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RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION

June 29, 2021

TO: All Parties of Record

RE: **GUD No. 10606**, *Formal Complaint of CNOOC Energy USA, LLC, Against Williams MLP Operating, LLC, and Mockingbird Midstream Gas Services, LLC*

EXAMINER LETTER NO. 71
First Supplemental Proposal for Decision

The First Supplemental PFD was issued today, along with a Revised Proposed Final Order, consistent with the Commission's Remand Order.[1] While there was no substantial change of the recommendation for final action, the parties may file exceptions and replies, consistent with the deadlines under Commission Rule § 1.122 (Filing of Exceptions and Replies).[2] Tentatively, this docket will be placed on the agenda for further consideration by the Commissioners at the scheduled August 3, 2021 open meeting.

Any party filing exceptions/replies or motions for rehearing/replies may do so electronically by email to HearingsDivision.efile@rrc.texas.gov,[3] with **12 hardcopies**—unstapled and without holes punched—delivered later by mail to Docket Services. Filings will be considered timely filed on the date of emailing/electronic filing.

Sincerely,

John Dodson
Administrative Law Judge

Attachment

cc: Service List

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[1] Order for Limited Purpose Remand, signed by the Commission on March 4, 2020; *see also* Commission Rule §§ 1.101(15) (authorizing ALJ "to issue a supplemental or amended proposal for decision"), and 1.123(b) (directing that an amended PFD be prepared only where remand evidence "results in a substantial change of the examiner's recommendation for final action").
[2] *See* Commission Rule § 1.122(a) ("Any party may, within 15 days after the date of service of a proposal for decision, file exceptions to the proposal for decision. Replies to such exceptions may be filed by any other party within 10 days after the deadline for filing such exceptions.").
[3] Confidential materials, if any, should be provided in hardcopy form only, consistent with packaging/labeling required under Commission Rule § 1.68 (Confidential Materials).

Service List

GUD Docket No. 10606
Formal Complaint of CNOOC Energy USA, LLC, Against Williams MLP Operating, LLC and Mockingbird Midstream Gas Services, LLC

Administrative Law Judge: John Dodson
Technical Examiners: James Currier and Rose Ruiz

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16 TEX. ADMIN. CODE § 1.7 (Ex Parte Communications):

(a) Ex parte communications are prohibited in contested cases as provided in the APA and other applicable rules including the Texas Disciplinary Rules of Professional Conduct.

(b) Each party shall provide all other parties with a copy of all documents submitted to an examiner.

(1) The attachment of a certificate of service stating that a document was served on a party creates a rebuttable presumption that the named party was provided a copy.

(2) Failure to provide a copy to all other parties may result in rejection and return of the document without consideration.

CHRISTI CRADDICK, *CHAIRMAN*
WAYNE CHRISTIAN, *COMMISSIONER*
JIM WRIGHT, *COMMISSIONER*

DANA AVANT LEWIS, *DIRECTOR*

RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION

GUD NO. 10606
First Supplemental Proposal for Decision

FORMAL COMPLAINT OF CNOOC ENERGY USA, LLC, AGAINST WILLIAMS MLP OPERATING, LLC, AND MOCKINGBIRD MIDSTREAM GAS SERVICES, LLC

Administrative Law Judge John Dodson
Technical Examiners: Rose Ruiz, James Currier

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SUPPLEMENTAL PROCEDURAL TIMELINE

Original PFD Issued:	January 9, 2020
Presented to Commissioners:	February 11, 2020, and March 4, 2020
Remand Order:	March 4, 2020
Complainant EXCO Dismissed from Docket:	June 30, 2020
Hearing Re-Opened:	September 9-11, 2020
Evidentiary Record Closed:	March 31, 2021
Deadline for Commission Action:	Not applicable

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FIRST SUPPLEMENTAL PROPOSAL FOR DECISION

I. INTRODUCTION

This First Supplemental Proposal for Decision ("Supplemental PFD") supplements the original Proposal for Decision, issued on January 9, 2020 ("Original PFD"),[1] as well as responds to the Commission's March 4, 2020 Order for Limited Purpose Remand ("Remand Order").[2]

The Original PFD contained the below general findings and legal analysis, accompanied where appropriate with footnoted citations to the supporting evidence.

- This is a discrimination case, not a rate case. The proper focus here is unequal treatment, not necessarily proper rate "benchmarking."
- Williams, as a utility gatherer pipeline, demanded from CEU and EXCO as a condition for new service that each pay not only its own gathering costs, ***but also*** the capital costs incurred during the five years prior attributable to a different customer—anchor shipper Chesapeake.
- From 2012 to 2017, when CEU and EXCO were not customers, Williams spent over $1.6 billion to acquire and build out the Mockingbird System to provide the requisite facilities and infrastructure to serve Chesapeake's gathering needs pursuant to the terms of their 2012 anchor contract (the Mockingbird Agreement).
- From 2014 to 2016, Williams allowed certain other new customers (Shippers 14, 15, 27, and 33) to pay only their own gathering costs and not these past contractual "Chesapeake expenses."
- For pipeline infrastructure built specifically to serve the contract-based needs of Chesapeake, the relevant "similarly-situated" conditions associated with repayment of those amounts are commercial in nature, rather than physical or geographical.
- Shippers 14, 15, 27, and 33 were similarly-situated to CEU and EXCO with respect to repaying what Williams spent to serve Chesapeake under contract before any were customers.
- Williams lacked a lawful basis for requiring CEU and EXCO, but not the four comparison shippers, to repay these prior Chesapeake expenses.

The Original PFD ultimately concluded that Williams committed multiple acts of unlawful discrimination under Texas law with respect to its attempted unequal recovery from both CEU and EXCO of anchor shipper Chesapeake's previous costs. The Original PFD found no unlawful discrimination, however, with respect to the rates charged by Williams to CEU and EXCO for each's own gathering service.

- Texas law allows some variance in the rates utilities charge their customers, and the approximate rate portion charged to CEU and EXCO, with the Chesapeake expenses removed, was not materially different from amounts paid by Shippers 14, 15, 27, and 33.

[1] For consistency, all defined terms used in the Original PFD have their same meaning in this Supplemental PFD.
[2] *See* Commission Rule § 1.101(15) (authorizing ALJ "to issue a supplemental or amended proposal for decision and proposed order").

On March 4, 2020, the Commission remanded this docket to reconsider the discrimination issue by re-opening the hearing and thereafter to provide additional analysis with respect to:

a. whether CEU and Chesapeake are similarly situated;
b. whether EXCO and Chesapeake are similarly situated;
c. whether CEU and EXCO are similarly situated; and
d. whether CEU and EXCO, respectively, are similarly situated to Shippers 14, 15, 27, and 33.

The Commission's Order for Limited Purpose Remand (the "Remand Order") is attached as Supplemental PFD Attachment 1. Below is the additional analysis requested by the Commission. Also provided, where appropriate, is supplemental legal analysis that provides context and informs these requested comparisons. Because there are no substantial changes to the recommendation for final action, this Supplemental PFD is issued consistent with Commission Rule §§ 1.123(b)[3] and 1.101(15).[4]

II. SUPPLEMENTAL PROCEDURAL HISTORY

On January 9, 2020, the Original PFD was issued. Consistent with Commission Rule § 1.122 (Filing of Exceptions and Replies), the parties were given the opportunity to file exceptions and replies. The findings and recommendations contained in the Original PFD were presented to the Commission at successive open meetings held on February 11, 2020, and on March 4, 2020. At the March 4, 2020 open meeting, the Commission issued its Remand Order.

On June 30, 2020, Complainant EXCO was dismissed from this docket on its own motion.[5] Consistent with the Remand Order, the merits hearing was re-opened from September 9-11, 2020, to give the parties an opportunity to present evidence and argument on the above similarly-situated comparisons (the "Remand Hearing").[6] A combined list of the parties' supplemental exhibits admitted into the evidentiary record during the Remand Hearing is attached as Supplemental PFD Attachment 2.

On March 31, 2021, the ALJ sealed portions of the remand record, finding that certain new exhibits and portions of the remand hearing transcript contain highly-sensitive, confidential information under Chapter 552 (Public Information) of the Texas Government Code.[7] The evidentiary record then closed.[8]

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[3] Commission Rule § 1.123(b) ("If, on remand by the Commissioners, additional evidence is received which results in a substantial change of the examiner's recommendation for final action, an amended proposal for decision shall be prepared and circulated to the parties, unless a majority of the Commission has held the hearing or read the record. If an amended proposal for decision is prepared, all parties shall have the right to file exceptions, replies, and briefs.").

[4] Commission Rule § 1.101(15) (authorizing ALJ "to issue a supplemental or amended proposal for decision").

[5] Agreed Order of Dismissal with Prejudice, signed by ALJ Dodson on June 30, 2020 (approving EXCO's request to leave the docket and dismiss its claims).

[6] *See* Examiner Letter No. 61 (Remand Notice of Hearing), issued Aug. 12, 2020 (attaching the Remand Notice of Hearing); *Gas Utilities Bulletin No. 1137*, published by the Oversight and Safety Division on Aug. 14, 2020, pp. 4-6 (containing the full Remand Notice of Hearing).

[7] Order Permanently Sealing Portions of the Remand Record, signed by ALJ Dodson on March 31, 2021.

[8] Examiner Letter No. 69 (Close of Evidentiary Record), issued March 31, 2021.

III. SUMMARY OF NEW EVIDENCE FROM CEU AND WILLIAMS

Looking through evidence without first being clear on the proper legal standard is a waste of time and energy. The legal standard is informed by the issue presented. Prior to conveying the parties' main-phase evidence and arguments, the Original PFD: explained that this is a discrimination case (rather than a benchmarking rate case);[9] and provided the proper legal standard applicable to discrimination cases, which is very different from rate cases where the standard is designed to establish fair prices.[10] The Original PFD then conveyed the parties' respective evidence and arguments,[11] applied the legal standard to the evidence relating to the proper comparison shippers (those alleged by the complainants to be similar and receiving different treatment),[12] and finally stated the conclusions resulting from this process.[13]

Not all evidence from the parties during the main phase pertained to the discrimination legal standard, and only some of the remand-phase evidence did (though it was responsive to the Remand Order). Neither complainant ever alleged unequal treatment as compared to Chesapeake or to each other. On the contrary, since the outset of this docket it has not been disputed that Williams treated CEU, EXCO, and Chesapeake identically. Comparison between and among these companies not only avoids the relevant legal standard for discrimination (focused on customers receiving *different* treatment), but also misses what kind of case this is. CEU and EXCO filed discrimination claims, not rate cases, and so the only shipper comparisons relevant here are those that CEU and EXCO, carrying the burden of proof, selected in their claims: Shippers 14, 15, 27, and 33. Other comparisons are not relevant or required under Texas law.

The overwhelming majority of new evidence and arguments offered by the remaining parties at the Remand Hearing focused on comparing CEU to Chesapeake (Remand Order, subpart a). This is an immaterial and irrelevant shipper comparison. Throughout this docket, Williams has litigated the wrong kind of case—a rate case—attempting to confuse this Commission with irrelevant Chesapeake/CEU "benchmarking" evidence that has no bearing whatsoever on the actual claims of discrimination it faces. The apparent strategy here being to avoid scrutiny on the customers Williams treated differently by focusing the Commission instead on the one it unquestioningly treated the same. This tactic was unsuccessful with the Original PFD and remains unsuccessful now. Despite Williams's persistence with its "benchmarking" defense: (1) this is not a rate case; (2) the complainants did not select Chesapeake as a comparison shipper; and (3) CEU and EXCO were treated identically to Chesapeake, not differently. This eliminates Chesapeake as a proper comparison shipper three times over. The same is true for CEU and EXCO as compared to each other (Remand Order, subpart c), for the same reason.

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[9] Original PFD at iii ("Though the types of discrimination alleged here pertain to rates, this is not a rate case and the lawfulness of the rate amounts offered to CEU and EXCO—under either a cost-of-service or market-based methodology—are not at issue. Discrimination is about unequal treatment, not fair prices.").

[10] *Id*. at 7-8.

[11] *Id*. at 9-17.

[12] *Id.* at 18-31.

[13] *Id*. at 32.

The requested shipper comparisons in the Remand Order that are relevant and probative here are the ones comparing the complainants to those shippers alleged by each in their complaints to be situated similarly yet treated differently by Williams (subpart d). These comparisons, despite being the most important and relevant, received less attention from the parties during the Remand Hearing. Most of the relevant and probative evidence on these comparisons came during the main phase—cited throughout the Original PFD analysis.[14] The Original PFD made three main findings with respect to the complainants' alleged unlawful treatment by Williams as compared to these four shippers (Shippers 14, 15, 27, and 33). Those main findings, along with the supporting evidence cited in the Original PFD, are summarized below.

(1) Contract-based capital expenses incurred by Williams from 2012 to 2017 relating to the acquisition and significant buildout of the Mockingbird System to serve anchor shipper Chesapeake's contractual gathering needs—when CEU or EXCO were not customers and had no service (discrimination found). For this, the Original PFD cited to numerous exhibits and testimony supporting: Williams and Chesapeake together financed these expenses;[15] similarly to CEU and EXCO, none of the four comparison shippers were customers of Williams when most of these Chesapeake-related expenses were caused;[16] Williams demanded their repayment only from CEU and EXCO, not from these comparison shippers;[17] and Williams lacked a lawful basis for distinguishing CEU and EXCO for this extra charge.[18]

(2) Gathering rates offered to CEU and EXCO for each's own gathering service and reflecting each's own customer capital costs (discrimination not found). For this, the Original PFD cited to testimony supporting that what remained of the rates Williams offered to CEU and EXCO, with the above Chesapeake expenses charge removed, was not materially different numerically from the gathering rates paid in 2017 by each of the four comparison shippers.[19] Without a material difference in treatment shown, a threshold element for discrimination was lacking and therefore claims could not survive further, regardless the outcome of any shipper comparisons.[20] This moot analysis was omitted from the Original PFD for this reason, and no party filed exceptions on this finding following the Original PFD's issuance.

(3) Processing requests for service from CEU and EXCO in a similar manner as compared to similar shippers (violation found). For this, the Original PFD cited to specific exhibits and testimony describing the efforts by CEU and EXCO representatives to negotiate and request gathering service terms as new customers, and Williams in response processing those service requests differently from others not due to shipper service characteristics, but instead like requests to be released from contractual duties that neither owed.[21]

[14] *See id*. at 9-11, 18-29.
[15] *Id*. at 10-11 (fn 45, 46, 47, 48, 51, 62, 63, 65, 66); at 18 (fn 83); at 21 (fn 93, 94, 97, 98).
[16] *Id*. at 10 (fn 52, 55).
[17] *Id*. (fn 53, 54, 56, 57, 58, 59, 60); at 21-22 (fn 95, 96, 99, 100, 101); at 24-25 (fn 109, 110).
[18] *Id*. at 23-25 (fn 103, 104, 105, 107, 109, 110, 112).
[19] *Id*. at 26 (fn 115, 116).
[20] *Id*. ("For the approximate portion of the Mockingbird Agreement rate charged to CEU and EXCO for actual gas-gathering service, then, there was no material difference in treatment and therefore no discrimination.").
[21] *Id*. at 10 (fn 53, 54, 56, 57, 58, 59, 60); at 28-29 (fn 127, 128, 129, 130, 131, 132, 133).

The Original PFD summarized the core arguments and supporting evidence offered by CEU and Williams during the main-phase proceeding,[22] and then cited and directly quoted the relevant testimonies and other exhibits in footnotes throughout that were probative and informed the discrimination legal standard.[23] All the parties' evidence from the main phase still exists in the record, including what was not highlighted in the Original PFD. The arguments and evidence from the parties conveyed in the Original PFD are not repeated here—including the contextual background, party, timeline, and Mockingbird Agreement evidence[24]—but rather are supplemented herein with new remand-phase material offered by CEU and Williams that is responsive to the Remand Order. Unlike during the main-phase proceeding, neither CEU nor Williams offered company fact witnesses during the remand phase, relying instead on the testimonies only from expert witnesses, listed below.

- *John Emory* (CEU), an engineer and Senior Consultant at Watson Millican & Company, an independent energy consultancy specializing in the energy industry. Mr. Emory reaffirms his conclusions from the main phase that CEU is similarly situated to Shippers 14, 15, 27, and 33, and also compares the other shippers named in the Remand Order.[25]
- *Jane Kidd* (CEU), an economist and Managing Member of Energy Litigation Services Group, a Houston-based economic consulting firm that focuses on the energy industry. Ms. Kidd offers opinions that Chesapeake is economically dissimilar to CEU and all other shippers because its Mockingbird Agreement rates are the product of a "two-part transaction" and include financing-related compensation stemming from Chesapeake's separate system sale transaction.[26]
- *Jim Cantwell* (Williams), an engineer and independent consultant. Mr. Cantwell responds to CEU's two experts and maintains his main-phase conclusion that CEU is similarly situated only to Chesapeake.[27]
- *David Biegler* (Williams), an engineer and former senior-level executive at multiple large energy companies, including natural gas pipeline and midstream gathering and processing companies. Mr. Biegler responds to CEU's two experts, discusses industry standards and practices, and concludes that CEU is similarly situated only to Chesapeake.[28]
- *Michael Webb* (Williams), an economist and a Vice President with Regulatory Economics Group, LLC ("REG"), a Virginia-based energy and pipeline industry consulting firm. Dr. Webb responds to CEU's two experts, discusses and contextualizes regulatory economics issues, and concludes that CEU is similarly situated only to Chesapeake.[29]

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[22] *Id*. at 9-17, and at Attachment 2 (CEU Demonstrative Case Summary), Attachment 3 (Williams Demonstrative Shipper Comparison Chart).
[23] *See id*. at 9-11, 18-29.
[24] *Id*. at 2-3, 9-11.
[25] Joint Ex. 132 (Emory Test.).
[26] Joint Ex. 139 (Kidd Test.).
[27] Williams Exs. 136 (Cantwell Test.), 140 (Cantwell Test. Corrections).
[28] Williams Ex. 135 (Biegler Test.).
[29] Williams Ex. 138 (Webb Test.).

As with the main-phase, the exhibits and testimony during the remand phase included a considerable portion of confidential material under seal. So that the Original PFD and this Supplemental PFD could be issued in unredacted, public form, some of this evidence is summarized or cited only.

A. Whether CEU and Chesapeake are Similarly Situated

In its complaint, CEU never alleges that Chesapeake was treated differently or asks the Commission to consider Chesapeake as a comparison shipper. Accordingly, this comparison does not inform the legal standard for discrimination applicable here and properly was excluded from the Original PFD for this reason. Responding to the Remand Order (subpart a), CEU and Williams offered the below arguments and evidence.

CEU's Evidence

CEU argues that it is dissimilar to Chesapeake based on economic factors, rather than physical service characteristics.[30] During the Remand Hearing, CEU introduced new evidence that Chesapeake's payments under the Mockingbird Agreement included additional, non-service related consideration stemming from the sale of the system occurring during the same year as the Mockingbird Agreement. From that sale, Chesapeake—as the former owner of the system asset being sold—received a higher sale price than what the system's actual 2012 valuation amount would have been had the same negotiating parties structured the Mockingbird Agreement differently to lower Chesapeake's gathering rates. As a precondition to closing the system sale, Chesapeake renegotiated its gathering agreements for the systems it was selling, agreeing to higher gathering rates in the Mockingbird Agreement than it otherwise would have over a 20-year term to substantially increase the total value of the asset it was selling.[31]

Supporting that the sale transaction and the gathering service transaction together had linked consideration, CEU highlights that the actual Chesapeake producing entity was not involved in negotiations for either transaction—instead, the sales price and the agreement framework negotiations were handled primarily by the parent's finance department.[32] Midstream personnel reentered the picture to negotiate the technical aspects of the gathering agreement only after the term sheets were completed.[33] Due to its desire in 2012 to maximize the sale value of its system, Chesapeake was not incentivized to negotiate low gathering rates under the Mockingbird Agreement; on the contrary, agreeing to higher gathering rates would have—and in fact did—greatly increase the sale value of the system and thereby gave Chesapeake, in need of cash at the time, more up front.[34]

[30] CNOOC Energy USA LLC's Post-Hearing Brief on Remand, filed Oct. 26, 2020 ("CEU Remand Br.") at 2, 6-8, 25-35; see also CNOOC Energy USA LLC's Response to Williams' Closing Statement and Brief on Remand, filed Nov. 6, 2020 ("CEU Remand Reply Br.").

[31] Joint Ex. 199-A (Lemmerman Dep.); Joint Ex. 157-A (Dell'Osso Dep.); Joint Ex. 200-A (Elder Test.); Hearing Tr. (June 19, 2019) at 204-206 (Bennett testifying); see also Joint Ex. 193 (Aug. 24, 2012 Revised CMO Valuation).

[32] Joint Ex. 200-A (Elder Test.) at 413-18.

[33] *Id*.

[34] *See* CEU Remand Br. at 26.

CEU offered new expert testimony to support its argument that CEU is dissimilar to Chesapeake based on economic factors.[35] CEU's economist expert explains that Chesapeake is dissimilar to *all* other shippers, including CEU, based on this "two-part transaction" whereby Chesapeake received a far greater sales price in 2012 than the system's actual worth in exchange for higher gathering rates.

> *The fact of a two-part transaction in and of itself significantly alters the total mix of information available for proper evaluation of discrimination. It renders the other 12 factors immaterial because those 12 factors, when taken in context of a two-part transaction, become inconsequential to the proper evaluation of discrimination. This is because no matter how similar the other 12 factors may be, the nominal "gathering rate" in a two-part transaction may not reflect only the actual consideration for gathering services, but instead may be a combination of compensation for gathering services and financing related to proceeds received for the sale. It is very much as if the Mockingbird Agreement itself contained a "?" where the gathering rate would be stated, because one cannot know what gathering rate Williams and Chesapeake would have agreed to had they negotiated the Mockingbird Agreement on a standalone basis. As a result, the condition of a two-part transaction makes Chesapeake dissimilar to and unsuitable for comparison to all other Mockingbird shippers for the purpose of drawing meaningful discrimination conclusions*.[36]

Accordingly, this "two part" transactional arrangement, involving the same negotiators participating during the same year (2012) in both the sale transaction and the gathering service transaction, not only informs the 13th factor under Commission Rule § 7.115(32)—"conditions and circumstances existing at the time of agreement or negotiation"—but it effectively renders the other 12 factors immaterial.[37] Chesapeake, which owned the Mockingbird System at the time of negotiation of the Mockingbird Agreement, had the singular ability to shift value from one part of the transaction to the other based on its preferences.[38] No other shipper or potential shipper on the Mockingbird System, including CEU, has that same ability because Chesapeake is the only shipper that also formerly owned the system.[39]

Though excluded from both transactions and the negotiations leading up to them, CEU acknowledges that Williams and Chesapeake were free to make any deal they wished, structured however they wished, so long as "innocent third parties" were not impacted in the form of higher gathering rates.[40] CEU did not participate in the "upfront cash" part of Chesapeake's "two-part transaction," and so CEU argues it should not be required to involuntarily participate in a gathering rate component designed to subsidize that higher purchase price.[41]

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[35] *See* Joint Ex. 139 (Kidd Test.); Joint Ex. 132 (Emory Test.) at 11-13.
[36] Joint Ex. 139 (Kidd Test.) at 9-10.
[37] *Id*. at 9.
[38] *Id*.
[39] *Id*.
[40] CEU Remand Br. at 33-35.
[41] *Id*.

