UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America ("INGAA"), pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] moves for leave to answer and answers the filings made by American Public Gas Association ("APGA") and Petitioners[2] on February 16, 2018 and February 20, 2018, respectively.[3] Although the Commission's procedural rules generally do not allow for answers to answers,[4] the Commission may permit them for good cause. The Commission has accepted answers that facilitate the decisional process or aid in the explication of issues, and has explained that it will accept answers that "assist[] in our decision-making process."[5] INGAA requests that the Commission accept this answer to clarify the record and address inconsistencies in Petitioners' recent pleadings.

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[1] 18 C.F.R. §§ 385.212 & 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 Company, Chevron U.S.A. Inc., ConocoPhillips Company, Hess Corporation, Petrohawk Energy Corporation, WPX Energy Marketing, LLC, and XTO Energy Inc. (collectively, "Petitioners").

[3] Motion for Leave to Answer and Answer of the American Public Gas Association (Feb. 16, 2018) ("APGA Answer"); Motion for Leave to Answer and Answer of the Undersigned Petitioners to Pipeline Answers (Feb. 20, 2018) ("Petitioners' Answer").

[4] 18 C.F.R. §§ 385.213(a)(2) & 385.713(d)(1).

[5] *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 1 n.3 (2014), *pet. for review denied*, *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015); *see also Algonquin Gas Transmission Co.*, 83 FERC ¶ 61,200, at p. 61,893 n.2 (1998) (accepting an answer in order to ensure "a complete and accurate record"), *order amending certificate*, 94 FERC ¶ 61,183 (2001); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211, at p. 61,672 n.5 (1990) (citing *Buckeye Pipe Line Co.*, 45 FERC ¶ 61,046 (1988)) (accepting an

ANSWER

I. Petitioners Ask the Commission to Disregard the Fundamental Framework of Section 5 of the Natural Gas Act.

A. Petitioners Have Not Met the Burden of Going Forward.

Petitioners do not back away from their request that the Commission require "immediate rate reduction[s]" based upon filings by interstate pipelines of cost and revenue studies that include a "simple adjustment to the income tax allowance," despite making no effort to shoulder their burden of going forward under Section 5 of the Natural Gas Act ("NGA").[6] Petitioners' blanket request would impose substantial compliance obligations upon the *entire interstate pipeline industry*. Petitioners' request would require "all interstate natural gas pipeline and storage companies" to undertake time-consuming and resource-intensive cost and revenue studies to demonstrate that their existing rates remain just and reasonable, and to defend their rate case settlements, negotiated rate agreements, and discounted rate agreements.[7] Petitioners seek to impose this burden upon the entire interstate pipeline industry based solely on the recent change to corporate income tax rates without attempting to make an evidence-based showing that even one individual pipeline's rates are unjust and unreasonable. The Commission explained in *Houlton Water Co. v Maine Public Service Co*. that a customer seeking an investigation of existing rates "must provide some basis to question the reasonableness of the overall rate level, taking into account changes in all cost components, and not just [one cost component]."[8] The burden

answer "where consideration of matters sought [will be] addressed in the answer will facilitate the decisional process or aid in the explication of issues.").

[6] Industry Petition for Initiation of Show Cause Proceedings Directed to Interstate Natural Gas Pipelines and Storage Companies at 4, 19 (Jan. 31, 2018) ("Petition").

[7] Petition at 1, 3-4 (excluding only Section 311 pipelines and companies due to file a Section 4 rate case in 2018 from the Petitioners' request).

[8] 55 FERC ¶ 61,037, at p. 61,110 (1991) (rejecting a request by customers to summarily order a utility to reduce its rates by an amount equal to a cancelled station's amortization and putting the burden on the

is on the Petitioners to prepare a reasonable, preliminary cost study for the Commission to consider to show that a rate found to be just and reasonable is no longer so. Petitioners have failed to satisfy their burden of going forward with an NGA Section 5 investigation.

