20100409-3033 FERC PDF (Unofficial) 04/09/2010 Attachment G

131 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Bison Pipeline LLC Docket No. CP09-161-000

ORDER ISSUING CERTIFICATE

(Issued April 9, 2010)

1. On April 20, 2009, Bison Pipeline LLC (Bison), filed an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and authorizing the construction and operation of a new pipeline, a new compressor station and other appurtenant facilities designed to transport approximately 477 million cubic feet per day (MMcf/day) from the Dead Horse region near Gillette, Wyoming to an interconnection with Northern Border Pipeline Company in Morton County, North Dakota. Bison also requests a blanket construction certificate under subpart F of Part 157 of the Commission's regulations and a blanket certificate to provide open-access transportation under subpart G of Part 284, of the Commission's regulations. Bison further requests approval of its proposed pro forma gas tariff.

2. As discussed below, the Commission finds that Bison's proposed project is required by the public convenience and necessity and issues the requested certificate authorizations, subject to conditions. Bison's proposed initial rates and tariff are approved, as conditioned and modified in the body of this order.

I. Background

3. Bison is a limited liability company. Bison's sole member is TC Continental Pipeline Holdings Inc., a wholly-owned indirect subsidiary of TransCanada Corp. TransCanada Northern Border Inc., a wholly-owned indirect subsidiary of TransCanada Corp., will be the operator of Bison.

4. Currently, Bison neither owns nor operates any interstate pipeline facilities, nor does it provide any services subject to the Commission's jurisdiction. Upon acceptance

20100409-3033 FERC PDF (Unofficial) 04/09/2010

of the requested certificate authorizations, Bison will become a jurisdictional natural gas company within the meaning of NGA section 2(6).[1]

II. Proposal

5. Bison states that the project will meet a critical need by providing additional pipeline capacity to transport natural gas from the Powder River Basin to serve the Midwest market and enhancing downstream consumers' access to a competitive clean-burning source of energy. Further, Bison claims the project will expand customer choices of supply basins and transportation paths, and help promote exploration and development of natural gas. Given the level of drilling activity, overall Rocky Mountain production area growth, and even conservative increases in Powder River Basin supply, the ability of the Midwest market to economically access this growing production source via the project will provide much needed supply diversity and reliability to this market.

6. Bison states that it held an initial open season on April 3, 2008 (which was revised on May 14, 2008), a second open season on August 8, 2008, and a third open season on March 17, 2009.[2] The open seasons resulted in four precedent agreements at negotiated rates for ten-year terms with non-affiliated shippers. The total project contractual commitments, as of the date of the Bison's application, are approximately 401 MMcf per day.

7. Specifically, Bison proposes to build approximately 302 miles of 30-inch diameter pipeline from the Dead Horse region near Gillette, Wyoming to an interconnection with

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[1] 15 U.S.C. § 717a(b).

[2] Bison established three classes of shippers. A "Foundation Shipper" is a party that submitted a bid for a minimum transportation quantity of 250 MMcf per day of natural gas for a minimum ten year term. The estimated negotiated reservation rate for Foundation Shippers is $0.548 per million Btu (MMBtu), subject to further adjustments and project cost sharing provisions. Anadarko Energy Services Company is a Foundation Shipper. A "Cornerstone Shipper" submitted a bid for a transportation quantity of between 100 MMcf and 249.999 MMcf/d. The estimated negotiated reservation rate for Cornerstone Shippers is $0.57/MMBtu, subject to further adjustments and project cost sharing provisions. Williams Gas Marketing, Inc. is a Cornerstone Shipper. An "Anchor Shipper" submitted a bid for a transportation quantity of less than 250 MMcf per day for a minimum ten year term. The estimated negotiated reservation rate for Anchor Shippers is $0.575/MMBtu, subject to further adjustments and project cost sharing provisions. Minnesota Energy Resources Corporation and MidAmerican Energy Company are Anchor Shippers. Additionally, a negotiated fuel rate of 0.69 percent for Company Use Gas was applicable to all project shippers electing the negotiated rate option.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

Northern Border Pipeline Company near Compressor Station No. 6 located in Morton County, North Dakota; one new 4,700 horsepower natural gas fired compressor unit with related appurtenances located in Hettinger County, North Dakota; and two meter stations with appurtenant facilities in Campbell County, Wyoming and Morton County, North Dakota. The initial firm design capacity of the project is approximately 477 MMcf/d of natural gas. Bison states that the project will cost an estimated $609.6 million and the proposed in-service date of the facilities is November 15, 2010.

8. Bison proposes to offer cost-based firm and interruptible open-access transportation services and offer negotiated rates as an option.

III. Interventions

9. Notice of Bison's application was published in the *Federal Register* on May 7, 2009 (74 FR 21351). Anadarko Energy Services Company, Black Hills Utility Holdings Inc., CenterPoint Energy Resources Corp., Enterprise Products Operating LLC, Integrys Gas Group[3], MidAmerican Energy Company, Minnesota Energy Resources Corporation (MERC), NICOR Gas Company, Northern Border Pipeline Company, Northern Natural Gas Company, Northern States Power Company-Minnesota and Northern States Power Company-Wisconsin (jointly), ONEOK Partners, L.P., Williams Gas Marketing Inc., Williston Basin Interstate Pipeline Company, Wisconsin Electric Power Company, Wyoming Interstate Company, Ltd, and Wyoming Pipeline Authority filed timely, unopposed motions to intervene.[4] The Department of Environmental Quality of the State of Montana filed a late motion to intervene. The Commission finds that granting the untimely motion will not delay, disrupt, or otherwise prejudice this proceeding, or place an additional burden on existing parties. Therefore, for good cause shown, we will grant the motion.[5] No comments in opposition or protests were filed. MERC's filing also contained comments seeking clarification of the proposed pro forma tariff. Bison filed a response to the comments. These matters are discussed below.[6]

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[3] Integrys Gas Group consists of North Shore Gas Co., The Peoples Gas Light and Coke Co., and Wisconsin Public Service Corp.

[4] 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(c) (2009).

[5] 18 C.F.R. § 385.214(d) (2009).

[6] MERC provides several editorial comments to Bison's tariff. Bison states in its answer that it will accept several of MERC's proposed editorial comments. Bison is directed to modify its tariff accordingly.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

IV. Discussion

10. Since Bison will use the proposed facilities to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

A. The Certificate Policy Statement

11. The Commission's Certificate Policy Statement provides guidance as to how we will evaluate proposals for certificating new construction.[7] 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 explained that in deciding whether to authorize the construction of major new pipeline facilities, we balance 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.

12. Under this policy, the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its 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, existing pipelines in the market and their 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, we 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 we proceed to complete the environmental analysis where other interests are considered.

1. Subsidization

13. As noted above, the threshold requirement is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing

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[7] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

customers. Bison is a new entrant in the natural gas market and has no existing customers. Therefore, there will be no subsidization.

2. Adverse Effects

14. Bison's application demonstrates that there will be no impact on existing services since Bison is a new company that has no current customers or services. Further, the project should not have any adverse impact on existing transmission providers or their customers. The project is designed to interconnect with Northern Border which, for years, has been largely dependent on gas supply from Canada. Access to this competitively-priced natural gas supply source should enhance utilization of Northern Border's pipeline system, which will increase the efficiency of the interstate pipeline grid. The additional infrastructure associated with the project expands supply options and transportation options to the benefit of consumers. The project provides producers in the Powder River Basin with an additional outlet for their natural gas supply. To the extent that the project reduces bottlenecks and facilitates access to markets, it will encourage further development of valuable Powder River Basin natural gas production. The project helps meet increasing demand in the Midwest market. Further, no pipeline company in Bison's market area has protested the application. For these reasons, we conclude that existing pipelines and their customers will not be adversely affected by the project.

15. In addition, there will be minimal adverse impacts on landowners associated with the construction and operation of this project. Bison participated in the National Environmental Policy Act (NEPA) pre-filing process and made information readily available to landowners to address any concerns. Bison states that its collaborative process with landowners has resulted in the acquisition of approximately 90 percent of the necessary survey permission by voluntary agreement. No landowner filed negative comments or protests to Bison's proposal.

16. Based on the benefits Bison's project will provide and the lack of any identified adverse impacts on existing customers or on other pipelines and their customers, and minimal adverse effects on landowners and communities, the Commission finds that Bison's proposal is consistent with the Certificate Policy Statement and section 7(c) of the NGA. Therefore, we find that Bison's proposal is required by the public convenience and necessity, subject to the conditions set forth herein.

B. Accounting

17. An allowance for funds used during construction (AFUDC) is a component part of the cost of constructing the project. On December 15, 2009, the Commission convened a

20100409-3033 FERC PDF (Unofficial) 04/09/2010

technical conference seeking input and comments on its then-current AFUDC policy.[8] As a result of the technical conference proceeding, the Commission revised its AFUDC policy as described in *Southern Natural Gas Co.* and *Florida Gas Transmission LLC.*[9] The Commission found it was unnecessary to establish a bright line for when a pipeline may begin to accrue AFUDC,[10] but under the Commission's revised AFUDC policy, the Commission will require applicants seeking a certificate of public convenience and necessity for authorization to construct pipeline facilities to make a representation in their filing that AFUDC accruals included in the cost of the facilities are calculated in accordance with the Commission's rules and regulations and pursuant to and consistent with the following conditions: (1) capital expenditures for the project have been incurred, and (2) activities that are necessary to get the construction project ready for its intended use are in progress.[11] Therefore, based on our revised AFUDC policy, we will allow Bison to include its proposed AFUDC, recalculated as discussed below, in its initial rates, subject to Bison's filing a representation that the proposed AFUDC accruals comply with the requirements of our revised AFUDC policy. Furthermore, if Bison determines that its proposed AFUDC accruals should be revised in light of our revised AFUDC policy conditions, it must revise all cost-of-service items dependant on Gas Plant In Service such as Income Taxes, Depreciation Expense, Return, and Interest Expense. Bison must then file its revised rates and work papers in sufficient time for the Commission to act on the revised rates prior to its filing the tariff sheets to implement those rates.[12]

18. Bison's proposal includes the capitalization of $24.3 million of AFUDC, commencing when it filed its application. In calculating its AFUDC rate, Bison [13] estimated its debt cost and used an equity cost rate for AFUDC of 14 percent, based on rates established in other pipeline certificate proceedings. Gas Plant Instruction 3(17)

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[8] *Notice of Technical Conference on Commission Policy on Commencement of Accrual of Allowance for Funds Used During Construction,* 74 FR 65117 (December 2, 2009).

[9] *Florida Gas Transmission Co., LLC,* 130 FERC ¶ 61,194 at P 28 (2010) and *Southern Natural Gas Co.,* 130 FERC ¶ 61,193 at P 36 (2010).

[10] *Southern Natural Gas Co.*, 130 FERC at P 35.

[11] *Id.* P 36.

[12] *Id.* P 41.