Williams's Evidence

Williams maintains its central position from the main-phase proceeding—that CEU is similarly situated to Chesapeake based on the 13 physical service factors enumerated under Commission rules.[42] These factors and their corresponding values, as presented by Williams, were conveyed in their entirety within the Original PFD and are not repeated here.[43] Just as it argued during the main phase, Williams maintains now that CEU's similarity to Chesapeake based on physical service characteristics and commercial likeness necessarily defeats or excuses any claims of unlawful unequal treatment of CEU as compared to Shippers 14, 15, 27, and 33.[44]

Williams also argues that CEU and Chesapeake are similar in that their volumes were the first on the system and that they, via their own development agreement, "intended to be and agreed to be similarly situated, and they achieved their objective through their years of joint planning and decision-making."[45] Despite only Chesapeake being Williams's customer, Williams argues: "[CEU and Chesapeake] worked hand-in-glove to drive the system growth and to decide (through their drilling and well pad plans) how much the gathering rate would increase, gathering system capital costs and build-out issues, and how rates change."[46] Under the structure of their development agreement and regular meetings, CEU and Chesapeake together: jointly developed their 600,000 mineral acres in the Eagle Ford; planned and drilled over 2,700 wells from 2010 through March 2018; and obtained drilling permits.[47] According to Williams, CEU and Chesapeake "always have been on equal footing" and their decisions under their own development agreement drove how Williams developed and built out the system.[48]

Responding to CEU's arguments that CEU is dissimilar to Chesapeake based on *economic* factors, Williams disputes that Chesapeake's payments under the Mockingbird Agreement include any extra consideration stemming from the separate 2012 system sale transaction.[49] From an industry perspective, Williams characterizes CEU's "two-part transaction" argument as unsupported speculation, stating that the 2012 system sale was not a unique or unusual transaction.[50] Gathering systems are commonly bought and sold in Texas, and they commonly are accompanied by agreements for follow-on use.[51] Also, it is not uncommon for a producer or midstream affiliate to build out a system initially to better suit its own gathering needs, and then later to sell it at some point in development or production.[52]

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[42] Williams' Closing Statement and Brief on Remand, filed Oct. 14, 2020 ("Williams Remand Br."); Williams' Reply to CNOOC's Post-Hearing Brief on Remand, filed Nov. 6, 2020 ("Williams Remand Reply Br.").
[43] Original PFD at 16-17, and Attachment 3 (Williams Shipper Comparison Chart); *see also* Williams Ex. 136 (Cantwell Test.) at 4-6 (restating these comparison values); Williams Ex. 135 (Biegler Test.) at 35-37.
[44] *See* Williams Remand Br. at 8-17.
[45] *Id*. at 15.
[46] *Id*. at 16.
[47] *Id*. at 8.
[48] *Id*. at 8-13, 16.
[49] Williams Remand Reply Br. at 18-20; Williams Ex. 136 (Cantwell Test.) at 24-35; Williams Ex. 135 (Biegler Test.) at 27-32; Williams Ex. 138 (Webb Test.) at 29-35.
[50] Williams Ex. 135 (Biegler Test.) at 27-28.
[51] *Id*. at 28.
[52] *Id*. at 28-29.

From an economic and transactional perspective, Williams argues that consideration under the two transactions remained separate, noting that the sale price for the system was set in September 2012 and the Mockingbird Agreement was not finalized until December 2012.[53] Williams further argues and provides supporting evidence that: the final sale price of the Mockingbird system assets was not inflated, as CEU claims, but rather was consistent with its 2012 book value,[54] and that the cost-of-service rate structure under the Mockingbird Agreement, including the target 18-percent pre-tax internal rate of return (IRR), was reasonable and within the norm for gathering agreements at the time involving this degree of gatherer risk.[55]

B. Whether EXCO and Chesapeake are Similarly Situated

In its complaint, EXCO never alleged that Chesapeake was treated differently or asked the Commission to consider Chesapeake as a comparison shipper. Accordingly, this comparison does not inform the legal standard for discrimination applicable here and properly was excluded from the Original PFD for this reason. Responding to the Remand Order (subpart b), CEU and Williams offered the below arguments and evidence.

With EXCO gone from this case, the remaining parties (CEU and Williams) offered very little evidence during the remand phase comparing EXCO to Chesapeake. Considering physical and service characteristics, CEU's engineering expert notes some physical or geographic similarities (services, location, length of haul, gas quality, pressure) in the Shallow system where EXCO's wells are located—with the main difference of Chesapeake having approximately 100 more receipt points than EXCO—but he ultimately declined to offer an opinion on whether Chesapeake and EXCO are similarly situated.[56] CEU's economist expert implies that EXCO is dissimilar to Chesapeake economically for the same reason as CEU (discussed above), because EXCO—like CEU and all other Mockingbird shippers—did not receive the substantial additional consideration that Chesapeake received from its 2012 system sale that factored into Chesapeake's higher gathering rates.[57]

With respect to Williams, because EXCO settled its claim prior to the Remand Hearing, Williams declined to offer additional evidence comparing EXCO to Chesapeake.[58] Should this comparison still matter to the Commission, however, Williams offers that EXCO would have been similarly situated to Chesapeake from 2012 to 2017 in the Shallow system, where its wells were located.[59]

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[53] Williams Remand Reply Br. at 19; Joint Ex. 202 (Mockingbird Agreement Draft); Remand Hearing Tr. (Sept. 9, 2020) at 237 (Emory testifying); *id*. (Sept. 10, 2020) at 37 (Kidd testifying); *id*. (Sept. 11, 2020) at 231-33 (Cantwell testifying).

[54] Williams Ex. 136 (Cantwell Test.) at 26-35.

[55] Williams Ex. 138 (Webb Test.) at 32-35; Williams Ex. 136 (Cantwell Test.) at 27, 29, 35.

[56] Joint Ex. 132 (Emory Test.) at 13-14.

[57] Joint Ex. 139 (Kidd Test.) at 3 ("[I]t is my opinion that Chesapeake is fundamentally dissimilar to all other shippers on the Mockingbird System because its gathering rates in the Mockingbird Agreement are the product of a two-part transaction, which resulted in rates that may reflect a combination of compensation for gathering services and financing related to proceeds received for the sale of the Mockingbird System.").

[58] Williams Remand Br. at 5-6.

[59] *Id*.

C. Whether CEU and EXCO are Similarly Situated

Being aligned as a litigant is different than being similar as a utility customer. In their complaints, neither CEU nor EXCO alleged different treatment as compared to the other or asked the Commission to consider the other as a comparison shipper. Furthermore, there has never been dispute from the parties that CEU and EXCU were not customers of Williams at any time relevant to this case, and so neither received any service from Williams to compare treatment to each other or anyone else. Accordingly, this comparison does not inform the legal standard for discrimination applicable here and properly was excluded from the Original PFD for this reason. Responding to the Remand Order (subpart c), CEU and Williams offered the below arguments and evidence.

With EXCO gone from this case, only CEU offered any evidence during the remand phase comparing CEU to EXCO, albeit minimal. Considering physical and service characteristics, CEU's engineering expert notes that CEU and EXCO have "similar or comparable characteristics" (receipt/delivery points, length of haul, gas quality, pressure) in the Shallow and Treating systems, but beyond this declined to offer an opinion on whether they are similarly situated.[60] CEU's economist expert implies that CEU and EXCO are similarly-situated economically, as neither company received the substantial additional consideration that Chesapeake received from its 2012 system sale that factored into Chesapeake's higher gathering rates.[61] As with the above EXCO/Chesapeake comparison, Williams declined to offer substantive evidence or argument on this comparison due to EXCO's settlement with Williams prior to the Remand Hearing.[62]

D. Whether CEU and EXCO, Respectively, are Similarly Situated to Shippers 14, 15, 27, and 33

These are the only shipper comparisons proper in this complaint proceeding and the only ones relevant and required under Texas law. The statutory and rule-based discrimination legal standards were conveyed in the Original PFD (pp. 7–8), and none involve comparisons with shippers that are treated the same. Nor do they limit customer comparison distinctions to just those that can be seen on a map. Evidence on the complicated seller/buyer/shipper/gatherer transactional relationship between Chesapeake and Williams was a big part of the main-phase proceeding and was conveyed in detail in the Original PFD.[63] The same is true for negotiation efforts by CEU and EXCO and the ultimate service terms offered by Williams, as compared to what Williams contemporaneously provided to Shippers 14, 15, 27, and 33.[64] Responding to the Remand Order (subpart d), CEU and Williams additionally offered the below arguments and evidence.

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[60] Joint Ex. 132 (Emory Test.) at 14.

[61] Joint Ex. 139 (Kidd Test.) at 3 ("[I]t is my opinion that Chesapeake is fundamentally dissimilar to all other shippers on the Mockingbird System because its gathering rates in the Mockingbird Agreement are the product of a two-part transaction, which resulted in rates that may reflect a combination of compensation for gathering services and financing related to proceeds received for the sale of the Mockingbird System.").

[62] *See* Williams Remand Br. at 5-6.

[63] Original PFD at 9-11 (fn 42, 43, 44, 45, 46, 47, 48, 51, 62, 63, 65, 66); at 18 (fn 83); at 21 (fn 93, 94, 97, 98).

[64] *Id*. at 10 (fn 53, 54, 56, 57, 58, 59, 60); at 21-22 (fn 95, 96, 99, 100, 101); at 24-25 (fn 109, 110).

<u>CEU's Evidence</u>

As explained above, CEU provided new evidence during the remand phase that both CEU and EXCO were similar economically to Shippers 14, 15, 27, and 33.[65] According to CEU, none of these shippers received the substantial and additional financial consideration that Chesapeake received from the 2012 sale of its system, financed in part via higher gathering rates under the contemporaneously-negotiated Mockingbird Agreement.[66] Viewing all other customers from an economic perspective, regardless their physical service characteristic differences, all are situated similarly opposite Chesapeake because Chesapeake's rate under the Mockingbird Agreement included not just payment for gathering service, but also Chesapeake-specific financing-related consideration that was bundled with it.[67]

Considering physical characteristics and conditions of service, CEU maintained its position from the main-phase proceeding that CEU is similarly situated to these four comparison shippers.[68] With respect to EXCO, located in the Shallow system, CEU's engineering expert: concludes that EXCO is not similarly situated to the Deep system comparison shippers (Shippers 14, 15, and 33) based on their location difference; and declined to offer an ultimate opinion on whether EXCO is similarly situated to Shipper 27 due to the unavailability of the "relevant primary commercial terms being offered by Williams to EXCO."[69]

With respect to CEU, evidence from the main-phase proceeding speaking to CEU's similarity to these four comparison shippers based on physical service factors was reintroduced during the Remand Hearing.[70] Considering all of the Commission's 13 conditions of service under Commission Rule § 7.115(32), CEU's engineer expert primarily concludes that CEU is similarly situated to these four comparison shippers based on location, quality of service, quantity, and duration.[71] CEU provides the below table listing the 13 service conditions, its general evaluation criteria for each, a summary of the specific aspects of each as relevant to the Mockingbird System and/or its shippers, and whether it was a "distinguishing factor" among comparison shippers.[72] As explained by CEU, a "distinguishing factor" is one it considers to be material and probative with respect to influencing rates or other commercial terms.[73]

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[65] *See* Joint Ex. 139 (Kidd Test.); Joint Ex. 132 (Emory Test.) at 11-13.
[66] *Id*.
[67] Joint Ex. 139 (Kidd Test.) at 3 ("[I]t is my opinion that Chesapeake is fundamentally dissimilar to all other shippers on the Mockingbird System because its gathering rates in the Mockingbird Agreement are the product of a two-part transaction, which resulted in rates that may reflect a combination of compensation for gathering services and financing related to proceeds received for the sale of the Mockingbird System.").
[68] *See* Joint Ex. 132 (Emory Test.).
[69] *Id*. at 15.
[70] *See* CEU Ex. 39 (Emory Test.); Joint Ex. 132 (Emory Test.).
[71] Joint Ex. 132 (Emory Test.) at 15.
[72] *Id*. at 7-8.
[73] *Id*. at 7.

CEU's Service Conditions for Similarly-Situated Shippers

	Service Condition	Evaluation Criteria	Evaluation of MB System and Shippers	Distinguishing Factor Amongst Similarly Situated Shippers?
A	Service Requirements	Services requested by shipper or being provided by gatherer.	MB System provides gathering, compression, treating, and gas lift services. All MB shippers are receiving gathering and compression. Some receive treating and gas lift. Fees are separate for gathering, compression and treating.	No - service requirements not a distinguishing factor for similarity as services are similar and rates for services are separate.
B	Location of Facilities	Location of shipper's facilities (i.e., gas receipt locations) in proximity to MB gas gathering systems.	MB Agreement established gathering systems by geographic area with diffferent rates for each (i.e., Rich, Deep, Shallow, and Treating). Evaluate shippers for similarity based on each Mockingbird system (i.e. Rich, Deep, Shallow).	Yes - location of facilities is a distinguishing factor. Shippers on specific MB systems considered similar.
C	Receipt and Delivery Points	Characteristics of shipper RPs and DPs could include quanity, functionality, and location.	The quantity of RPs and DPs is related to the shipper's dedication (i.e. quantity and/or geographic area). The functionality of the RPs and DPs for shippers on the Mockingbird system are similar.	No - functionality of RPs and DPs are similar amongst MB shippers, not a distinguishing factor for similarity
D	Length of Haul	Length of haul is actual distance from individual RPs to DPs and will vary for any and all RPs and DPs on a gathering system.	Actual length of haul on a given gathering system varies for each shipper and RP/DP and does not have direct influence on commericla terms. Functionality of the haul is relevant and is similar amongst MB shippers.	No - actual length of haul (i.e., distance from specific RP to DP) not considered to be distinguishing factor for similarity.
E	Quality of Servce (firm, interruptible, etc)	Priority level of service being requested by shipper or provided by gatherer.	MB provides three levels of priority on the MB system - Priority 1, 2, and 3. Lower priority levels get curtailed first if there is a system curtailment or insufficent system capacity.	Yes - Priority level is considered a distinguishing factor amongst MB shippers.
F	Quantity	Quantity refers to actual volumetric quantity of gas being gathered or committed under a gathering agreement. MB agreements do not specifiy min/max volumetric quantities. Shippers' delivery obligation is established by specific area or interest dedication.	Quantity in MB Agreement is defined in terms of area/well dedication. Majority of shippers on MB system have area or well dedication.	Yes - distinguishing factor amongst MB shippers is whether shipper has an area and/or well(s) dedication.
G	Swing Requirements	Not applicable for gas gathering agreements.	No "swing requirements" in MB Agreement.	No - not a distguishing factor for similarity.
H	Credit Worthiness	Not considered.		
I	Gas Quality	Gas quality refers to composition and production conditions of shipper's gas as delivered to gathering system. Gas quality specifications are typcially included in agreements but are not characteristics of shipper's gas.	Key gas quality parameters for gas gathering in field areas include HHV, GPM content, H2S, and CO2. Gas quality will vary over time and location within the field.	No - gas quality is similar amongst MB shippers with exception of H2S. Gas with high H2S is treated which is a separate service provided by MB. Gas quality is not a distiguishing factor for similarity.
J	Pressure (including inlet or line pressure)	Refers to pressure at the inlet to the gathering system (at the location where gas is received from shipper) and "line pressure". Line pressure could be any location on a gathering system as pressures will vary in any gathering system.	MB agreements require shipper to deliver gas at RP at prevailing system pressure. Pressure at shipper RP's will vary over time. Some agreements have "target pressure" to be maintained by gatherer.	No - pressure is not a distguishing factor for similarity. Target pressures and any associated penalties is a negotiated term between shipper and gatherer.
K	Duration of Service	Refers to the length or term of a gas gathering agreement.	Duration of a gathering agreement between a shipper and gatherer in a production area can have bearing on the other commerical terms, however, actual length not necessarily a significant factor.	Yes - duration of service is a distinguishing factor for similarity. Chesapeake has 20 year term under MB Agreement.
L	Connect Requirements	Refers to specific connection requirements of shipper required by the gatherer. There are two aspects to connection requirements including the physical requirements (i.e., equipment, facilities, location, etc.) and the commercial aspect (who bears costs for connection).	No signficant differences in physical connection requirements between MB shippers. Which party bears the costs of connection is a negotiated commmerical term.	No - physical connection requirements is not a distinguishing factor for similarity.
M	Conditions and circumstances existing at time	What, if any, conditions and circumstances existing at the time of the agreement not otherwise addressed in one of the other identified service conditions, or negotiation had an influence on the commercial terms being requested by the shipper or offered by the gatherer.	Other conditions and circumstances that may influence commercial terms would include commodity prices, midstream competition, and general economic activity.	No - COS methodology effectively accounts for impact of commodity prices and general economic activity. Midstream competition does not appear to have influence on rates.

Of these 13 service conditions, CEU considers the following four to be relevant or distinguishing factors in this case: (1) location of facilities; (2) quality of service; (3) quantity; and (4) duration of service.[74] CEU also evaluated and offered the below "primary commercial terms" considered by CEU to be the primary terms of a gas gathering agreement that are negotiated and agreed to between a shipper and gather (or being required by the gatherer).[75]

- **Rates**: the rates for gathering, compression, and/or treating on a \$/MMBtu and/or \$/Mcf basis.

[74] *Id*. at 8-9.
[75] *See id*. at 9-10.

- **Rate adjustment**: the rate adjustment provision, if any, that provides for or allows the rates to be adjusted over the term of the agreement.
- **FL&U**: the fuel, loss, and unaccounted for gas provision that allocates any FL&U on the pipeline system between the shipper and gatherer, including any maximum (i.e., caps) and associated penalties.
- **Drip**: the provision that addresses the ownership of drip condensate liquids that form in the gathering system.
- **Well Connection Costs**: which party incurs the costs to connect a shipper's receipt points to the gathering system. This also would include, where applicable, which party incurs the cost to connect any additional or future wells (wells not existing at the time of the gas gathering agreement but which may be drilled in the future as part of a dedicated area).

According to CEU, consideration of these "primary commercial terms" informs which service conditions are most relevant in identifying similarly-situated shippers.[76] CEU provides the below chart that applies these primary commercial terms in comparing CEU ("MB" on the chart) to the comparison shippers.[77]

CEU's Shipper Comparisons Based on Primary Commercial Terms

Shipper	Gathering System	Quality of Service	Gathering & Compression Rate, $/MMBtu	Treating Rate, $/Mcf	Rate Adjustment	FL&U	Drip
MB	Deep Oil	Priority 1	$1.96-$2.03 $2.00 to $3.87 (actual between 2012-2018) [Feb '17 $2.06]	$0.38-$0.40 $0.43 to $0.75 (actual between 2012-2018) [Feb '17 $0.64]	2013-14: monthly based on volumes 2015+: annually based on COS calc	Actual - subject to cap	Producer
MB	Rich Gas	Priority 1	$0.62-$0.64 $0.62 to $1.27 (actual between 2012-2018) [Feb '17 $0.64]				
MB	Shallow Oil	Priority 1	$5.30-$5.93 $5.36 to $7.89 (actual between 2012-2018) [Feb '17 $6.67]				
14	Deep Oil	Priority 1	$0.74 [Feb '17 $0.77]	$0.35 [Feb '17 $0.36]	CPI	Actual	Gatherer
15	Deep Oil	Priority 1	$0.74 [Feb '17 $0.77]	$0.35 [Feb '17 $0.36]	CPI	Actual	Gatherer
17	Deep Oil	Priority 1	$2.00 [Feb '17 $2.15]	Negotiated if applicable	2.5% per year	Actual	Gatherer
27	Shallow Oil	Priority 1	$0.99	$0.65	2.5% per year	Actual	Gatherer
33	Deep Oil	Priority 1	$0.81 [Feb '17 $0.83]	$0.49	2.5% per year	Actual	Gatherer

[76] *Id*. at 10.
[77] *See id*. at 11.

Considering and comparing these commercial terms, CEU considers itself similarly situated to Shippers 14, 15, 27, and 33 based on the Commission's physical factors that CEU considers to be most relevant and important: location, quality of service, quantity, and duration. These four comparison shippers and CEU alike, argued by CEU, have the same quality of service (Priority 1), similar quantity (acreage or interest dedication), and similar duration (multi-year term).[78] Disagreeing with the degree of probative value and relevance assigned by Williams to some of these factors, CEU further provides the below chart, which highlights its responses to Williams's positions.[79]

CEU's Responses to Williams's Shipper Comparisons

Service Condition	Williams Position	Emory Response
Location	A shipper has to be in all 11 Mockingbird subsystems to be similar to CEU.	Gathering System (i.e., Location) is a relevant factor to identify similarly situated shippers. There are three (3) Gathering Systems (Rich, Deep, Shallow) on Mockingbird System with respect to the rates charged by Williams.
RPs	A shipper has to have same number of RPs to be similar to CEU.	Disagree. RP's do not have direct influence on primary commercial terms provided or offered by Williams. Not a relevant factor for similarity.
Length of Haul	A shipper has to have same length of haul to be similar to CEU.	Disagree. Length of haul does not have direct influence on primary commercial terms provided or offered by Williams. Not a relevant factor for similarity.
Quality of Service	A shipper has to have same quality of service to be similar to CEU.	Agree (assuming CEU is receiving or Williams offers Priority 1 service).
Quantity	A shipper has to have same volumes to be similar to CEU.	Disagree that absolute volumes need to be same. Area or well dedication is a relevant factor.
Duration of Service	A shipper has to have same term to be similar to CEU.	Agree that duration of service is a relevant factor but disagree that it necessary to have identical 20-year term to be similar.
Connect Requirements	A shipper who bears upfront cost to connect cannot be similar to CEU.	Physical connection requirements are not relevant factor. Which party bears connection cost is negotiable (i.e., primary commercial term) and is not inherent to shipper or shipper's gas for purposes of similarity.
Other Conditions	A shipper has to retain drip condensate to be similar to CEU	Which party retains drip is negotiable (i.e., primary commercial term). In any event, value of drip on Mockingbird System is small relative to gathering rates.

[78] *Id*. at 15.
[79] *Id*. at 18.

