commission

[40]Second Revised Sheet No. 254B.

[41]References to Sections are to Williston Basin's GTC unless otherwise noted.

[42]Letter of transmittal at 2, Docket No.RP00-463-003 (April 29, 2002).

responded that other reticulated pipelines had made segmentation proposals[43] and required Williston Basin to submit a proposal in its compliance filing.

In its compliance filing, Williston Basin proposes that a shipper may segment its firm capacity under Rate Schedules FT-1 and ST-1 subject to various conditions.[44] It proposes that shippers may segment their capacity at or between their currently effective, telemetered, primary receipt and delivery points and in the currently effective single-direction of flow in their transportation agreements.[45] The segmented transaction must also meet other criteria including availability of point capacity, absence of adverse impact on the direction of gas flow, and absence of adverse impact on storage operations. In addition, segmentation capacity may not exceed a shipper's primary capacity on any individual segment. That is, the total of the quantities requested for segmented transactions must be equal to or less than the shipper's MDQ for the primary receipt and/or delivery points on the date segmentation is requested.[46] A shipper must make a request for segmentation ten business days in advance, and segmented transactions are scheduled after firm non-segmented transactions using primary and alternate points.[47] Williston Basin may control or restrict segmentation that threatens the operation of its system.

Under Williston Basin's proposal, a shipper may lose segmentation rights in several ways. If a shipper changes a primary point, it will void any previously approved segmentation associated with that point. A shipper may lose its segmented capacity if there is a request for uncommitted capacity. A shipper may also lose all or a portion of its segmented capacity if there is a new request for segmentation and the shipper has not utilized its segmented capacity in the preceding 30 days. Segmentation rights may also be suspended or terminated if there are operational or contractual changes on the pipeline's system that impair its ability to continue the segmented transaction.

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[43]Dominion Transmission Inc., 95 FERC ¶ 61,316 (2001); Colorado Interstate Gas Company, 95 FERC ¶ 61,321 (2001).

[44]Proposed Section 50, GTC.

[45]Even though there is no actual discernible physical gas flow, Williston Basin specifies a direction of flow in its transportation agreements.

[46]Section 50.8, GTC, Original Sheet No. 386.

[47]Section 9.20.1, GTC, Third Revised Sheet No. 228A.

Williston Basin asks the Commission to delay implementation of the proposed segmentation provisions until the first day of the month following 120 days after the date of a final Commission order. It states that extensive programming is necessary to implement the segmentation provisions.

The Commission finds Williston Basin's proposal is positive and provides a means of moving forward on its system toward greater flexibility for shippers, while at the same time taking into account Williston's concerns about the operational effects of segmented transactions on its reticulated system. In addition, although several parties opposed Williston's original proposal not to allow segmentation, no party objects to Williston's instant proposal to allow segmentation subject to the above described limitations. The Commission believes the proposal is beneficial in that it will serve to begin the use of segmented transactions on Williston Basin and will allow the pipeline to gain experience with these transactions. In time, the Commission believes this experience should lead the pipeline to expand the scope of segmented transactions on its system.

The Commission finds that the conditions Williston Basin places on segmentation in its proposal address its concerns about the integrity of its operations and services. The conditions prevent the simultaneous transportation of multiples of a shipper's contract demand on the mainline since segmentation capacity may not exceed the shipper's primary capacity on any individual segment. They also prevent segmented transactions from displacing firm primary and alternate service since segmented transactions are scheduled after these non-segmented transactions. Williston Basin's conditions also take into account operational considerations in that they make segmentation transactions subject to the availability of point capacity and to prior review in which the pipeline may consider their impact on gas flow. Finally, Williston Basin reserves the right to control or restrict segmentation that threatens the operation of its system.

For these reasons, the Commission finds that Williston Basin's segmentation proposal is just and reasonable under Section 5 of the NGA and accepts it. Williston Basin may implement its segmentation proposal on the first day of the month following 120 days after the date of the issuance of this order, or November 1, 2002.

Flexible Point Rights

Under the Texas Eastern/El Paso policy, a releasing shipper and a replacement shipper both are able to choose primary points consistent with their mainline contract demand.[48] In its August 15, 2000 filing, Williston Basin did not propose a method for replacement shippers to obtain primary points for segmented transactions as it had not proposed any form of segmentation. The Commission said in its February 27 order that it would review this aspect of Williston Basin's compliance with Order No. 637 when Williston Basin made its segmentation proposal.