[13] Bison estimated an AFUDC debt rate for financing of 4.50 percent for 2009 and 4.75 percent for 2010.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

prescribes a formula for determining the maximum amount of AFUDC that may be capitalized as a component of construction cost.[14] That formula, however, uses prior year book balances and cost rates of borrowed and other capital. In cases of newly created entities, such as Bison, prior year book balances do not exist; therefore, using the formula contained in Gas Plant Instruction 3(17) could produce inappropriate results for initial construction projects. Accordingly, to ensure that the appropriate amounts of AFUDC are capitalized in this project, we will require Bison to capitalize the actual costs of borrowed and other funds for construction purposes not to exceed the amount of debt and equity AFUDC that would be capitalized based on the approved overall rate of return.[15]

19. In similar cases, the Commission limited the maximum amount of AFUDC that the pipeline could capitalize by limiting the AFUDC rate to a rate no higher than the overall rate of return underlying its recourse rates.[16] We will therefore require Bison to revise its AFUDC methodology to ensure that its maximum AFUDC rate for the entire construction period is no higher than the overall rate of return underlying its recourse rates. Further, Bison must use its actual cost of debt (short-term and long-term) in the determination of its AFUDC rate, if it results in an AFUDC rate lower than the overall rate of return underlying its recourse rates.[17]

C. Rates

20. The Commission has reviewed the proposed cost of service and proposed initial rates and generally finds them reasonable for a new pipeline entity such as Bison, subject to the modifications and conditions discussed below.

1. Initial rates

21. Bison proposes to offer cost-based firm (Rate Schedule FT-1) and interruptible (Rate Schedules IT-1 and PAL) open-access transportation services on a non-discriminatory basis under Part 284 of the Commission's regulations. Bison states that the proposed rates reflect a straight fixed-variable rate design in allocating costs and designing rates for service. Bison states that it will offer negotiated rates as an option

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[14] 18 C.F.R. Part 201 (2009).

[15] *See, e.g., Cheniere Creole Trail Pipeline, L.P.*, 115 FERC ¶ 61,331 (2006), *Port Arthur Pipeline, L.P.*, 115 FERC ¶ 61,344 (2006), and *Golden Pass Pipeline, L.P.*, 112 FERC ¶ 61,041 (2005).

[16] *See Gulfstream Natural Gas System, L.L.C.*, 91 FERC ¶ 61,119 (2000) and *Buccaneer Gas Pipeline Co. L.L.C.*, 91 FERC ¶ 61,117 (2000).

[17] *See Mill River Pipeline, L.L.C.*, 112 FERC ¶ 61,070 (2005).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

pursuant to section 38 of the General Terms and Conditions (GT&C) of its pro forma tariff.

22. The proposed recourse rate for Rate Schedule FT-1 is based upon a single rate zone for the entire design capacity of the pipeline. The proposed base FT-1 reservation rate is derived using a $127,843,000 first year cost of service and annual FT-1 reservation billing determinants of 168,359,535 Dth based on Bison's maximum daily design capacity. The proposed maximum cost-based FT-1 daily reservation rate is $0.7588 per Dth. Bison estimates $100,000 of variable costs resulting in a proposed FT-1 commodity rate of $0.0006 per Dth.

23. The proposed maximum IT-1 rate is $0.7594 per Dth. Bison is proposing to recover its fuel gas, including lost and unaccounted-for gas, through a tracker mechanism defined in section 42 of the pro forma tariff.

2. Return on Equity and Capital Structure

24. Bison proposes a capital structure of 50 percent equity and 50 percent debt. The overall rate of return of 11 percent incorporates a return on equity of 14 percent based upon the project's business and financial risk. Bison states that the proposed rate of return is consistent with that granted to other new pipeline projects as long as the equity component of the capital structure is no more than 50 percent. We find that Bison's proposal to finance the proposed project is consistent with other recent projects approved by the Commission for new pipeline companies.[18] In these projects, the Commission approved a capital structure of 50 percent debt and 50 percent equity, as well as a return on equity of 14 percent. Accordingly, we will accept Bison's proposed capital structure and rate of return on equity.

3. Interruptible Services Revenue Crediting

25. The Commission's policy regarding new interruptible services requires pipelines to credit 100 percent of interruptible and authorized overrun service revenues, net of variable costs, to firm and interruptible shippers; or, in the alternative, to allocate costs and volumes to these services.[19] Bison has proposed to do neither. In its January 4, 2010 data response, Bison states that currently it has contracted for 407 MMcf/d of the design capacity of 477 MMcf/d under ten-year agreements at fixed negotiated rates which are lower than the proposed recourse rates and Bison is at risk for selling the remaining

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[18] *See, e.g., MarkWest Pioneer, L.L.C.,* 125 FERC ¶ 61,165 (2008) and *Bradwood Landing LLC,* 124 FERC ¶ 61,257 (2008).

[19] *See, e.g., Rockies Express Pipeline LLC,* 116 FERC ¶ 61,272, at P 50 (2006).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

design capacity. Presently, therefore, Bison's projected revenues are below its fully-allocated costs, and Bison is responsible for the difference. At this point Bison states that no firm shippers are paying a fully-allocated rate. Bison states that until it is placed in service and has an operating history for selling unsubscribed capacity, it would be premature to forecast interruptible and/or overrun service revenues as a credit in the recourse rate computation or to allocate an estimated amount of cost of service and forecast interruptible volumes to calculate an IT-1 rate. However, in the event a commitment on the treatment of IT revenue in the calculation of the recourse rate is required at this time, and given Bison's current contract circumstances, Bison would offer to credit IT in the recourse rate computation for firm service if Bison is able to achieve its revenue requirement including the recovery of prior deficiencies.

26. As described above, Commission policy requires a pipeline to either allocate costs and volumes to its interruptible services in the development of initial recourse rates or to credit all revenues received from interruptible service, net of variable costs, to its firm and interruptible shippers. This is to ensure that shippers do not pay a rate that is higher than is required to recover the costs of providing their service. Bison maintains that it is premature for it to forecast interruptible revenues, but it also proposes not to credit any interruptible revenues received until and unless it has fully recovered its cost of service, including that associated with currently unsubscribed capacity. This is not acceptable. Bison is directed to either revise its system rates with an allocation of costs to these services or revise its tariff to provide for a mechanism to credit 100 percent of the interruptible and authorized overrun service revenues, net of variable costs, to its firm and interruptible shippers. If Bison finds that it is not able to meet its firm service revenue requirements after it goes into service, it has the option to file a section 4 rate case to address that issue.

4. Greenhouse Gas Surcharge

27. Original Sheet No. 8 includes a Greenhouse Gas Surcharge that would be assessed under section 51 of the GT&C. MERC notes that the GT&C does not include a section 51 and that such a surcharge would be speculative and inappropriate to include at this time. Bison states in its answer that inclusion of the Greenhouse Gas Surcharge is an error and it will delete this reference when it files to make its tariff effective prior to the in-service date of the project. Bison is directed to modify its tariff accordingly.

5. Rate Changes and Three-Year Filing Requirements

28. If Bison desires to make any other rate changes not specifically authorized by this order prior to placing its facilities into service, it must file an amendment to its application under NGA section 7(c). In that filing, Bison will need to provide cost data

20100409-3033 FERC PDF (Unofficial) 04/09/2010

and the required exhibits supporting any revised rates.[20] After the subject facilities are constructed and placed into service, Bison may only change its rates, including to reflect any revised construction and operating costs, in a second proceeding.

29. Consistent with precedent, the Commission will require Bison to file a cost and revenue study at the end of its first three years of actual operation to justify its existing cost-based firm and interruptible recourse rates.[21] In its filing, the projected units of service should be no lower than those upon which Bison's approved initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the Commission's regulations to update cost of service data.[22] After reviewing the data, the Commission will determine whether to exercise its authority under NGA section 5 to establish just and reasonable rates. In the alternative, in lieu of this filing, Bison may make an NGA section 4 filing to propose alternative rates to be effective no later than 3 years after the in-service date for its proposed facilities.

6. Fuel

30. Bison is proposing to recover its fuel gas, including lost and unaccounted for gas, in-kind from shippers pursuant to section 42 of its GT&C. In addition, Bison states that a negotiated fuel rate of 0.69 percent was applicable to all shippers electing the negotiated rate option in the open season. Bison states that section 38.10 of its GT&C clearly states that its system fuel percentage will not be impacted by shippers who pay a negotiated fuel rate as part of a negotiated rate agreement and that Bison will assume the risk of recovery of fuel gas attributable to shippers who negotiate a fuel rate in order to ensure that its recourse rate shippers are not affected.

31. Commission policy prohibits a pipeline from shifting costs associated with its negotiated rate shippers to recourse rate shippers. Consistent with this policy, the Commission has held that when a pipeline negotiates fuel retainage percentage factors with a negotiated rate shipper, the pipeline must bear the risk of underrecovery of its fuel costs and cannot shift unrecovered fuel costs to its recourse rate shippers.[23] Accordingly, in any fuel proceeding Bison will have the burden of showing that its proposal does not

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[20] Any such amendment filing should be made sufficiently in advance of the desired in-service date to provide the Commission adequate time to act on the filing.

[21] *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165 (2008); *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008).

[22] 18 C.F.R. § 154.313 (2009).

[23] *Algonquin Gas Transmission, LLC*, 124 FERC ¶ 61,195 (2008).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

shift any unrecovered fuel costs due to the fuel provisions in its negotiated rate agreements to its recourse rate shippers.

D. Pro Forma Tariff Issues

1. Rate Schedule IT-1

32. Section 2.2 of Rate Schedule IT-1 states that "[d]emonstration of creditworthiness will be required upon Company's receipt of each nomination…" MERC seeks clarification that the required demonstration would not delay or prevent it from receiving service to the extent its existing assurances of creditworthiness were sufficient for the nominated service. Bison responds that potential shippers often routinely request an interruptible transportation agreement regardless of their intent to use the agreement in the near term. Accordingly, Bison states the intent of section 2.2 is to provide a shipper with the flexibility to delay the establishment of creditworthiness until such time as the shipper actually intends to nominate and utilize such an agreement. Bison states the demonstration of credit would not delay or prevent a shipper from receiving service to the extent its existing assurances were sufficient for the nominated service. Bison proposes revised language to provide further clarity regarding the intent of this section. Bison is directed to modify its tariff accordingly.

2. Index Price

33. Section 6.2 of Rate Schedule PAL states that a shipper failing to pay back loaned quantities will be charged a fee based on a daily index price at Ventura as determined by Platts Gas Daily.[24] Section 11.9 of the GT&C states that shippers that fail to comply with an Operational Flow Order will pay a penalty based on three times the highest price of gas at Ventura and section 41.1.4 of the GT&C states that Bison will use the midpoint price at Ventura in determining the credit requirement for loaned gas for PAL service.