Williams's Evidence

Williams provided evidence and argument that CEU is not similarly situated to any of Shippers 14, 15, 27, and 33.[80] In support, Williams centrally argues and provides expert testimony supporting that: (1) CEU is a "core shipper" due to its large volumes, unlike the four smaller comparison shippers, and therefore, industry practice allows Williams to recover its previous system capital expenses from CEU, even though CEU was not a customer of Williams at the time;[81] (2) unlike CEU, these four comparison shippers were nearby to other gathering systems, each having a viable gathering service alternative to Williams, and so their lack of captivity warranted Williams charging them less;[82] and (3) CEU's physical service requirements were not similar to those of the four smaller comparison shippers.[83]

Williams distinguishes CEU from these smaller comparison shippers as being a "core shipper" as that term is defined by Williams. According to Williams, the volumes from the larger "core shippers" form the justification for building most pipelines and gathering systems.[84] Before any pipeline is developed, it must have "a reasonable assurance" that one or more core shippers are committed to using it.[85] An anchor shipper contract "enables the system to be built," and systems often are built out, according to Williams, in reliance not only upon core volumes that are dedicated under contract but also upon volumes without contractual assurances but that are attributable to the anchor shippers' wells.[86] Here, although Chesapeake was the unquestioned anchor shipper and only one whose volumes Williams secured by contract, Williams argues that CEU stands alongside Chesapeake bearing responsibility for Chesapeake's contract-based infrastructure expenses—even though CEU was never a customer of Williams—because Williams incurred these expenses with CEU in mind, as well.[87] By contrast, Williams contends that the four smaller comparison shippers "did not participate in causing the system to be built, and it stands to reason that such a shipper is in a position different from core shippers and may not be required to bear the same cost-responsibility."[88] These smaller shippers "arrived later in time" without a "close commercial tie to the anchor shipper."[89]

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[80] Williams Ex. 136 (Cantwell Test.) at 9-14; Williams Ex. 135 (Biegler Test.) at 37-40; Williams Ex. 138 (Webb Test.) at 27-29; *see also* Williams Remand Br. at 18-24.
[81] Williams Ex. 135 (Biegler Test.) at 8-11; Williams Ex. 138 (Webb Test.) at 21-29.
[82] Williams Ex. 136 (Cantwell Test.) at 19-23; Williams Ex. 135 (Biegler Test.) at 12-13, 23-26; Williams Ex. 138 (Webb Test.) at 28-29, 37, 39, 46.
[83] Williams Ex. 136 (Cantwell Test.) at 9-14; Williams Ex. 135 (Biegler Test.) at 37-40; Williams Ex. 138 (Webb Test.) at 37-40.
[84] Williams Ex. 135 (Biegler Test.) at 8.
[85] *Id*.
[86] *Id*. at 9-10.
[87] *Id*. at 10 ("Williams spent more than $1.6 billion dollars to develop a system that was designed to serve Chesapeake's and [CEU's] production. It installed more than 1,000 miles of pipe across seven counties to reach the wide-spread footprint that Chesapeake and [CEU] co-own. Williams developed more than 700 central receipt points to collect and gather their gas. The gatherer connected flow lines from 2,700 wells to those 700 receipt points. And it installed compressor stations to ensure the efficient, reliable flow of gas. It is indisputable that the investment by Williams was caused by the service to collect the gas produced by Chesapeake and [CEU] (which Chesapeake controlled) . . . .").
[88] *Id*.; Williams Ex. 138 (Webb Test.) at 27 ("None of these shippers constitute core shippers, such as [CEU] and Chesapeake, for whom the system was built. These shippers are not core shippers; they are marginal shippers. As such it is appropriate for Williams offered these marginal shippers lower rates.").
[89] Williams Remand Br. at 23.

Second, Williams argues that CEU's customer captivity relative to these four comparison shippers situates them differently, justifying their not paying for the same prior capital expenses required of CEU.[90] According to Williams, it responded appropriately to competitive market forces by offering lower rates to these shippers to prevent them from doing business with another gatherer, which then prevented Williams from losing their volumes "and the associated revenue they generated."[91] In other words, Williams asks this Commission to agree that Texas law allows regulated utilities to force extra capital charges only its captive customers if doing so is more profitable. In support, Williams provides evidence that: CEU had no viable alternative for service;[92] Williams's actions were consistent with industry practice;[93] and that Williams behaved in an economically reasonable manner.[94]

Third, Williams argues that CEU is not similar to Shippers 14, 15, 27, and 33 based on a comparison of physical characteristics and service requirements.[95] Comparing CEU to **Shippers 14 and 15**, Williams highlights what it considers to be material and relevant differences with respect to location, receipt points, quantity, and connect requirements.[96] These two shippers: are located in one system (Deep), whereas CEU is located in all three systems (Deep, Shallow, Rich); have only about 79 receipt points, whereas CEU has over 900; account for 2 percent and 9 percent of volumes in the Deep system, respectively, whereas CEU's gas would account for about 25 percent of volumes in the Deep; and paid for their own connection costs upfront to connect to the system, leaving nothing new for Williams to build/spend when starting their service, argued by Williams to be distinguishable from CEU.[97] Comparing CEU to **Shippers 27 and 33**, Williams highlights what it considers to be material and relevant differences with respect to location, receipt points, quality of service, quantity, and connect requirements.[98] These two shippers: are located in one system (Shipper 27/Shallow, Shipper 33/Deep), whereas CEU is located in all three systems (Deep, Shallow, Rich); have one receipt point apiece, whereas CEU has over 900; receive firm or interruptible service based on actual volumes, whereas CEU presumably would receive only firm/Priority 1 service; each account for less than 1 percent of volumes in their respective systems, whereas CEU's gas would account for about 25 percent; and paid for their own connection costs upfront to connect to the system, leaving nothing new for Williams to spend when starting their service, argued by Williams to be distinguishable from CEU.[99]

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[90] *Id*. at 23-24; Williams Ex. 136 (Cantwell Test.) at 10-11, 19-23; Williams Ex. 135 (Biegler Test.) at 12-13, 23-26; Williams Ex. 138 (Webb Test.) at 28-29, 37, 39, 46; *see also* Williams Ex. 203-A (Revised Shipper Chart) at 1 (Shippers 14, 15, 27, and 33 are "adjacent to alternative gathering systems").

[91] Williams Remand Br. at 23 (citing the testimony of a Williams company fact witness); *see also* Williams Ex. 138 (Webb Test.) at 28 ("Second, and more important, bringing these shippers on involves almost no risk for Williams. If the shippers have their gas gathered and transported for a year or two and then their wells stop producing, Williams has lost no money.").

[92] Williams Ex. 136 (Cantwell Test.) at 19-23; Williams Ex. 135 (Biegler Test.) at 23-26.

[93] Williams Ex. 135 (Biegler Test.) at 12-13.

[94] Williams Ex. 138 (Webb Test.) at 28-29.

[95] Williams Remand Br. at 18-22; Williams Ex. 136 (Cantwell Test.) at 9-14; Williams Ex. 135 (Biegler Test.) at 37-40; and Williams Ex. 138 (Webb Test.) at 37-40; *see also* Original PFD, Attachment 3 (Williams Shipper Comparison Chart); Williams Ex. 203-A (Williams Revised Shipper Comparison Chart).

[96] Williams Ex. 136 (Cantwell Test.) at 9; Williams Ex. 135 (Biegler Test.) at 37-39.

[97] *Id*.; *see also* Remand Hearing Tr. (Sept. 11, 2020) at 102 (Cantwell testifying).

[98] Williams Ex. 136 (Cantwell Test.) at 10-11; Williams Ex. 135 (Biegler Test.) at 37-39.

[99] *Id*.; *see also* Remand Hearing Tr. (Sept. 11, 2020) at 102 (Cantwell testifying).

IV. SUPPLEMENTAL ANALYSIS

The Original PFD found that Williams unlawfully discriminated against CEU and EXCO by requiring them in 2017, as a condition for receiving new gathering service, to repay anchor shipper Chesapeake's prior contract-driven capital expenses incurred by Williams from 2012 to 2017 to serve Chesapeake pursuant to their anchor contract (the "Chesapeake Expenses"). At the same time, Williams provided gathering service to other shippers—including Shippers 14, 15, 27, and 33—without this added charge, requiring them to pay only their own gathering service costs. As explained in the Original PFD, the same system infrastructure that existed for these four comparison shippers when each started new service also existed later for CEU and EXCO when they similarly sought new service.[100] Demanding repayment of these past Chesapeake Expenses from CEU and EXCO, who did not cause them and were not customers when Chesapeake did, was discriminatory for both CEU and EXCO.

The Original PFD found no unlawful discrimination, however, with respect to the rates offered to CEU and EXCO for their own gathering service. With the Chesapeake Expenses charge removed, the remaining rate amounts were not materially different from the gathering rates paid in 2017 by Shippers 14, 15, 27, and 33. As explained in the Original PFD, Texas law affords public utilities a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so.[101] Because a threshold element was lacking here—a material unequal treatment—any discrimination claim necessarily could not survive further, regardless the outcome of any "similar service" analysis of these four comparison customers. This moot analysis was omitted from the Original PFD for this reason.

Consistent with the Remand Order, the record was re-opened and the parties given an opportunity to offer new evidence and arguments on the "similar service" element of these discrimination claims. As discussed above, both CEU and Williams availed themselves of this opportunity and both offered new testimony and other evidence considered by each to inform the four enumerated shipper comparisons under the Remand Order. The below analysis supplements the Original PFD as well as provides the requested analysis of this evidence and applicable law.

A. Requested Shipper Comparisons

Most of the Remand Order asks for comparisons between and among CEU, EXCO, and Chesapeake—three shippers (or potential shippers) that nobody alleged received different treatment by Williams. On the contrary, all the parties in this case agree that these shippers were treated virtually identically, and the evidence throughout this case—during both the main and remand phases—supports this. These are the wrong comparisons for this type of case.

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[100] Original PFD at 23-24.

[101] *Id*. at 19-20 (citing *Amtel Communications, Inc. v. Pub. Util. Com'n of Texas*, 687 S.W.2d 95, 102 (Tex. App.—Austin 1985, no writ), *United Gas Corp. v. Shepherd Laundries Co.*, 144 Tex. 164, 172–73 (1945), *Westlake Ethylene Pipeline Corp. v. R.R. Comm'n of Texas*, 506 S.W.3d 676, 683 (Tex. App.—Austin 2016, pet. denied), and *El Paso Elec. Co. v. Pub. Util. Com'n of Texas*, 917 S.W.2d 846, 864 (Tex. App.—Austin 1995), writ dismissed by agreement sub nom. *El Paso Elec. Co. v. Pub. Util. Com'n*, 917 S.W.2d 872 (Tex. App.—Austin 1996, no writ)).

Discrimination cases involving rates are not rate cases.[102] They have very different consequences and must be kept distinct in thought.[103] They are distinct not only in their fundamental nature but also in their mechanics and order of procedure. Utilities carry the burden of proof in rate cases, where the utility may prevail if it can justify its challenged rate by proving to the regulator that it was "benchmarked" properly. In discrimination cases, by contrast, the burden of proof rests with the complainant, and so the complainant—not the utility—controls its own allegations of unlawful conduct, including which comparison customers it selects to place before the regulator to be considered as similarly situated. Utilities accused of discrimination have no say in which shippers are selected for comparison by complainants, and the utility certainly is not allowed to avoid scrutiny on the many customers it treated differently by focusing the regulator instead on the one customer it treated the same. As explained in the Original PFD, discrimination is not about treating one similar customer the same, but rather treating no similar customers differently.[104]

A discrimination case not focused on complainant-selected comparison shippers is not a discrimination case. The exercise of comparing a challenged rate against the benchmarking choice by the utility is called a rate case. From the outset of this proceeding, CEU and EXCO have litigated discrimination claims whereas Williams, in its defense, has litigated a rate case. In doing so, Williams improperly asks the Commission to agree (and find dispositive) that the rate amounts offered to CEU and EXCO were fair prices for value received—via benchmarking—and thereby swap the complainant-selected comparison customers (Shippers 14, 15, 27, and 33) for one that Williams would prefer to discuss (Chesapeake). This ignores well-settled guidance from the Texas Supreme Court that any type of rate amount or charge, even if fair and otherwise lawful, yet may be discriminatory.[105] Here, CEU and EXCO carried the burden of proof for their respective claims, and they selected Shippers 14, 15, 27, and 33 as comparison shippers—not Chesapeake and not each other. Focus away from these four shippers, then, is a material legal and procedural error that could affect the finality of the Commission's decision.

This is not a simple case, but the Commission's role here is simpler than what Williams asks of it. Rather than permanently linking CEU and Chesapeake based on physical characteristics and geography for all purposes, including rate benchmarking and apparently all potential variants of future comparative treatment by Williams, the Commission here only needs to determine whether the law and evidence favors CEU and EXCO with respect to the comparison shippers *they* offer—meaning, within the scope of this remand, whether Shippers 14, 15, 27, and 33 qualify under either the Utilities Code standard ("similar and contemporaneous service") or the Commission's rule standard ("the same or substantially the same physical, regulatory, and economic conditions of service").

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[102] *See, e.g., Shepherd Laundries Co.*, 144 Tex. at 170 (distinguishing excessive rates from unlawful discrimination) ("A discrimination may arise from a mere inequality in rates, but an overcharge arises only when the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, or when it is in excess of the rate established for the particular customer or business."); *Leslie v. Houston Nat. Gas Corp.*, 280 S.W.2d 353, 357 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.) (same).
[103] *Shepherd Laundries Co.*, 144 Tex. at 176.
[104] Original PFD at 23.
[105] *See Shepherd Laundries Co.*, 144 Tex. at 170, 176 (instructing that "a discrimination may arise from a mere inequality in rates" and that fair/lawful rates paid affect *damages*, not the underlying discrimination finding).

1. System Expenses to Serve Chesapeake from 2012 to 2017, When CEU and EXCO Were Not Customers (Discrimination Found)

The Chesapeake Expenses included expenses incurred by Williams to serve the gathering needs of Chesapeake pursuant to the terms of their gas-gathering contract (Mockingbird Agreement) from 2012 to 2017, when CEU and EXCO were not customers. Comparison Shippers 14, 15, 27, and 33 similarly were not customers when most of these infrastructure expenses were incurred by Williams and similarly did not cause them. As explained in the Original PFD, the Mockingbird System underwent a massive and costly buildout from 2012 to 2017 to meet the contractual infrastructure needs of Chesapeake,[106] and the rate Chesapeake paid in 2017 included repayment of these costs.[107] Charging CEU and EXCO what Chesapeake paid while also repeatedly referencing both Chesapeake and the Mockingbird Agreement, Williams expected and required both CEU and EXCO to join in repaying Chesapeake's prior customer capital costs—in addition to each's own customer costs.[108] By contrast, Williams only required Shippers 14, 15, 27, and 33 to pay each's own costs.[109]

[106] Williams Ex. 69 (Bennett Dep.) at 41-42 ("**Q**: You're familiar with the term 'anchor shipper' are you not? **A**: Yes. **Q**: Okay. Can you define for me how – what you would consider that term to mean? I want to make sure I use the same one. **A**: An anchor shipper is a large, very significant customer for a system that usually consumes the majority or – you know, a large portion or majority of the capacity on a system and has – you know, has requested a certain level of service that is defining how the system will get constructed and built out. **Q**: In the case of the Mockingbird gas gathering systems, is Chesapeake the anchor shipper? **A**: Yes."); Williams Ex. 28 (Bennett Test.) at 7 ("The construction of the System generally takes place in advance of drilling, at Chesapeake's request."); Joint Ex. 3 (Mockingbird Agreement), Section 2 (Receipt and Delivery Points; Pressure); Exhibit A-2 (General Terms and Conditions), Section 2 (Construction and Ownership of Facilities and Connection of Additional Wells); Exhibits C-1, C-2, C-3, C-4, Section 5 (Scope and Budget Process) (all); Joint Ex. 40 (Chesapeake maps showing the gathering system infrastructure buildout from 2012 to 2018 to serve Chesapeake wells).

[107] Hearing Tr. (June 20, 2019) at 22 (Bennett testifying) ("**Q**: Do you have a perspective on whether payout has been achieved based on the revenues that had been received and the capital that has been expended under the Mockingbird Agreement? **A**: Yes. Payout has not been achieved.").

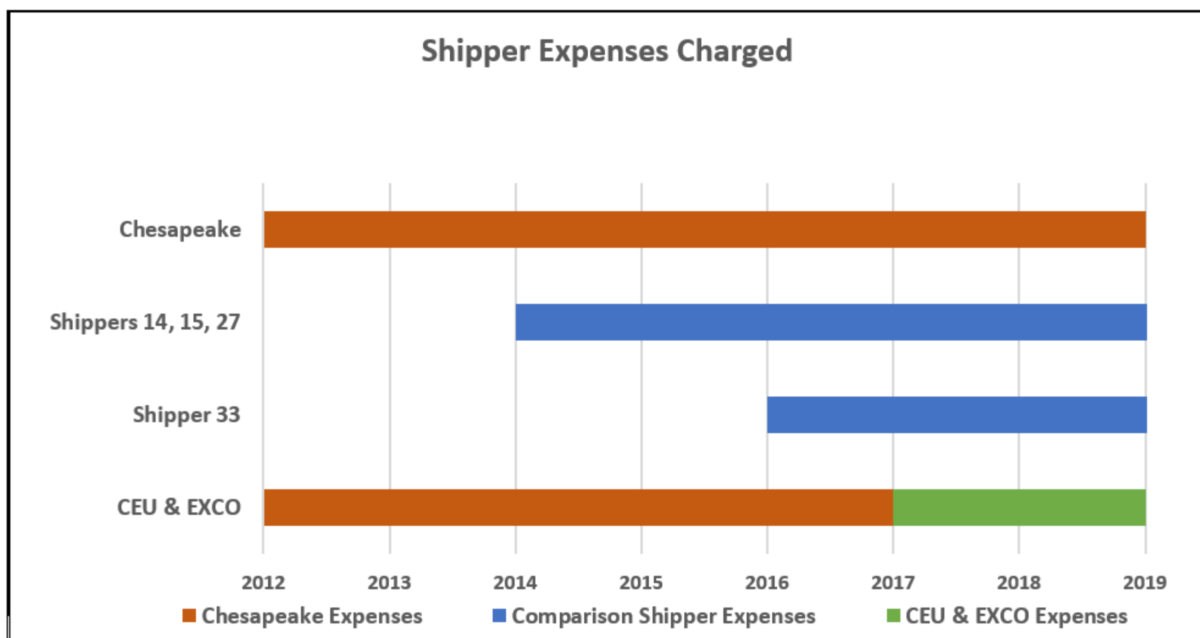
[108] CEU Ex. 41 (Leo Williams Test.) at 12-13 ("Respondents consistently responded that they were unable to provide CEU with a rate any different than the rate Respondents provide to Chesapeake. When, on each occasion, I inquired as to the reason for not offering a different rate than Chesapeake's rate, Respondents, in each case, stated to me that the Mockingbird Agreement did not allow it to do so.") (evidentiary ruling sustaining objection later vacated during the merits hearing at Hearing Tr. [June 18, 2019] at 162:4-17); Joint Ex. 28 (Bennett Test.) at 19, 22 ("After all, [CEU] has benefited from the arrangement between Chesapeake, its operator, and Williams that has allowed the system to be built. . . . Williams expanded its gas gathering system—at no upfront cost to EXCO or Chesapeake—to connect new wells and to add other infrastructure. Williams spent millions of dollars to do this, and Williams took actions pursuant to the terms of the Mockingbird Agreement and based on the information Chesapeake provided about EXCO's development and drilling plans."); CEU Ex. 9 (service offer from Williams to CEU, dated Aug. 24, 2017); Joint Ex. 99 (service offer from Williams to EXCO, dated Oct. 24, 2017).

[109] Hearing Tr. (June 19, 2019) at 246 (Bennett testifying) ("**Q**: So [Shippers 14 and 15] get something that's roughly a third, maybe a little bit more, of the [Mockingbird Agreement] rate, and there's nothing in their gathering agreement that requires them to bear any capital costs associated with the existing receipt points and the capital that was spent already to connect them up. These capital provisions you talk about in your pre-filed testimony apply only when they go drill a new well that requires a new connection to the system? **A**: That's correct. Under that agreement, Williams doesn't have any future capital cost commitment. We're just providing service for that fee for their existing wells."), and at 249-51 (Bennett testifying) ("**Q**: None of [Shippers 14, 15, 27, and 33] have a specific obligation to front reimbursement for the capital associated with the backbone of the system, do they? Their capital cost obligation is – you're talking about connection costs? **A**: Yes, correct. Any costs for them to connect to an existing line or if we have to build a line and get reimbursed into one of our trunk lines. . . . **Q**: The capital you're talking about is just the piece of capital to connect to the system. [Shippers 14, 15, 27, and 33] are not paying up front any reimbursement for the part of the system that's already in existence, are they? **A**: No. They aren't paying for any sort of past capital expenditures. . . . **Q**: When one of these third-party wells comes along and you have a contract and there's an aid-in-construction provision where they're paying capital up front, the capital that they pay is only the new capital associated with hooking them up to the system, not reimbursement for historical stuff? **A**: Correct."); *see also* Joint Exs. 116 (Shipper 14 contract), 117 (Shipper 15 contract), 119 (Shipper 27 contract), and 120 (Shipper 33 contract).

Under Texas law, discrimination may be found not only with respect to rates charged by a utility for its services, but also "in certain other practices of the utility wherein it may depart from the standard of impartial treatment."[110] Here, the Chesapeake Expenses charge demanded from CEU and EXCO was not with respect to their own gathering service, but rather for service previously provided by Williams to a different customer, anchor shipper Chesapeake, when CEU and EXCO had no type of direct business relationship with Williams—as utility customers or otherwise. In other words, CEU and EXCO were given another customer's bill.

The below chart generally shows what Williams demanded from CEU and EXCO as potential new customers in 2017, as compared to Shippers 14, 15, 27, and 33, who only had to pay their own customer costs.

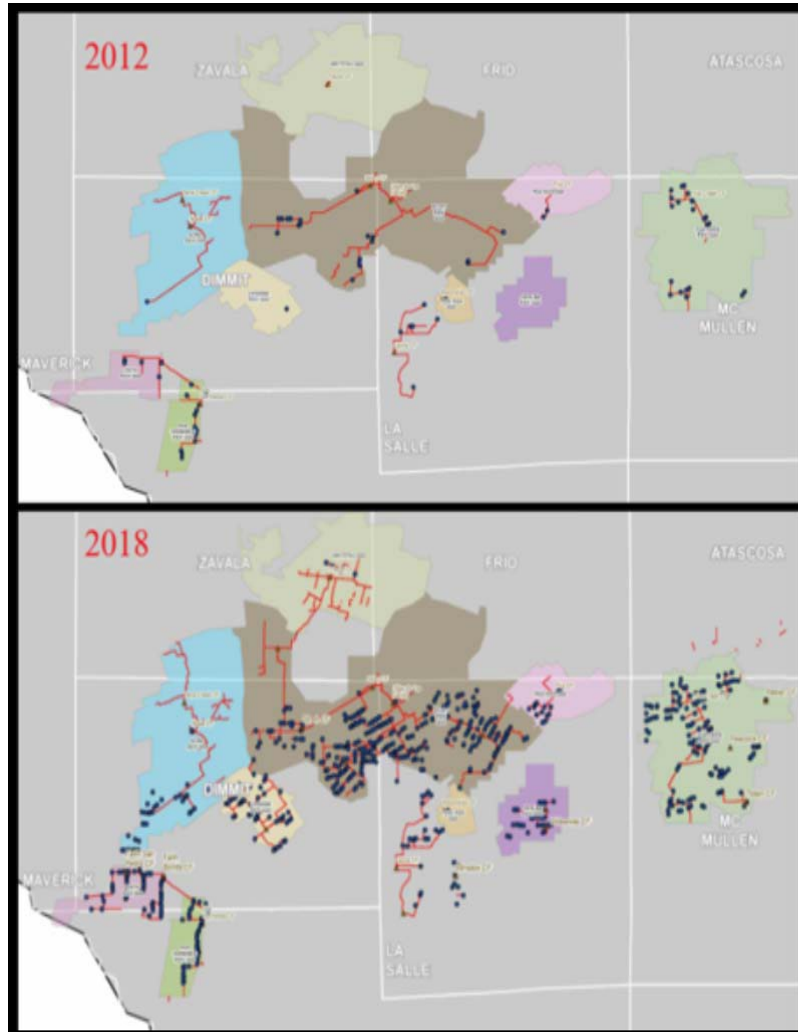
Repayment of Shipper Capital Expenses
Demanded by Williams



As shown above, Shippers 14, 15, and 27 became customers in 2014 and the only service-related expenses each was required to pay was its own. Shipper 33 became a customer in 2016 and the only service-related expenses it was required to pay was its own. Even Chesapeake, the contract anchor shipper and by far the largest and most favored customer, only had to pay for expenses related to its own service. By contrast, Williams required CEU and EXCO, as a condition for becoming customers, to pay not only each's own service-related expenses, but also the prior contractual expenses Williams incurred to serve Chesapeake beforehand, when CEU and EXCO were not customers.