Petitioners' Answer misconstrues *INGAA v. FERC* to support that under Section 5, the Commission may impose an industry-wide requirement that pipelines file cost and revenue studies without first finding that any individual pipeline may be over-recovering its cost of service.[9] The Commission cannot require the submission of a cost and revenue study without first making an initial, data-based determination that a pipeline may be over-recovering its cost of service.[10] As also discussed in TransCanada's answer,[11] in *INGAA v. FERC*, the Commission had first made a generic determination in a notice-and-comment rulemaking proceeding that it was unjust and unreasonable for pipelines to prohibit operationally feasible segmentation, before requiring pipelines to demonstrate compliance with its segmentation policy.[12] The Commission has made no such finding about any pipeline's individual rates, nor has the Commission made any generic determination resulting from a notice-and-comment rulemaking proceeding. Further, Petitioners have not provided any specific basis for the Commission to require the submission of cost and revenue studies.

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customers to prepare cost study using FERC Form No. 1 data and other publicly available data to demonstrate that rates may be no longer just and reasonable.). *See also Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. & Regs. ¶ 31,267, at P 4 (2008) ("A section 5 complaint may rely on Forms 2, 2-A, and 3-Q financial data to support a complaint.").

[9] Petitioners' Answer at 3 (citing *INGAA v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002)).

[10] *See* n. 8, *supra. See also, e.g.*, *Columbia Gulf Transmission, LLC*, 154 FERC ¶ 61,027, at P 1, *reh'g denied*, 154 FERC ¶ 61,275 (2016) (ordering a cost and revenue study only after making an initial determination that the pipeline "may be substantially over-recovering its cost of service," based on an examination of the pipeline's Form 2 filings).

[11] Motion for Leave to Answer and Answer of TransCanada Corporation (Feb. 23, 2018).

[12] *INGAA v. FERC*, 285 F.3d at 37. The court cautioned in *INGAA v. FERC* that while it was "reasonably confident that the Commission will hew to its constraints [under Section 5]; if not, obviously a judicial remedy would follow any individualized abuse." *Id.* at 38.

To support their request that pipelines be required under Section 5 to affirmatively demonstrate the justness and reasonableness of their rates, Petitioners' mischaracterize a show cause proceeding in which the Commission required pipelines to demonstrate their compliance with an existing requirement to post capacity release offers.[13] The Commission found, after holding industry-wide technical conferences and examining individual pipelines' tariffs and websites, that there may be substantial noncompliance with the Commission's requirement that pipelines post capacity release offers on their websites. After making this initial determination, the Commission required pipelines to comply with the existing requirement, or simply to show they already complied.[14] Further, the requirement to add the Request to Purchase Releasable Capacity under Notices on interstate pipelines' Informational Postings Websites was in conjunction with the adoption of the NAESB 3.0 Standards resulting from Order 587-W,[15] which went through a notice-and-comment rulemaking proceeding. This is wholly different from Petitioners' request that the Commission require all pipelines to demonstrate the justness and reasonableness of their existing rates. Petitioners have made no demonstration that any, let alone all, pipelines' existing rates are no longer just and reasonable or demonstrated non-compliance with any specific Commission requirement. Petitioners' blanket request for industry-wide cost and revenue studies is unsupported and should be denied.

[13] Petitioners' Answer at 4 (citing *Posting of Offers to Purchase Capacity*, 146 FERC ¶ 61,203, at P 2 (2014)).
[14] *Posting of Offers to Purchase Capacity*, 146 FERC ¶ 61,203 at PP 4-5.
[15] *Standards for Business Practices of Interstate Natural Gas Pipelines; Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, 153 FERC ¶ 61,061 (2015).

B. Petitioners Continue to Seek to Short-Circuit the Requirements of NGA Section 5.

Even assuming, for the sake of argument, that the Petition had included pipeline-specific analyses that satisfied the burden of going forward, the Petition still asks the Commission to short-circuit the requirements of NGA Section 5. Section 5 allows the Commission to adjust rates only "after a hearing,"[16] at which the proponent of change to an existing rate must prove with substantial evidence that (i) the pipeline's approved rates are unjust and unreasonable, and (ii) the proposed changes to the rates are just and reasonable.[17] Petitioners' Answer asserts that a "paper hearing" rather than a trial-type evidentiary hearing before an administrative law judge is appropriate to resolve a proceeding under Section 5.[18]

Petitioners ignore that the Commission's long-standing practice is to set general rate cases under both NGA Sections 4 and 5 for a full evidentiary hearing.[19] Paper hearings are not adequate in this instance given the numerous issues of material fact that must be considered in determining each pipeline's overall rate. Petitioners' request to "summarily"

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[16] 5 U.S.C. 717d(a). *See FPC v Nat. Gas Pipeline Co of Am.*, 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.").