34. MERC questions the appropriateness of using Ventura as a pricing point for activity occurring on Bison's pipeline system and suggests a pricing point associated with Powder River Basin gas would be more reasonable and have a proper nexus to the shipper's wrongful action. Bison argues that Ventura is an appropriate point since it is the market center delivery point in the related downstream transportation agreements and is a liquid point. According to Bison, the gas to be transported on its system will ultimately be delivered to interconnects with Northern Border or Northern Natural Gas Company at Ventura. However, Bison notes that since filing its application Platts Gas Daily has added the "Northern Border, Ventura Transfer Point" as a pricing point and so Bison is revising its description of the Northern Natural location to read "Deliveries to

[24] MERC states that Ventura, Iowa is a point on Northern Border Pipeline.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

Northern Natural Gas at Ventura in Hancock County, Iowa." Thus, Bison proposes to modify its tariff to reflect the average of the two points.

35. The Bison pipeline system will extend from the Dead Horse region near Gillette, Wyoming to an interconnect with Northern Border in Morton County, North Dakota. Utilizing Ventura, Iowa, a point located several hundred miles downstream of Bison's system as an index price for activity occurring on Bison would include the economic value of gas transported on Northern Border in its determination and would not be fully representative of the price of gas on an upstream pipeline such as Bison. Therefore, Bison is directed to select an index price that is more representative of the value of gas on its system. In addition, on November 19, 2004, the Commission issued its *Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets*,[25] which determined that price indices in interstate pipeline tariffs must provide the volume and number of transactions upon which the index value is based and must meet at least one of four criteria defined in the order. In its compliance filing, Bison must address how any proposed index price complies with the Commission's policy in this area.

3. General Terms and Conditions

a. Section 6 – Billing and Payment

36. Section 6.5 of Bison's GT&C states that after providing a shipper a thirty day notice of suspension of service for not paying an invoice, Bison may terminate service within 15 days after giving notice to the customer and the Commission if the customer has not paid in full the invoice amount due. Section 154.602 of the Commission's regulations provides that pipelines must give at least 30 days' notice to the Commission before terminating a service agreement.[26] Accordingly, we will require Bison to revise section 6.5 of the GT&C to conform to section 154.602.

b. Section 11.8.2 – Operational Flow Order

37. Section 11.8.2 of Bison's GT&C states that shippers or interconnected parties that do not comply with an Operational Flow Order shall indemnify Bison against any claims of responsibility. The Commission has consistently held that a simple negligence

[25] 109 FERC ¶ 61,184 (2004).

[26] *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 262 (2006).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

standard is appropriate for the liability and indemnification provisions on the ground that all parties, including the pipeline, should be liable for their negligent acts.[27] The Commission, however, has allowed pipelines to limit their liability for simple negligence to direct damages, so that they are only liable for indirect, consequential, incidental, or punitive damages where there is gross negligence, willful misconduct or bad faith.[28] Section 11.8.2 would improperly insulate Bison from all damages, direct as well as indirect, for its own simple or gross negligence. Bison is directed to revise section 11.8.2 to comply with Commission policy.

c. Section 13 – Curtailment

38. Section 13 of Bison's GT&C states that Bison shall have the right to curtail service at any time for maintenance and repairs. The Commission has found that curtailment is only applicable in an emergency situation or when an unexpected capacity loss occurs after scheduling.[29] Because routine repair or maintenance is not an emergency situation or an unexpected loss of capacity, we will require Bison to modify its tariff to clarify that routine repair and maintenance should be planned through scheduling and should not disrupt confirmed service.

d. Section 18.3 – Right of First Refusal

39. Section 18.3 of Bison's GT&C provides Bison with the right to provide a shipper with the Right of First Refusal (ROFR) notice up to thirty-six months prior to termination of the shipper's agreement in the event Bison has proposed an expansion project that would utilize capacity on Bison's existing facilities. Under the Commission's policy, if an expansion open season is issued and becomes fully subscribed, the pipeline may issue a subsequent separate notice prior to construction to its ROFR shippers whose contracts will be expiring within thirty-six 36 months. This would allow a pipeline to fully plan and rationalize its pending construction project.[30] However, the thirty-six month ROFR notification provisions in Bison's section 18.3 apply to all expansion projects without any consideration as to whether they are fully subscribed. Therefore, Bison is directed to

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[27] *See, e.g., Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P 5 (2006); *Gulf South Pipeline Co.*, 98 FERC ¶ 61,278, at 62,182 n.56 (2002).

[28] *ANR Pipeline Co.*, 100 FERC ¶ 61,132, at 61,505 (2002).

[29] *See, e.g., MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 52 (2008) and *Gulfstream Natural Gas System, L.L.C.*, 91 FERC ¶ 61,119, at 61,470 (2000).

[30] *Gas Transmission Northwest Corp.*, 117 FERC ¶ 61,315, at P 55 (2006).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

revise section 18.3 to comply with Commission policy so that the thirty-six-month ROFR notification provisions apply only with expansion projects that are fully subscribed.

e. Section 26.5 – Foundation Shipper Rights to Planned Expansions

40. Section 26.5 of Bison's GT&C provides a Foundation Shipper the right to contract for any planned expansion of Bison's pipeline system. Specifically, section 26.5 provides a Foundation Shipper the right "to subscribe for all or a portion of such planned expansion capacity." While Bison may give a Foundation Shipper the right to contract for expansion capacity, it cannot provide a Foundation Shipper with the sole right to subscribe to all of the expansion capacity. Under the Commission's policies, all new interstate pipeline construction must be preceded by a nondiscriminatory, nonpreferential, open season process through which potential shippers may seek and obtain firm capacity rights. If Bison is to undertake an expansion for a Foundation Shipper, it must also provide other shippers with the ability to bid for and obtain capacity in the open season in a nondiscriminatory manner. While *Midcontinent Express Pipeline LLC*[31] provided Foundation Shippers with the right to a defined amount of capacity at a Commission-approved rate or the right to require Midcontinent Express to construct additional capacity in the future, it did not provide Foundation Shippers with the sole right to contract for all capacity in the future. Therefore, Bison is directed to modify section 26.5 such that any capacity awarded to a Foundation Shipper in an expansion be done in a nondiscriminatory manner and with regard to the Commission's open season policy.

f. Section 27 – Release of Firm Capacity

41. MERC states that section 27.1.1 of Bison's GT&C, which allows Bison to refuse to allow a permanent release of capacity if it has a reasonable basis to conclude that it will not be financially indifferent to the release, is vague and leaves Bison with excessive discretion to reject a permanent release of capacity. MERC states the provision should be rejected or at least clarified to limit Bison's discretion. Bison states in its answer that similar language has been approved in other pipeline tariffs and no further changes are required.

42. We find the provision reasonable and accept Bison's tariff language as proposed. In *Northwest Pipeline Corporation*,[32] the Commission addressed the issue of a pipeline refusing to allow a permanent release of capacity "if it has a reasonable basis to conclude

[31] *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008).

[32] 111 FERC ¶ 61,231 (2005).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

that it will not be financially indifferent to the release."[33] The Commission stated that the financial indifference of the pipeline in a permanent release is a reasonable factor to consider in deciding whether to permit the release. The Commission also stated that the pipeline must have flexibility in this regard and does not have to set out in its tariff every extenuating circumstance or condition that would lead the pipeline to determine that it will not be financially indifferent to the release transaction. For the same reasons, we accept Bison's proposed language here.

43. Section 27.14 of Bison's GT&C addresses the case of a releasing shipper who is subject to a bankruptcy proceeding and, in that proceeding, rejects the agreement with Bison under which it has released capacity. According to section 27.14, the replacement shipper would then have to pay the lesser of the releasing shipper's rate or the maximum tariff rate. According to MERC, this is inconsistent with Commission policy which allows a pipeline to terminate a release of capacity to the replacement shipper if the releasing shipper's service agreement is terminated, provided the pipeline provides the replacement shipper with an opportunity to continue receiving service if it agrees to pay, for the remaining term of the replacement shipper's contract, the lesser of the releasing shipper's contract rate, the maximum tariff rate applicable to the releasing shipper's capacity or some other rate acceptable to the pipeline.[34] MERC states that under Bison's proposal Bison would not terminate the agreement, but would require the replacement shipper to keep the contract at what may be a different rate.

44. Bison acknowledges in its answer that Commission policy requires the pipeline to provide the replacement shipper with the option of choosing whether to retain the capacity when the releasing shipper rescinds its contract with the pipeline, instead of requiring the replacement shipper to retain the capacity by paying a rate that may be in excess of the rate it was obligated to pay the releasing shipper. Bison states it intends to modify its tariff in its compliance filing. Bison is directed to modify its tariff accordingly.

g. <u>Section 34 – Operational Balancing Agreement Policy</u>

45. Section 34.2 of Bison's GT&C states that Bison will not have an obligation to execute an Operational Balancing Agreement (OBA) with any party that is not creditworthy pursuant to section 41 of its GT&C. In Order No. 587-G,[35] the Commission

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[33] *Id.* P 23-25.

[34] *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding,* 111 FERC ¶ 61,412 (2005).

[35] *Standards For Business Practices of Interstate Natural Gas Pipelines,* Order No. 587-G, FERC Stats. & Regs. ¶ 31,062 (1998).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

adopted a regulation (section 284.10(c)(2)(i))[36] requiring each interstate pipeline to enter into operational balancing agreements at all points of interconnection between its system and the system of another interstate or intrastate pipeline. Bison will be required to comply fully with this regulation once in service and is directed to modify its tariff accordingly.

h. Section 38 – Negotiated Rates

46. Section 38.5 of Bison's GT&C states that when Bison enters into a negotiated rate agreement it will file a tariff sheet with the Commission stating the name of the shipper, the negotiated rate, and the rate schedule applicable to the agreement. Section 38.5 also states that unless Bison executes and files a non-conforming agreement, its negotiated rate tariff sheet will contain a statement that the negotiate rate agreement does not deviate in any material aspect from the applicable form of agreement in the tariff. Commission policy requires that if a pipeline files a tariff sheet reflecting the terms of a negotiated rate agreement, the tariff sheet summary must fully describe the essential elements of the transaction, including the name of the shipper, the negotiated rate, the type of service, the receipt and delivery points applicable to the service and the volume of gas to be transported. Also, where the price term of the negotiated rate agreement is a formula, the formula should be fully set forth in the tariff sheet.[37] Bison is directed to modify its tariff to include the essential elements of the transaction as required by the Commission's negotiated rate policy.

i. Section 42 – Company Use Gas

47. Although, MERC supports the use of a tracking mechanism for Company Use Gas, it believes that the possibility of a monthly adjustment as proposed by Bison in section 42 of its GT&C would unduly complicate supply planning. MERC states that any contract of greater than one month or even a shorter term transaction that spanned more than one month could require differing amounts of gas to be furnished in-kind which creates a risk that the buyer and seller must address in their supply contract. In addition, MERC states the changing fuel rate increases the opportunity for nomination errors, causing confirmation problems as the buyer and seller adjust to the new quantity. MERC believes an annual or seasonal fuel adjustment would be more consistent with how supply markets function and still provide for tracking.

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[36] 18 C.F.R. § 284.10(c)(2)(i) (2009).