[110] *Amtel Communications*, 687 S.W.2d at 102.

The below graphic generally shows the Mockingbird System's physical buildout from 2012 through 2017 that provided the requisite infrastructure to serve anchor shipper Chesapeake's contractual gathering needs.[111] Chesapeake was a customer for the entirety of this period; CEU and EXCO were not customers for any of it.



With respect to Williams's attempted recovery from CEU and EXCO of these prior Chesapeake Expenses, the Original PFD identified Shippers 14, 15, 27, and 33 as receiving "similar and contemporaneous service" (Utilities Code standard)[112] and as receiving service under "the same or substantially the same physical, regulatory, and economic conditions of service" (agency rules standard).[113] Those findings and analyses are further supplemented below.

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[111] Williams Ex. 227 (Williams's Summary Presentation), p. 17 (demonstrative exhibit only); *see also* Joint Ex. 3 (Mockingbird Agreement), Section 2 (Receipt and Delivery Points; Pressure); Exhibit A-2 (General Terms and Conditions), Section 2 (Construction and Ownership of Facilities and Connection of Additional Wells).

[112] Tex. Util. Code § 121.104(a)(2) (Discrimination in Service and Charges Prohibited) ("A pipeline gas utility may not directly or indirectly charge, demand, collect, or receive from anyone a greater or lesser compensation for a service provided than the compensation charged, demanded, or received *from another for a similar and contemporaneous service*.") (emphasis added).

[113] *See* Commission Rule § 7.115(32) (defining "similarly-situated shipper").

a. Utilities Code Standard (Section 121.104(a)(2))

The Utilities Code standard is broad and succinct: comparison shippers qualify if they receive "similar and contemporaneous service."[114] Even for customers receiving similar service, Texas courts generally have held that utilities lawfully may treat customers differently in certain situations, such as when doing so would achieve a defined social policy of regulation.[115] The standard for permitting such distinctions is whether a "substantial and reasonable basis" exists for distinguishing favored and disfavored customers.[116]

Contemporaneous Service

As a threshold issue, neither CEU nor EXCO meet these criteria as compared to each other (Remand Order, subpart c) because neither was a direct customer of Williams in 2017, and therefore neither was receiving contemporaneous service by Williams. Accordingly, CEU and EXCO each do not qualify as a proper comparison shipper for the other for conduct prohibited under Utilities Code Section 121.104.

Chesapeake and the comparison shippers (Shippers 14, 15, 27, and 33), however, all were receiving gas gathering service from Williams as direct customers when, in 2017, Williams offered service terms to CEU and EXCO. At this time: Chesapeake's rate included repayment of the gathering and capital expenses associated with its bargained-for service needs under the Mockingbird Agreement; and Shippers 14, 15, 27, and 33 each only paid its own respective customer costs, free from any obligation to repay these prior Chesapeake Expenses. Accordingly, the "contemporaneous" element is satisfied with respect to all these shippers.

Similar Service

The second question is whether service for this type of charge was "similar." The "service" at issue here is what was received by CEU's and EXCO's chosen comparison shippers (Shippers 14, 15, 27, and 33), which in 2017 included: gathering service only—with responsibility to pay each's own gathering costs only—with no added charges for repayment of expenses incurred by Williams beforehand to serve Chesapeake. The discrimination specifically found in the Original PFD was not for the costs and expenses attributable to CEU or EXCO *after* becoming customers (discussed separately in the Original PFD and below), but rather pertained to

[114] Tex. Util. Code § 121.104(a)(2) (Discrimination in Service and Charges Prohibited) ("A pipeline gas utility may not directly or indirectly charge, demand, collect, or receive from anyone a greater or lesser compensation for a service provided than the compensation charged, demanded, or received from another *for a similar and contemporaneous service*.") (emphasis added).

[115] *Amtel Communications*, 687 S.W.2d at 102 ("Notwithstanding a statutory prohibition against rate discrimination between consumers similarly situated or receiving the same kind of service, it has been held or recognized that a public utility may validly discriminate in favor of low-income or elderly persons.").

[116] *See id.* ("But the [anti-discriminatory] principle includes a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so. The dividing line is generally that drawn by the rule of reasonableness, for mere inequality is not itself unlawful discrimination. This is to say, the different treatment practiced by the public utility must be founded upon a substantial and reasonable ground of distinction between the favored and disfavored classes or individuals."), and *El Paso Elec. Co.*, 917 S.W.2d at 864 (following the standard in *Amtel Communications*, stating that "unequal treatment does not necessarily produce unlawful discrimination; as long as a substantial and reasonable basis exists for the distinction. . . .").

Williams's past acquisition and buildout of system infrastructure needed to serve Chesapeake from 2012 to 2017, when CEU and EXCO were not customers. Utilities generally may collect from a customer in its current bill any unrecovered past capital expenses attributable to that customer, as well as foreseeable future expenses attributable to that customer, but something entirely different occurs when a utility attempts to recover from new customers the unrecovered past expenses attributable to a *different* customer—expenses that were not caused by the new customers and that were incurred by the utility before the new customers began receiving service. This is the fact pattern presented here.

There is no rule of thumb by which to determine whether the conditions of utility service are similar or dissimilar.[117] It is a question of fact to be determined from the testimony in each case, and the burden of proof is on the complaining party.[118] Generally for utilities, Texas courts have regarded utility service as similar when "material billing factors" are substantially the same, and any matter which presents "a substantial difference as a ground of distinction between customers" is a material billing factor.[119] Where the utility has no fixed classifications as among its customers and no published rates, the question of whether certain customers are similarly situated insofar as "material billing factors" is concerned is a question of fact.[120] With respect to the recovery by a utility of its capital investment and operational costs from customers that cause greater expense to the utility, superior to that furnished other customers, the Texas Supreme Court has allowed utilities to charge such "favored" customers a higher charge that is proportional to the greater expense they cause.[121] In such situations, the billing factors valued most by Texas higher courts are quantity used and the cost of furnishing the service.[122]

The fact pattern in this case is highly unique, involving: no privity of contract between the utility and either complainant; separate third-party agreements between each complainant and the utility's anchor shipper; one complainant's "take in kind" right that, if exercised, immediately would make it the second-largest shipper on the

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[117] *Ford v. Rio Grande Val. Gas Co.*, 141 Tex. 525, 527 (1943); *Amtel Communications*, 687 S.W.2d at 102.

[118] *Id*.

[119] *Ford*, 141 Tex. at 527.

[120] *Tex. Power & Light Co. v. Doering Hotel Co.*, 147 S.W.2d 897, 902 (Tex. Civ. App.—Austin 1941), aff'd, 139 Tex. 351, 162 S.W.2d 938 (1942) (distinguished on other grounds in *Shepherd Laundries Co.*, 144 Tex. at 164).

[121] *Ford*, 141 Tex. at 529 ("These cost elements relate both to [the utility's] capital investment and to its operational cost … as permitting a utility to fix a higher rate for the customer whose service entails the greater cost. In other words, [w]here a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored.") (internal quote omitted). *See also Doering Hotel Co.*, 147 S.W.2d at 902 ("It is well settled that where a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored."); *Graver v. Edison Elec. Illuminating Co. of Brooklyn*, 110 N.Y.S. 603, 607 (App. Div. 1908) (relied upon by the Texas Supreme Court in *Ford*, 141 Tex. at 527) (considering proportionality in relation to the recoverability of expenses caused by customers due to their difference in conditions).

[122] *Ford*, 141 Tex. at 527 ("Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material billing factor. Quantity used is an important one. So is the cost of furnishing the service. In fact, it has been said that quantity used and the cost of service are the principal ones.") (internal cites omitted); *see also, e.g., Tex. Power & Light Co. v. Hilltop Baking Co.*, 78 S.W.2d 718 (Tex. Civ. App.—Waco 1935, writ dism'd) (affirming a finding by the trial court that corporate utility customers with comparable electric current usage were similarly situated, notwithstanding language in their contracts categorizing them differently).

system; rates for the anchor shipper that are negotiated contract rates but that nevertheless depend upon the utility's conduct with respect to other customers; enormous capital investment by the utility totaling over $1.6 billion for infrastructure during the five-year span between the anchor shipper starting service in 2012 and the complainants seeking new service in 2017; and finally, the anchor shipper previously owning the system, with negotiations for both the sale and gathering service occurring during the same time period and involving the same companies—something that almost certainly affected consideration under both transactions. Perfectly controlling caselaw probably does not exist.

The caselaw cited herein, while not directly on point, nevertheless informs how Texas higher courts generally have approached discrimination cases involving rates and charges demanded by utilities from their larger corporate utility customers. While not strictly controlling here, these cases still can be analogous and helpful. What is particularly noteworthy about these cases is that: (1) non-customers were never considered as causing any type of expenses to the utility; and (2) the "material billing factors" considered were those existing not at the time of the bill, but rather at the time the expenses to the utility were caused.[123]

On which customer caused Williams's system expenses from 2012 to 2017, both CEU and EXCO must be disqualified from consideration because neither was a customer during that time. The evidence establishes that these expenses were incurred by Williams at the cause and behest of Chesapeake to serve Chesapeake's infrastructure needs under the Mockingbird Agreement. In other words, Williams was performing under its anchor contract with Chesapeake when it incurred these costs. Testimony from Williams's own witnesses makes plain that only Chesapeake caused Williams to incur these expenses:[124]

> *Q: You're familiar with the term "anchor shipper," are you not?*
>
> ***A: Yes.***
>
> *Q: Okay. Can you define for me how—what you would consider that term to mean? I want to make sure I use the same one.*
>
> ***A: An anchor shipper is a large, very significant customer for a system that usually consumes the majority or—you know, a large portion or majority of the capacity on a system and has—you know, has requested a certain level of service that is defining how the system will get constructed and built out.***
>
> *Q: In the case of—in the case of the Mockingbird gas gathering systems, is Chesapeake the anchor shipper?*
>
> ***A: Yes.***

[123] *See, e.g.*, *Hilltop Baking Co.*, 78 S.W.2d at 720 (affirming the lower court's application of material billing factors "during the period in question" when the utility service was provided).

[124] Williams Ex. 69 (Bennett Dep.) at 41-42; *see also* Williams Ex. 28 (Bennett Test.) at 7 ("The construction of the System generally takes place in advance of drilling, at Chesapeake's request."); Williams Ex. 138 (Webb Test.) at 18 ("[The Mockingbird Agreement] obligates Williams to spend capital at the direction of Chesapeake."), at 43 ("Chesapeake made the commitment that caused Williams to spend $1.6+ billion to connect to its gas production"), and at 45 ("Chesapeake caused Williams to build an extensive gathering system . . . .").

The Mockingbird System was acquired and built out pursuant to contract terms driven by Chesapeake, and the facilities and infrastructure in existence by 2017 would have existed for Chesapeake even if CEU and EXCO never became customers.[125] Indeed, that is exactly what happened. Williams acknowledges that CEU and EXCO were not customers while these expenses were incurred from 2012 to 2017, but Williams argues that they nevertheless caused these infrastructure buildout expenses during this time period because they produced from the same wells as Chesapeake, and the infrastructure could service all volumes from those wells. This is a zero-sum argument for Williams and fails for a few reasons. Primarily, wells are not utility customers and neither are volumes. As explained in the Original PFD, Williams made the business decision to bear these upfront capital investment costs protected only by one contract with one producer, who Williams knew could not fully dedicate all the gas from its wells.[126] Sophisticated companies are presumed to understand and intend their bargained-for contractual duties and consideration, and Williams most definitely is a sophisticated company. Knowingly undertaking these capital investment costs based solely on the volumes Chesapeake *could* provide is legally indistinguishable from acceptance of what Chesapeake *could not* provide. Williams cannot credibly claim prejudice for receiving exactly the bargain it made, nor can it reasonably have expected to recover the remainder of these expenses from other sources who were neither customers nor business partners—at least not under theories of recovery appropriate for consideration by a regulatory agency.

Having established the undisputed (that CEU and EXCO were not customers) and the obvious (that non-customers without service do not cause service expenses), the next question is how "billing factors" should be considered here, if at all. As with the 13 enumerated factors in the Commission's rules (discussed below), the "material billing factors" considered previously by courts are not the legal standard itself, but rather serve as a non-exhaustive aid to informing the standard, where appropriate. Courts are not bound to use them in all situations,[127] but rather have done so only where there was continuity of utility service for all parties—and for all time periods—relevant to those cases. Without exception, the small universe of relevant caselaw here involves parties who were existing customers when the expenses in dispute were caused or incurred. Here, by contrast, the extra charge demanded from CEU and EXCO in 2017 related to capital expenses incurred by Williams beforehand, prior

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[125] Joint Ex. 3 (Mockingbird Agreement), Section 2 (Receipt and Delivery Points; Pressure); Exhibit A-2 (General Terms and Conditions), Section 2 (Construction and Ownership of Facilities and Connection of Additional Wells).

[126] Original PFD at 29; *see also* Hearing Tr. (June 19, 2019) at 209-10 (Bennett testifying) ("**Q**: And you would agree with me, wouldn't you, that one thing that is commonly done by gatherers, if you're going to build a system around the assumption that you're going to have a shipper's volumes on that system—if that's going to be part of the design criteria for the system, one thing you commonly do is you get that shipper to dedicate its gas to that agreement, don't you? **A**: It's typical that shippers will dedicate gas or a gatherer would require a dedication of gas when you're looking at a significant capital expenditure in building a system, yes. **Q**: Right. You don't want to build the system, have the gas leave the system, and end up holding the bag? **A**: Correct."), and at 210-11 (Bennett testifying) ("**Q**: You never asked [CEU] to dedicate their gas, even though they represented about a third of the volumes that Chesapeake was talking about? **A**: No, we did not. **Q**: There's no reason you couldn't do that. Right? You could have done that? **A**: But we didn't have an agreement with CEU. **Q**: But you could have approached them about the Mockingbird Agreement. You could have asked them to dedicate their gas to it if you wanted to ensure those volumes would be there, couldn't you? **A**: I guess we could have.").

[127] *Ford*, 141 Tex. at 527 ("There is no rule of thumb by which to determine whether the conditions of utility service are similar or dissimilar. It is a question of fact to be determined from the testimony in each case."); *Amtel Communications*, 687 S.W.2d at 102 (same).

to either CEU or EXCO starting service, caused at the time by an actual customer (Chesapeake). Expenses as between a utility and its *customers* are recoverable through rates or charges in customer bills. Non-customers do not pay bills, however. Expenses as between a utility and *non-customers* are recoverable the same way any other company hopes to be repaid for a service or product rendered: by contract. The Original PFD refers to these prior 2012–2017 infrastructure costs both as "capital expenditures" and also as "financing." Both are correct. Charged to Chesapeake, who was a customer at the time, these are capital expenditures recoverable through Chesapeake's rates. But charged later to CEU and EXCO, who did not cause these prior expenses and were not customers when Chesapeake did, this looks instead like attempted financing or recovery of debt owed. If commonly-used "billing factors" inform similarity for what was billed, then commonly-used commercial factors are appropriate for informing similarity for what was financed. For this, the physical characteristics or location of the lendee institution's offices are wholly irrelevant to repayment obligations. What matters instead is what is contained within the four corners of the financial instrument and who appears on the signature page. Considering these relevant factors, CEU and EXCO situate identically to Shippers 14, 15, 27, and 33—none assumed any portion of Chesapeake's debt independently, and none appear alongside Chesapeake within the Mockingbird Agreement.

If standard utility customer "billing factors" are to be considered for repaying these past expenses, notwithstanding CEU and EXCO not being utility customers when these expenses were caused, then the appropriate corresponding point in time for making comparisons is when the expenses reflected in the bills were caused—not years later when Williams attempted recovery, after circumstances had changed. Despite labeling them "billing factors," Texas courts have used them to inform conditions of *service*, not conditions of billing. For most utility customers, there may be no difference between the two since service and billing often occur contemporaneously, or nearly so. CEU and EXCO, however, were there only for the bill but not earlier for what was billed. From 2012 to 2017, when the capital expenses associated with the acquisition and buildout of the Mockingbird System were caused, the below chart compares shippers named in the Remand Order based on volumes and cost of service—the two billing factors found by the Texas Supreme Court to be most relevant and determinative.[128]

[128] *Ford*, 141 Tex. at 527 ("Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material billing factor. Quantity used is an important one. So is the cost of furnishing the service. In fact, it has been said that quantity used and the cost of service are the principal ones.") (internal cites omitted).

Material Billing Factors When the 2012–2017 System Expenses Were Caused

	Chesapeake *(2012–2017)*	Shippers 14, 15, 27, and 33 *(2012–2017)*	CEU and EXCO *(2012–2017)*
Volumes	~75% of system volumes[129] by 2017	0% before 2014 (14, 15, 27) and 2016 (33); *fractional thereafter*[130]	0% *Not customers*
Customer Service Cost	7 counties; 11 subsystems; ~900 receipt points; ~600,000 acres of leases; ~2,700 wells	$0 before 2014 (14, 15, 27) and 2016 (33); *fractional thereafter*[131]	$0 *Not customers*

CEU and EXCO again are situated identically to Shippers 14, 15, 27, and 33, compared using their usage and cost to Williams when these expenses were caused. Chesapeake alone caused the contract-driven infrastructure and associated expenses needed for its own service from 2012 to 2017. Distinguishing Chesapeake from CEU and EXCO is proper, then, both as the *cause* of these past expenses, as they were incurred pursuant to Chesapeake's anchor contract with Williams, and as a *customer class*, as CEU and EXCO were not customers then and therefore had no volumes or operating costs—the two "billing factors" held in highest regard by Texas higher courts. These same billing factors were near identical for Shippers 14, 15, 27, and 33, who similarly: did not cause Chesapeake's contract expenses and shipped zero or negligible volumes when most of this infrastructure was built; and never assumed any obligation to repay Chesapeake's debts. This was both an improper overcharge for CEU and EXCO and an unlawful, unequal treatment as compared to Shippers 14, 15, 27, and 33—each of whom similarly was not required under Texas law to pay the prior contract expenses of another customer unrelated to each's own gathering service.

Substantial and Reasonable Basis to Distinguish

Even for customers receiving similar service, Texas courts generally have held that utilities lawfully may treat customers differently in certain rare situations, such as when doing so would achieve a defined social policy.[132] The standard for permitting such distinctions is whether a "substantial and reasonable basis" exists for distinguishing favored and disfavored customers.[133] Here, with respect to payment

[129] Remand Hearing Tr. (Sept. 11, 2020) at 102 (Cantwell testifying).

[130] After starting service, Shippers 14 and 15 had approximately 2% and 9% of the volumes in the Deep system, respectively. Shippers 27 and 33 each had less than 1% of the volumes in the Shallow and Deep systems, respectively. *See* Remand Hearing Tr. (Sept. 11, 2020) at 102 (Cantwell testifying); Williams Ex. 136 (Cantwell Test.) at 10-11.

[131] After starting service, Shippers 14 and 15 had 79 receipt points (Deep), Shipper 27 had one receipt point (Shallow), and Shipper 33 had one receipt point (Deep). *See* Williams Ex. 136 (Cantwell Test.) at 9-11.

[132] *See Amtel Communications*, 687 S.W.2d at 102 ("Notwithstanding a statutory prohibition against rate discrimination between consumers similarly situated or receiving the same kind of service, it has been held or recognized that a public utility may validly discriminate in favor of low-income or elderly persons.").

[133] *See id.* ("But the [anti-discriminatory] principle includes a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so. The dividing line is generally that drawn by the rule of reasonableness,

of the prior Chesapeake Expenses, the evidence supports that Williams distinguished CEU and EXCO from comparison Shippers 14, 15, 27, and 33 for two primary reasons, neither of which had anything to do with physical billing factors or social policy goals: *first*, the four comparison shippers were not captive customers and each had access to another competitor gathering system, whereas CEU and EXCO did not; and *second*, doing so financially benefited Williams under the accounting terms of Williams's Mockingbird Agreement with Chesapeake. The Original PFD addressed and summarily dismissed both these as improper bases to distinguish CEU and EXCO.[134] That analysis is supplemented below.

Overcharging utility customers is never lawful, regardless the reason. Chesapeake's prior contract expenses that are non-service related overcharges for CEU and EXCO also would be so for the four comparison shippers, regardless their smaller size or their good fortune to have other nearby gathering service alternatives. Williams incurred these infrastructure expenses while performing under the Mockingbird Agreement to serve Chesapeake's gathering and contract needs.[135] The comparison shippers were not customers when most of these expenses were caused, and CEU and EXCO were not customers for any of it. In other words, everything Williams built for Chesapeake from 2012 to 2017 was born from contractual duties and would have existed even if no other customers did. Though service-related for Chesapeake, these past contract expenses were not service-related for anyone else, making them overcharges for *everyone* else—and for the same reason. This situates CEU and EXCO similarly to other shippers not only factually but as a matter of law. Williams therefore had both a substantial and reasonable basis—and a lawful duty—to distinguish Chesapeake from other customers for repaying these capital expenses because Chesapeake alone caused them under its contract.[136] Among these other customers—including CEU, EXCO, and the four comparison shippers—there is no lawful way to distinguish them that would justify an unlawful overcharge on anyone. Doing so would undermine utility regulation policies—not achieve them.

Notwithstanding the above, Williams's main bases for distinguishing CEU and EXCO based on customer captivity and based on maximizing revenue under the terms of the Mockingbird Agreement each fails on its own merits. For customer captivity, undisputed evidence supports that comparison Shippers 14, 15, 27, and 33 all had reasonable access to alternative gathering systems, whereas CEU and EXCO did not.

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for mere inequality is not itself unlawful discrimination. This is to say, the different treatment practiced by the public utility must be founded upon a substantial and reasonable ground of distinction between the favored and disfavored classes or individuals."), and *El Paso Elec. Co.*, 917 S.W.2d at 864 (following the standard in *Amtel Communications*, stating that "unequal treatment does not necessarily produce unlawful discrimination; as long as a substantial and reasonable basis exists for the distinction").

[134] Original PFD at 22-25.

[135] *See* Joint Ex. 3 (Mockingbird Agreement), Section 2 (Receipt and Delivery Points; Pressure); Exhibit A-2 (General Terms and Conditions), Section 2 (Construction and Ownership of Facilities and Connection of Additional Wells).

[136] *See, e.g.*, *Ford*, 141 Tex. at 529 ("These cost elements relate both to [the utility's] capital investment and to its operational cost … as permitting a utility to fix a higher rate for the customer whose service entails the greater cost. In other words, [w]here a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored.") (internal quote omitted); *Doering Hotel Co.*, 147 S.W.2d at 902 ("It is well settled that where a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored.").

In other words, CEU and EXCO were captive customers, unlike these four comparison shippers. This fails as a substantial and reasonable basis to distinguish customers. Regulation exists to stand in the place of competition—not for the protection of utility customers that *have* viable alternatives, but rather for those that do not. Unregulated companies do not have to worry about such distinctions, but Williams is not an unregulated company. Here, the four comparison shippers were geographically nearby to other gathering systems and therefore were assured of service—either with Williams or with someone else. By contrast, CEU and EXCO were captive customers and as such had no way to protect themselves if their utility provider imposed arbitrary and onerous conditions of service—such as shouldering them with the anchor shipper's contractual consideration. Creating favored or disfavored "classes" of customers based on their captivity undercuts a core purpose of regulation.

