UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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Petition for Initiation of Show Cause Proceedings	)	**RP18-415-000**
	)	

ANSWER OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA OPPOSING PETITION FOR INITIATION OF SHOW CAUSE PROCEEDINGS

The Interstate Natural Gas Association of America ("INGAA"), pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure[1] and the Commission's February 7, 2018 notice, submits this Answer opposing the Petition for Initiation of Show Cause Proceedings Directed to Interstate Natural Gas Pipelines and Storage Companies submitted in the captioned docket ("Petition").[2]

INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry. INGAA's 27 members represent the majority of interstate natural gas transmission pipeline companies in the United States. Its United States members are regulated by the Commission pursuant to the Natural Gas Act, 15 U.S.C. §§ 717-717w. INGAA's members, which operate approximately 200,000 miles of pipelines and greater than 10,000 storage wells, provide an indispensable link between natural gas producers and consumers.

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[1] 18 C.F.R. § 385.213 (2017).

[2] The Petition was submitted by the following trade associations: American Forest and Paper Association, American Public Gas Association, Independent Petroleum Association of America, Natural Gas Supply Association, and Process Gas Consumers Group. Petitioners also include the following companies: Aera Energy LLC, Anadarko Energy Services Co., Chevron U.S.A. Inc., ConocoPhillips Co., Hess Corp., Petrohawk Energy Corp., WPX Energy Marketing, LLC, and XTO Energy Inc. (collectively, "Petitioners").

OVERVIEW

The Commission should reject the Petitioners' request to circumvent the requirements of Section 5 of the Natural Gas Act ("NGA"), and address the impacts of tax reform on pipeline rates in a manner consistent with its established practice and legal precedent for action pursuant to NGA Section 5. INGAA supports the NGA's objective of ensuring just and reasonable natural gas transportation rates. To ensure the justness and reasonableness of rates, the NGA requires the Commission to follow specific procedural steps and consider the numerous factors that affect pipelines' rates. NGA Section 5 places the burden of justifying a change to an existing rate on the proponent of the change, a requirement that the Petitioners want the Commission to ignore. The Petition requests the Commission to impermissibly shift the burden established by Section 5 and to engage in piecemeal rate revisions, which is inconsistent with the requirements of NGA Section 5.

The proposed "one-size-fits-all" approach suggested by Petitioners is inconsistent with the applicable statutory framework and inappropriate for interstate natural gas pipelines. The Commission's policies have fostered intense competition in the interstate natural gas transportation market, which has resulted in many pipelines contracting at negotiated and discounted rates that frequently do not recover the pipelines' full costs. Many pipelines and customers also have reached rate settlements designed to provide rate certainty for a defined moratorium period. The Commission should avoid generic actions that isolate individual cost components without accounting for individual pipelines' diverse business and financial circumstances, the comprehensive review of all cost and revenue components, and existing rate case moratoria.

Petitioners' proposed one-size-fits-all, industry-wide, approach also ignores that any modifications to most negotiated and discounted rate agreements would need to satisfy the heightened *Mobile-Sierra* standard of review,[3] under which the Commission must presume that freely-negotiated contracts are just and reasonable, and may only modify a contract that "seriously harms the public interest."[4] Blanket modification of pipeline rates would undermine the stability of rate case settlements, and negotiated rate agreements, in contravention of Commission policy of avoiding disruptions to freely-negotiated contracts. One-size-fits-all action to make a tax adjustment would also violate the fundamental prohibition against piecemeal ratemaking.

The situation facing the Commission today is not unique. When addressing similar issues in 1986, the Commission did not take generic mandatory action, but adhered to procedures consistent with its statutory obligations. The Commission should likewise avoid taking action in this proceeding that would violate the requirements of NGA Section 5.

Using existing sources of information, the Commission has initiated 16 NGA Section 5 rate cases in recent years. This process requires the Commission to address all components of a pipeline's rates, including cost increases, throughput decreases, changes in a pipeline's contract portfolio from either a contractual volume or contractual rate perspective, and other factors that impact a pipeline's rates and assure the rates remain just and reasonable. The Commission initiates such individual Section 5 proceedings only after conducting a thorough review of a pipeline's reported cost and revenue data and other

[3] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*").
[4] *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1*, 554 U.S. 527 (2008).

financial information. This same process remains available to the Commission and does not require that the Commission disregard NGA Section 5 in the manner suggested by Petitioners. Such an approach would recognize the individual circumstances of each pipeline. At the same time, such an approach would avoid the potential of straining the Commission's resources to the detriment of its other important policy objectives.