In its April 29 compliance filing, Williston Basin makes no change in its existing procedures regarding primary points. It regards its existing provisions as in compliance with the Texas Eastern/El Paso policy. Section 12.5.1, GTC, of Williston Basin's current tariff permits shippers to change a primary point under certain conditions, with the concurrent loss of the original primary point. Section 17.8, GTC, provides that a releasing shipper may designate whether the replacement shipper may amend or change the primary receipt and delivery points of the released capacity.

The Commission finds Williston Basin's tariff does not fully comply with the Texas Eastern/El Paso policy. Under the Texas Eastern/El Paso policy, both the releasing and replacement shipper should be able to choose primary points consistent with their contract demand. Above, the Commission has accepted Williston's proposal to schedule segmented transactions after primary and secondary point non-segmented transactions. Therefore, there is no reason to allow replacement shippers in segmented transactions to obtain primary points. However, the Texas Eastern/El Paso policy also applies to non-segmented releases. Consequently, Williston Basin must modify its tariff so that the releasing shipper and the replacement shipper in non-segmented releases may both choose primary points consistent with their contract demand, subject to available capacity at the points and Williston's ability to provide primary firm service between the two primary points requested. The releasing shipper may restrict the replacement shipper's right to change its existing primary points in the release request.[49]

Mainline Priority at Secondary Points

Order No. 637-A provides that each pipeline must afford a higher priority over mainline capacity to shippers seeking to use a secondary point within their capacity path than shippers seeking to use mainline capacity outside of their path, unless the pipeline

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[48]Order No. 637, ¶ 31,091 at 31,304.

[49]Term Sheet Form, Section 17.13, paragraphs 11 and 13, GTC, Second Revised Sheet No. 266.

can demonstrate that such an approach is operationally infeasible or leads to anticompetitive outcomes on its system.[50]

Williston Basin did not propose any pro forma tariff language changes for mainline priority at secondary points in its August 15, 2000 filing. It asserted gas does not flow in a straight line on its system and deliveries are made by displacement, sometimes by several. Thus, there are no physical paths for shippers' gas flows and it cannot and does not differentiate between alternate points within a shipper's contracted primary path and outside its contracted primary path. The Commission responded that point priority may depend on Williston Basin's segmentation proposal and that it would review this aspect of its compliance with Order No. 637 when it made that proposal.

In its April 29 filing, Williston Basin maintains that it cannot differentiate between alternate points that are between a shipper's contracted primary points and alternate points that are not. Thus, it states, it cannot give a higher priority to alternate points within-the path. It states that it schedules all transactions with alternate points after transactions with primary points.

The Commission accepts Williston Basin's treatment of alternate points as reasonable. The Commission agrees that on its reticulated system there is no physical path and thus no way of identifying or giving priority to alternate points within a path. Thus, it will not require Williston Basin to give priority to secondary points within-the-path.

Discounting

In Order No. 637-A, the Commission stated that the current policy permitting a pipeline to limit discounts to particular points needed to be reexamined in relation to restrictions on capacity release and segmentation.[51] In CIG/Granite State, the Commission adopted a new policy in which a shipper with a discounted rate that seeks to use an alternate point, whether for segmentation, capacity release, or its own use of flexible points, can continue to receive a discounted rate if the pipeline has granted a discount to a similarly situated transaction at the alternate point.[52] There is a rebuttable

[50]Order No. 637-A, ¶ 31,099, at 31,596-98.

[51]Order No. 637-A at 31,595.

[52]Colorado Interstate Gas Company, 95 FERC ¶ 61,321 (2001); Granite State Gas
(continued...)

presumption that the shipper is similarly situated to shippers at an alternate point. The policy is an application of the general requirement that pipelines must not engaged in undue discrimination. At the alternate point, the shipper must pay the greater of its existing discount or the discount received by other shippers at that point.

Williston Basin made no proposal concerning retention of discounts at alternate points in its August 15 filing. The Commission directed it to implement the rebuttable presumption policy and a procedure for processing requests to retain discounts at each scheduling opportunity provided by the pipeline within two hours of the receipt of the request.

In Section 12.6.2 of its April 29 filing, Williston Basin proposes to implement the discount policy. It provides that discounts will not automatically be granted at alternate points, but that discounts at alternate points shall not be discriminatory. It provides that a shipper may request that its discount will apply at an alternate or segmented point and that there shall be a rebuttable presumption that a shipper will retain its discounted service. Williston Basin may rebut the presumption. If the shipper's request is granted it will pay the higher of its current rate discount or the rate discount being offered at such point. Williston Basin also provides that shipper may submit a request at least two hours prior to any nomination deadline by electronic means and the pipeline will respond within two hours of receipt of the request, with the exception of those received between 4:00 p.m. and 6:30 a.m. which will receive a response by 8:30 a.m. the following business day.