[17] 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") (citing *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1579–80 (D.C. Cir.1993)); *Complex Consol. Edison Co. of New York, 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.") (citing *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1314 (D.C. Cir. 1991)); *see also W. Res., Inc.*, 9 F.3d at 1579-80; *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

[18] Petitioners' Answer at 5.

[19] The Commission also has rejected paper hearings as inappropriate when material issues of fact are in dispute. *See, e.g.*, *Tex. Gas Serv. Co. v. El Paso Nat. Gas*, 133 FERC ¶ 61,079, at PP 20-21 (2010) (establishing hearing and rejecting request for paper hearing on NGA Section 5 complaint asserting that pipeline's fuel rates were unjust and unreasonable); *S. Co. Energy Mktg.*, 112 FERC ¶ 61,054, at P 58 (2005) ("Where there are genuine issues of material fact that cannot be resolved on the basis of the written record, or where the [Delivered Price Test] analysis has overlooked certain competitive effects, the Commission will set such issues for hearing.").

adjust pipeline rates based only on the corporate tax change disregards the many offsetting rate elements that the Commission must consider when determining whether a pipeline's *overall* rates are no longer just and reasonable.[20] The Commission must recognize that "[r]atemaking is, of course, much less a science than an art,"[21] and that "there is no single cost-recovering rate, but a zone of reasonableness" within which just and reasonable rates may fall.[22] The paper hearings requested by Petitioners are contrary to the Commission's long-standing practice and would not in this case produce just and reasonable rates.

Recognizing that Section 5 rate proceedings typically raise material issues of fact, the Commission has consistently required that Section 5 rate cases be conducted using full evidentiary hearings, pursuant to the Track II Timeline.[23] The Commission has used the Track II Timeline in all 16 of the Section 5 rate cases that it has initiated since 2009[24] and also used the Track II Timeline for the only customer-initiated Section 5 complaint set for hearing in that period.[25] The Track II Timeline is already "expedited" relative to a Section 4 case – with a shortened adjustment period and a fixed date for the administrative law judge's initial decision – in recognition of the potential that pipelines subject to Section 5

[20] Petitioners' Answer at 5.
[21] *Ala. Elec. Coop., Inc. v*. FERC, 684 F.2d 20, 27 (D.C. Cir. 1982).
[22] *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976).
[23] *See, e.g.*, *Columbia Gulf Transmission*, 154 FERC ¶ 61,027 at PP 11-12. The Commission has noted that the Track II Timeline is necessary to provide the parties with adequate time to conduct discovery. *Id*. at 12.
[24] *Nat. Gas Pipeline Co. of Am. LLC*, 129 FERC ¶ 61,158, at P 9 (2009); *N. Nat. Gas Co.*, 129 FERC ¶ 61,159, at P 8 (2009); *Great Lakes Gas Transmission L.P.*, 129 FERC ¶ 61,160, at P 8 (2009); *Kinder Morgan Interstate Gas Transmission LLC*, 133 FERC ¶ 61,157, at P 11 (2010); *Ozark Gas Transmission, L.L.C.*, 133 FERC ¶ 61,158, at P 11 (2010); *Bear Creek Storage Co.*, 137 FERC ¶ 61,134, P 11 (2011); *MIGC LLC*, 137 FERC ¶ 61,135, P 11 (2011); *ANR Storage Co.*, 137 FERC ¶ 61,136, at P 11 (2011); *Wyo. Interstate Co.*, 141 FERC ¶ 61,117, at P 11 (2012); *Viking Gas Transmission Co.*, 141 FERC ¶ 61,118, at P 11 (2012); *Tuscarora Gas Transmission Co.*, 154 FERC ¶ 61,030, at P 11 (2016); *Empire Pipeline, Inc.*, 154 FERC ¶ 61,029, at P 11 (2016); *Iroquois Gas Transmission Sys.*, 154 FERC ¶ 61,028, at P 11 (2016); *Columbia Gulf Transmission, LLC*, 154 FERC ¶ 61,027 at P 12; *Wyo. Interstate Co.*, 158 FERC ¶ 61,040, at P 11 (2017); *Nat. Gas Pipeline Co. of Am. LLC*, 158 FERC ¶ 61,044, at P 11 (2017).
[25] *Pub. Utils. Comm'n of Nev. v. Tuscarora Gas Transmission Co.*, 135 FERC ¶ 61,174, at P 31 (2011).