ANSWER

I. The Commission Must Address Tax Reform in a Manner Consistent with the Requirements of Section 5 of the NGA.

The Commission should reject Petitioners' request for expedited action, which would short-circuit the well-established and congressionally-mandated procedures required by Section 5. Despite acknowledging that Section 5 applies,[5] the Petition asks FERC to ignore the procedural framework required by Section 5 that squarely places the burden of proof on the proponent of a change to a previously-approved rate. The Commission has been repeatedly reversed by reviewing courts in the past when it has failed to closely follow the requirements of NGA Section 5. Under Section 5, the Commission must consider all components of a pipeline's cost of service and not limit the scope of its inquiry to a single component (such as an income tax allowance) without considering other factors that may also affect the cost of service.

A. The Commission May Not Circumvent the Statutory Requirements of Section 5 of the NGA.

Petitioners ask the Commission to disregard the statutory requirements of NGA Section 5 by "[r]equir[ing] an immediate rate reduction," without holding a full hearing.[6] Section 5 allows the Commission to adjust rates it finds unjust and unreasonable only "after

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[5] Petition at 14.
[6] *Id*. at 4.

a hearing."[7] The United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") has made clear that under Section 5, even an interim order can "only issue after full hearing and must include a statement of reasons based upon findings of fact which are supported by substantial evidence in the record. No emergency can excuse these procedural requirements."[8] What Petitioners characterize as "[l]ong, drawn out administrative proceedings" are, in fact, statutory safeguards mandated by Congress as a prerequisite to changing a previously-approved rate.[9]

To support their request for "immediate rate reduction[s]," Petitioners misapply the Commission's recent actions requiring the recalculation of rates of new proposed pipelines, in the context of ongoing NGA Section 7(c) certificate proceedings where those proposed initial rates had not yet been approved.[10] Such recent actions in ongoing NGA Section 7(c) proceedings are not applicable to filed just and reasonable rates that have been approved by the Commission and which may only be changed by the Commission pursuant to NGA Section 5. In a Section 7(c) certificate proceeding, "the applicant pipeline has the burden of providing support for and demonstrating that its proposal, including its estimated costs and proposed initial rates, are required by the present or future public convenience and necessity."[11] Under NGA Section 5, the Commission or complainant must carry the dual burden of proof of supporting, with substantial evidence, (i) that the pipeline's approved rates are unjust and unreasonable, and (ii) that the Commission's or complainant's

[7] 15 U.S.C. § 717d(a) (2012). *See FPC v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 583 (1942) (under Section 5, "[t]he first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings.")
[8] *American Smelting & Refining Co. v. FPC*, 494 F.2d 925, 933 (D.C. Cir. 1974).
[9] Petition at 5.
[10] *Id*. at 4 (citing *Transcon. Gas Pipe Line Corp.*, 162 FERC ¶ 61,050, at P 17 (2018)).
[11] *Tenn. Gas Pipeline Co., L.L.C.*, 147 FERC ¶ 61,196, P 35 (2014).

proposed changes to the rates are just and reasonable.[12] Changing rates that have not yet been approved in a NGA Section 7 proceeding does not serve as a model for changing a pipeline's previously-approved rates, which may only be changed via the procedures required under Section 5. The Petition calls for FERC to ignore Section 5's requirements and must be rejected.

B. Petitioners Improperly Seek to Shift NGA Section 5's Burden of Proof onto the Pipelines.

The Petitioners ask the Commission to initiate show cause proceedings that require each interstate natural gas pipeline and storage company to submit cost and revenue studies "demonstrating that [their] *existing* rates continue to be just and reasonable[.]"[13] The Petition also asks that FERC require the pipelines to "provide evidence" of any settlements or contracts that the pipeline contends are exempt from a Commission-ordered rate adjustment.[14] These requests ask the Commission to improperly shift the burden of proof on the pipelines when Section 5 places the burden of proof squarely on the proponent of a change to an existing rate.