[37] *Natural Gas Pipeline Negotiated Rate Policies and Practices,* 104 FERC ¶ 61, 134, at P 32 (2003).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

48. Bison answers that all existing contractual agreements supporting the pipeline contain a negotiated fuel rate which is constant over a ten year term and no other potential Bison shippers have raised this concern. Bison states a monthly tracker for company use gas is appropriate on a pipeline such as Bison which has no storage and limited line pack flexibility. Bison states that in some respects monthly fuel adjustments can actually facilitate a shipper's supply planning efforts since the monthly adjustment to the rate should be minimized, the rate being charged is more representative of the pipeline's actual use of company use gas, and the potential for significant changes to the rate is minimized. Accordingly, Bison believes this provision is in the best interest of its shippers and states that no further changes are warranted.

49. Interstate pipelines have a variety of options to choose from in recovering their fuel costs and the use of a monthly tracker is an option that has been approved and is being utilized by several pipelines.[38] The Commission sees no reason to require Bison to change its fuel recovery process. However, section 42 of Bison's GT&C does not require Bison to make any type of filing with the Commission to support its monthly fuel percentage calculations. Therefore, Bison is directed to modify its tariff so that it will file with the Commission an annual report that supports the fuel and lost and unaccounted-for gas factors used for the prior period.

j. Section 46 – Reservation Charge Credits

50. The Commission's policy regarding reservation charge credits is that where scheduled gas is not delivered due to a *non-force majeure* or planned maintenance event, there must be a full reservation charge adjustment as to the undelivered amount. This is because the failure was due to the pipeline's conduct and was within its control. Bison's proposal not to provide reservation charge credits when it fails to deliver at least 98 percent of a shipper's Firm Daily Quantity in *non-force majeure* situations does not comply with Commission policy because it requires shippers to bear the risk associated with interruption of service within the pipeline's control.[39] Bison is directed to revise its tariff to provide reservation charge credits when it does not provide 100 percent of its scheduled service.

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[38] *See, e.g.*, Kern River Gas Transmission Company, FERC Gas Tariff, Second Revised Vol. 1, Sixth Revised Sheet No. 109; Iroquois Gas Transmission System, L.P., FERC Gas Tariff, First Revised Vol.1, First Revised Sheet No. 47A.

[39] *Petal Gas Storage, L.L.C.*, 126 FERC ¶ 61,199 (2009).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

4. Form of Service Agreement

51. MERC states that Original Sheet Nos. 600 and 609 of the Rate Schedule FT-1 and IT-1 form of service agreements refer to transportation pursuant to Parts 157 and 284 of the Commission's regulations and MERC assumes that Bison, a new pipeline, is only proposing to offer open access transportation under Part 284. Bison confirms such in its answer and states it will remove the reference to Part 157 in its form of service agreements when it files to make its tariff effective prior to the in-service date of the project. Bison is directed to modify its tariff accordingly.

52. Article 10 of the Rate Schedule Park and Loan form of service agreement is entitled "Other Operating Provisions" and is to be used to specify other operating provisions relating to the agreement. The Commission requires pipelines to include form of service agreements in their tariffs in order to comply with NGA section 4(c)'s requirement that pipelines file all contracts which affect the pipeline's rates and services "in any manner." The filing of the form of service agreement gives the Commission and other interested parties an opportunity to review that service agreement to ensure that its provisions are just and reasonable and not unduly discriminatory. This enables the Commission to exempt pipelines from filing service agreements with individual customers that conform to the form of service agreement.[40] For this procedure to satisfy the filing requirements of NGA section 4, the form of service agreement must define the information that may be included in its blanks with sufficient clarity for the Commission to understand the nature of the contractual provisions it is authorizing the pipeline to enter into. For example, the Commission has held that allowing a blank section labeled "Other" in a form of service agreement is too broad and vague, and could lead to the inclusion of impermissible terms and conditions of service.[41] Bison's proposed Article 10 does not sufficiently define the information which could be included in those exhibits without the need to file them with the Commission. Therefore, Bison is directed to modify Article 10 of the Rate Schedule PAL form of service agreement to clarify that only provisions permitted to be negotiated by Bison's tariff may be placed in this section.

E. Precedent Agreements

53. The precedent agreements filed by Bison provide the firm contractual support for the Project and Bison states they are the result of extended negotiations with the Project Shippers in a highly competitive market. According to Bison, each precedent agreement contains contractual provisions that will ultimately be contained in the respective service

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[40] *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,001-2 (2001).

[41] *See Northern Natural Gas Co.*, 102 FERC ¶ 61,171, at P 18 (2003) (*Northern Natural)*.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

agreement executed by each Project Shipper and to the extent the contractual provisions constitute non-conforming or potential material deviations from the form of service agreement in Bison's tariff, such provisions were necessary for the respective shippers to make a binding commitment to the Project. Bison states that absent these contractual commitments, Project Shippers would not have subscribed to the project. Since the provisions were tailored to address the particular concerns of each Project Shipper, Bison states that none of the identified contract provisions create the risk of undue discrimination.

54. Bison states it intends to file the executed Rate Schedule FT-1 Service Agreements identifying any non-conforming provisions in each agreement in compliance with the Commission's regulations or order in this proceeding. Therefore, Bison requests that the Commission address the potentially non-conforming provisions in this proceeding so that any resultant questions may be promptly resolved before the applicable provisions are incorporated into executed agreements filed in compliance with the Commission's regulations or Commission order in this proceeding.

55. The Commission finds that the non-conforming provisions as described by Bison would constitute material deviations from Bison's form of service agreements. The Commission, in other proceedings, has found that non-conforming provisions may be necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of the project.[42] We find that the non-conforming provisions relating to rate adjustment, creditworthiness, right of first refusal, termination rights, the Mobile Sierra standard, and the potential rate adjustment resulting from an upstream extension project are permissible because they do not present a risk of undue discrimination and will not affect the operational conditions of providing service nor result in any customer receiving a different quality of service from that available to Bison's other customers.[43] However, Bison has described other provisions that provide certain shippers with rights hat may present the potential for undue discrimination. These provisions are addressed below.

1. Pre-Approved Expansion Rights

56. The Foundation Shipper has, until the third anniversary date of the in-service date of the project, a first right to contract on planned expansions. According to Bison, since the Foundation Shipper provides the most critical support for the construction of the

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[42] *See, e.g., Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008) and *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 78 (2006).

[43] *See, e.g., Gulf South Pipeline Co., L.P.*, 115 FERC ¶ 61,123 (2006) and *Gulf South Pipeline Co.*, 98 FERC ¶ 61,318, at 62,345 (2002).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

project, it is reasonable to have this provision to address its future capacity needs. Bison states the right has a strictly limited duration and the Commission previously has accepted a similar type of provision.[44]

57. This pre-approved expansion right is defined in section 26 of Bison's GT&C and further discussed in the tariff section of this order. Although, providing a Foundation Shipper with a right to contract for future expansion capacity is permissible, under Commission policy all new interstate pipeline construction must be preceded by a nondiscriminatory, nonpreferential, open season process through which all potential shippers may seek and obtain firm capacity rights. If Bison is to undertake an expansion for a Foundation Shipper it must also provide other shippers with the ability to bid for and obtain capacity in the open season in a nondiscriminatory manner.

2. Gas Quality and Pressure

58. As part of the precedent agreements applicable to all shippers, Bison states it has agreed to propose the same natural gas quality standards as those contained in Northern Border's FERC Gas Tariff, First Revised Volume No. 1. Additionally, Bison states the Foundation Shipper's precedent agreement contains a provision that the pressure of natural gas tendered to the project shall not exceed 1,430 pounds per square inch. Bison states these provisions were critical to the Foundation Shipper to ensure that gas transported would be accepted for delivery by Northern Border, the interconnecting pipeline.

59. The Commission has held that minimum or maximum pressure provisions relate to the operational conditions of transportation service on the pipeline and affect the quality of service to be received by the shipper.[45] Thus, such provisions may not be negotiated absent a provision in the tariff authorizing such negotiation. Section 2 of Bison's GT&C and its form of service agreement do not provide the ability to negotiate maximum or minimum pressure commitments at individual points. Therefore, the Foundation Shipper's pressure provision would not be acceptable subject to Bison modifying its tariff to provide for maximum or mutually-negotiable pressure at receipt points for all similarly situated shippers. However, the pressure provision, as described by Bison, would establish a maximum pressure cap at the receipt point. It is not clear from the information provided by Bison the extent to which this provision would affect the quality of service provided to the Foundation Shipper or to Bison's other shippers. Therefore, the provision may be permissible. Bison should file additional supporting information

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[44] *Citing, Midcontinent Express Pipeline LLC,* 124 FERC ¶ 61,089 (2008).

[45] *Dominion Transmission, Inc.,* 113 FERC ¶ 61,152 (2005); *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,004 (2001).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

when it files its nonconforming agreements before the pipeline goes into service for the Commission to determine whether the material deviation is permissible.

3. Other Non-Conforming Provisions of the Cornerstone Shipper's Proposed Service Agreement

60. Bison states the Foundation Shipper's precedent agreement contains a provision to be added as Article 13 to the FT-1 Rate Schedule service agreement regarding limitation of liability. Bison states this provision was important to the Foundation Shipper.

61. Bison's GT&C addresses the issue of liability for all shippers. Providing the Foundation Shipper with different liability provisions would constitute a material deviation fundamentally affecting the terms and conditions of service and would not be permissible. If filed, Bison must either remove the non-conforming provisions or add them to its tariff to be applicable to all shippers.

62. Bison states the Cornerstone Shipper's proposed service agreement contains certain other provisions in Articles 10.2 through 10.5 that do not materially affect the substantive rights of other shippers but were important to the Cornerstone Shipper. Since, Bison does not describe in any detail the non-conforming provisions included in Articles 10.2 through 10.5 of the proposed service agreement, the Commission cannot determine whether these provisions constitute a material deviation affecting the terms and conditions of service and whether these provisions would be permissible.

63. When a contract deviates materially from the form of service agreement, the contract must be filed and made public.[46] We require disclosure of contracts with material deviations because the public disclosure of these agreements prevents undue discrimination through secret rates or terms. Accordingly, Bison must file at least 60 days before the in-service date of the proposed facilities, an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations. In addition, the Commission emphasizes that the above determinations relate only to those items as described by Bison in its application and not to the entirety of the precedent agreements or the language contained in the precedent agreements.

F. Blanket Certificates

64. Bison has applied for a Part 157, subpart F blanket certificate which would give it authority under section 7 of the NGA to perform automatically, or after prior notice,

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[46] 18 C.F.R. § 154.1(d) (2009).

20100409-3033 FERC PDF (Unofficial) 04/09/2010

certain activities related to the construction, acquisition, abandonment, replacement, and operation of pipeline facilities. The issuance of the requested authorization will permit Bison to respond expeditiously to the needs of the public it will serve following the receipt of a certificate and is required by the public convenience and necessity. Accordingly, we will issue the requested Part 157, subpart F blanket certificate.