Also undercutting a core purpose of regulation would be distinguishing customers solely to maximize revenue pursuant to private, third-party contract terms that the utilities themselves draft. Regulation ceases to be so if the companies that are regulated are allowed to draft their own authorities that they later hold out to regulators to justify treating certain customers differently based on the utility's own revenue factors, rather than their customers' service-related ones. Here, Williams drafted and agreed to accounting terms in the Mockingbird Agreement that financially penalized Williams for charging CEU and EXCO less than what Chesapeake paid. Artificial customer distinctions made in privately-negotiated contracts, however, are not controlling in discrimination cases and they do not bind the Commission or Texas courts to categorize shippers, wells, or gas the same way.[137] There is nothing wrong with a utility earning a return, but the return by itself cannot be the driving force for distinguishing customers—especially captive ones.

b. Commission Rule Standard (Rule 7.115(32))

The list of 13 factors contained in Commission Rule 7.115(32) (Definitions) is not the legal standard for "similarly-situated shippers" under Commission rules. These factors serve not as the standard itself, but rather as a non-exhaustive aid to assist in applying the actual legal standard located in the text immediately above: "any shipper that seeks or receives transportation services under the same or substantially the same physical, regulatory, and economic conditions of service as any other shipper of a transporter."[138]

Just as with the Utilities Code standard, discussed above, neither CEU nor EXCO meets these criteria as compared to each other (Remand Order, subpart c) because neither was a direct customer of Williams in 2017 and therefore neither was a current "shipper of a transporter" under the standard. Accordingly, CEU and EXCO each do not qualify as a proper comparison shipper for the other under the Commission's standard.

The Commission standard is similar enough otherwise to the Utilities Code standard to warrant avoiding undue repetition or duplication of the above analysis.

[137] Original PFD at 22.
[138] Commission Rule § 7.115(32).

As already explained, another customer's prior contract-driven expenses have nothing to do with the service CEU and EXCO wanted in 2017. The 13 factors enumerated under Commission Rule § 7.115 are designed to aid in comparing service that customers actually receive—not unrelated foreign charges. Just as with the "billing factors" used by Texas courts, the point of using these factors is not to compare companies in a benchmarking-type exercise typically done in rate cases, but rather to stratify classes of customers based on their service requirements and relative expense to the utility to provide that service. For gathering service received, discussed separately below, these factors absolutely can be helpful and appropriate to use for distinguishing customers. The overcharge at issue here is not for gathering service for CEU and EXCO as new customers, however, but rather an attempted collection of outside debt incurred by Williams beforehand to serve Chesapeake pursuant to their anchor contract. In that contract (the Mockingbird Agreement), Williams bargained away its ability to exclude this charge from certain future customers such as CEU and EXCO while at the same time receiving Chesapeake's full payment amount under the contract's accounting terms. In other words, this charge was an attempted recovery by Williams of debt that was caused by Chesapeake but that could not be recovered from Chesapeake, at least not contractually. For CEU and EXCO, who were not involved in this Williams/Chesapeake commercial backstory, this new charge in 2017 functionally was no different than being handed someone else's check. Customer classes stratified by physical and geographical service characteristics are not helpful and not relevant for non-service related charges. The "physical, regulatory, and economic conditions of service" for CEU and EXCO were the same in this regard as compared to Shippers 14, 15, 27, and 33: gathering service only, with no obligation to pay for Williams's contract-driven expenses incurred beforehand to serve Chesapeake.

Commission rules require only that the 13 factors listed under Rule § 7.115(32) be evaluated for significance, not that they be considered further in any depth if not material or probative.[139] The Original PFD provided these 13 factors in their entirety but explained that physical shipper characteristics are not relevant for repayment of what Williams and Chesapeake together financed in their Mockingbird Agreement.[140] If these physical and geographical shipper characteristics are to be considered, though, then just as with the "billing factors" used by Texas courts (discussed above), they are only helpful and probative if their values correspond to the time when these prior expenses were caused—not when Williams later in 2017 attempted recovery.[141] The below chart compares the Commission's 13 factors under Commission Rule § 7.115(32), with the proper comparison shippers highlighted and the values shown reflecting customer usage from 2012 to 2017, when these expenses were incurred.

[139] Commission Rule §§ 7.115(32) ("In determining whether conditions of service are the same or substantially the same, the Commission shall evaluate the significance of relevant conditions, including, but not limited to, the following…"), 7.7003(d) ("In determining whether an entity has violated § 7.7001 of this title or has unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller, the Commission will consider the factors set forth in the definition of 'similarly situated shipper' in § 7.115 of this title. In determining whether conditions of service are the same or substantially the same, the Commission shall evaluate the significance and degree of similarity or difference in relevant conditions between sellers that are material and probative, including, but not limited to, the following…").

[140] *See* Original PFD at 16-17, and Attachment 3 (Williams Shipper Comparison Chart).

[141] *See, e.g.*, *Hilltop Baking Co.*, 78 S.W.2d at 720 (determining material billing factors "during the period in question" when the utility service was provided).

Commission Rule § 7.115(32) Factors
(System Expenses Caused from 2012 to 2017)

		Chesapeake *(2012–2017)*	Shippers 14, 15, 27, and 33 *(2012–2017)*	CEU and EXCO *(2012–2017)*
(1)	**Service Requirements**	The same on each subsystem	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(2)	**Location of Facilities**	Rich, Deep, Shallow subsystems	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(3)	**Receipt & Delivery Points**	~900 receipt points	N/A before 2014 (14, 15, 27) and 2016 (33)	None *Not customers*
(4)	**Length of Haul**	The same on each subsystem	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(5)	**Quality of Service**	Firm (Priority 1)	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(6)	**Quantity**	~75% of system volumes by 2017	0% before 2014 (14, 15, 27) 0% before 2016 (33)	0% *Not customers*
(7)	**Swing Requirements**	N/A	N/A	N/A
(8)	**Credit Worthiness**	N/A	N/A	N/A
(9)	**Gas Quality**	The same on each subsystem	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(10)	**Pressure**	The same on each subsystem	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(11)	**Duration of Service**	Started in 2012 *Term expiring 2032*	Started in 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(12)	**Connection Requirements**	Technically comparable	N/A before 2014 (14, 15, 27) and 2016 (33)	N/A *Not customers*
(13)	**Conditions and Circumstances Existing at Time of Agreement or Negotiations**	**Service-related expenses? YES**	**Service-related expenses? NO**	**Service-related expenses? NO**

As discussed above, Texas higher courts: assign capital expense repayment to customers who cause those expenses; do not consider non-customers to cause any expenses to the utility whatsoever; and determine "material billing factor" values at the time of the *service*, not at the time of the bill. There is no dispute in this case that CEU and EXCO were not customers when Williams built out the system from 2012 to 2017, and Williams acknowledges that the only customer during this period that could have—and in fact did—cause these expenses was Chesapeake, the contract anchor shipper and signatory to the 2012 Mockingbird Agreement. It is during this time period when these contract-driven Chesapeake system expenses were caused, and so this is the proper time period to determine service or "billing" factor values. As shown above, CEU and EXCO had near identical service needs and usage as the four comparison shippers during this period. Texas higher courts value quantity and cost of service as the main determinative factors in distinguishing customers, and CEU and EXCO shipped the same volumes and caused the same expenses to Williams as did the four comparison shippers: none.

c. Conclusion

Should CEU and EXCO decide to become customers in the future, then at that time both may have sizable "system footprints" superior to certain smaller shippers, warranting lawfully distinguishing them as customers based on their own comparative higher service costs.[142] Before then, however, including when Williams incurred the entirety of the Chesapeake Expenses, the footprint, volumes, and cost to serve CEU and EXCO as non-customers were zero. Williams was bound under the Mockingbird Agreement to serve the gathering needs of anchor shipper Chesapeake from 2012 to 2017, including providing the requisite facilities and infrastructure to perform under their contract, and so these expenses would have existed for Williams by 2017 even if CEU and EXCO never approached Williams for service. The same was true for comparison Shippers 14, 15, 27, and 33, yet Williams only required them to pay for their own customer gathering costs—not Chesapeake's costs beforehand. The Chesapeake Expenses were service-related for *Chesapeake*, but not for these four comparison shippers and similarly not for CEU or EXCO. There is no functional or lawful basis to distinguish customers along service-related lines for non-service related charges. CEU and EXCO situate identically to comparison Shippers 14, 15, 27, and 33 in this regard, and so Williams lacked a lawful basis to distinguish CEU and EXCO from these four comparison shippers with respect to payment of a foreign charge that was non-service related for everyone alike. Doing so departed from the standard of impartial treatment expected of public utilities and therefore was discriminatory under Texas law.[143]

Consistent with the Original PFD and the above supplemental analysis, the below chart summarizes the shipper comparisons requested under the Remand Order for this charge under both the Utilities Code standard ("similar and contemporaneous service")[144] and the Commission's rule standard ("the same or substantially the same physical, regulatory, and economic conditions of service").[145]

[142] *See, e.g.*, *Ford*, 141 Tex. at 529 ("These cost elements relate both to respondent's capital investment and to its operational cost, which are recognized … as permitting a utility to fix a higher rate for the customer whose service entails the greater cost. In other words, where a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored.") (internal reference omitted).

[143] *Amtel Communications*, 687 S.W.2d at 102 ("In additional to the rates charged by a utility for its services, discrimination may possibly be found in certain other practices of the utility wherein it may depart from the standard of impartial treatment."); *see also Shepherd Laundries Co.*, 144 Tex. at 170 ("Every overcharge, when exacted of one to the exclusion of others, is indeed, a discrimination.").

[144] Tex. Util. Code § 121.104(a)(2) (Discrimination in Service and Charges Prohibited) ("A pipeline gas utility may not directly or indirectly charge, demand, collect, or receive from anyone a greater or lesser compensation for a service provided than the compensation charged, demanded, or received from another for a similar and contemporaneous service.").

[145] Commission Rule § 7.115(15) (defining "similarly-situated shipper") ("Any shipper that seeks or receives transportation services under the same or substantially the same physical, regulatory, and economic conditions of service as any other shipper of a transporter.").

Shipper Comparison Summary
(Repayment of 2012–2017 Chesapeake Expenses)

	Utilities Code Standard	Commission Rule Standard
a. CEU vs. Chesapeake	X	X
b. EXCO vs. Chesapeake	X	X
c. CEU vs. EXCO	X	X
d. CEU/EXCO vs. Shippers 14, 15, 27, and 33	✓	✓

2. Rates Offered to CEU and EXCO for Their Own Service (Discrimination Not Found)

The Original PFD found no unlawful discrimination with respect to the prices offered by Williams to CEU and EXCO related to each's own gas-gathering service.[146] With the Chesapeake Expenses overcharge removed from the rates amounts offered to CEU and EXCO, the remaining 20 percent approximates what each was charged for actual gathering service.[147]

System	Mockingbird Rate	20 Percent	Comparison Shipper Rate
Shallow	$6.67	$1.33	$0.99
Deep	$2.06	$0.41	$0.77-0.83

Explaining that Texas law allows some variance in the rates utilities charge their customers, the Original PFD found that these numerical differences were not material and therefore there was no material difference in treatment proven.[148] With this threshold element not satisfied, a discrimination claim necessarily could not survive further, regardless the outcome of any "similar shipper" analysis for Shippers 14, 15, 27, and 33. Because this analysis is moot, it was omitted from the Original PFD.

Notwithstanding the lacking threshold element and legal mootness of further analysis—something no party took issue with following issuance of the Original PFD—for the purpose of responding to the Remand Order the below analysis will presume, hypothetically, that there was a material difference in treatment proven for the rates offered to CEU and EXCO for their own gathering service.

[146] Original PFD at 26.
[147] Joint Ex. 29 (Cantwell Test.) at 12 ("It is worth repeating, 80% of the System Fees for the four Mockingbird Systems is directly attributable to the capital and Target Return aspects of the Mockingbird Agreement where [Williams] bore all the upfront capital risk. When you compare the System Fees apples to apples on a given system to the Third-Party fees on that system by eliminating the capital and Target Return component of the System Fee, you will find them to be comparable and non-discriminatory.").
[148] Original PFD at 26 (citing *Amtel Communications*, 687 S.W.2d at 102; *Shepherd Laundries Co.*, 144 Tex. at 172–73; *Westlake*, 506 S.W.3d at 683; and *El Paso Elec. Co.*, 917 S.W.2d at 864).

Just as with the Chesapeake Expenses overcharge (discussed above), neither CEU nor EXCO satisfies the "contemporaneous service" element under either the Utilities Code standard or Commission Rule standard as compared to each other (Remand Order, subpart c) because neither was a direct customer of Williams. Accordingly, CEU and EXCO each do not qualify as a proper comparison shipper for the other under either standard. By contrast, Chesapeake and the four comparison shippers (Shippers 14, 15, 27, and 33) all were receiving gas gathering service from Williams as direct customers in 2017, and so the "contemporaneous" element is satisfied with respect to all these shippers.

The below chart compares the Commission's 13 factors under Commission Rule § 7.115(32), with the proper comparison shippers highlighted.

Commission Rule § 7.115(32) Factors

(Rates Offered to CEU and EXCO for Their Own Service)

		Chesapeake *(2017)*	Shippers 14, 15, 27, and 33 *(2017)*	CEU and EXCO *(2017)*
(1)	**Service Requirements**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(2)	**Location of Facilities**	Rich, Deep, Shallow subsystems	Deep (14, 15, 33) Shallow (27)	Rich, Deep, Shallow (CEU) Shallow (EXCO)
(3)	**Receipt & Delivery Points**	~900 receipt points	~79 receipt points (14/15) 1 receipt point (27, 33)	~900 receipt points (CEU) ~70 receipt points (EXCO)
(4)	**Length of Haul**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(5)	**Quality of Service**	Firm (Priority 1)	Firm (14, 15) Firm or interruptible based on volume (27, 33)	Only Firm (Priority 1) offered
(6)	**Quantity**	200% of CEU's volumes ~50% of system volumes *(if CEU takes full 33% in kind)*	~2% Deep volumes (14) ~9% Deep volumes (15) ~1% (27, 33)	50% of Chesapeake's volumes (CEU) ~25% of system volumes (CEU)
(7)	**Swing Requirements**	N/A	N/A	N/A
(8)	**Credit Worthiness**	N/A	N/A	N/A
(9)	**Gas Quality**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(10)	**Pressure**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(11)	**Duration of Service**	Started in 2012 *Term expiring 2032*	Started in 2014 (14, 15, 27) and 2016 (33) *Terms expiring 2024 (14, 15), 2032 (27), and 2033 (33)*	Williams offered service as direct customers in 2017
(12)	**Connection Requirements**	Technically comparable	Technically comparable	Technically comparable
(13)	**Conditions and Circumstances Existing at Time of Agreement or Negotiations**	N/A	N/A	N/A

As shown above, the conditions of service or "billing factors" are largely similar for everyone alike. The key notable difference among them, though, is the factor considered by Texas higher courts to be among the most important: volumes.[149]

[149] *See Ford*, 141 Tex. at 528-29 (considering volume usage and cost of service as the primary determinative billing factors); *Doering Hotel Co.*, 147 S.W.2d at 902 (affirming a jury's determination of similarly-situated utility customers based on several billing factors but firstly-named "volume of the current required"); *Hilltop Baking Co.*, 78 S.W.2d at 719-20 (affirming a finding by the trial court that corporate utility customers with comparable electric current usage were similarly situated, notwithstanding language in their contracts categorizing them differently).

In *Ford v. Rio Grande Valley Gas Co.*, the Texas Supreme Court considered volume usage, along with operational costs, as the main billing factor affecting the similarity of commercial electric utility customers—even though the comparison companies alleged to be similar (canning plants) were engaged in a wholly different business enterprise than the plaintiff (laundry).[150] In *Texas Power & Light Co. v. Hilltop Baking Co.*, the Court of Appeals considered quantity/usage as the main determinative factor even though the utility distinguished its customers differently in private contracts. Here, Chesapeake has double the volumes of CEU. Though they operate in the same locations and can share infrastructure,[151] Chesapeake has twice the volumes as CEU and is twice the customer. Distinguishing corporate utility customers in the context of alleged rate discrimination, the Court in *Ford* found that comparison companies were not similarly situated where their volumes over three years differed by an average of 203 percent.[152] Chesapeake's is 200 percent. Regardless the similarity of any other material billing factor, the Texas Supreme Court considers this degree of volume disparity not only a "substantial difference," but an obvious one.[153]

If Chesapeake's 200-percent volumes vis-à-vis CEU is an obvious substantial difference, then the fractional volumes of the smaller Shippers 14, 15, 27, and 33 compared to CEU and EXCO are even more so.[154] For CEU's and EXCO's own service, then, during a time period when both are customers of Williams and not beforehand, neither Chesapeake nor these four comparison shippers receive "similar service" or are similarly situated otherwise based on customer size and volumes.

CEU's main argument for dissimilarity as compared to Chesapeake is not due to volumes, however. Most of the remand-phase litigation centered around whether Chesapeake's payments under the Mockingbird Agreement included non-service related consideration bundled together with its otherwise service-related utility rates. Chesapeake's affiliate (CMO) was the previous owner of the system prior to 2012, and negotiations for the sale of the system in 2012 by Chesapeake's parent (Chesapeake Energy Corporation) involved the same parties that, at the same time, also were negotiating service terms and rates for the 2012 Mockingbird Agreement. CEU argues that Chesapeake, in need of more cash at the time, negotiated for a higher sale price, which gave Chesapeake more cash up front (the sale transaction) in exchange for a higher return for Williams when providing gathering service to Chesapeake over the next 20 years (the gathering agreement). According to CEU,

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[150] *See also Doering Hotel Co.*, 147 S.W.2d at 902 ("It is not uncommon in the classification of consumers and the publications of rates applicable thereto for utilities to include in the same class and under the same rate schedule, business enterprises and institutions engaged in wholly different undertakings, but having the same material billing factors.").

[151] *See Ford*, 141 Tex. at 528 (considering location and the potential for sharing equipment/infrastructure when comparing the cost to serve comparison customers).

[152] *See id.*, 141 Tex. at 529. For 1938, the plaintiff's average monthly consumption was 490,000 cubic feet, where comparison companies had: 98,000 (500% difference); 278,000 (176% difference); 1,082,000 (221% difference); and 1,352,000 (276% difference). For 1939, the plaintiff's average monthly consumption was 510,000 cubic feet, where comparison companies had: 535,000 (105% difference); 564,000 (111% difference); 899,000 (176% difference); and 1,224,000 (240% difference). For 1940, the plaintiff's average monthly consumption was 514,000 cubic feet, where comparison companies had: 737,000 (143% difference); 747,000 (145% difference); 920,000 (179% difference); 945,000 (184% difference); and 973,000 (189% difference).

[153] *Id.*, 141 Tex. at 529 ("The substantial difference in these figures is obvious.").

[154] In the Deep subsystem, Shippers 14 and 15 had 2% and 9% of the volumes in 2017, respectively. Chesapeake and CEU had 75% and 25%, respectively. *See* Remand Hearing Tr. (Sept. 11, 2020) at 102 (Cantwell testifying).

this "two-part" financing arrangement makes Chesapeake uniquely dissimilar to all shippers, including CEU, because Chesapeake's payments to Williams under their Mockingbird Agreement always will include this additional, non-service related financing-type consideration from the sale transaction.

Were this a rate case, CEU probably did enough to show with extrinsic evidence that the contracting parties' intent with these two transactions was for Chesapeake gradually to repay consideration received as a *seller* through its rates as a *customer*, notwithstanding the lack of express language in both contracts memorializing this arrangement.[155] In other words, the Mockingbird Agreement rate likely included bundled consideration wholly unrelated to gathering service—making Chesapeake's rate a bad benchmark choice. As explained throughout the Original PFD and above, however, fair prices are not at issue in discrimination proceedings, where the proper focus is similar service—not accurate rates. In discrimination cases, customers generally are stratified or grouped according to differences in service needs, with customer distinctions made by the utility in its different comparative treatment scrutinized to determine whether a lawful ("substantial and reasonable") basis existed to distinguish them.[156] Here, there was no different comparative treatment between CEU and Chesapeake; their *identical* treatment is why this docket exists. Without a difference in treatment, arguing that Chesapeake's rate was a bad benchmark choice—or else should have been adjusted downward to account for Chesapeake's unrelated financing arrangement—is a conversation for a rate case, not here. Assuming that Williams had, in fact, adjusted Chesapeake's rate downward for CEU and EXCO and therefore treated both differently from Chesapeake, then the shipper comparisons involving Chesapeake (Remand Order, subparts a-b) indeed would be ripe and proper. That hypothetical claim, however, likely would come from Chesapeake as the favored customer paying more, rather than from CEU or EXCO each paying less, and the question before the Commission would be whether Williams had a substantial and reasonable basis to distinguish Chesapeake from the others. Aside from volume differences already considered by the Texas Supreme Court as "substantial" (discussed above), adjusting out foreign consideration unrelated to gathering service probably would qualify, as well.

<u>Conclusion</u>

Unlike with the non-service related Chesapeake Expenses overcharge (discussed separately above), gathering service for CEU's and EXCO's own volumes, while both are customers, is service related for both and therefore service-related factors are relevant and probative to distinguish them from other customers. Consistent with the Original PFD and the above supplemental analysis, the below chart summarizes the shipper comparisons requested under the Remand Order for

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[155] *See* Joint Exs. 157-A (Dell'Osso Dep.) at 101-02; 158-A (Stice Dep.) at 196-98, 201; 199-A (Lemmerman Dep.) at 177-80; 200-A (Arbitration Tr.) at 418; 194 (CMO Valuation Proposal), element 3(iv).

[156] *Amtel Communications*, 687 S.W.2d at 102 ("But the [anti-discriminatory] principle includes a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so. The dividing line is generally that drawn by the rule of reasonableness, for mere inequality is not itself unlawful discrimination. This is to say, the different treatment practiced by the public utility must be founded upon a substantial and reasonable ground of distinction between the favored and disfavored classes or individuals."), and *El Paso Elec. Co.*, 917 S.W.2d at 864 (following the standard in *Amtel Communications*, stating that "unequal treatment does not necessarily produce unlawful discrimination; as long as a substantial and reasonable basis exists for the distinction . . . .").

normal gathering service under both the Utilities Code standard ("similar and contemporaneous service") and the Commission's rule standard ("the same or substantially the same physical, regulatory, and economic conditions of service").

Shipper Comparison Summary
(Rates Offered to CEU and EXCO for Their Own Service)

	Utilities Code Standard	Commission Rule Standard
a. CEU vs. Chesapeake	X	X
b. EXCO vs. Chesapeake	X	X
c. CEU vs. EXCO	X	X
d. CEU/EXCO vs. Shippers 14, 15, 27, and 33	X	X

Worth highlighting again here is that discrimination and rate cases have very different purposes and consequences, and the outcome of one type of case is not necessarily dispositive for the other. Rates that are fair prices for value received nevertheless can be discriminatory if others receiving similar service are unlawfully undercharged,[157] and utility pipelines are not rigidly bound in all circumstances to charge identical rates to customers receiving similar service.[158] Whereas customers determined to be similarly situated generally are entitled comparable rates among themselves, customers not similarly situated nevertheless may be charged numerically comparable rates—so long as each rate is established properly under a lawful ratesetting methodology.