NGA Section 5 requires that before an investigation is initiated, the movant must first satisfy its burden of going forward to show that a pipeline's rates may be unjust and unreasonable.[15] This requires the movant to provide an adequate evidentiary basis, using

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[12] 15 U.S.C. § 717d(a); *see Am. Gas Ass'n v. FERC*, 428 F.3d 255, 263 (D.C. Cir. 2005) (explaining that under NGA Section 5 the "Commission must demonstrate by substantial evidence that the existing rate or tariff has become unjust or unreasonable, and that the proposed rate is both just and reasonable"); *"Complex" Consol. Edison Co. of N.Y., Inc. v. FERC*, 165 F.3d 992, 1001 (D.C. Cir. 1999) ("Under Section 5, the Commission must first establish that the . . . existing rate is unjust and unreasonable. It is only after this antecedent showing has been made that the Commission properly can illustrate that its alternate rate proposal is both just and reasonable."); *see also W. Res., Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

[13] Petition at 3 (emphasis added).

[14] *Id*. at 4.

[15] *See Ameren Servs. Co. N. Ind. Pub. Serv. Co.*, 121 FERC ¶ 61,205, P 34 n.26 (2007) ("[c]omplainants seeking a hearing have the burden to show that a hearing is warranted."), *order on reh'g*, 125 FERC ¶

the pipeline's Form 2 data and/or data from its last rate case, to provide evidence that a pipeline's rates have become unjust and unreasonable. The Commission has held that merely showing that one rate component has changed fails to satisfy the burden of production; rather, the movant must "tak[e] into account changes in all cost components."[16] To carry their burden of showing that any pipeline's effective rates may be unjust and unreasonable, Petitioners must account for all cost components of a pipeline's rate, not just a single element. Petitioners' sweeping request that the Commission initiate blanket Section 5 action against all pipelines without providing any analysis fails to meet their burden of going forward.

NGA Section 5 also prohibits the Commission from requiring pipelines to bear the burden of proof to justify their current rates. In *Consumers Energy*, for example, the court rejected the Commission's directive that a Hinshaw pipeline file "a petition for rate approval to justify its current rate or to establish a new maximum rate."[17] The court noted that under Section 5, the movant – in that case the Commission – "will have to bear the burden of justifying any change."[18]

When the Commission asks a pipeline to submit cost and revenue data, it is not the pipeline's duty to "demonstrat[e] that its existing rates continue to be just and reasonable."[19] That burden is on the proponent of the change in the existing rate. For pipelines whose rates are governed by settlements that provide rate case moratoria, Petitioners also request that the "pipeline provide evidence to that effect."[20] With respect

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61,162 (2007). *See also Tex. E. Transmission, LP*, 140 FERC ¶ 61,216, at PP 28-30 (2012), *reh'g denied*, 149 FERC ¶ 61,143 (2014).

[16] *See Houlton Water Co. v. Maine Public Service Co.,*55 FERC ¶ 61,037 (1991).

[17] *Consumers Energy Co. v. FERC*, 226 F.3d 777, 781 (6th Cir. 2000).

[18] *Id.* at 780.

[19] Petition at 3.

[20] *Id.* at 4.

to discounted or negotiated rate agreements that are exempt from Commission-ordered rate adjustments, Petitioners again seek to force pipelines to "identify those contracts, and provide evidence to that effect."[21] Both of these requests ask the Commission to improperly shift the Section 5 burden onto the pipelines.

In numerous cases, the D.C. Circuit has reversed the Commission when it has blurred the distinction between NGA Sections 4 and 5. In *Western Resources, Inc. v. FERC*, the D.C. Circuit recounted the court's efforts to police the Commission's exercise of its NGA Section 5 authority, noting that "[t]his court 'has consistently disallowed attempts to blur the line between §§ 4 and 5.'"[22] In *Public Service Commission of New York*, the D.C. Circuit stated that "[o]n four occasions in the last three years this court has reviewed Commission efforts to compromise § 5's limits on its power to revise rates. On each the court has repelled the Commission's gambit. This is number five."[23] In *Western Resources*, the court said "[w]e now make it an even six."[24] The Commission should avoid Petitioners' invitation to press the Commission into another reversal by the courts.