65. Bison also requests a Part 284, subpart G blanket certificate to provide open-access transportation service. Under a Part 284 blanket certificate, Bison will not need to receive individual authorizations to provide services to particular customers. This blanket authority will allow Bison to provide firm and interruptible open-access transportation service on a non-discriminatory basis to parties requesting such service consistent with the terms and conditions set forth in its tariff. Accordingly, we will grant Bison a Part 284 blanket certificate.

G. Environmental Assessment

66. On December 29, 2009, Commission staff issued the final environmental impact statement (EIS) to present staff's evaluation of the potential environmental impacts of the Bison Pipeline Project and to satisfy the requirements of the National Environmental Policy Act of 1969. The U.S. Department of the Interior, Bureau of Land Management (BLM) participated in the preparation of the EIS as a cooperating agency. The EIS addresses geology; soils; water resources; wetlands; vegetation; wildlife and aquatic resources; special status species; land use, recreation, and visual resources; socioeconomics; cultural resources; air quality and noise; reliability and safety; cumulative impacts; and alternatives.

67. The Commission staff initially began its review of the project following Commission approval for Bison to use the pre-filing process on June 4, 2008, in Docket No. PF08-23-000. On September 30, 2008, FERC staff issued its *Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Pathfinder Pipeline Project and Bison Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI).[47] The NOI was published in the *Federal Register* on October 6, 2008.[48] The NOI was sent to approximately 6,897 interested

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[47] The Notice of Intent explained that the Commission would be assessing potential environmental impacts and issues associated with both the proposed Bison Pipeline Project and a second proposed TransCanada pipeline project, the Pathfinder Pipeline Project, which paralleled the Bison Project. Due to a lack of shipper interest in the Pathfinder Project, TransCanada postponed its efforts to obtain permits for that project.

[48] 73 Fed. Reg. 58225.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

parties including federal, state, and local officials; agency representatives; tribes; conservation organizations; local libraries and newspapers; and property owners within 0.25 mile of the proposed pipeline routes.

68. Subsequent to the issuance of the NOI, staff conducted four public scoping meetings in communities along the proposed route.[49] Staff received written and verbal comments from landowners, concerned citizens, and government agencies regarding impacts on water quality due to crossings of perennial surface waters, reclamation and revegetation, riparian and deciduous woodland habitats, potential for spreading noxious and invasive plant species and the need for measures to control them to reduce potential impacts on state and federally protected species or their habitats, especially sage-grouse. Comments also addressed compensation for use of right-of-way and access roads, socioeconomic impacts on local communities, impacts from greenhouse gases, cumulative impacts, and alternative pipeline routes and aboveground facility locations.

69. On April 20, 2009, Bison filed an application with the Commission. The Commission issued a draft EIS for public comment on August 21, 2009. The draft EIS was mailed to staff's environmental mailing list, including affected landowners who were added to the mailing list after issuance of the NOI, and landowners potentially affected by some of the alternatives. The public was given 45 days from the date of publication in the *Federal Register* to review and comment on the draft EIS. In addition, four draft EIS comment meetings were held at the same locations as the public scoping meetings.[50]

70. Comments received at the public meetings addressed backfilling the trench, pipeline safety, impacts to fragile soils, and restoration and revegetation of the right-of-way. Written comments on the draft EIS were received from three federal agencies (U.S. Fish and Wildlife Service (FWS), BLM, and the Environmental Protection Agency (EPA)); one Native American tribal entity: the Tribal Historic Preservation Office, on behalf of the Standing Rock Sioux Tribe; and six state agencies: Wyoming Game and Fish Department, Montana Department of Environmental Quality (Montana DEQ), North Dakota State Historical Society, North Dakota State Land Commission, North Dakota State Water Commission, and North Dakota Parks and Recreation. The final EIS responded to the comments received on the draft EIS. Notice of the availability of the final EIS was published in the *Federal Register* on January 5, 2009 (75 Fed. Reg. 358). The final EIS was mailed to the same parties as the draft EIS, as well as to parties that

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[49] The public scoping meetings were held in Gillette, WY; Broadus, MT; Bowman, ND; and Glen Ullin, ND during the evenings of October 13, 14, 15, and 16, 2008, respectively.

[50] The comment meetings were held on the evenings of September 21-24, 2009.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

commented on the draft EIS and landowners newly identified as affected by proposed route variations. The distribution list is provided as Appendix A of the final EIS.

1. Major Environmental Issues Addressed in the Final EIS

71. The EIS evaluated the impacts of the project as reduced by Bison's proposed mitigation measures and concluded that construction and operation of the proposed Bison Pipeline Project would result in some adverse environmental impacts. However, staff concluded that environmental impacts would be reduced to less-than-significant levels if the proposed project were constructed and operated in accordance with applicable laws and regulations, Bison's proposed mitigation, and staff's recommendations (as adopted in the appendix to this order). The EIS conclusions were based on information provided by Bison and data developed from field investigations; literature research; alternatives analysis; comments from federal, state, and local agencies; and input from public groups and individual citizens.

a. Soils and Vegetation

72. Bison's project will traverse a variety of soil types and conditions. However, more than 60 percent of the lands crossed are classified as rangeland, where vegetation growth is constrained by water availability.

73. Bison has developed multiple project-specific plans designed to avoid or minimize environmental impacts during construction, including an Upland Erosion Control, Revegetation, and Maintenance Plan (Bison's Plan). Bison's Plan is generally consistent with the FERC guidance except for requested modifications that, by and large, will provide more site-specific protective to the environment.

74. However, included in these modifications is a proposal to delay restoration activities in specific areas along the right-of-way such as tie-in locations, hydrostatic testing workspaces, and travel lanes. The EIS concluded that the initiation of restoration should not be delayed, but acknowledged that in certain specific areas under continual use this may not be practical. The appendix to this order includes environmental condition 14 which directs Bison to revise its Plan to comply with the shorter timeframes allowed for commencing restoration as stipulated in the FERC Upland Erosion Control, Revegetation, and Maintenance Plan, and requires that any site-specific exceptions to these timeframes be filed for review and written approval by the Director of OEP.

75. Bison has developed a draft Reclamation Plan to address both BLM-managed lands and privately owned land. BLM has indicated that some aspects of Bison's current draft Reclamation Plan may not be adequate to minimize erosion and ensure successful revegetation/ reclamation on BLM and private lands, and Bison and BLM are currently working to develop an adequate final Reclamation Plan. Environmental condition 15

20100409-3033 FERC PDF (Unofficial) 04/09/2010

directs Bison to file, prior to initiating construction, a final Reclamation Plan that addresses the outstanding concerns of BLM.

76. Numerous comments were received on the draft EIS concerning the potential spread of noxious weed seeds through natural dispersal pathways (i.e., wind and animal transport), uptake with dust abatement water, and transport on construction equipment. The EIS evaluated Bison's proposal to require construction contractors to clean equipment prior to arrival at a job site and to check vehicles arriving at work sites to determine that they are free of soil or debris capable of transporting seeds or other propagules. In addition, Bison will set up a wash station at each county line crossed by the project to limit the spread of weeds between counties. The EIS determined that additional wash stations are necessary to improve the efficiency of Bison's plan. The appendix to this order includes environmental condition 18 which directs Bison to establish four additional equipment wash stations in Campbell County, Wyoming, and in Carter County, Montana to reduce the spread of noxious weeds.

b. <u>Wetlands, Fish, and Wildlife Resources</u>

77. During project development, the initially proposed acreage of wetland impacts was reduced by more than 62 percent and direct impacts on forested wetlands were eliminated. This reduction in impacts was due to routing adjustments to avoid wetlands where practicable, limitations on right-of-way width through wetlands, and Bison's minimization efforts during the planning process.

78. Although the majority of the waterbodies that will be crossed by the project are either intermittent (54 percent) or ephemeral (31 percent) and thus would not support fisheries year-round, some intermittent waterbodies could provide important spawning habitat for several fisheries. A total of 21 waterbodies along the proposed project route have been identified as supporting fisheries of special concern. However, Bison has agreed to install its pipeline across all waterbodies with perceptible flow, including all fisheries of special concern, using a dry crossing method to minimize impacts on these resources.

79. The project area is inhabited by a diversity of animal taxa, including large and small mammals, raptors, waterfowl, game birds, non-game birds, reptiles, and amphibians. Wildlife habitats that are cleared will be allowed to revegetate in most areas, resulting in a small loss of habitat. Some sensitive wildlife habitats will be affected by the proposed project, but efforts have been made to minimize the effects. The EIS determined that implementation of Bison's Plan, Bison's Wetland and Waterbody Construction and Mitigation Procedures (Bison's Procedures), and other proposed mitigation measures, such as timing restrictions and the use of buffer zones, will minimize the effects of the proposed project on wildlife. To minimize impacts on sage-grouse specifically, Bison will maintain a 0.6-mile no-surface occupancy buffer around

20100409-3033 FERC PDF (Unofficial) 04/09/2010

leks[51] year-round and a 3-mile no-activity buffer around leks between March 1 and June 30.

80. Migratory birds are species that nest in the United States and Canada during summer and migrate south to the United States, Mexico, Central and South America, and the Caribbean for the winter season. Migratory birds are protected under the Migratory Bird Treaty Act (MBTA). Consultations are underway between Bison and the FWS to form a Migratory Bird Treaty Act Conservation Agreement to minimize impacts on migratory birds. The appendix to this order includes environmental condition 20 which directs Bison to file its final MBTA Conservation Agreement prior to initiating construction.

81. Based on consultations with the FWS under Section 7 of the Endangered Species Act, the EIS found that 13 federally listed or candidate species may occur in the general vicinity of the project. As a result of surveys and analysis, the EIS determined that the project will either have no effect or is not likely to adversely affect any of these species. However, consultation with the FWS is not yet complete and the appendix to this order includes environmental condition 21 which restricts project construction until Commission staff completes consultation with the FWS.

c. Cultural Resources

82. Cultural resource surveys are over 97 percent complete along the proposed pipeline route. Surveys along the remaining corridor and remaining uninventoried access roads and facility locations are currently being completed or are pending landowner permission to access the survey sites. Three sites considered eligible for listing in the National Register of Historic Places (NRHP) will be avoided either by boring underneath the site, realigning the pipeline, or narrowing the construction right-of-way. While National Historic Preservation Act consultation and studies are ongoing, environmental condition 26 requires that Bison not begin construction until it files all reports and plans and the Director of OEP notifies Bison in writing that construction may begin.

d. Land Use

83. The pipeline will primarily cross open land (63.9 percent) and agricultural land (27.8 percent). The EIS concludes that disruption of grazing by construction will typically be temporary or short term within any given area and describes Bison's commitment to notify and coordinate with all grazing leaseholders and landowners prior

[51] A lek is an area used for the performance of communal breeding displays and courtship during the mating season by certain birds.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

to construction activities in order to identify potential concerns and reduce impacts on grazing activities.

e. Air and Noise

84. Operation of the proposed project will permanently affect both the air quality and noise environment near the Hettinger Compressor Station. However, the EIS determined that no significant impacts on air quality will result from emissions from the project. Due to the rural setting and the results of noise impact analysis, it is expected that neither construction nor operational noise will be significant. Environmental condition 27 requires that Bison file noise surveys after placing the Hettinger Compressor Station in service, and if appropriate, install additional noise controls.

f. Alternatives

85. The EIS considered the No Action and Postponed Action Alternatives. While the No Action or Postponed Action Alternatives would eliminate or delay the environmental impacts identified in this final EIS, U.S. markets would be denied the project objective of delivering up to 477 MMcf/d of natural gas from supply regions in the Powder River Basin to meet the increasing demand in the Midwestern United States. By denying or delaying the certificate for the project, the production and delivery of natural gas from existing wells located in the Powder River Basin may be delayed. This might result in more expensive and less reliable natural gas supplies for the end-users and greater reliance on alternative fossil fuels, such as coal or fuel oil, or both.