3. Processing Requests for Service from CEU and EXCO (Violation Found)

The Original PFD found that Williams violated Commission Rule § 7.7001 (Natural Gas Transportation Standards and Code of Conduct), which requires pipelines to process requests for transportation services from any shipper in a similar manner as it does for any other similarly-situated shipper.[159] The same standard for "similarly-situated shippers" discussed above applies to violations here: "any shipper that seeks or receives transportation services under the same or substantially the same physical, regulatory, and economic conditions of service as any other shipper of a transporter."[160]

[157] *Shepherd Laundries Co.*, 144 Tex. at 170-77 (distinguishing excessive rates from unlawful discrimination).
[158] *See Amtel Communications*, 687 S.W.2d at 102 ("But the [anti-discriminatory] principle includes a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so. The dividing line is generally that drawn by the rule of reasonableness, for mere inequality is not itself unlawful discrimination. This is to say, the different treatment practiced by the public utility must be founded upon a substantial and reasonable ground of distinction between the favored and disfavored classes or individuals."), and *El Paso Elec. Co.*, 917 S.W.2d at 864 (following the standard in *Amtel Communications*, stating that "unequal treatment does not necessarily produce unlawful discrimination; as long as a substantial and reasonable basis exists for the distinction. . . ."); *see also Amtel Communications*, 687 S.W.2d at 102 (reasoning that, notwithstanding a statutory prohibition against rate discrimination between customers similarly situated or receiving the same kind of service, public utilities lawfully may charge different rates if doing so would achieve certain policy goals of utility regulation).
[159] Original PFD at 28-29; Commission Rule § 7.7001(b)(4).
[160] Commission Rule § 7.115(32).

Just as with the other types of treatment, discussed above, neither CEU nor EXCO meets these criteria as compared to each other (Remand Order, subpart c) because neither was a direct customer of Williams in 2017 and therefore neither was a current "shipper of a transporter" under the standard. Accordingly, CEU and EXCO each do not qualify as a proper comparison shipper for the other under the Commission's standard.

Administratively processing requests for service from potential new shippers probably has more to do with the indoor work spaces of Williams rather than the wells outside. The scrutinized conduct of the gatherer utility here is processing requests for service, not the service itself, despite the Rule's comparison factors speaking only to the latter. Nevertheless, the Rule requires that the Commission's 13 physical service factors at least be evaluated for significance, even if none ultimately are determined to be material and probative.[161] Accordingly, the below chart compares the Commission's 13 factors under Commission Rule § 7.115(32), with the proper comparison shippers highlighted.

Commission Rule § 7.115(32) Factors
(Processing Requests for Service)

		Chesapeake *(2017)*	Shippers 14, 15, 27, and 33 *(2017)*	CEU and EXCO *(2017)*
(1)	**Service Requirements**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(2)	**Location of Facilities**	Rich, Deep, Shallow subsystems	Deep (14, 15, 33) Shallow (27)	Rich, Deep, Shallow (CEU) Shallow (EXCO)
(3)	**Receipt & Delivery Points**	~900 receipt points	~79 receipt points (14/15) 1 receipt point (27, 33)	~900 receipt points (CEU) ~70 receipt points (EXCO)
(4)	**Length of Haul**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(5)	**Quality of Service**	Firm (Priority 1)	Firm (14, 15) Firm or interruptible based on volume (27, 33)	Only Firm (Priority 1) offered
(6)	**Quantity**	200% of CEU's volumes ~50% of system volumes *(if CEU takes full 33% in kind)*	~2% Deep volumes (14) ~9% Deep volumes (15) ~1% (27, 33)	50% of Chesapeake's volumes (CEU) ~25% of system volumes (CEU)
(7)	**Swing Requirements**	N/A	N/A	N/A
(8)	**Credit Worthiness**	N/A	N/A	N/A
(9)	**Gas Quality**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(10)	**Pressure**	The same on each subsystem	The same on each subsystem	The same on each subsystem
(11)	**Duration of Service**	Started in 2012 *Term expiring 2032*	Started in 2014 (14, 15, 27) and 2016 (33) *Terms expiring 2024 (14, 15), 2032 (27), and 2033 (33)*	Williams offered service as direct customers in 2017
(12)	**Connection Requirements**	Technically comparable	Technically comparable	Technically comparable
(13)	**Conditions and Circumstances Existing at Time of Agreement or Negotiations**	**Mockingbird Agreement signatory?** **YES**	**Mockingbird Agreement signatory?** **NO**	**Mockingbird Agreement signatory?** **NO**

[161] Commission Rule § 7.7003(d) ("In determining whether an entity has violated § 7.7001 of this title or has unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller, the Commission will consider the factors set forth in the definition of 'similarly situated shipper' in § 7.115 of this title. In determining whether conditions of service are the same or substantially the same, the Commission shall evaluate the significance and degree of similarity or difference in relevant conditions between sellers that are material and probative, including, but not limited to, the following…").

Large utility pipelines such as Williams have complex business operations that include both contractual and regulatory obligations. They can wear two "hats" in this regard—one as a party to business agreements with duties owed under contracts governing their conduct as private business partners, and another as a regulated pipeline with duties owed under Texas law governing their conduct as public utilities. Here, CEU and EXCO needed the latter Williams but instead got the former.

As explained in the Original PFD, Williams processed requests for service from CEU and EXCO in a very unusual manner.[162] Despite neither being a signatory to the Mockingbird Agreement or owing any contractual duties to Williams otherwise, Williams treated CEU and EXCO like contract-bound business partners anyway—processing each's request for new service directed in fact to Williams *the public utility* instead as directed to Williams *the hypothetical business partner*, asking to be released from duties under the Mockingbird Agreement owed only by Chesapeake.[163] Rather than presenting CEU and EXCO with service terms and rates reflecting each's unique customer needs—as it did with comparison Shippers 14, 15, 27, and 33—Williams sent letters to CEU and EXCO that each: (1) repeatedly referenced Chesapeake; (2) referenced the Mockingbird Agreement; and (3) offered only Chesapeake's rate under the Mockingbird Agreement.[164] Other potential customers, regardless their physical characteristics, did not have to argue their way out of someone else's 320-page cost-of-service contract to earn service terms unique to their own gathering needs. The 13 physical and geographical service factors under Commission Rule § 7.115(32) do not contemplate this kind of conduct, nor are they helpful in situating so-affected potential customers similarly.

Consistent with the Original PFD and the above supplemental analysis, the below chart summarizes the shipper comparisons requested under the Remand Order for processing requests for service under the Commission's rule standard ("the same or substantially the same physical, regulatory, and economic conditions of service").

Shipper Comparison Summary
(Processing Requests for Service)

	Commission Rule Standard
a. CEU vs. Chesapeake	X
b. EXCO vs. Chesapeake	X
c. CEU vs. EXCO	X
d. CEU/EXCO vs. Shippers 14, 15, 27, and 33	✓

[162] Original PFD at 28-29.
[163] CEU Ex. 41 (Leo Williams Test.) at 13 ("When, on each occasion, I inquired as to the reason for not offering a different rate than Chesapeake's rate, Respondents, in each case, stated to me that the Mockingbird Agreement did not allow it to do so.") (evidentiary ruling sustaining objection later vacated during the merits hearing at Hearing Tr. [June 18, 2019] at 162:4-17).
[164] CEU Ex. 9 (letter from Williams to CEU, dated August 24, 2017); Joint Ex. 99 (letter from Williams to EXCO, dated October 24, 2017).

B. Remedies Clarification

The remedy in the Original PFD cures the discrimination found in a manner that maximally allows Williams to control its own rates going forward, without undue regulatory interference. Rather than tell Williams specifically what it *can* charge, the remedy proposed instead tells Williams what it *cannot* charge. The discrimination found had nothing to do with rate amounts offered to CEU and EXCO for their own gathering service going forward, but rather was for an identifiable overcharge relating to past contract-driven expenses from 2012 to 2017 that were service related only for anchor shipper Chesapeake—but not for CEU or EXCO who were not customers. With this discriminatory overcharge removed, the remaining amounts offered to CEU and EXCO for each's own service in 2017 was not unlawfully discriminatory, and so there is nothing here for the Commission to cure. As explained in the Original PFD, remedies must cure only proven discrimination.[165]

The proposed remedy allows Williams to retain its normal business judgment and ability to craft current rates for CEU and EXCO that are "unique to their own business and commercial needs" and that reflect their own service-related expenses as new customers—the same as with comparison Shippers 14, 15, 27, and 33—without additionally being charged for what Williams spent previously in the performance of its contract with Chesapeake.[166] The Original PFD purposely was silent on specific amounts because the Commission's ratesetting function is not summoned (or necessary) here, and so existing Texas law is sufficient to govern the rates ultimately chosen by Williams.[167] Nothing in the recommended proposed remedy directs Williams to charge identical rates to CEU and EXCO as paid by the four smaller comparison shippers or to provide gathering service to CEU and EXCO "at cost"—something misconstrued by Williams following issuance of the Original PFD.[168] Clarifying language is added the Proposed Final Order (second ordering paragraph), also shown below, that addresses this. Alternatively, should Williams prefer not to choose its own rates, then it is free to file a rate case and request that the Commission do it instead.

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[165] Original PFD at 31.

[166] *Id*. at 30-31.

[167] *See, e.g.*, *Ford*, 141 Tex. at 529 ("These cost elements relate both to [the utility's] capital investment and to its operational cost … as permitting a utility to fix a higher rate for the customer whose service entails the greater cost. In other words, [w]here a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored.") (internal quote omitted); *Doering Hotel Co.*, 147 S.W.2d at 902 ("It is well settled that where a particular consumer is furnished a type of service, requiring additional expense to the utility company, superior to that furnished other consumers, the company may exact of such favored consumer a higher charge therefor than it collects from those less favored."); *Graver*, 110 N.Y.S. at 607 (relied upon by the Texas Supreme Court in *Ford*, 141 Tex. at 527) (considering proportionality in relation to the recoverability of expenses caused by customers due to their difference in conditions).

[168] Williams Ex. 136 (Cantwell Test.) at 13-14.

V. SUPPLEMENTAL FINDINGS AND CONCLUSIONS[169]

The below findings of fact and conclusions of law supplement those enumerated in the Original PFD. The sequential numbering of these supplemental findings and conclusions, as well as those already made beforehand, may be different in the prepared order for the Commission, which is organized topically. A copy of the Revised Proposed Final Order is attached as Supplemental PFD Attachment 3.

Supplemental Findings of Fact

30. The hearing on the merits initially was held from June 18-20, 2019 (the "Main Hearing"). A combined list of the parties' exhibits admitted into the evidentiary record then is attached to the Proposal for Decision (the "Original PFD"). *(revises language in existing FOF 30)*
33. On January 9, 2020, the Original PFD was issued. *(revises language in existing FOF 33)*
82. For these charges, shippers on the Mockingbird System in 2017 for whom Williams did not require repayment are similarly situated to CEU and EXCO, including, at minimum: Shippers 14, 15, 27, and 33. *(revises language in existing FOF 82)*
83. Uncontroverted evidence supports that the rates Williams charged these shippers covered only their own gathering costs, with no added charge for repaying the previous capital expenses caused by Chesapeake. *(revises language in existing FOF 83)*
85. All shippers using the Mockingbird System benefited from the respective capital investment and operational costs that they, while customers, caused Williams to incur to furnish them gathering service. *(revises language in existing FOF 85)*
87. The same infrastructure that existed from 2014 to 2016 for Shippers 14, 15, 27, and 33 also existed later in 2017 when CEU and EXCO sought to become new customers. *(revises language in existing FOF 87)*
93. Williams did not keep Shippers 14 and 15 on the system by reducing their gathering rate, but instead did so by charging them only each's own customer gathering costs, without any added charge for prior infrastructure expenses caused by Chesapeake. *(revises language in existing FOF 93)*

[169] The recommended Revised Proposed Final Order (Attachment 3) partially sustains only CEU's claims—not EXCO's—since EXCO's complaint was dismissed, with prejudice, on its own motion. *See* Agreed Order of Dismissal with Prejudice, signed by ALJ Dodson on June 30, 2020 (approving EXCO's request to leave the docket and dismiss its claims). Accordingly, EXCO is not entitled any relief of its own in this docket. Evidence supporting Williams's treatment of EXCO, however, still exists in the record and supports the findings of fact and conclusions of law contained in the Original PFD, as well as those revised or supplemented herein (and is responsive to the Commission's Remand Order). Though EXCO no longer is entitled to its own relief, these findings and conclusions still reflect Williams's proven conduct as a utility gatherer subject to agency rules and state law, consistent with the evidentiary record. For this reason, these ALJ findings and conclusions were not disturbed. The Commission, at its option and preference, may choose to adopt or remove them from its final order.

94. Shippers 14, 15, 27, and 33 each received contemporaneous service when CEU and EXCO sought new service in 2017. *(revises language in existing FOF 94)*

95. Requiring repayment of the Chesapeake Expenses from CEU and EXCO—but not from Shippers 14, 15, 27, and 33—unreasonably disadvantaged and prejudiced both CEU and EXCO. *(revises language in existing FOF 95)*

117. The findings and recommendations contained in the Original PFD were presented to the Commission at successive open meetings held on February 11, 2020, and on March 4, 2020.

118. At the March 4, 2020 open meeting, the Commission issued an Order for Limited Purpose Remand, pursuant to Commission Rule § 1.123(a)(3) (the "Remand Order").

119. On June 30, 2020, Complainant EXCO was dismissed from this docket on its own motion.

120. On August 12, 2020, the Remand Notice of Hearing was issued, setting the merits hearing to re-open on September 9, 2020 (the "Remand Notice of Hearing").

121. On August 14, 2020, the Commission published the Remand Notice of Hearing in *Gas Utilities Bulletin No. 1137*.

122. Consistent with the Remand Order, the merits hearing was re-opened from September 9-11, 2020, to give the parties an opportunity to present evidence and argument on the requested similarly-situated comparisons (the "Remand Hearing"). A combined list of the parties' supplemental exhibits admitted into the evidentiary record during the Remand Hearing is attached to the First Supplemental Proposal for Decision ("Supplemental PFD").

123. On March 31, 2021, the ALJ sealed portions of the remand record, finding that certain new exhibits and portions of the remand hearing transcript contain highly-sensitive, confidential information under Chapter 552 (Public Information) of the Texas Government Code.

124. On March 31, 2021, the ALJ again closed the evidentiary record.

125. On June 29, 2021, the Supplemental PFD was issued.

126. Anchor shipper and then-customer Chesapeake caused Williams to incur capital expenses exceeding $1.6 billion relating to the acquisition and buildout of the Mockingbird System, from 2012 to 2017, to serve Chesapeake's contractual gathering needs (the "Chesapeake Expenses").

127. Williams was performing under its Mockingbird Agreement with Chesapeake when Williams incurred the Chesapeake Expenses.

128. CEU and EXCO were not customers when the Chesapeake Expenses were incurred by Williams and did not cause them.

129. The Chesapeake Expenses were not service-related for CEU and EXCO.

130. Williams requiring repayment of the Chesapeake Expenses from CEU and EXCO, as a condition for service, was an overcharge for CEU and EXCO.

131. Shippers 14, 15, 27, and 33 were not customers when the significant majority of Chesapeake Expenses were incurred by Williams, and they did not cause them.

132. The Chesapeake Expenses were not service-related for Shippers 14, 15, 27, and 33.

133. Williams not requiring repayment of the Chesapeake Expenses from Shippers 14, 15, 27, and 33 was not an undercharge for those shippers.

134. Shippers 14, 15, 27, and 33 each received contemporaneous service when CEU and EXCO sought new service in 2017.

135. Service for Shippers 14, 15, 27, and 33 was similar and under substantially the same physical, regulatory, and economic conditions of service as sought by CEU and EXCO: gathering service only—with responsibility to pay each's own gathering costs only—with no added charges for repayment of expenses incurred by Williams beforehand to serve Chesapeake.

136. The Chesapeake Expenses overcharge for CEU and EXCO similarly would have been an unlawful overcharge for Shippers 14, 15, 27, and 33, and for the same reason.

137. Williams lacked a substantial and reasonable basis to distinguish CEU and EXCO from comparison Shippers 14, 15, 27, and 33 for purposes of requiring repaying of Chesapeake's prior contract-driven capital expenses.

138. There is no functional or lawful basis to distinguish CEU and EXCO from comparison Shippers 14, 15, 27, and 33 along service-related lines for non-service related charges.

139. Traditional "material billing factors" or conditions of service, including those enumerated under Commission Rule § 7.115(32), are not material or probative for informing similar situatedness for charging only CEU and EXCO—but not Shippers 14, 15, 27, and 33—the prior, contract-driven capital expenses caused by Chesapeake from 2012 to 2017, when CEU and EXCO were not customers.

140. From 2012 to 2017, when the Chesapeake Expenses were caused, Chesapeake was a customer for the entirety of this period; CEU and EXCO were not customers for any of it.

141. Shippers 14, 15, and 27 became customers in 2014 and the only service-related expenses each was required to pay was its own; Shipper 33 became a customer in 2016 and the only service-related expenses it was required to pay was its own.

142. When Williams incurred most of the Chesapeake Expenses from 2012 to 2017, CEU and EXCO shipped the same volumes and caused the same customer expenses to Williams as did Shippers 14, 15, 27, and 33: none.

143. When Williams incurred most of the Chesapeake Expenses from 2012 to 2017, the service or "billing factors" during that time period for CEU and EXCO were similar and substantially the same as compared to Shippers 14, 15, 27, and 33.

144. Williams had a reasonable opportunity to recover the Chesapeake Expenses, along with a reasonable return, from its gathering contract with Chesapeake.

145. The Chesapeake Expenses incurred by Williams, from 2012 to 2017, were non-service related for CEU, EXCO, and comparison Shippers 14, 15, 27, and 33 alike, and therefore demanding their repayment only from CEU and EXCO departed from the standard of impartial treatment expected of public utilities.

Supplemental Conclusions of Law

6. The Original PFD and Supplemental PFD were issued and served on all parties in accordance with Commission Rule §§ 1.121, 1.101(15), and 1.123. *(revises language in existing COL 6)*

11. The "third party gas" approval provisions contained in the Mockingbird Agreement do not give unlawful advantage to Chesapeake and do not unreasonably or unlawfully disadvantage or prejudice CEU or EXCO. *(revises language in existing COL 11)*

16. A lawful and adequate remedy for the discrimination herein relating to past capital expenses charged to CEU is to require Williams to remove from the rates offered to CEU all amounts associated with repayment of the Chesapeake Expenses, consistent with Williams's treatment of Shippers 14, 15, 27, and 33. *(revises language in existing COL 16)*

17. A lawful and adequate remedy for the violation herein relating to processing CEU's service request is to require Williams to process requests for service from CEU as a new customer, free from any duties contained in the Mockingbird Agreement or other private contracts, consistent with Williams's treatment of Shippers 14, 15, 27, and 33. *(revises language in existing COL 17)*

18. Under Texas law, customers that are furnished gathering service requiring greater capital investment and operational cost to the utility gatherer lawfully may be distinguished from other customers for purposes of proportional recovery of those added expenses through rates. *Ford v. Rio Grande Val. Gas Co.*, 141 Tex. 525, 529 (1943).

19. Capital expenses incurred pursuant to a utility gatherer's contractual duties to provide service to an existing customer are not service-related

expenses for non-customers receiving no service during the time period when those expenses were caused.

20. Where a comparison of conditions of service or "material billing factors" is appropriate for determining "similar service" or "similarly-situated" shippers, including under Commission Rule § 7.115(32), the relevant time period for considering values is when the service is provided or expenses caused—not when recovery or billing is attempted, if at a different time.
21. Utility customers are similarly situated as a matter of law with respect to the same unlawful overcharge imposed upon some that similarly, and for the same reason, would be an unlawful overcharge for the others, as well.

The below ordering paragraphs reflect the above supplemental analysis and are included in the attached Revised Proposed Final Order.

- IT IS THEREFORE ORDERED that the findings of fact and conclusions of law herein are adopted, consistent with the Original PFD and Supplemental PFD, and that CEU's discrimination claims against Williams are PARTIALLY SUSTAINED consistent with this Order. *(revises language in the first ordering paragraph)*
- IT IS FURTHER ORDERED that Williams shall comply with the remedies herein not later than seven (7) days after the date this Order becomes final. Compliance herewith does not preclude or prevent Williams from charging rates reflecting new invested capital or operational costs that CEU separately may cause, while a customer, or to earn a reasonable return from CEU otherwise, consistent with Texas law. *(revises language in the second ordering paragraph)*

SIGNED on June 29, 2021.

John Dodson
Administrative Law Judge

Rose Ruiz
Technical Examiner

James Currier
Technical Examiner

Supplemental PFD
Attachment 1

Remand Order

BEFORE THE
RAILROAD COMMISSION OF TEXAS

FORMAL COMPLAINT OF CNOOC ENERGY USA, LLC, AGAINST WILLIAMS MLP OPERATING, LLC, AND MOCKINGBIRD MIDSTREAM GAS SERVICES, LLC	§ § § § §	**GAS UTILITIES DOCKET NO. 10606**

ORDER FOR LIMITED PURPOSE REMAND

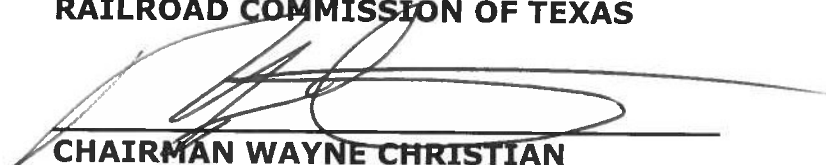
At successive open meetings held on February 11 and March 4, 2020, the ALJ presented to the Commissioners the Proposal for Decision, issued on January 9, 2020. Pursuant to Commission Rule § 1.123(a)(3) (Commission Action), it is **ORDERED** that this docket be remanded for the limited purpose to reconsider the discrimination issue by re-opening the hearing to further develop the record by giving the parties an opportunity to present evidence and argument on which parties, if any, are similarly situated with particular consideration given to:

a. whether CNOOC and Chesapeake are similarly situated;
b. whether EXCO and Chesapeake are similarly situated;
c. whether CNOOC and EXCO are similarly situated;
d. whether CNOOC and EXCO, respectively, are similarly situated to Shippers 14, 15, 27, and 33; and

thereafter for the examiners to provide an in-depth analysis of the evidence on this similarly-situated requirement in their PFD.

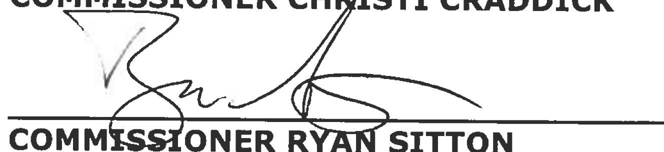
SIGNED on March 4, 2020.