C. NGA Section 5 Prevents the Commission from Conducting Piecemeal Ratemaking.

The Petition incorrectly asserts that "the Commission need not consider every element of a pipeline's costs to find that one component is excessive, and to order refunds accordingly."[25] Petitioner's claim is wrong. The plain language of NGA Section 5 does not permit the Commission to revise rates on a piecemeal basis. A fundamental tenet of

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[21] *Id*.
[22] 9 F.3d at 1578 (quoting *Pub. Serv. Comm'n of N.Y. v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989)); *see also Sea Robin Pipeline Co.*, 795 F.2d at 183 ("The Commission is not free to blend, or pick and choose at will between, its section 4 and 5 authority.").
[23] 866 F.2d at 488-89.
[24] 9 F.3d at 1578.
[25] Petition at 16 (citing *FPC v. Tenn. Gas Transmission Co.*, 371 U.S. 145 (1962).

ratemaking is that the *end result*, not any individual rate component, is what determines whether rates are just and reasonable.[26] The Commission has explained the bar against piecemeal ratemaking when applying Section 206 of the Federal Power Act ("FPA"), which is applied identically to NGA Section 5:[27]

> Commission precedent does not provide for piecemeal review of a single component of a filed rate. That is, if the Commission suspends a proposed rate for more than a nominal period, the Commission cannot put one element used to calculate the proposed rate into effect during the suspension period by establishing an interim rate based on a recalculation of the existing rate without first meeting its obligation under section 206 to find that the existing rate is not just and reasonable and that the replacement interim rate is just and reasonable.[28]

The Commission has previously recognized the prohibition against piecemeal ratemaking in responding to a prior reduction in the federal corporate income tax level. As the D.C. Circuit explained, the Commission does not have a policy of "treating changes in tax liability per se as warranting dollar-for-dollar spot adjustments in established rates without review of other cost-of-service components."[29] Discussing the Commission's response to the 1986 tax reform, the D.C. Circuit stated that the Commission "seem[ed] to

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[26] *See Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) ("In examining the end result of the rate order, [the Supreme Court] made clear, a court cannot affirm simply because each of the component decisions of that order, taken in isolation, was permissible; it must be the case 'that they do not *together* produce arbitrary or unreasonable *consequences.*' (quoting *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 800 (1968)).

[27] Courts and the Commission have held that Section 5 of the NGA is to be interpreted in the same way as Section 206 of the FPA, and that holdings that apply to section 5 of the NGA also apply to section 206 of the FPA. *See, e.g., New Dominion Energy Coop*., Opinion No. 499, 122 FERC ¶ 61,174, P 56 n.82, P 61 n.91 (2008) (citing *Pub. Serv. Comm'n of N.Y. v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir 1980)).

[28] *New York Indep. Sys. Operator, Inc*., 134 FERC ¶ 61,178, P 16 (2011) (footnote omitted). *See also Jersey Cent. Power & Light Co.*, 810 F.2d at 1177 ("In examining the end result of the rate order, [the Supreme Court] made clear, a court cannot affirm simply because each of the component decisions of that order, taken in isolation, was permissible; it must be the case 'that they do not *together* produce arbitrary or unreasonable *consequences.*' (quoting *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 800 (1968)); *Carolina Power & Light Co. v. FERC*, 860 F.2d 1097, 1102 (D.C. Cir. 1988) (recognizing that the Commission "appears to believe that wholesale rates should ordinarily be adjusted only upon a comprehensive review of cost-of-service data."); *Iroquois Gas Transmission Sys.*, 80 FERC ¶ 61,213, at p. 61,845 (1997) (recognizing "regulatory policy against piecemeal rate changes").

[29] *Carolina Power & Light Co.*, 860 F.2d at 1103.

recognize the procedural barriers" to requiring a "spot adjustment" to a utility's tax rate, noting that Order No. 475 emphasized utilities' rights to initiate "an evaluation of the utilities' aggregate costs and revenues" under FPA Section 205 or 206.[30] Before ordering any rate adjustments to reflect the reduced tax rate, the Commission must comprehensively examine individual pipelines' costs and revenues, including conducting a full hearing.

The Petitioners' citation to *FPC v. Tennessee* to support its request for the Commission to immediately find the tax component unjust and unreasonable, and order rate revisions is wrong, and misleading at best.[31] That case addressed a proceeding initiated by the pipeline under NGA Section 4 in which the pipeline bore the burden of justifying its proposed rates. The Commission ordered the interim reduction in that case only after a "full hearing," in which it determined that the pipeline had not justified its proposed rate of return. The Court explained that "a natural gas company initiating an increase in rates under § 4(d) assumes the hazards involved in that procedure."[32] This rationale is not applicable under Section 5, where the pipeline's rates have already been found to be just and reasonable, and the pipeline has not made a filing under Section 4 to revise them.[33]

Despite suggesting the possibility of refunds, the Petition acknowledges that "Section 5 relief is prospective only."[34] NGA Section 5 provides for the Commission to take "prospective remedial action" if, after a hearing, "it determines that any previously