86. The EIS did not identify any existing pipeline systems with expansion plans that could meet the purpose and need of the Bison Project. The EIS concluded that existing systems would require significantly more construction than the proposed Bison project and, therefore, the use of existing pipeline systems is not a viable alternative.

87. The EIS evaluated five major route alternatives based on public and agency comments to determine whether impacts on environmentally sensitive resources could be avoided or reduced. However, none of the major route alternatives would offer significant environmental advantages over the proposed project route.

88. The EIS also evaluated route variations that were identified to minimize impacts on wetland and waterbodies crossed by the project route and to address landowner concerns. Each route variation considered was compared to the corresponding segment of the proposed project route to determine whether potential environmental benefits would be afforded. Route variations that were found to offer environmental advantages were incorporated into the project by Bison. It is anticipated that minor alignment shifts may continue to be made prior to and during construction, in order to accommodate site-specific circumstances, such as landowner concerns.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

2. Comments on the Final EIS

89. The State of Montana provided comments on the EIS in a letter dated January 27, 2010. Specifically, the Montana Fish, Wildlife and Parks (Montana FWP) indicated that native habitats including riparian, wetland, and sagebrush steppe are priority community types and should receive priority consideration by the Commission in terms of minimizing impacts and or mitigating unavoidable impacts. The EIS identifies riparian corridors as important habitat for species (including threatened and endangered species) and important to stabilizing streambanks and reducing floodwater velocities, which can prevent or limit streambank erosion. Through minor re-routes along the originally proposed construction right-of-way and adherence to the measures in its Plan and Procedures, Bison would minimize riparian impacts. As previously stated, numerous minimization and avoidance measures were adopted during project development to substantially reduce potential impacts on wetlands. Appendix T of the EIS contains an overview of routing modifications implemented to reduce impacts on riparian corridors and wetlands.

90. The EIS describes the scrub-shrub uplands in the project area as particularly important to sagebrush-obligate species, such as the greater sage-grouse and sage sparrow. Scrub-shrub also provides foraging habitat for many mammals, raptors, and game birds. Much of this habitat has been severely degraded by development and invasive species. As acknowledged in the final EIS, sagebrush habitat is difficult and slow to re-establish when disturbed by construction. However, Bison is required to successfully re-establish the native vegetation so that cover and density of vegetation within the right-of-way is similar to that of adjacent, undisturbed land. Although a mature vegetative community requires years to re-establish, the project construction will not cause a permanent loss of sagebrush habitat. Also, to minimize impacts to sagebrush habitat, the project is colocated with existing disturbances where possible and will adhere to timing and distance buffers through crucial habitats.

91. As Bison will not clear the permanent right-of-way during operations unless required to do so for safety and inspection purposes, the avoidance of sagebrush habitat to the extent practicable, and in-place mitigation proposed in the form of habitat re-establishment could ultimately be more beneficial to the species and habitat than enhancement and creation opportunities off-site. Staff concludes that with the proposed or recommended mitigation to minimize environmental impacts, the project is consistent with the Montana Sage-Grouse Management Plan and its overall goals.

92. The Montana FWP states that it is impossible to comment on the effects of the pipeline on migratory birds without knowing the details of the MBTA agreement. It further requests that the Commission require Bison to consult with Montana FWP in developing an MBTA agreement. As indicated in the EIS, the FWS implements and

20100409-3033 FERC PDF (Unofficial) 04/09/2010

enforces the MBTA and is the lead agency for MBTA consultation. Bison has been working with the FWS in the development of a final conservation agreement. Input on the content of that agreement would be at the discretion of the FWS and Bison; however, Bison has indicated that it would provide the finalized agreement to Montana FWP.

93. The Montana FWP requests that the Commission require Bison to develop a grouse survey protocol in consultation with the Montana FWP and require that Bison strictly adhere to its grouse survey protocols during the 2010 surveys. The Montana FWP states that surveys should include consideration of leks within 4 miles of the pipeline. Bison indicates that its surveys for lek sites followed the protocols described in Wildlife Survey Protocol for Coal Bed Natural Gas Development, which were developed by the Western Association of Fish and Wildlife Agencies and locally adapted by the Wyoming Game and Fish Department. Bison has stated that the state agencies, including Montana FWP, approved the survey guidelines. Bison indicated that it conducted sage-grouse lek surveys within 3 miles of the project in 2009 following protocols developed in consultation with the Montana FWP and approved on April 1, 2009. The staff determined that the surveys are sufficient to allow a complete assessment of potential impacts to the sage-grouse and this assessment is provided in the EIS.

94. Bison proposes to withdraw approximately 13.6 million gallons from the Philippi Reservoir, most of which will be used for hydrostatic testing of the pipeline. The Montana FWP indicates that this reservoir is an important wetland habitat for waterfowl and shorebirds and that species of concern (white-faced ibis and black tern) have been documented on these wetlands. The Montana FWP requests that either an assessment be completed for the impacts of the removal of water or that another source of water be identified and used.

95. As stated in the EIS, neither of the two identified water sources for hydrostatic testing is known to contain federally listed threatened or endangered species. Bison has further stated that the withdrawal of hydrostatic test water would result in a 6-inch drop in water levels over the 80-acre surface and that the landowner has indicated that the average seasonal fluctuation is approximately 3 feet. Consequently, a 6-inch drop would be well within typical seasonal fluctuations on the reservoir. In addition, Bison expects to withdraw water for hydrostatic purposes during September after the majority of white-faced ibis and black terns would have migrated south for the winter.

96. In comments on the EIS, the Montana DEQ requests that disturbed areas be reseeded with a native mix that is similar to species found within adjacent undisturbed lands, unless otherwise requested by a landowner or land management agency. As discussed in the EIS and its appendices, reclamation of an area will not be considered successful until the disturbed area is similar in cover and density to adjacent, undisturbed lands. Final seed mixes, which include native species, have been determined in

20100409-3033 FERC PDF (Unofficial) 04/09/2010

consultation with the National Resources Conservation Service (NRCS), landowners, and land management agencies, and are being further refined in consultation with BLM.

97. The Montana DEQ expressed concerns regarding winter construction and backfilling frozen spoil. Bison has stated that trenches will be backfilled by October 31, project-wide; however, it will backfill all trenches along Spread 2 (including all lands in Montana) prior to September 20 to minimize or avoid the chance for frozen soils. In addition, Bison has stated that it will monitor the right-of-way and communicate with the landowners over the life of the project to identify any ditchline subsidence that occurs in order to properly maintain and protect the pipeline.

98. The Montana DEQ also recommends that drilling fluids and cuttings from horizontal directional drilling (HDD) not be disposed of in a manner that would allow stormwater runoff to wash them into State of Montana waters. The EIS is clear that there are no HDDs proposed in Montana, therefore the project will not require disposal of drilling fluids and cuttings in Montana. As discussed in the EIS and its appendices, where an HDD is employed, drilling mud (a non-hazardous substance) will be disposed of at an approved off-site location, backfilled into the drill hole to be covered with subsoil and topsoil, or spread across the subsoil of the construction right-of-way (if approved by the landowner), covered with topsoil, and reseeded.

99. The Montana DEQ also recommends that apart from flumed pipeline crossings, equipment bridges should be clear-span bridges wherever feasible. As discussed in the EIS, Bison will use span bridges during construction at perennial waterbodies with flowing water and flume bridges may be used for waterbodies that are dry at the time of construction. Any span or flume bridge will be installed in a manner that does not impede flow, cause scour, or significantly increase turbidity.

100. The Montana DEQ has also indicated that only dry open-cut methods should be allowed for stream crossings with water present at the time of construction. As stated in the EIS, Bison has agreed to cross all waterbodies by an open-cut dry crossing method if water is present and flowing at the time of construction.

101. Montana DEQ staff indicated that they were contacted by a landowner requesting additional information regarding the treatment of paleontological resources identified on his property. Bison responded that it believes that the Montana DEQ staff are referring to Mr. Rusley who owns land with paleontological resources along the proposed route. On May 12, 2009, Mr. Rusley granted Bison permission to collect the fossils and provide them to him once collected. On December 29, 2009, Mr. Rusley revoked that permission and requested additional information on the nature of the fossils on his property. Bison responded to Mr. Rusley's request on January 11, 2010, and is currently working with him to make an informed decision regarding the resources on his property.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

102. The Montana DEQ and Montana FWP have concerns regarding raptors and migratory birds. The Montana DEQ has recommended that raptor deterrents be placed on mile markers within sage-grouse habitat where other tall structures are uncommon. As stated in the EIS, Bison will not place markers or signs at heights above that of fence posts in the project area and therefore does not propose the use of deterrents. The Montana FWP recommends that no construction occur in Conservation Reserve Program (CRP) lands between March 15 and July 31 to reduce impacts to nesting birds. As noted in the EIS, Bison will provide site-specific mitigation plans for crossings of CRP lands to the land-managing agencies (Farm Service Agency and NRCS) that comply with the regulations of those agencies. In addition, Bison is currently working with FWS to determine the best methods to protect migratory birds while considering project constraints. Methods being considered include construction outside of the nesting season, vegetative clearing outside of the nesting season, and pre-construction surveys.

103. The Montana DEQ recommends that Bison implement a 500-foot buffer between the storage of hazardous materials and refueling activities, and wetlands and waterbodies. As stated in the EIS, Bison's Procedures will not allow refueling and storage of hazardous materials within 100 feet of a wetland or waterbody. The 100-foot buffer has been incorporated into previous projects around the country and has been deemed adequate to protect the resources. On BLM lands, these activities will not be permitted within 500 feet of wetland or waterbody boundaries. As stated in the EIS and its appendices, a suitable secondary containment structure must be utilized at each fuel storage site. The structure must be lined with suitable plastic sheeting; provide a minimum containment volume equal to 150 percent of the volume of the largest storage vessel; and provide at least 1 foot of freeboard. If earthen containment dikes are used, they shall be constructed with slopes no steeper than three-to-one (horizontal to vertical) to limit erosion and provide structural stability. If refueling or minor quantities of fuel storage were needed due to site-specific conditions or unique construction requirements (e.g., continuously operating pumps), an Environmental Inspector must approve the location for use in advance and utilize additional protections.