investigations could be over-recovering their costs of service.[26] The present circumstances are no different than those under a typical Section 5 case, except that here, no movant has satisfied the initial burden of going forward. APGA, one of the Petitioners, specifically acknowledges that "[e]veryone understands that this matter is not simple."[27] Petitioners, therefore, have provided no reason why the Commission should abbreviate the already-expedited timeline under Section 5 for conducting a rate case, let alone to impose such procedures across the entire interstate pipeline industry. The Commission should not depart from its well-established processes under Section 5 for conducting a full evidentiary hearing.

II. Petitioners Ask the Commission to Disregard the Bargains Made in Black Box Settlements.

Petitioners assert that "black box" settlements – those in which the parties agree upon overall rates without identifying specific rate components[28] – do not affect the relief requested.[29] They do. The parties to "black box" settlements frequently affirm that their settled rates result from a carefully crafted and delicate compromise among many parties with diverse and conflicting interests and that any modification has the potential to upset the compromise.[30] When a "black box" settlement specifies no income tax rate, the change in the income tax rate cannot be the basis for concluding that the agreed upon rate is no longer just and reasonable. APGA acknowledges that some shippers bargained for the right to have rates adjusted to reflect decreases in corporate income tax as part of particular

[26] *See Columbia Gulf Transmission, LLC*, 154 FERC ¶ 61,027 at P 12. Individual Commissioners have called the Track II Timeline "ambitious" for a Section 5 proceeding. *Nat. Gas Pipeline Co. of Am. LLC*, 129 FERC ¶ 61,158 (statement of Commissioner Spitzer, concurring).
[27] APGA Answer at 2.
[28] *See, e.g.*, *El Paso Nat. Gas Co.*, 132 FERC ¶ 61,139, at P 82 (2010).
[29] Petitioners' Answer at 7.
[30] *Columbia Gas Transmission, LLC*, 154 FERC ¶ 61,208, at P 11 (2016).

pipeline settlements.[31] The Commission should not go back and modify settlements where no such bargain was struck. Petitioners' suggestion that Form 2 data can be used to derive unstated cost of service components within a "black box" settlement is also incorrect. The Form 2 data includes audited financials prepared using the FERC Uniform System of Accounts, but does not necessarily reflect the cost of service components of "black box" settled rates. By agreeing to a "black box" settlement, all parties benefit by not having to take a position on stated levels of each cost of service component. Adjusting the rates under a "black box" to address a change to a single rate element that is not specified in the settlement rates would be an impossible task and would not result in just and reasonable rates.

III. The Commission Should Reject APGA's Request for New Accounting Procedures.

APGA suggests that the Commission should adopt new accounting procedures that "can compel pipelines to account for their lower costs as of January 1."[32] This suggestion is unclear. To the extent APGA is seeking new accounting procedures to address excess accumulated deferred income tax ("ADIT") resulting from the new tax rates, the request is unnecessary. Interstate natural gas pipelines were already required to adjust their accounting entries for ADIT on December 31, 2017 to reflect the new tax rates. Any resulting reductions to ADIT will be accomplished via journal entries. ADIT is a non-cash item, and ADIT reductions would not create cash that could be refunded to customers.

[31] APGA Answer at 2-3.

[32] *Id*. at 5. APGA offers no Commission precedent in support of its request, citing only a Commission letter order approving an uncontested settlement. *Id.* (citing *Northwest Pipeline LLC*, 160 FERC ¶ 61,008 at P 11 (2017)). The *Northwest* order specifically states that "[t]he Commission's approval of the 2017 Settlement does not constitute acceptance of, or precedent regarding, any principle or issue in this proceeding." *Northwest*, 160 FERC ¶ 61,008 at P 22. The *Northwest* order demonstrates only that the Commission may approve provisions in a settlement between a pipeline and its customers even though the settlement may contain provisions that are not consistent with Commission policy.