[30] *Id*. (citing Electric Utilities; Rate Changes Relating to Federal Corporate Income Tax Rates for Public Utilities, Order No. 475, FERC Stats. & Regs. ¶ 30,752 (1987), *reh'g denied*, Order No. 475-A, 41 FERC ¶ 61,029 (1987)).
[31] Petition at 16 (citing *FPC v. Tenn.*, 371 U.S. at 149-156).
[32] *FPC v. Tenn.*, 371 U.S. at 152.
[33] *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1946) ("*FPC v. NGPL*"), cited by Petitioners, further demonstrates that the Commission cannot order spot adjustments that cut short Section 5's procedures for adjusting a filed rate. In *FPC v NGPL*, the Commission ordered a rate reduction only after conducting "extensive hearings," and, before reducing the rate in question, the Commission made offsetting rate adjustments that had been proposed by the pipeline company. *Id.* at 579-80.
[34] *Cf.* Petition at 16 with Petition at 5.

approved rate, charge, or classification by a natural gas company or any rule, regulation, practice or contract affecting jurisdictional services is unjust, unreasonable, or unduly preferential or discriminatory."[35] FERC has repeatedly affirmed that it "lack[s] authority under NGA section 5 to order refunds" for periods prior to a merits decision in such a proceeding.[36]

II. A One-Size-Fits-All Approach Is Not Appropriate Given the Diverse Circumstances Across Pipelines.

Petitioners' request that the Commission examine pipelines' rates by making a "simple adjustment" to the income tax allowance for all pipelines improperly ignores the diverse factors that affect the rates charged by individual interstate pipelines. Petitioners request the Commission to obtain a cost and revenue study from each pipeline, make "[a] simple adjustment to the income tax allowance," and on that evidence alone, deem pipelines' rates unjust and unreasonable and order rate adjustments.[37] Petitioners contend that this approach would avoid "redundant litigation of the same issue in multiple proceedings."[38] Petitioners' request is not only inconsistent with the requirements of Section 5, but also ignores that each pipeline faces unique contract, market, business, and financial circumstances, and that a one-size-fits-all, industry-wide, approach would not produce just and reasonable results in any case.

The Commission may not order a rate change based merely on changes in costs of a single rate component; rather, the Commission must show that the components "do not

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[35] *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, P 7 n.11 (2014)
[36] *N. Natural Gas Co.*, 131 FERC ¶ 61,178, P 17 (2010), *reh'g denied*, 133 FERC ¶ 61,111 (2010).
[37] Petition at 19.
[38] *Id*. at 5.

together produce arbitrary or unreasonable *consequences*."[39] A one-size-fits-all, industry-wide, approach of finding pipelines' existing rates unjust and unreasonable on the basis of simply plugging in the new 21% corporate income tax rate for the previous 35% rate would fail to meet this requirement. Such a "simple adjustment" would ignore substantial changes that have occurred in the natural gas transportation industry in the last ten years, which is reflected in a pipeline's contracting practices and rates, but may not be reflected in that pipeline's Commission-approved maximum applicable rate. The so-called "simple adjustment" would also ignore other elements of a pipeline's cost of service that have increased that would offset the effect of the lower corporate tax rate.

In the past decade, the natural gas industry has witnessed a substantial increase in competition and a collapse of basis differentials across most interstate pipelines. These changing circumstances are reflected in the settlement agreements that govern most pipelines' maximum applicable transportation rates, many of which provide for rate certainty for defined periods. Modification of these settlements solely on the basis of the new corporate income tax rate would disregard the broader circumstances and financial trade-offs between the parties to those carefully-negotiated settlements. Modification of these settlement agreements would further deprive parties of the benefits of their bargains, and would damage the industry's ability to rely on settlements as a basis for establishing rates in the future. The Commission "recognize[s] the role of settlements in providing rate certainty," and has stated that in deciding whether to exercise its discretion to initiate a

[39] *See also Jersey Cent. Power & Light Co.*, 810 F.2d at 1177 (emphasis in original) (citing *In re Permian Basin Area Rate Cases,* 390 U.S. at 800).