104. The EPA provided comments on the EIS in a letter dated February 1, 2010. The EPA states that there was insufficient disclosure and information in support of the impacts analysis of twenty route variations filed by Bison in December 2009. The variations would affect only 7.5 miles of the proposed route described in the EIS. Although individual route variations would be between 0.1 and 2.2 miles long, the total project length would decrease by 0.13 miles and route variations would generally minimize impacts compared to those described in the EIS. Of the twenty route variations, seven were minor alignment shifts that did not require moving the pipeline out of the current corridor, eight were shifts in the alignment to decrease crossing angles of waterbodies and roads, and one proposed route variation was denied by the landowner. Of the remaining four route variations proposed for incorporation into the route, three were proposed through landowner requests and one was proposed to avoid a cultural site.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

Although the acreage of a particular land cover may increase or decrease slightly from those presented in the EIS, these route variations do not result in a change to the number of wetlands, waterbodies, or environmental buffers crossed, nor will they result in a change to impacts on federal, tribal, or state lands; forested lands; or paleontological resources. Impacts on lands within 100 km of a Class I area would increase by 0.04 mile.

105. The EPA contends that the EIS does not fully disclose information regarding the Executive Order (EO) 11990, Protection of Wetlands. As noted by the EPA, EO 11990 states that "[e]ach agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities."

106. As discussed in the EIS and its appendices, no permanent loss of wetlands will occur from the project. The U.S. Army Corps of Engineers' Section 404(b) (1) Guidelines require that no discharge of dredged or fill material in waters of the United States be permitted unless appropriate and practicable steps have been taken to minimize adverse impacts associated with the discharge. These Guidelines establish a mitigation sequence, under which compensatory mitigation is required to offset losses to the aquatic environment (including temporary losses) after all appropriate and practicable steps have been taken to first avoid and then minimize those impacts. In observance of the first two steps of the sequence, Commission staff reviewed Bison's initial proposal and worked with Bison to develop a pipeline route and methods that avoid and minimize long-term wetland impacts. Adherence to the Commission's Procedures, as adopted by Bison, require the reduction of the right-of-way width in wetlands from the proposed 120 feet to 75 feet, which significantly reduces wetland impacts, as does the requirement to site extra workspaces outside of wetlands. During project development, the acreage of wetland impacts was reduced from 43.7 acres of emergent wetlands to 16.3 acres (a reduction by more than 62 percent) and direct impacts on forested wetlands were eliminated (from an original impact of 4.2 acres). This reduction in impacts was due in part to the staff's routing requirements and suggestions during the planning process. Commission staff met with Bison in the field and reviewed many of the largest or most sensitive wetland crossings, and provided suggestions regarding avoidance and minimization of impacts. In many areas, Bison realigned the original pipeline route in order to avoid or minimize impacts on riparian wetlands. Given the noted measures to reduce impacts on wetlands, as more fully described in the EIS, and considering permits have already been issued to Bison by the U.S. Army Corps of Engineers, we find that the project is consistent with the intent of EO 11990.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

107. The EPA expressed concern that the correct Federal Land Manager (FLM) for the Theodore Roosevelt National Park, a Class I area 72 km northwest, was not consulted with regard to construction of the proposed Hettinger Compressor Station. As noted in the EIS, the project will be located in a Class II area and the Hettinger Compressor Station will not be a major PSD source. The FLM requires notification of a PSD source within 100 km of a Class I area. As reported in the EIS, staff required Bison to perform an air impact analysis of the emissions from the Hettinger Compressor Station and the resulting air impacts near the compressor station were within the national ambient air quality standards. The EIS concludes that, given the magnitude of emissions and the distance between the park and the compressor station, the Hettinger Compressor Station will not have an adverse effect on the Theodore Roosevelt National Park.

108. The EPA also requests a quantitative analysis of construction emissions from the project and that we include mitigation for construction emissions as well as specific standards for fugitive construction emissions. The EPA has mandated the use of ultra low sulfur diesel fuel beginning in June 2010 and Bison would be required to abide by this regulation. Although it is possible to ask companies to commit to using the newest equipment, the benefits of this type of requirement would be most apparent in areas experiencing heightened air pollution concerns, such as non-attainment areas. There are no non-attainment regions in the area of the project. In addition, Bison has stated that it will incorporate mitigation measures such as reducing or prohibiting unnecessary idling of construction equipment, and properly maintaining engines. Although any increase in emissions would have an incremental increase in air emissions in the local area and thus have a detrimental effect on air quality, it is not practical to do an air modeling analysis for a *de minimis* level of criteria pollutant emissions, such as emissions of less than 1 ton/year per pipeline mile.

109. Bison has developed a plan to mitigate fugitive emissions, which is provided in Appendix U of the EIS. As stated in the EIS, the Wyoming Department of Environmental Quality regulates the emissions of particulate matter arising from construction activities through its Air Quality Division Standards and Regulations Chapter 3, Section 2(f)(i)(A). The rule requires frequent watering or application of dust control chemicals to reduce fugitive dust. The Montana DEQ regulates these types of fugitive dust emissions through the Montana Administrative Rules 17.8.308(3), which requires reasonable precautions to prevent airborne particulate matter at construction sites. The North Dakota Department of Health-Department of Air Quality regulates fugitive dust from construction activities through the North Dakota Century Code 33-15-17-03(2). Bison will be required to comply with these regulations and Bison's Environmental Inspector will be responsible for monitoring fugitive dust and enforcing control measures.

110. Bison has not finalized its list of water sources and environmental condition 17 requires that, prior to construction, Bison file, for review and written approval by the

20100409-3033 FERC PDF (Unofficial) 04/09/2010

Director of OEP, a final list of all water sources that would be used for hydrostatic testing, HDDs of waterbodies, and dust abatement along with associated withdrawal volumes. For each proposed source, Bison must identify an alternative water source, along with withdrawal volumes. The alternative water source could be used if a proposed source does not contain sufficient volume to support both the resources within it and the needs of the project.

111. The EPA notes that water withdrawals have not been fully analyzed and contends that an analysis of the potential to impact attainment of water quality standards as a result of withdrawals should be completed for identified and potential alternative sources. As stated in the EIS, Bison will limit potential impacts on waterbodies resulting from individual and cumulative water withdrawals by reusing the same water in more than one test segment, maintaining adequate flow rates in all source waterbodies to protect aquatic life, and screening all hydrostatic test water withdrawal intakes to prevent entrainment of fish and aquatic organisms. In addition, prior to any hydrostatic testing, Bison will obtain any and all discharge permits that may be required by federal, state, and local regulatory agencies. Upon completion of hydrostatic testing, the hydrostatic test water will be sampled, tested, and treated or filtered as necessary to reduce pollutant levels or remove suspended particles from the water, per applicable discharge permit requirements. If required, additional water quality testing will be conducted throughout discharge operations in accordance with permit conditions. Permits will also be required for the withdrawal of dust abatement water. The EIS concludes that with adherence to permit requirements, water withdrawn for hydrostatic or dust abatement purposes will not impact the water quality of the source waterbody.

112. National Historic Preservation Act consultation and studies are ongoing. The State Historic Preservation Officers (SHPO) for Montana, Wyoming, and the BLM provided comments on the cultural resources inventory reports and unanticipated discoveries plan and requested revisions. The North Dakota SHPO stated that it would await completion of the cultural resources surveys before commenting. Environmental condition 26 to this order requires that Bison not begin construction until Bison files all reports and plans and the Director of OEP notifies Bison in writing that construction may begin.

3. Other Permits and Authorizations

113. To confirm that Bison has satisfied the requirements of all federal permits and authorizations, including those delegated to states, environmental condition 28 requires that Bison file with the Secretary documentation that it has received all authorizations required under federal law (or evidence of waiver thereof) in each respective state.

114. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The

20100409-3033 FERC PDF (Unofficial) 04/09/2010

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.[52] Bison 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 Bison. Bison shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

4. Conclusion

115. We have reviewed the information and analysis contained in the EIS regarding potential environmental effects of the project, and we adopt its analysis and its recommendations as our own. Based on our consideration of this information, we agree with the conclusions presented in the EIS and find that the project, if constructed and operated as described in the EIS, is an environmentally acceptable action. This conclusion is also based on the recommended environmental mitigation measures in the appendix to this order, which would reduce the environmental impact to less-than-significant levels. Therefore, we are including the environmental mitigation measures recommended in the EIS as conditions to the authorization issued to Bison by this order.

Findings

116. For the reasons discussed above, the Commission finds that the project is required by the public convenience and necessity and that a certificate authorizing the construction and operation of the facilities described in this order and in the application should be issued, subject to the conditions discussed herein and listed in the appendix.

117. The Commission on its own motion, received and made part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorizations sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Bison in Docket No. CP09-161-000, authorizing the construction and operation of the subject facilities, as described more fully in this order and in the application.

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

20100409-3033 FERC PDF (Unofficial) 04/09/2010

(B) A blanket construction certificate is issued to Bison under subpart F of Part 157 of the Commission's regulations.

(C) A blanket transportation certificate is issued to Bison under subpart G of Part 284 of the Commission's regulations.

(D) The facilities authorized in this order shall be constructed and made available for service within two years from the date of this order's issuance, in accordance with section 157.20(b) of the Commission's regulations.

(E) This certificate authorization is conditioned on Bison's compliance with the provisions of all applicable Commission regulations under the NGA, including, but not limited to, sections 157.20 (a), (c), (e), and (f).

(F) Bison shall adhere to the accounting and reporting requirements discussed in the body of the order.

(G) The certificate issued in Ordering Paragraph (A) is conditioned upon Bison's compliance with the environmental conditions set forth in the appendix to this order.

(H) Bison shall notify the Commission's environmental staff by telephone, e-mail, or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Bison. Bison shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

(I) Bison's initial rates and tariff are approved, as conditioned and modified in the body of this order.

(J) Bison shall file actual tariff sheets that comply with the requirements contained in the body of this order no less than 60 days and no more than 90 days prior to the commencement of interstate service.

(K) Bison is directed to file its negotiated rate agreements or a tariff sheet describing the essential elements of the agreement no less than 60 days or no more than 90 days prior to the commencement of interstate service.

(L) Bison is directed to file an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet identifying these agreements as non-conforming agreements at least 60 days and no more than 90 prior to the commencement of interstate service.

(M) Within three years after its in-service date, as discussed herein, Bison must

20100409-3033 FERC PDF (Unofficial) 04/09/2010

make a filing to justify its existing cost-based firm and interruptible recourse rates. In the alternative, in lieu of such filing, Bison may make an NGA section 4 filing to propose alternative rates to be effective no later than three years after the in-service date for its proposed facilities.

(N) Bison must execute firm contracts equal to the level of service and terms of service represented in the precedent agreements prior to commencing construction.