Excess ADIT will instead be flowed back to customers in accordance with existing amortization methods consistent with ratemaking principles.[33] No new accounting procedures are required.

To the extent APGA is requesting that the Commission require interstate pipelines to create a new regulatory liability beginning on January 1, 2018 to account for "[t]he amount of the overcollection resulting from the 21% tax rate,"[34] such a request is contrary to NGA Section 5. In requesting that the Commission "compel pipelines to account for their lower costs *as of January 1*," APGA appears to invite the Commission to adjust currently-effective rates on a retroactive basis.[35] Section 5 allows the Commission to adjust rates it finds unjust and unreasonable only "after a hearing,"[36] and on a *prospective* basis only.[37] The Commission should reject APGA's attempt to make an end run around Section 5's prohibition on retroactive ratemaking.

APGA's request for a new regulatory liability would also violate the Commission's prohibition against piecemeal ratemaking. The Commission has explained that its precedent "does not provide for piecemeal review of a single component of a filed rate" without first considering other aspects of a pipeline's cost of service.[38] APGA seeks to

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[33] The Tax Cuts and Jobs Act of 2017 maintains the normalization requirements of the Internal Revenue Code of 1986 for utility property, including pipelines. *See* Pub. L. No. 115-97, § 13001(b)(6)(A). Pursuant to normalization requirements, pipelines must amortize any regulatory liability associated with the excess ADIT balance resulting from the change in the corporate tax rate when computing their costs-of-service and when reflecting operating results in their regulated books of account. To achieve this, pipelines must amortize a regulatory liability based on the average rate assumption method, or they can do so ratably on an average remaining life basis of the utility property.

[34] APGA Answer at 5.

[35] *Id.* (emphasis added).

[36] 15 U.S.C. § 717d(a).

[37] *See* Answer of the Interstate Natural Gas Association of America Opposing Petition for Initiation of Show Cause Proceedings at 10-11 (Feb.12, 2018) ("INGAA February 12 Answer") and cited authority. Petitioners, which include APGA, expressly acknowledged in the Petition that "Section 5 relief is prospective only." Petition at 5.

[38] *N.Y. Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,178, at P 16 (2011) (citing *Houlton Water Co.*, 55 FERC ¶ 61,037 at p. 61,110). *See also* INGAA February 12 Answer at 8-11 and cited authority.

require an account adjustment that recognizes and tracks over time only a pipelines' decreased tax liability without consideration of other elements of a pipeline's cost of service that have increased over time and have not been tracked which would offset the effect of the lower corporate tax rate on the pipeline's overall rates. This suggestion also ignores the effect that discounted and negotiated rates would have on determining the ultimate rate. The Commission should reject APGA's unsupported request to circumvent the Commission's ratemaking policies via a change to accounting procedures.

IV. The Commission May Address the Impact of Tax Reform Using Its Longstanding Practice of Regulating Pipeline Rates under NGA Section 5.

Section 5 of the NGA provides the appropriate framework for the Commission to address the impact of tax reform on pipeline rates. As INGAA stated in its Answer,[39] when the Commission has determined, pursuant to an analysis of the cost and revenue data provided in annual Form 2 filings and other facts and circumstances, that a pipeline may be over-recovering its cost of service, the Commission has initiated rate proceedings under the procedures of NGA Section 5. This practice recognizes the diversity of circumstances among individual pipelines, and allows the Commission to ensure its consideration of the impact of tax reform on pipelines' rates remains within the bounds of the Commission's authority under NGA Section 5.

[39] INGAA February 12 Answer at 16-18.

CONCLUSION

The Petitioners continue to propose an unworkable, industry-wide, approach that would violate the established NGA Section 5 procedures for changing pipeline rates. The Commission should dismiss the Petition.

Respectfully submitted,

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March 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document 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 1st day of March, 2018.

Respectfully submitted,

/s/ Ammaar Joya

Ammaar Joya