Section 5 proceeding, it would "take into account the parties' interest in maintaining a Settlement."[40] The Commission has explained:

> Provisions in settlements insulating their rates from change due to subsequent Commission and Court orders in other proceedings are essential for ensuring that settlements accomplish the purpose of providing rate certainty. Without such provisions, the utility of settlements for resolving cases would be severely jeopardized. No settlement could ever be truly final, because the rates resulting from the settlement would always be subject to reopening based on subsequent Commission or Court decisions.[41]

Rate settlements are frequently negotiated on a "black-box" basis, in which, as the outcome of arms-length negotiations, parties agree upon overall rates for the various services without identifying specific rate components, other than depreciation.[42] Because such black-box settlements do not typically identify corporate income tax rates, it would be improper to order a rate modification in response to a change in the federal corporate income tax rate, which is itself not specifically reflected in the pipeline's existing rate. Parties to rate case settlements can, and in many instances do, provide in their settlements for rate changes to reflect any adjustments to the federal corporate income tax rate.[43] In cases where parties have declined to include such arrangements in their settlements, the

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[40] *Natural Gas Pipeline Co. of Am.*, 162 FERC ¶ 61,009, at P 29 (2018). The D.C. Circuit has recognized more generally that parties in the industry need to be able to rely on the finality of approved rates, and has stated that "this interest outweighs the value of being able to correct for decisions that in hindsight may appear unsound." *Pub. Utils. Comm'n of Cal. v. FERC*, 894 F. 2d 1372, 1383 (D.C. Cir. 1990).

[41] *Iroquois Gas Transmission Sys. L.P.*, 69 FERC ¶ 61,165, at p. 61,631 (1994). The Commission also noted that its decision not to order a modification to a settlement was "consistent with the principle that approved settlements are binding on the parties and should not be modified simply because it later appears that 'the result is not as good as it ought to have been.'" *Id.* (footnote omitted) (quoting *Tex. E. Transmission Corp. v. FPC*, 306 F.2d 345, 348 (5th Cir. 1962)).

[42] *See, e.g., El Paso Natural Gas Co*., 132 FERC ¶ 61,139, at P 82. Most modern settlement agreements expressly provide that they are the results of carefully crafted, delicate compromises among multiple parties, and that modification to any term has the potential to upset the compromise. *See, e.g., Columbia Gas Transmission, LLC*, 154 FERC ¶ 61,208, at P 11 (2016).

[43] *See, e.g.,* Columbia Gas Transmission, LLC, Stipulation and Agreement, Section 8.3, Docket No. RP12-1021-000 (Sept. 4, 2012), *approved in Columbia Gas Transmission, LLC*, 142 FERC ¶ 61,062 (2013) (expressly setting out base rates that correspond with various federal corporate income tax rates).

Commission should not substitute its judgment for that of settling parties as to how freely-negotiated transportation rates should reflect the new tax rate.[44]

The Petition also overlooks the extent to which the rates actually charged by pipelines are set through negotiated and discounted rate agreements, which present unique ratemaking questions. These contracts reflect the specific facts and circumstances, including market conditions, on individual pipelines. In many circumstances, the discounted and negotiated rates are well below the pipeline's maximum recourse rate, which means that these contracts are not recovering the full costs of income taxes (or any other cost-of-service component). Petitioners' request ignores that discount adjustments associated with these contracts would reduce billing determinants for purposes of developing rates and serve to counterbalance, or in some cases, negate, any downward rate impact associated with the change in corporate income tax rate. If the Commission requires pipelines to make rate changes without considering the impact of discount adjustments to rates, this ultimately could overstate any potential downward pressure on pipelines' recourse rates resulting from a change in the income tax allowance. Petitioners further fail to appropriately consider that negotiated rate agreements are insulated from the "simple adjustment" requested in the Petition, although Petitioners recognize that such agreements may be exempt from any potential Commission ordered rate adjustments.[45] Courts and the

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[44] Consideration of the risk that a pipeline's rates may increase or decrease in the future is an inherent part of the settlement negotiations that occur in a rate case. Just as a settling pipeline accepts risks that it will be unable during the term of its settlement to modify its rates in the event its costs rise, the shippers accept risks that the pipeline's costs may decrease without immediately being reflected in the pipeline's rates.