(O) Bison shall file a representation that its proposed AFUDC accruals for the project comply with the revised policy conditions. In the alternative, if Bison determines that its proposed AFUDC accruals should be revised in light of the revised policy conditions, it shall revise all cost-of-service items dependent upon Gas Plant in Service, such as Income Taxes, Depreciation Expense, Return, and Interest Expense, and file its revised rates and workpapers in sufficient time for the Commission to act on the revised rates prior to filing the tariff sheets to implement those rates.

(P) Bison and its representations made with respect to AFUDC accruals are subject to an audit to determine whether they are in compliance with the revised policy and related Commission rules and regulations.

(Q) The motion to intervene out of time filed by the Department of Environmental Quality of the State of Montana is granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

Appendix

Environmental Conditions

In the following conditions, "file" means to file with the Secretary at FERC and "review and written approval" refers to the Director of OEP.

1. Bison shall follow the construction procedures and mitigation measures described in its Application and supplemental filings (including responses to staff data requests), and as identified in the EIS, unless modified by the Commission's Order. Bison must:
   a. Request any modification to these procedures, measures, or conditions in a filing;
   b. Justify each modification relative to site-specific conditions;
   c. Explain how that modification provides an equal or greater level of environmental protection than the original measure; and
   d. Receive approval in writing from the Director of OEP before using that modification.

2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the Project. This authority shall allow:
   a. Modification of conditions of the Commission's Order; and
   b. Design and implementation of any additional measures deemed necessary (including stop work authority) to assure continued compliance with the intent of the environmental conditions as well as avoidance or mitigation of adverse environmental impact resulting from Project construction and operation.

3. **Prior to any construction**, Bison shall file an affirmative statement, certified by a senior company official, that all company personnel, Environmental Inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EIS, as supplemented by filed alignment sheets. As soon as they are available, and before the start of construction, Bison shall file any revised detailed survey alignment map/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Commission's Order. All requests for modifications of environmental conditions of the Commission's Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

Bison's exercise of eminent domain authority granted under Section 7(h) of the NGA in any condemnation proceedings related to the Commission's Order must be consistent with these authorized facilities and locations. Bison's right of eminent domain granted under Section 7(h) of the NGA does not authorize Bison to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Bison shall file detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in previous filings. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area**.

   This requirement does not apply to route variations recommended herein, extra workspace allowed by Bison's Upland Erosion Control, Revegetation, and Maintenance Plan, or minor field realignments per landowner needs and requirements that do not affect other landowners or sensitive environmental areas such as wetlands.

   Examples of alterations requiring approval include all route realignments and facility changes resulting from:
   a. Implementation of cultural resources mitigation measures;
   b. Implementation of mitigation measures for endangered, threatened, or special concern species;
   c. Recommendations by state regulatory authorities; and
   d. Agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. Within 60 days of the acceptance of the Certificate and **before construction begins**, Bison shall file an Implementation Plan, for the review and written approval of the Director of OEP. Bison must file revisions to the plan as schedules change. The plan shall identify:

   a. How Bison will implement the construction procedures and mitigation measures described in its application and supplements (including responses

20100409-3033 FERC PDF (Unofficial) 04/09/2010

to staff data requests) identified in the EIS, and as required by the Order;

b. How Bison will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;

c. The number of EIs assigned per spread and aboveground facility site, and how Bison will ensure that sufficient personnel are available to implement the environmental mitigation;

d. Company personnel, including EIs and contractors, who will receive copies of the appropriate materials;

e. The location and expected dates of the environmental compliance training Bison will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);

f. The company personnel (if known) and specific portion of Bison's organization responsible for compliance;

g. The procedures (including use of contract penalties) Bison will follow if noncompliance occurs; and

h. For each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:

(1) the completion of all required surveys and reports;

(2) the environmental compliance training of onsite personnel;

(3) the start of construction; and

(4) the start and completion of restoration.

7. Bison shall employ a team of one or more EIs, or as may be established by the Director of OEP, per construction spread. The EIs shall be:

a. Responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;

b. Responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;

c. Empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;

d. A full-time position, separate from all other activity inspectors;

e. Responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and

f. Responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, Bison shall file updated

20100409-3033 FERC PDF (Unofficial) 04/09/2010

status reports on a weekly basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

a. An update on Bison's efforts to obtain the necessary federal authorizations;
b. The construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
c. A listing of all problems encountered and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
d. A description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
e. The effectiveness of all corrective actions implemented;
f. A description of any landowner/resident complaints that may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
g. Copies of any correspondence received by Bison from other federal, state, or local permitting agencies concerning instances of noncompliance and Bison's response.

9. Bison shall develop and implement an environmental complaint resolution procedure that remains active for at least 3 years following the completion of Project construction. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the Project and restoration of the right-of-way. Prior to construction, Bison shall mail the environmental complaint resolution procedure to each landowner whose property would be crossed by the Project.

a. In the letter to affected landowners, Bison shall:
    i. Provide a local contact that the landowners shall call first with their concerns; the letter shall indicate how soon to expect a response;
    ii. Instruct the landowners that, if they are not satisfied with the response, they shall call Bison's Hotline; the letter shall indicate how soon to expect a response; and
    iii. Instruct the landowners that, if they are still not satisfied with the response from Bison's Hotline, they shall contact the Commission's Enforcement Hotline at (888) 889-8030.
b. In addition, Bison shall include in its weekly status report a table that contains the following information for each problem/concern:
    i. The identity of the caller and the date of the call;
    ii. The identification number from the certificated alignment sheet(s)

20100409-3033 FERC PDF (Unofficial) 04/09/2010

of the affected property and appropriate location by milepost;

iii. A description of the problem/concern; and

iv. An explanation of how and when the problem was resolved or will be resolved, or why it has not been resolved.

10. Bison must receive written authorization from the Director of OEP **before commencing service of the Project**. Such authorization will be granted only following a determination that rehabilitation and restoration of the right-of-way and other areas of Project-related disturbance are proceeding satisfactorily.

11. **Within 30 days of placing the certificated facilities in service**, Bison shall file an affirmative statement, certified by a senior company official:

    a. That the facilities have been constructed in compliance with all applicable conditions and that continuing activities will be consistent with all applicable conditions; or

    b. Identifying the Certificate conditions with which Bison has complied or will comply. The statement shall also identify any areas affected by the Project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

12. **Prior to construction**, Bison shall file, for review and written approval, site-specific mitigation plans to minimize potential landslides, slope failure, and erosion for all areas of high susceptibility to landslide along the proposed Project route, including those listed in Table 3.1.1-7.

13. **Prior to implementing any blasting**, Bison shall file, for review and written approval, a completed Contractor Blasting Plan and site-specific blasting plan. The plans shall also be provided to all other appropriate federal and state agencies for review.

14. **Prior to construction**, Bison shall revise its Upland Erosion Control, Revegetation, and Maintenance Plan to be consistent with Sections IV.F 3.(c).1, V.A.1, and V.D.3.d of the FERC Plan regarding the timing of final grading, placement of erosion control measures, and seeding. Bison shall also request any site-specific exceptions to the timeframes for locations of delayed restoration for our review and written approval.

15. **Prior to construction**, Bison shall file a final Reclamation Plan that addresses the outstanding concerns of BLM.

16. **Prior to construction at the unnamed waterbodies at MP 263.1 and MP 264.3**, Bison shall file, for review and written approval, site-specific crossings plans for

20100409-3033 FERC PDF (Unofficial) 04/09/2010

the major waterbody crossings at these locations.

17. **Prior to construction**, Bison shall file, for review and written approval, a final list of all water sources that would be used for hydrostatic testing, HDD, and dust abatement along with associated withdrawal volumes. For each proposed source, Bison shall also identify an alternative water source, along with withdrawal volumes.

18. **During construction**, Bison shall establish additional equipment wash stations at MP 18.7 and MP 48.8 in Campbell County, Wyoming, and at MP 108.5 and MP 157.1 in Carter County, Montana to reduce the spread of noxious weeds.

19. **Prior to construction**, Bison shall file, for review and written approval, its final list of invasive species potentially occurring within the Project area based on field surveys, all associated agency consultations, and any species-specific mitigation measures to avoid or limit the spread of invasive aquatic species

20. **Prior to construction**, Bison shall file its final MBTA Conservation Agreement developed in consultation with FWS. In addition, file, for review and written approval, a plan for how Bison would implement the requirements included in the MBTA Conservation Agreement.

21. Bison shall **not begin construction** of the proposed Project facilities until:
    a. The staff completes any necessary consultations with FWS; and
    b. Bison has received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin.

22. **Prior to construction**, Bison shall file a list of locations of potential foraging and roosting habitat for whooping cranes within 1 mile of the proposed Project and shall implement a 1-mile buffer zone around any identified potential roosting or foraging habitat during the spring and fall migration periods (April 15 through May 15 and September 15 through October 30). If a whooping crane is encountered during construction, Bison shall stop all construction activity within a 1-mile buffer around the sighting, and notify the applicable FWS Ecological Service Office.

23. **Prior to construction**, Bison shall file, for review and written approval, a plan to minimize impacts on windbreaks on a site-specific basis in coordination with landowners. Additional mitigation measures that shall be considered include relocating extra workspaces to open areas, boring, and transplanting trees to an unaffected portion of the windbreak.

20100409-3033 FERC PDF (Unofficial) 04/09/2010

24. Bison shall file a proposed power line interference study for any crossings of high-voltage lines and identify all appropriate measures to minimize potential impacts associated with the power lines.

25. **Prior to construction across the Cannonball River**, Bison shall file, for review and written approval, a revised Cannonball River Crossing Plan that identifies the methods for ensuring safe portage around the construction area and associated steep streambanks, and specifies measures to provide assistance to any boaters who may request help.

26. **Bison shall not begin** construction of facilities and/or use of all staging, storage, or temporary work areas and new or to-be-improved access roads **until**:
    a. Bison files:
        i. Remaining cultural resources survey report(s), any necessary site ii. evaluation report(s), and avoidance/treatment plan(s); and
        ii. Outstanding comments on the cultural resources reports and plans from the Wyoming, Montana, and North Dakota SHPOs, BLM, and interested Indian tribes.
    b. The ACHP is afforded an opportunity to comment if historic properties would be adversely affected; and
    c. The FERC staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Bison in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

    All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CONTAINS PRIVILEGED INFORMATION – DO NOT RELEASE**."

27. Bison shall file noise surveys **no later than 60 days** after placing the Hettinger Compressor Station in service. If the noise attributable to the operation of all of the equipment at the Hettinger Compressor Station at full load exceeds an Ldn of 55 dBA at any nearby noise-sensitive area, Bison shall install the additional noise controls to meet the level **within 1 year** of the in-service date. Bison shall confirm compliance with the above requirement by filing a second noise survey **no later than 60 days** after it installs the additional noise controls.

28. Prior to receiving written authorization from the Director of OEP to commence construction of project facilities in each state, Bison shall file with the Secretary documentation that they have received all authorizations required under federal law (or evidence of waiver thereof) in each respective state.

Document Content(s)

CP09-161-000.DOC.....1-44