RAILROAD COMMISSION OF TEXAS



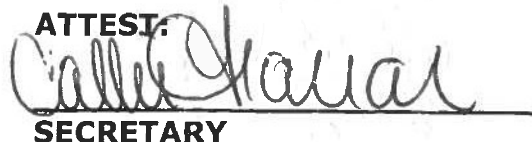
CHAIRMAN WAYNE CHRISTIAN

COMMISSIONER CHRISTI CRADDICK



COMMISSIONER RYAN SITTON

ATTEST:



SECRETARY

Supplemental PFD
Attachment 2

Remand-Phase Exhibit List

IN THE RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION

COMPLAINT OF CNOOC ENERGY USA, LLC AGAINST WILLIAMS MLP OPERATING LLC & MOCKINGBIRD MIDSTREAM GAS SERVICES, LLC	§ § § § §	**GUD DOCKET NO. 10606**

COMBINED REMAND HEARING EXHIBIT LIST

C = CONFIDENTIAL

HC = HIGHLY CONFIDENTIAL

N = NOT CONFIDENTIAL OR HIGHLY CONFIDENTIAL

PM = PROTECTED MATERIALS

CEU = CNOOC ENERGY USA, LLC

WMS = WILLIAMS MLP OPERATING LLC & MOCKINGBIRD MIDSTREAM GAS SERVICES, LLC

EXCO = EXCO OPERATING COMPANY, LP

JOINT = CEU, WMS, AND EXCO JOINT OFFER OF EXHIBIT

CEU objections marked **X (red)**

Williams objections marked **X (blue)**

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
127	Williams Amended Corporate Deposition Notice of CNOOC dated July 16, 2020	JOINT		X	N
128	CNOOC International website discussing its "partner" and operator Chesapeake	JOINT		X	N
129	CNOOC Master Well List identifying more than 3,000 wells connected to the Williams' Eagle Ford gathering system ***Digital version provided on USB Flash Drive***	JOINT		X	C (perm. sealed)
130	Exco-Williams Gas Gathering/Gas Purchase and Settlement Contract (June 2020) (WilliamsGUD10606.005400-005439)	JOINT		X	N
131	Development Agreement by and between Chesapeake Exploration and OOGC America with Agreed Joint Operating Agreement (OOGC 000100-000257)	JOINT		X	C (perm. sealed)
132	CNOOC's Supplemental Prefiled Direct Testimony of John Emory dated June 12, 2020	JOINT		X	N
133	John Emory's Amended Shipper Matrix – Prefiled Testimony Ex. 19A	JOINT		X	C

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
	(OOGC 142417) ***Digital version provided on USB Flash Drive***				
134	EXCO K v MB rates dated July 8, 2020 (OOGC 142416) ***Digital version provided on USB Flash Drive***	JOINT		X	C
135	Williams' Prefiled Direct Testimony of David Biegler dated July 10, 2020	WMS	X	X (subject to discovery order dated September 4, 2020)	N (select portions perm. sealed)
136	Williams' Supplemental Prefiled Direct Testimony of Jim Cantwell dated July 10, 2020	WMS	X	X (subject to discovery order dated September 4, 2020)	N (select portions perm. sealed)
137	Transaction #7 (EXCO 000543-000543)	JOINT		X	C
138	Williams' Prefiled Direct Testimony of Dr. Michael Webb dated July 10, 2020	WMS	X	X (subject to discovery order dated September 4, 2020)	N (select portions perm. sealed)
139	CNOOC's Supplemental Prefiled Direct Testimony of Jane Kidd dated June 12, 2020	JOINT		X	N (select portions perm. sealed)
140	Corrections to the Supplemental Prefiled Direct Testimony of Jim Cantwell dated August 12, 2020	WMS	X	X (subject to discovery order dated September 4, 2020)	N
141	Pioneer Natural Resources Announces Sale of Eagle Ford Shale Midstream Assets	JOINT		X	N
142	Devon Energy and Crosstex Energy – Sale of Eagle Ford Shale Midstream Assets and Entry into New Contract	JOINT		X	N
143	BHP Billiton Ltd. – SEC Form 6-K Discussing Sale of Eagle Ford Shale Midstream Assets and Entry into New Contract	JOINT		X	N
144	*Intentionally Omitted*				
145	*Intentionally Omitted*				
146	September 8, 2012 CHK and GIP Agreement re Confirmation of Indicative Valuation of CMO Midstream Assets and CMO Mid-Continent Midstream Assets and Associated Exclusivity Extension	JOINT		X	HC

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
	(WilliamsGUD10606.004898-004908)				
147	June 20, 2012 Emails between Johnson and Lemmerman re EF Oil (CHK_STGATE_00087918-00087920)		X		C
148	June 29, 2012 Email between Chuchla and CHK re Preliminary Model Output (CHK_STGATE_00105441-00105445)		X		C
149	CHK Development Preliminary Model Output June 2012 (CHK_STGATE_00105446-00105459)		X		C
150	July 10, 2012 Emails between Guidry and Koeng re: CMD Model Q&A (CHK_STGATE_00107571-00107574)		X		C
151	August 24, 2012 CHK and GIP Agreement re Revised Non-Binding Indicative Valuation for CMO Midstream Assets and CMO Mid-Continent Midstream Assets (OOGC 019335-019344)	JOINT		X	PM/C (perm. sealed)
152	November 16, 2012 Email from Brilliant re: November 2012 Project Thor Fees (OOGC 019366-019370)		X		PM/C
153	Project Thor Discussion Materials August 2012 (CHK_STGATE_00107896-00107900)		X		C
154	John Emory Expert Reply Report dated June 15, 2018 (OOGC 026970-027004)		X		C
155	John Emory Expert Disclosure dated April 6, 2018 (OOGC 027005-027059)		X		C
156	Jane Kidd Expert Report dated April 6, 2018 (OOGC 027081-027158)		X		C
157	Domenic Dell'Osso Deposition Excerpts – June 2018 (OOGC 013366-013432)		X		C
157-A	Domenic Dell'Osso Deposition Excerpts – June 2018, CEU Designations highlighted in Yellow and WMS in Green (OOGC 013366-013432)	JOINT		X	C (perm. sealed)
158	John Michael Stice Deposition Excerpts – June 2018 (OOGC 011829-011968)		X		C
158-A	John Michael Stice Deposition Excerpts – June 2018, CEU Designations highlighted in Yellow and WMS in Green (OOGC 011829-011910)	JOINT		X	C (perm. sealed)

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
159	Analyzing Rate Increases (OOGC 011808-011822)		X		C
160	GIP Letters dated August 13-15, 2012 (OOGC 012003-012017)	CEU	X	X (admitted subject to limitations appearing in the record)	C (perm. sealed)
161	October 26, 2012 Workstream (OOGC 013475-013490)		X		C
162	EXCO Petition for Leave to Intervene & Complaint dated October 4, 2018		X		N
163	Williams' Closing Statement & Brief dated August 29, 2019		X		N
164	GUD 10606 Hearing on the Merits Transcript Vol. 1, p. 72		X		N
165	GUD 10606 Hearing on the Merits Transcript Vol. 1, pp. 89-99		X		N
166	GUD 10606 Hearing on the Merits Transcript Vol. 2, pp. 130-160		X		N
167	Data sheet of meter number, area, operator, meter function, measurement month, average temperature, average pressure, etc. (WilliamsGUD10606.003939) ***Digital version provided on USB Flash Drive***		X		HC
168	CHK Board of Directors Mtg. August 1-3, 2012 – Presentation (OOGC 016558-016565)		X		PM/C
169	CHK Board of Directors Mtg. September 20-21, 2012 – Presentation (OOGC 016566-016586)		X		PM/C
170	CHK Board of Directors Working Session October 19, 2012 – Presentation (OOGC 016587-016589)		X		PM/C
171	CHK July 2012 Presentation (OOGC 018744-018878)		X		PM/C
172	June 7, 2012 GIP – CHK Exclusivity Letter (OOGC 019281-019290)		X		PM/C
173	GIP Presentation Project Thor Discussion Materials August 2012 (OOGC 019330-019334)	CEU	X	X (admitted subject to limitations appearing in the record)	PM/C (perm. sealed)
174	August 29, 2012 GIP Letter (OOGC 019345-019355)	JOINT		X	PM/C (perm. sealed)
175	Project Thor Proposal Presentation November 2012 (OOGC 019356-019365)		X		PM/C

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
176	Email dated December 6, 2012 from Lemmerman to Brilliant et al Subject: Purchase Price Rill forward (OOGC 019371-019385)		X		PM/C
177	December 11, 2012 TPH Project Thor Valuation (WilliamsGUD10606.005624-005680)	JOINT		X	HC/AEO
178	EXCO Compromise and Settlement Agreement (WilliamsGUD10606.005440-005499)		X		HC
179	CEU's Designation of David Biegler Deposition dated August 28, 2020		X		N
179-A	David Biegler Deposition Transcript dated August 28, 2020, CEU Designations highlighted in Yellow and WMS in Green	JOINT		X	N
180	CEU's Designation of Jim Cantwell Deposition dated August 28, 2020		X		N
180-A	Jim Cantwell Deposition Transcript dated August 28, 2020, CEU Designations highlighted in Yellow and WMS in Green	JOINT		X	N
181	CEU's Designation of Michael Webb Deposition		X		N
181-A	Michael Webb Deposition Transcript dated August 20, 2020, CEU Designations highlighted in Yellow and WMS in Green	JOINT		X	N
182	10-K Annual Report Pursuant to Section 13 of 15 (d) of the Securities Exchange Act of 1934- Access Midstream Partners (OOGC 021995-022143)		X		PM/C
183	November 4, 2019 Email from CHK to CEU re Williams' COS Discussion (OOGC 141762)		X		C
184	December 3, 2019 Emails between T. Bonine (WMS) to L. Williams (CEU) re New Agreement (OOGC 142232-142235)		X		N
185	December 9, 2019 Email between T. Mendel (CHK) to CEU re CHK/CEU Marketing Meeting (OOGC 142221-142223)		X		C

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
186	November 14, 2019 Email and attached letter from WMS to CEU re Gas Gathering and Treating on the Mockingbird Midstream Gas Services EagleFord Gathering System (OOGC 142228-142229)		X		C
187	Mockingbird Activity Summary, Invoice dated December 26, 2019 (OOGC 141512-141633)		X		C
188	Mockingbird Activity Summary, Invoice dated January 24, 2020 (OOGC 141635-141714)		X		C
189	Mockingbird Activity Summary, Invoice dated February 27, 2020 (OOGC 142419-142521)		X		C
190	Mockingbird Activity Summary, Invoice dated March 25, 2020 (OOGC 142523-142624)		X		C
191	CNOOC Election Not to Participate in Chesapeake Eagle Ford Gathering System – August 6, 2012 – Arbitration Ex. 259 (CHK_OOGC_0190720-0190723)	WMS		X	C (perm. sealed)
192	August 13, 2012 Term Sheet from Global Infrastructure Partners for the Purchase of CMO Midstream Assets and CMO Mid-Continent Midstream Assets – Arbitration Ex. 223 (OOGC_011636-011641)	JOINT		X	C (perm. sealed)
193	August 24, 2012 Revised Term Sheet from Global Infrastructure Partners for the Purchase of CMO Midstream Assets and CMO Mid-Continent Midstream Assets (OOGC_011654-011662)	JOINT		X	C (perm. sealed)
194	August 29, 2012 Final Term Sheet from Global Infrastructure Partners for the Purchase of CMO Midstream Assets and CMO Mid-Continent Midstream Assets – Arbitration Ex. 228 (OOGC_011663-011673)	JOINT		X	C (perm. sealed)
195	Redline Comparison of August 13, 2012 Term Sheet to August 24, 2012 Revised Term Sheet	JOINT		X	C (perm. sealed)
196	Redline Comparison of August 24, 2012 Revised Term Sheet to August 29, 2012 Final Term Sheet	JOINT		X	C (perm. sealed)
197	Domenic Dell'Osso Deposition Testimony – June 2018 (OOGC 013366-013432)		X		C

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
198	John Michael Stice Deposition Testimony – June 2018 (OOGC 011829-011910)		X		C
199	Bryan Lemmerman Deposition Testimony – May 2018 (OOGC 010783-010857)		X		C
199-A	Bryan Lemmerman Deposition Testimony – May 2018, CEU Designations highlighted in Yellow and WMS in Green (OOGC 010783-010909)	JOINT		X	C (perm. sealed)
200	Arbitration Testimony Excerpts related to Eagle Ford Rate Structure and Statoil 18% Cost of Service Model Agreement[1] (OOGC 035334; 035500-035507; 035540-035542; 035656-035683; 035691-035692)	WMS	X		C
200-A	Arbitration Testimony Excerpts related to Eagle Ford Rate Structure and Statoil 18% Cost of Service Model Agreement[2], CEU Designations highlighted in Yellow and WMS in Green (OOGC 035334; 035479; 035481- 035486; 035491-035495; 035500-035507; 035525; 035540-035542; 035547; 035550; 035656-035683; 035691-035692)	JOINT		X	C (select portions perm. sealed)
201	*Omitted (Duplicate)*				C
202	First Draft of Mockingbird Agreement (WilliamsGUD10606.005671-005682)	JOINT		X	C
203	Williams' Shipper Chart – Updated		**X (limited to demonstrative purpose only)**		C
203-A	Williams' Shipper Chart – Updated (version 2)	WMS		X (limited to demonstrative purpose only)	N
204	Deposition Designations – CNOOC's Corporate Representative – July 2020	JOINT		X	N
204-A	Deposition Designations – CNOOC's Corporate Representative – July 2020, CEU Designations highlighted in Yellow and WMS in Green	JOINT		X	N

[1] Hearing Transcript pages 19, 479-506, 636-645, 1095-1158, 1190-1200, and 1228-1232.

[2] Hearing Transcript pages 19, 394-397, 402-425, 442-461, 479-506, 578, 636-645, 662-677, 1095-1158, 1190-1200, and 1228-1232.

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
205	Railroad Commission Eagle Ford Production Data– 2013, 2016, 2017, and 2018	JOINT		X	N
206	Jim Cantwell Supplement to Pre-Filed Testimony – Sept. 2, 2020	WMS	X		N
207	Correspondence from CNOOC's Counsel – 8/27/20		X		N
208	Biegler Prefiled Direct Testimony Exhibit 1 – Non-Party Amicus Letters Filed in GUD 10606 in January 2012	WMS	X (struck by discovery order dated September 4, 2020)		N
209	Biegler Prefiled Direct Testimony Exhibit 2 – Eagle Ford Gas Gathering System Volumes for Nov. 2016 to Jan. 2018	JOINT		X	C
210	Webb Prefiled Direct Testimony Exhibit 1 – CV and Testimony Experience of Dr. Michael J. Webb	JOINT		X	N
211	Enterprise Products Partners Announces Acquisition of Eagle Ford Midstream Assets from Pioneer Natural Resources and new 20-year Contract	JOINT		X	N
212	Steven Mufson, *Debt-Plagued Chesapeake Energy to sell $6.9 billion of its holdings,* WASHINGTON POST (September 12, 2012); *Chesapeake Energy Might Delay Asset Sales,* NEW YORK TIMES (May 11, 2012); Christopher Helman, *Chesapeake Energy's New Plan: Desperate Measures for Desperate Times,* FORBES (February 13, 2012, 12:00 pm); *CEU Prefiled Master Exhibit 6* **Hearing on the Merits 2019 Ex. No. 46**	CEU	X	X (limited to demonstrative purposes only)	N
213	Excerpts from Oil & Gas Docket No. 01-0308609 Transcript Vol. 1, May 23, 2018 (OOGC 025747-025752; 025805-025838; 025863-025869; 026098) **Hearing on the Merits 2019 Ex. No. 70**		X		N
214	Excerpts from Oil & Gas Docket No. 01-0308609 Transcript Vol. 2, May 24, 2018 (OOGC 026099-026100; 026150-026151; 026199-026227; 026227-026248; 026306) **Hearing on the Merits 2019 Ex. No. 71**		X		N
215	Oil & Gas Docket No. 01-0308609 PHC Transcript, September 5, 2018 (OOGC 026369; 026397-026419; 026424) **Hearing on the Merits 2019 Ex. No. 73**		X		N
216	October 2012 ACMP Investor Presentation – Access Midstream Partners	CEU	X		N

Exhibit No.	Description	Offered By:	Objection	Admitted	Confidential Status
	(OOGC 004473-004505) **Hearing on the Merits 2019 Ex. No. 74**				
217	October 2014 ACMP Investor Presentation – Access Midstream Partners (OOGC 004506-004540) **Hearing on the Merits 2019 Ex. No. 75**	CEU	X		N
218	Access Midstream Partners Investor Presentation - July 2013 (OOGC 021566-021601) **Hearing on the Merits 2019 Ex. No. 76**	CEU	X		C
219	News Releases of Chesapeake Midstream Partners and Access Midstream Partners from July 21, 2010 to December 22, 2012; Exhibit 358 (OOGC 019523-019544) **Hearing on the Merits 2019 Ex. No. 77**		X		C
220	Email thread dated July 6, 2012 from Lemmerman to Sayall et al. FW: Term Sheets; Exhibit 201 (OOGC 019264-019268) **Hearing on the Merits 2019 Ex. No. 78**		X		C
221	Email thread dated June 25, 2012 from Johnson to Lemmerman et al. Re: Term Sheets (OOGC 019291-019306) **Hearing on the Merits 2019 Ex. No. 79**	CEU	X	X (admitted subject to limitations appearing in the record)	C (perm. sealed)
222	Email thread dated August 7, 2012 from Stice to Lemmerman Re: Midstream Process Update; Mike Stice's response to CMD Equity Sale discussion (OOGC 019320-019324) **Hearing on the Merits 2019 Ex. No. 81**		X		C
223	Email dated June 7, 2012 from Johnson to Lemmerman Re; CMD Term Sheet Comments (OOGC 019471) **Hearing on the Merits 2019 Ex. No. 83**		X		C
224	Chesapeake Gas Production and Decline Curves **Hearing on the Merits 2019 Ex. No. 109**		X		N
225	Williams September 9, 2020 Earnings Call	CEU	X		N
226	CEU Opening Statement slide deck	CEU		X (limited to demonstrative purposes only)	N (select portions perm. sealed)
227	Williams Opening Statement slide deck	WMS		X (limited to demonstrative purposes only)	N

Supplemental PFD
<u>Attachment 3</u>

Revised Proposed Final Order

BEFORE THE
RAILROAD COMMISSION OF TEXAS

FORMAL COMPLAINT OF CNOOC	**§**	
ENERGY USA, LLC, AGAINST	**§**	**GUD NO. 10606**
WILLIAMS MLP OPERATING, LLC,	**§**	**HEARINGS DIVISION**
AND MOCKINGBIRD MIDSTREAM	**§**	
GAS SERVICES, LLC	**§**	

REVISED PROPOSED FINAL ORDER

Notice of Open Meeting to consider this Order was duly posted with the Secretary of State within the time period provided by law pursuant to Chapter 551 (Open Meetings) of the Texas Government Code. The Railroad Commission of Texas ("Commission") adopts the following findings of fact and conclusions of law and orders as follows:

FINDINGS OF FACT

General

1. This docket involves two separate complaints against Williams MLP Operating, LLC, and Mockingbird Midstream Gas Services, LLC (together, "Respondents" or "Williams"): (1) the complaint of CNOOC Energy USA, LLC ("CEU"), initially filed on February 22, 2017, and most recently amended on March 1, 2019; and (2) the complaint of EXCO Operating Company, LP ("EXCO"), initially filed on October 4, 2018, and most recently amended on January 14, 2019.

2. Only the discrimination claims are at issue in this docket.

3. In 2012, Williams purchased a gas-gathering system in the Eagle Ford, consisting of approximately 1,000 miles of gathering pipelines and spanning seven counties (the "Mockingbird System"). At the same time, Williams entered into a 20-year gas gathering agreement with various Chesapeake corporate entities (collectively, "Chesapeake"), whereby Chesapeake serves as the anchor shipper and dedicates all its gas from approximately 2,000 wells to the Mockingbird System.

4. CEU and EXCO are not signatories to Williams's 2012 anchor shipper contract with Chesapeake (the "Mockingbird Agreement") and are not direct customers of Williams.

5. CEU and EXCO had contracts only with Chesapeake, to market their gas, and Chesapeake was Williams's customer. The rates Chesapeake pays to Williams under the Mockingbird Agreement, then, are passed on to Chesapeake's own customers pursuant to Chesapeake's own, separate marketing contracts.

Parties

6. Complainant CEU is a non-operating working interest owner in wells located in Atascosa, Dimmit, Frio, La Salle, McMullen, Webb, and Zavala Counties, Texas. The majority of CEU's gas is produced from wells operated by Chesapeake. CEU owns an undivided 33-percent interest of the gas volumes in these wells. CEU has a marketing arrangement with Chesapeake, but CEU may elect to take all its gas in kind.

7. Complainant EXCO is an operator of approximately 130 wells that it bought from Chesapeake in 2013.

8. Respondent Williams is a gas utility pipeline as defined in Section 121.001 (Definition of Gas Utility) of the Texas Utilities Code. Williams provides gathering, compression, and treating service for the gas it gathers on the Mockingbird System. Williams is the full owner of the Mockingbird System, purchasing a 50-percent interest in 2012 and the remaining half in 2014.

9. Intervenors Jamestown Resources, LLC, Larchmont Resources, LLC, and Pelican Energy, LLC (collectively, "Intervenors"), are working interest owners of gas in the Eagle Ford that is gathered and shipped on the Mockingbird System. Like CEU, these companies each have marketing arrangements with Chesapeake and may elect to take their gas in kind.

Procedural Background

10. On February 22, 2017, CEU filed its initial complaint.

11. On March 14, 2017, Williams appeared in the case, timely answering the complaint and moving for dismissal.

12. On April 17, 2018, this motion to dismiss was denied.

13. On April 23, 2018, Williams appealed this interim ruling; no action was taken by the Commissioners and consequently the appeal was deemed denied by operation of law.

14. On June 29, 2018, CEU filed an amended complaint.

15. On August 2, 2018, a motion by Williams was approved to "bifurcate" the docket so that a determination on discrimination could be made prior to a rate proceeding. CEU's Rate Claim was not severed out into a separate docket, however.

16. On October 4, 2018, EXCO filed a consolidated motion to intervene and complaint.

17. On December 14, 2018, Intervenors filed a consolidated motion to intervene and complaint.

18. At a prehearing conference held on December 20, 2018, the presiding Administrative Law Judge ("ALJ") granted EXCO's motion to intervene.

19. On January 14, 2019, EXCO timely amended its complaint.

20. On February 19, 2019, the ALJ granted Intervenors' motion to intervene.

21. On March 1, 2019, Intervenors timely amended their complaint, bringing both a Discrimination Claim and a Rate Claim—similar to CEU and EXCO.

22. On March 1, 2019, CEU filed a second amended complaint.

23. From January 18 to March 11, 2019, Williams separately moved to dismiss each of the complaints, as amended.

24. On May 2, 2019, the ALJ issued a single ruling: (1) denying the motion to dismiss CEU's claims; (2) denying the motion to dismiss EXCO's claims; and (3) granting the motion to dismiss Intervenors' Discrimination Claim, but denying the motion to dismiss their Rate Claim.

25. On May 7, 2019, Williams and Intervenors separately and timely appealed this interim ruling; no action was taken by the Commissioners and consequently both appeals were deemed denied by operation of law.

26. On May 24, 2019, the Notice of Hearing was issued, setting the hearing on the merits to commence on June 18, 2019 ("Notice of Hearing").

27. On May 31, 2019, the Commission published the Notice of Hearing in *Gas Utilities Information Bulletin No. 1108.*

28. From June 14-18, 2019, the ALJ issued several written evidentiary rulings on the admissibility of certain pre-filed witness testimonies offered by CEU, EXCO, Williams, and Intervenors.

29. On June 17, 2019, prior to the start of the merits hearing and after notice to the parties, the presiding ALJ severed the Rate Claims of CEU, EXCO, and Intervenors into a separate docket, GUD No. 10856.

30. The hearing on the merits initially was held from June 18-20, 2019 (the "Main Hearing"). A combined list of the parties' exhibits admitted into the evidentiary record then is attached to the Proposal for Decision (the "Original PFD").