[45] Petition at 4. The determination of whether an adjustment to a pipeline's recourse rates will affect the charges payable under a specific discounted or negotiated rate agreement is likely to involve an interpretation of the language of individual contracts and the intent of the parties to those agreements. If genuine issues regarding the interpretations of discounted or negotiated agreements arise, they are more properly brought by the parties advancing the dispute. Further, to the extent that such issues involve a straightforward matter of contractual interpretation, in many cases, disputes may be more appropriately

Commission have recognized that in entering into negotiated rate agreements, pipelines and shippers account for the risks that the pipeline's operating costs may change in the future.[46] In recognition of contracting parties' consideration of these risks entering into negotiated and discounted rate agreements, the courts require that in order to modify most such contracts the Commission must satisfy the *Mobile-Sierra* standard, under which the Commission must "presume that the rate set out in a freely negotiated contract meets the just and reasonable requirement imposed by law."[47] The Commission may only modify contracts under *Mobile-Sierra* if it demonstrates "that the contract seriously harms the public interest,"[48] which generally requires "a finding that the existing rate might impair the financial ability of [the pipeline] to continue its service, or that the rate would cast upon other consumers an excessive burden, or be unduly discriminatory, or that there are other circumstances of unequivocal public necessity."[49] The Commission has specifically recognized the role of negotiated rate agreements in providing rate certainty to pipelines and their shippers.[50] To the extent there is any disagreement between the parties regarding the contract interpretation, the shipper will be able to immediately take steps to enforce its

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decided by a state court with expertise in contract interpretation. *See Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979).

[46] *See Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1305 (D.C. Cir. 2010) ("The fact that Iberdrola, in hindsight, considers its predecessor's bargain [for a negotiated rate agreement] unwise is no reason to disregard the contract's clear meaning."); *Columbia Gulf Transmission Co.*, 109 FERC ¶ 61,152, at P 13 (2004), *reh'g denied*, 111 FERC ¶ 61,338 (2005) ("To the extent a pipeline and its shipper want to obtain rate certainty by agreeing to a rate that will remain in effect throughout the term of the service agreement, the Commission provides them an opportunity to do so by entering into a negotiated rate agreement.").

[47] *Dominion Transmission v. FERC*, 533 F.3d 845, 852-53 (D.C. Cir. 2008) (quoting *Morgan Stanley Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008) ("*Morgan Stanley*")) (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*")).

[48] *Id.* at 853 (quoting *Morgan Stanley*, 554 U.S. at 530).

[49] *Id.* (quoting *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 271 (D.C. Cir. 2007)) (internal quotation marks omitted).

[50] *Columbia Gulf Transmission Co.*, 109 FERC ¶ 61,152, at P 13 ("To the extent a pipeline and its shipper want to obtain rate certainty by agreeing to a rate that will remain in effect throughout the term of the service agreement, the Commission provides them an opportunity to do so by entering into a negotiated rate agreement.").

rights under the contract without the need for the requested Commission review and determination.

The intense competition that has caused discounted and negotiated rate contracting practices distinguishes the interstate natural gas industry from state-regulated utilities with franchised service territories that typically are able to collect their maximum rates and pass through costs in routine rate cases. The Petition also fails to recognize that several interstate pipelines are authorized to provide storage services at market-based rates. Such rates are not cost based so there is nothing to apply the "simple adjustment" toward.

One-size-fits-all rate modifications would interfere with rate certainty that shippers and pipelines have bargained for under rate settlements and negotiated rate agreements. These agreements, negotiated in the context of the dramatic changes that have occurred in the pipeline industry in the past decade, should not be modified. Many of these negotiated rate agreements made possible the construction of substantial pipeline infrastructure over the past 15 years, and continue to provide the financial backing for the construction of new projects. Modifications to negotiated rate agreements, as appears to be contemplated by the Petition, would adversely impact pipelines' access to capital markets for the construction of new infrastructure, adding an additional level of uncertainty to new projects and placing future projects at risk.

III. The Commission May Utilize Its Past Practices Under NGA Section 5 if Necessary to Address the Impact of Tax Reform on Pipeline Rates.

A change in corporate tax rates is not unprecedented. Under the Tax Reform Act of 1986, the federal corporate income tax rate was reduced from 46 percent to 34 percent. FERC responded by adopting Order No. 475, which permitted—but did not require—electric utilities to file rate reductions through FPA Section 205 (equivalent to NGA

Section 4).[51] The Commission did not *mandate* that utilities use the abbreviated formula, but rather, permitted utilities that believed the formula was not appropriate to file general section FPA Section 205 rate cases, or to do nothing. The Commission noted that if a utility did nothing, FERC could initiate a rate case under section 206.[52] Likewise, the Commission did not require generic rate reductions for natural gas pipelines.[53] Notably, the Commission issued Order No. 475 only after engaging with stakeholders though notice-and-comment rulemaking.[54] The process used by FERC following the 1986 tax reform is consistent with NGA Section 5's allocation of the burden of proof on the proponent of a change in a pipeline's existing rates.