The Commission finds Williston Basin's proposal concerning discounting complies with its rebuttable presumption policy and accepts it.

The ADQ Penalty

Order No. 637 requires that a pipeline's penalties adhere to three principles.[53] First, a pipeline may include transportation penalties in its tariff only to the extent necessary to prevent the impairment of reliable service. Second, a pipeline must credit to shippers all revenues from all penalties net of costs. Third, a pipeline must provide to

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[52](...continued)
Transmission , Inc. 96 FERC ¶ 61,273 (2002), reh'g denied, 98 FERC ¶ 61,019 (2002); Paiute Pipeline Company, 96 FERC ¶ 61,167 at 61,750 (2001).

[53]18 C.F.R. § 284.12(c)(2)(v) (2001).

shippers, on a timely basis, as much information as possible about the imbalance and overrun status of each shipper and the imbalance of the pipeline's system as a whole.

Williston's tariff provides for imbalance, nomination (scheduling), unauthorized daily overrun, and unauthorized annual overrun penalties.[54] In its August 15 filing, Williston Basin proposed to limit its scheduling and unauthorized daily overrun penalties to situations in which there were operational problems. The Commission accepted Williston Basin's imbalance, scheduling, and unauthorized daily overrun penalties. With regard to its unauthorized annual delivery quantity (ADQ) penalty, Williston Basin proposed to charge two rather than five times the unauthorized overrun index price for excess volumes. Williston Basin imposes an unauthorized ADQ penalty on volumes that exceed a shipper's annual demand quantity by more than one half of one percent.

The Commission rejected Williston Basin's proposed unauthorized ADQ overrun penalty. It found that the penalty could be imposed during non-critical periods; that during non-critical periods only nominal penalties, on the order of the IT rate, are warranted; and that Williston Basin's penalty was greater than nominal. The Commission required Williston Basin to revise its ADQ penalty either by proposing a nominal penalty for non-critical periods, not to exceed twice its IT rate, or waive the unauthorized ADQ overrun penalty when the unauthorized overrun does not cause operational problems.

In its April 29 filing, Williston Basin proposes in Section 15.16.1 unauthorized ADQ overrun penalties of two times the IT rate for non-critical periods and two times the index price during critical periods. The Commission finds Williston Basin's proposal complies with the Commission's regulation concerning penalties and accepts it.

Penalty Revenue Crediting

Order No. 637 required that all pipelines credit penalty revenues to shippers. In its August 15 filing, Williston Basin proposed to credit to shippers, net of costs, nomination variance, MDDQ unauthorized overrun, ADQ unauthorized overrun, and unauthorized gas penalties. The Commission accepted these proposals as in compliance

[54]Williston Basin also has an Unauthorized Gas Penalty consisting of immediate confiscation of the unauthorized gas during critical periods and confiscation after at least 45 days in non-critical periods. Section 18, Sheet No. 282. However, Williston Basin proposes to credit penalty revenues from the confiscation of unauthorized gas. This proposal is discussed below in the section on penalty revenue crediting.

with Order No. 637, but required Williston Basin to file an annual report with the Commission in which it supports any costs that are netted against credits.

Williston Basin states, that, as required by the Commission, it will file an annual report upon completion of one year after the date these tariff sheets are placed in effect in which it will provide support for any costs that have been netted against any amounts credited back to appropriate shippers.[55] Williston Basin does not appear to have proposed a tariff provision concerning the report.

The Commission will require Williston Basin to file an annual report each year on the crediting of its penalty revenues in which it supports any costs that are netted against credits. In addition, Williston Basin must add a provision to its tariff stating this requirement.

The Commission orders:

(A) The requests for rehearing are denied.

(B) Williston Basin's compliance filing is accepted subject to the conditions in the body of this order.

(C) The tariff sheets listed in Appendix A are accepted to be effective July 1, 2002, subject to the further revisions required by this order.

(D) The segmentation provisions contained in Section 50, Original Sheet Nos. 383 - 386, are accepted to be effective November 1, 2002.

(E) Williston Basin is required to make a filing to comply with the modifications and additions required in this order within 30 days of the issuance of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,

[55] Letter of Transmittal at 13, Docket No. RP00-463-003 (April 29, 2002).

Deputy Secretary.

Appendix A

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