31. On August 20, 2019, the ALJ made legal findings that certain exhibits and portions of the hearing transcript contain highly sensitive, confidential information under Chapter 552 (Public Information) of the Texas Government Code and ordered that these materials shall remain sealed permanently in Commission records.

32. On August 20, 2019, the evidentiary record closed.

33. On January 9, 2020, the Original PFD was issued.

34. The findings and recommendations contained in the Original PFD were presented to the Commission at successive open meetings held on February 11, 2020, and on March 4, 2020.

35. At the March 4, 2020 open meeting, the Commission issued an Order for Limited Purpose Remand, pursuant to Commission Rule § 1.123(a)(3) (the "Remand Order").

36. On June 30, 2020, Complainant EXCO was dismissed from this docket on its own motion.

37. On August 12, 2020, the Remand Notice of Hearing was issued, setting the merits hearing to re-open on September 9, 2020 (the "Remand Notice of Hearing").

38. On August 14, 2020, the Commission published the Remand Notice of Hearing in *Gas Utilities Bulletin No. 1137*.

39. Consistent with the Remand Order, the merits hearing was re-opened from September 9-11, 2020, to give the parties an opportunity to present evidence and argument on the requested similarly-situated comparisons (the "Remand Hearing"). A combined list of the parties' supplemental exhibits admitted into the evidentiary record during the Remand Hearing is attached to the First Supplemental Proposal for Decision ("Supplemental PFD").

40. On March 31, 2021, the ALJ sealed portions of the remand record, finding that certain new exhibits and portions of the remand hearing transcript contain highly-sensitive, confidential information under Chapter 552 (Public Information) of the Texas Government Code.

41. On March 31, 2021, the ALJ again closed the evidentiary record.

42. On June 29, 2021, the Supplemental PFD was issued.

43. There were no attempts by Chesapeake to intervene or participate in this proceeding.

The Mockingbird System

44. The Mockingbird System was built for the purpose of gathering and treating gas so that it could move to markets for beneficial uses.

45. The system consists of approximately 1,000 miles of gathering pipelines, spanning seven counties: Atascosa, Dimmit, Frio, La Salle, McMullen, Webb, and Zavala.

46. The system consists of four separate systems: the Deep Oil System ("Deep"), the Shallow Oil System ("Shallow"), the Rich Gas System ("Rich"), and the Treating System ("Treating"). Each of these systems is designed to serve the characteristics of the gas delivered by producers.

Relevant Background

47. In 2010, CEU purchased from Chesapeake an undivided 33-percent interest in oil and gas leases and other assets in the Eagle Ford, encompassing approximately 600,000 acres, for approximately $2.1 billion.

48. In 2010, CEU and Chesapeake entered into a Development Agreement, whereby Chesapeake marketed CEU's production.

49. Prior to 2012, CEU's gas was gathered on the Mockingbird System under a fixed-fee gas gathering agreement between Chesapeake Energy Marketing, Inc. ("CEMI"), on the producer's side, and the then-owner of the system, Chesapeake Midstream Operating ("CMO"), and Mockingbird Midstream Gas Services, LLC ("Mockingbird"), both on the gatherer's side (the "CMO Agreement").

50. In 2012, Chesapeake Energy Corporation sold its subsidiary, CMO, including the gas-gathering system, to Access Midstream Partners for $2.16 billion.

51. In 2012, Chesapeake, Access Midstream Partners, Mockingbird, and Williams together negotiated and drafted the Mockingbird Agreement, which replaced the CMO Agreement.

52. In 2012, Williams acquired 50-percent ownership in Access Midstream Partners.

53. In 2013, EXCO purchased the leasehold and well interests of 130 of Chesapeake's wells.

54. From 2013 through 2017, Chesapeake purchased the casinghead gas produced by these EXCO wells and Chesapeake then nominated the gas to the Mockingbird System via its Mockingbird Agreement with Williams.

55. In 2014, Williams acquired the remaining half of Access Midstream Partners, and thereafter fully owned the Mockingbird System.

56. In 2014, Shippers 14, 15, and 27 became Williams customers.[1]

[1] A significant portion of the evidentiary record contains highly sensitive, confidential information related to private customer information, contracts, and business negotiations. These exhibits were sealed by the ALJ following post-Hearing briefing by the parties. All the comparison customers discussed herein are referred to only by an identifying number, rather than their actual corporate name.

57. In late 2015, CEU contacted Williams by email about the "options and possibility" of a gathering contract with Williams.

58. In early 2016, CEU requested, by telephone, gathering rates and terms of service from Williams. In response, a representative from Williams said that Williams would not offer CEU any rate that was different than what it was charging Chesapeake under the Mockingbird Agreement.

59. In 2016, Shipper 33 became a Williams customer.

60. On June 6, 2017, CEU emailed Williams asking to "talk to someone" about gathering rates.

61. On July 13, 2017, CEU again emailed Williams about rate options.

62. On August 24, 2017, Williams gave CEU a written offer, which referenced the Mockingbird Agreement and offered a "blended" version of Chesapeake's rate.

63. On October 5, 2017, and as later clarified on October 16, 2017, CEU sent a written request to Williams, requesting rate quotes.

64. Prior to October 24, 2017, EXCO requested rates from Williams.

65. On October 24, 2017, Williams gave EXCO a written offer, which referenced the Mockingbird Agreement and offered a rate consistent with Chesapeake's rate.

66. CEU never accepted Williams's offer of service at the rate quoted.

67. EXCO never accepted Williams's offer of service at the rate quoted.

The Mockingbird Agreement

68. Chesapeake and Mockingbird are signatories to the Mockingbird Agreement.

69. Williams participated in negotiation and drafting of the Mockingbird Agreement.

70. CEU and EXCO are not signatories to the Mockingbird Agreement.

71. Under the Mockingbird Agreement, Chesapeake dedicates all the gas from its wells on the covered acreage, including gas owned by CEU and other working-interest owners.

72. CEU has the right to take its gas in kind and enter into its own transportation and marketing arrangements.

73. The Mockingbird Agreement uses a cost-of-service model ("COS Model"), which annually redetermines gathering rates to give Williams a targeted 18-percent rate of return.

74. In large part because the building of the Mockingbird System was predicated on gas volumes and revenues from the dedicated Chesapeake-operated wells, the Mockingbird Agreement was structured to help ensure that all such gas volumes—volumes for which the system was built—would continue to flow on the system.

75. The structure of the Mockingbird Agreement was an important part of the balance struck that allowed the system to be built in light of the large scope of Chesapeake's leases and the high upfront capital costs that Williams bore totaling over $1.6 billion.

76. The rates charged to Chesapeake under the Mockingbird Agreement are designed both to recoup to Williams these prior capital investment costs, as well as Williams's costs to provide actual gathering service to Chesapeake.

77. A key feature of the Mockingbird Agreement is Chesapeake's right to determine how the rates Williams charges other customers are used for revenue input purposes under the Mockingbird Agreement to calculate Chesapeake's annual revenue obligation to Williams.

78. Under the Mockingbird Agreement's terms, the "third party gas" approval provisions apply to rates that Williams charges to CEU and EXCO.

79. The "third party gas" approval provisions provide Williams an economic incentive to offer rates to CEU and EXCO that are not lower than the rates Chesapeake pays.

80. The "third party gas" approval provisions do not allow Chesapeake to control the service or rate amounts Williams offers to other customers.

81. The "third party gas" approval provisions, located in attached "Cost of Service Calculation Methodology" exhibits rather than in the main contract, function as revenue inputs used to calculate Chesapeake's annual revenue obligations to Williams.

82. The "third party gas" approval provisions do not prohibit Williams from offering different rates to any other customers, nor do they require Williams to treat any other customers the same as Chesapeake.

83. The "third party gas" approval provisions do not prevent Williams from complying with its obligations as a regulated pipeline.

84. The "third party gas" approval provisions do not give advantage to Chesapeake and do not unreasonably disadvantage or prejudice CEU or EXCO.

Charges and Quality of Service Offered by Williams

Prior Capital Investment Costs Charged to CEU and EXCO

85. Anchor shipper and then-customer Chesapeake caused Williams to incur capital expenses exceeding $1.6 billion relating to the acquisition and buildout of the Mockingbird System, from 2012 to 2017, to serve Chesapeake's contractual gathering needs (the "Chesapeake Expenses").

86. Williams was performing under its Mockingbird Agreement with Chesapeake when Williams incurred the Chesapeake Expenses.

87. The rate Williams charges its anchor shipper, Chesapeake, pursuant to the Mockingbird Agreement includes both: (1) repayment of the $1.6 billion Williams spent on the system, and (2) actual gathering service.

88. By only offering CEU and EXCO the same rate—or constructively the same rate—that Chesapeake pays, Williams required CEU and EXCO to pay for both things, as well.

89. Williams estimates that roughly 80 percent of the rate it charges to its anchor shipper, Chesapeake, is to pay itself back the $1.6 billion Williams spent on the Mockingbird System, plus a return on that investment.

90. From late 2015 through 2017, CEU and EXCO made attempts to obtain gathering service and rates from Williams, and Williams responded by offering the same—or constructively the same—rates and service of Chesapeake.

91. At this same time: Mockingbird Agreement was still in effect; the $1.6 billion Williams spent on the Mockingbird System was not yet paid back; and Williams was not requiring repayment from certain other customers.

92. Financing the Mockingbird System's purchase and buildout was a purely economic action, and so the relevant "similarly-situated" conditions associated with repayment to Williams of these amounts likewise must be commercial, rather than geographical or geological.

93. For these charges, shippers on the Mockingbird System in 2017 for whom Williams did not require repayment are similarly situated to CEU and EXCO, including, at minimum: Shippers 14, 15, 27, and 33.

94. Uncontroverted evidence supports that the rates Williams charged these shippers covered only their own gathering costs, with no added charge for repaying the previous capital expenses caused by Chesapeake.

95. There are no competitive alternatives for repaying Williams what it spent on the Mockingbird System.

96. All shippers using the Mockingbird System benefited from the respective capital investment and operational costs that they, while customers, caused Williams to incur to furnish them gathering service.

97. For similarly-situated Shippers 14, 15, 27, and 33 who became new customers from 2014 to 2016, Williams did not require them to pay back any amounts Williams previously spent on the Mockingbird System.

98. The same infrastructure that existed from 2014 to 2016 for Shippers 14, 15, 27, and 33 also existed later in 2017 when CEU and EXCO sought to become new customers.

99. When CEU and EXCO approached Williams for service, there were no new costs required of Williams to connect them to the system.

100. Williams included in the "connection costs" for CEU and EXCO the $1.6 billion Williams spent on the system, even though by 2017 CEU and EXCO already were connected to the system and therefore Williams had nothing new to build.

101. CEU and EXCO were not customers of Williams in 2014, and so the reasons for Williams's treatment of Shippers 14 and 15 then, vis-à-vis other customers at that time, are not relevant now.

102. In 2017 when CEU and EXCO approached Williams as potential new customers, Shippers 14 and 15 already had signed long-term gathering contracts with Williams and therefore were not at risk of leaving the system.

103. The approximate portion of the Mockingbird Agreement rate in 2017 for actual gathering service, with prior capital expenditures removed, was not higher than the gathering rate Shippers 14 and 15 paid.

104. Williams did not keep Shippers 14 and 15 on the system by reducing their gathering rate, but instead did so by charging them only each's own customer gathering costs, without any added charge for prior infrastructure expenses caused by Chesapeake.

105. CEU and EXCO were not customers when the Chesapeake Expenses were incurred by Williams and did not cause them.

106. The Chesapeake Expenses were not service-related for CEU and EXCO.

107. Williams requiring repayment of the Chesapeake Expenses from CEU and EXCO, as a condition for service, was an overcharge for CEU and EXCO.

108. Shippers 14, 15, 27, and 33 were not customers when the significant majority of Chesapeake Expenses were incurred by Williams, and they did not cause them.

109. The Chesapeake Expenses were not service-related for Shippers 14, 15, 27, and 33.

110. Williams not requiring repayment of the Chesapeake Expenses from Shippers 14, 15, 27, and 33 was not an undercharge for those shippers.

111. Shippers 14, 15, 27, and 33 each received contemporaneous service when CEU and EXCO sought new service in 2017.

112. Service for Shippers 14, 15, 27, and 33 was similar and under substantially the same physical, regulatory, and economic conditions of service as sought by CEU and EXCO: gathering service only—with responsibility to pay each's own gathering costs only—with no added charges for repayment of expenses incurred by Williams beforehand to serve Chesapeake.

113. The Chesapeake Expenses overcharge for CEU and EXCO similarly would have been an unlawful overcharge for Shippers 14, 15, 27, and 33, and for the same reason.

114. Williams lacked a substantial and reasonable basis to distinguish CEU and EXCO from comparison Shippers 14, 15, 27, and 33 for purposes of requiring repaying of Chesapeake's prior contract-driven capital expenses.

115. There is no functional or lawful basis to distinguish CEU and EXCO from comparison Shippers 14, 15, 27, and 33 along service-related lines for non-service related charges.

116. Traditional "material billing factors" or conditions of service, including those enumerated under Commission Rule § 7.115(32), are not material or probative for informing similar situatedness for charging only CEU and EXCO—but not Shippers 14, 15, 27, and 33—the prior, contract-driven capital expenses caused by Chesapeake from 2012 to 2017, when CEU and EXCO were not customers.

117. From 2012 to 2017, when the Chesapeake Expenses were caused, Chesapeake was a customer for the entirety of this period; CEU and EXCO were not customers for any of it.

118. Shippers 14, 15, and 27 became customers in 2014 and the only service-related expenses each was required to pay was its own; Shipper 33 became a customer in 2016 and the only service-related expenses it was required to pay was its own.

119. When Williams incurred most of the Chesapeake Expenses from 2012 to 2017, CEU and EXCO shipped the same volumes and caused the same customer expenses to Williams as did Shippers 14, 15, 27, and 33: none.

120. When Williams incurred most of the Chesapeake Expenses from 2012 to 2017, the service or "billing factors" during that time period for CEU and EXCO were similar and substantially the same as compared to Shippers 14, 15, 27, and 33.

121. Williams had a reasonable opportunity to recover the Chesapeake Expenses, along with a reasonable return, from its gathering contract with Chesapeake.

122. Requiring repayment of the Chesapeake Expenses from CEU and EXCO—but not from Shippers 14, 15, 27, and 33—unreasonably disadvantaged and prejudiced both CEU and EXCO.

123. This material difference in repayment amounts applies both as a numerical difference and as a condition of service.

124. The Chesapeake Expenses incurred by Williams, from 2012 to 2017, were non-service related for CEU, EXCO, and comparison Shippers 14, 15, 27, and 33 alike, and therefore demanding their repayment only from CEU and EXCO departed from the standard of impartial treatment expected of public utilities.

Rates Charged to CEU and EXCO for Their Own Service

125. With the money Williams spent on the system removed from Chesapeake's anchor rate under the Mockingbird Agreement, the remaining 20 percent approximates the rate component for actual gathering service.

126. The numerical differences between the 20-percent Mockingbird Agreement rate and the rate paid by Shippers 14, 15, 27, and 33 are not material.

127. In the Deep system the 20-percent Mockingbird Agreement rate was less than the rate paid by similarly-situated customers.

128. For the approximate portion of the Mockingbird Agreement rate charged to CEU and EXCO for actual gas-gathering service, there was no material difference in treatment.

129. The evidence does support that Williams used different methodologies for the rates of Shippers 14, 15, 27, and 33, compared to CEU and EXCO, but CEU and EXCO did not establish that they were unreasonably disadvantaged or prejudiced by this.

Quality of Service

130. CEU and EXCO both made general requests to Williams for gathering service, and Williams responded by offering them rates for firm "Priority 1" quality service—the same type that Chesapeake received and several other shippers on the system received.

131. At this same time, several other shippers in both the Shallow and Deep systems were receiving Priority 2 or Priority 3 service.

132. Williams never offered CEU or EXCO either Priority 2 or Priority 3 service.

133. CEU and EXCO did not establish that they made clear and specific requests asking for Priority 2 or Priority 3 service.

134. CEU and EXCO did not establish that they were treated unequally or that they were unreasonably disadvantaged.

135. CEU and EXCO offered insufficient evidence that they were unreasonably disadvantaged or prejudiced by Williams not offering them Priority 2 or Priority 3 service.

Processing Requests for Service from CEU and EXCO

136. When determining what rate to charge other customers requesting service, Williams typically considers all of the relevant market conditions, and the ultimate rate chosen is the result of negotiations over a number of issues, including the nature and conditions of the market, what party bears the cost of connection, the term of the agreement, the location of the wells, dedication, and liquids handling.

137. When CEU and EXCO requested service, however, Williams did not go through the process described above; rather, Williams responded only with rates consistent with the Mockingbird Agreement, or a constructively-equivalent variation.

138. Williams treated CEU and EXCO like debtors and actual Mockingbird Agreement signatories, processing their requests not as new customer requests for service, but instead as requests to be released from duties owed to Williams under the Mockingbird Agreement.

139. For processing CEU's and EXCO's requests for service, shippers on the Mockingbird System who are not signatories to the Mockingbird Agreement, including Shippers 14, 15, 27, and 33, are similarly situated to CEU and EXCO.

140. Williams processed CEU's and EXCO's requests for new gathering service as requests to be released from obligations owed to Williams under the Mockingbird Agreement, and Williams's offer letters functionally served to deny releasing them.

141. CEU and EXCO are not parties to the Mockingbird Agreement and owe Williams nothing under its terms.

142. The weight of reliable evidence supports that Williams processed CEU's and EXCO's requests for service in a manner to attempt to mitigate revenue losses virtually guaranteed under the Mockingbird Agreement's "third party gas" revenue provisions, which substantially reduce Chesapeake's revenue requirement owed to Williams if Williams offers CEU and EXCO a lower rate.

143. CEU and EXCO each proved that Williams processing their requests for service in a different manner than requests from other customers under substantially the same physical, regulatory, and economic conditions.

144. CEU and EXCO each proved that Williams's actions were unreasonable.

CONCLUSIONS OF LAW

General

1. Williams is a gas utility pipeline as defined in Section 121.001 (Definition of Gas Utility) of the Texas Utilities Code.

2. As a gas utility, Williams is subject to the jurisdiction of the Commission all the duties of gas utilities and pipelines, including the duty not to discriminate in service and charges.

3. The Commission has exclusive original jurisdiction over all matters decided in this docket.

Notice and Procedure

4. All required notices were issued and/or provided in accordance with the requirements of Subtitle A (Administrative Procedure and Practice) of the Texas Government Code and applicable Commission rules.

5. This proceeding was conducted in accordance with Subtitle A (Administrative Procedure and Practice) of the Texas Government Code and applicable Commission rules.

6. The Original PFD and Supplemental PFD were issued and served on all parties in accordance with Commission Rule §§ 1.121, 1.101(15), and 1.123.

Burden of Proof

7. Under Commission Rule § 1.23(b) (Burden of Proof), Complainants CEU and EXCO each carried the burden of proving their respective discrimination claims by a preponderance of the evidence.

8. Complainant CEU met its burden of proof in establishing two separate acts of unlawful discrimination by Williams, as demonstrated by the findings of fact herein.

9. Complainant EXCO met its burden of proof in establishing two separate acts of unlawful discrimination by Williams, as demonstrated by the findings of fact herein.

The Mockingbird Agreement

10. The "third party gas" approval provisions contained in the Mockingbird Agreement do not prevent Williams from complying with its obligations as a regulated pipeline.

11. The "third party gas" approval provisions contained in the Mockingbird Agreement do not give unlawful advantage to Chesapeake and do not unreasonably or unlawfully disadvantage or prejudice CEU or EXCO.

Attempted Recovery of Past System Expenses

12. Under Texas law, customers that are furnished gathering service requiring greater capital investment and operational cost to the utility gatherer lawfully may be distinguished from other customers for purposes of proportional recovery of those added expenses through rates. *Ford v. Rio Grande Val. Gas Co.*, 141 Tex. 525, 529 (1943).

13. Capital expenses incurred pursuant to a utility gatherer's contractual duties to provide service to an existing customer are not service-related expenses for non-customers receiving no service during the time period when those expenses were caused.

14. Where a comparison of conditions of service or "material billing factors" is appropriate for determining "similar service" or "similarly-situated" shippers, including under Commission Rule § 7.115(32), the relevant time period for considering values is when the service is provided or expenses caused—not when recovery or billing is attempted, if at a different time.

15. Utility customers are similarly situated as a matter of law with respect to the same unlawful overcharge imposed upon some that similarly, and for the same reason, would be an unlawful overcharge for the others, as well.

Discrimination Against CEU and EXCO

16. Consistent with the findings herein, Williams required repayment from CEU of the $1.6 billion Williams spent on the Mockingbird System, while writing these charges off for other similarly-situated customers, in violation of Section 121.104(a)(2) of the Texas Utilities Code and Subchapter G (Code of Conduct) of the Commission's rules.

17. Consistent with the findings herein, Williams required repayment from EXCO of the $1.6 billion spent by Williams on the Mockingbird System, while writing these charges off for other similarly-situated customers, in violation of Section 121.104(a)(2) of the Texas Utilities Code and Subchapter G (Code of Conduct) of the Commission's rules.

18. Consistent with the findings herein, Williams processed CEU's request for service in a different manner than requests from other similarly-situated customers, in violation of Commission Rule § 7.7001(b)(4).

19. Consistent with the findings herein, Williams processed EXCO's request for service in a different manner than requests from other similarly-situated customers, in violation of Commission Rule § 7.7001(b)(4).

CEU's Remedies

20. A lawful and adequate remedy for the discrimination herein relating to past capital expenses charged to CEU is to require Williams to remove from the rates offered to CEU all amounts associated with repayment of the Chesapeake Expenses, consistent with Williams's treatment of Shippers 14, 15, 27, and 33.

21. A lawful and adequate remedy for the violation herein relating to processing CEU's service request is to require Williams to process requests for service from CEU as a new customer, free from any duties contained in the Mockingbird Agreement or other private contracts, consistent with Williams's treatment of Shippers 14, 15, 27, and 33.

IT IS THEREFORE ORDERED that the findings of fact and conclusions of law herein are adopted, consistent with the Original PFD and Supplemental PFD, and that CEU's discrimination claims against Williams are **PARTIALLY SUSTAINED** consistent with this Order.

IT IS FURTHER ORDERED that Williams shall comply with the remedies herein not later than seven (7) days after the date this Order becomes final. Compliance herewith does not preclude or prevent Williams from charging rates reflecting new invested capital or operational costs that CEU separately may cause, while a customer, or to earn a reasonable return from CEU otherwise, consistent with Texas law.

IT IS FURTHER ORDERED that copies of this Order shall be referred to the Commission's Enforcement Division and to the Office of the Attorney General for consideration of all associated administrative penalties that may be proper under Texas law.

IT IS FURTHER ORDERED that all other motions, requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not granted or approved in this Order, are hereby **DENIED**.

IT IS FURTHER ORDERED this Order will not be final and effective until 25 days after the Commission's Order is signed. If a timely motion for rehearing is filed by any party at interest, this Order shall not become final and effective until such motion is overruled, or if such motion is granted, this order shall be subject to further action by the Commission. The time allotted for Commission action on a motion for rehearing in this docket prior to its being overruled by operation of law is hereby extended until 100 days from the date this Order is signed.

SIGNED on August ______, 2021.

RAILROAD COMMISSION OF TEXAS

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CHAIRMAN CHRISTI CRADDICK

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COMMISSIONER WAYNE CHRISTIAN

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COMMISSIONER JIM WRIGHT

ATTEST:

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SECRETARY