The Commission's recent issuance of data requests to several companies constructing new pipeline projects, asking them to adjust proposed costs-of-service and recourse rates to reflect the reduced corporate income tax rates, is not the same as reviewing previously-approved rates, which may only be changed pursuant to NGA Section 5.[55] These rate adjustments were issued in pipeline certificate proceedings under Section 7(c), not Section 5, requiring pipelines to reflect the revised tax rates in the new recourse rates for the proposed projects.[56] In this process, the Commission has not requested revisions to the negotiated rate agreements supporting these projects.

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[51] Order No. 475 at p. 30731.
[52] *Id.* at p. 30,738 ("The Commission has no statutory authority to require utilities to make rate reductions under FPA section 205. The Commission does intend, however, to initiate FPA section 206 proceedings against utilities that it believes are overcollecting as a result of the reduction of the tax rate.").
[53] In 1987 most gas pipelines' rate case settlements included tax trackers, and accordingly, the Commission did not take action related to gas pipelines' tax rates. *Id.* at p. 30,731, n.3.
[54] Electric Utilities; Rate Changes Relating to Federal Corporate Income Tax Rate for Public Utilities, FERC Stats. and Regs. ¶ 32,437 (1987) (notice of proposed rulemaking).
[55] *See* DTE Midstream Appalachia, LLC., Docket No. CP17-409; Paiute Pipeline Co., Docket No. CP17-471; Southern Natural Gas Co., LLC., Docket No. CP17-46; and WBI Energy Transmission, Inc., Docket No. CP17-257. Subsequently, the Commission has issued similar data requests to various pipelines in other Section 7(c) proceedings.
[56] *Dominion Energy Cove Point LNG, LP*, 162 FERC ¶ 61,056, PP 22-23 (2018); *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, P 66 (2018); *Transcontinental Gas Pipe Line Corp.*, 162 FERC ¶ 61,050, P 17 (2018).

The Commission already collects substantial data about each interstate natural gas pipeline's costs and revenues through annual Form 2 filings. In fact, the Commission Staff annually performs its own cost and revenue analyses of pipelines utilizing the Form 2 data. In these annual analyses, Commission Staff examines individual pipeline's costs and revenues and other facts and circumstances to evaluate the justness and reasonableness of a pipeline's rates under the NGA and as a means to attempt to carry the Commission's burden of producing substantial evidence if it decides to initiate a Section 5 investigation.[57] Based on this practice, the Commission has initiated 16 proceedings under NGA Section 5 since 2009.[58] Once initiated, these proceedings require the pipeline to file a detailed cost and revenue study and, if after a hearing the FERC finds that the dual burden of Section 5 is met, the FERC can adjust the pipeline's rates prospectively. The Commission should continue to proceed with appropriate caution and consideration when addressing the impact of recent changes in corporate income tax rates, as part of any future cost and revenue analyses conducted by the Commission. If the Commission acts without proper consideration of the bounds of its NGA Section 5 authority, it could encourage protracted litigation that would result in ongoing rate uncertainty for all parties. Any steps taken by the Commission should also recognize that the individual circumstances of each pipeline vary and avoid the risk of overwhelming the Commission's resources to the detriment of its other policy objectives.

See Atlantic Refining Co. v. Pub. Serv. Comm's of N.Y. (CATCO), 360 U.S. 378 (1959) (explaining process for setting an initial rate under NGA Section 7).

[57] INGAA acknowledges the Commission's authority to initiate rate investigations under NGA Section 5, but it and its members reserve the right to challenge the legality of any specific future action under Section 5 in this or any other proceeding.

[58] Staff Presentation (Jan. 19, 2017), https://ferc.gov/industries/gas/gen-info/rate-filings/01-19-17-G-1-2-Presentation.pdf.

CONCLUSION

The Commission's pro-competitive policies, beginning with the restructuring of the natural gas industry, have led to diverse market conditions and contracting practices across the various interstate natural gas pipelines. The one-size-fits-all, industry-wide, approach proposed by Petitioners would fail to produce just and reasonable rates and would violate the procedures for changing pipeline rates required by Section 5 of the NGA. The Commission should dismiss the Petition.

Respectfully submitted,

/s/ Joan Dreskin

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon the parties designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission for the above-captioned docket in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C. this 12th day of February, 2018.

Respectfully submitted,

/s/ Joan Dreskin

Joan Dreskin