

130 FERC ¶ 61,133  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Natural Gas Pipeline Company of America, LLC

Docket No. RP10-147-001

ORDER ON REHEARING

(Issued February 24, 2010)

1. On December 22, 2009, Natural Gas Pipeline Company of America, LLC (Natural) and Marathon Oil Company (Marathon) requested rehearing of the Commission's November 19, 2009 order issued in the captioned docket.<sup>1</sup> The November 19, 2009 Order initiated an investigation and hearing, pursuant to section 5 of the Natural Gas Act (NGA), into the justness and reasonableness of Natural's rates. On December 22, 2009, Natural also filed a motion to stay the requirement in the Commission's November 19, 2009 Order that Natural file a cost and revenue study. As discussed below, the Commission denies rehearing of its November 19, 2009 Order and dismisses as moot the motion for stay of the requirement of the November 19, 2009 Order.

**Background**

2. On November 19, 2009 the Commission, based upon its review of publicly available information, determined that Natural may be substantially over-recovering its cost of service and fuel and lost and unaccounted for gas (FL&U), and that this may cause Natural's rates to be unjust and unreasonable. Specifically, the Commission examined Natural's Form 2 for 2008 filed in April of 2009 and found that based upon the cost and revenue information in that form, Natural's level of earnings may substantially exceed its actual cost of service, including a reasonable return on equity.

3. The Commission stated that it used the cost and revenue information provided by Natural in its 2008 Form 2 to develop a cost of service with an estimated 12.00 percent return on equity and compared this to Natural's actual revenues. The total revenue reported by Natural exceeded its cost of service as calculated by the Commission by approximately \$149,110,881 for 2008, resulting in an estimated return on equity, net of

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<sup>1</sup>*Natural Gas Pipeline Co. of America, LLC*, 129 FERC ¶ 61,158 (2009) (November 19, 2009 Order).

income taxes, of about 24.50 percent.<sup>2</sup> Further, the Commission stated that Natural also appeared to be substantially over recovering fuel and lost and unaccounted for gas from its customers because the amount of gas Natural received in-kind from its customers was over twice the amount of fuel use and lost and unaccounted for gas on Natural's system.<sup>3</sup>

4. Accordingly, the Commission found, based upon a preliminary analysis, that Natural's rates, including fuel retention percentages, may be unjust and unreasonable and may permit Natural to recover revenue substantially in excess of its costs of service and fuel and lost and unaccounted for gas. The Commission stated that pursuant to NGA section 4, Natural may seek authorization from the Commission to adjust its rates to establish just and reasonable rates, but noted that Natural had not attempted any such adjustment in more than 13 years. Based upon these reasons, the Commission initiated an investigation to examine the justness and reasonableness of the rates pursuant to section 5 of the NGA and set the matter for hearing.<sup>4</sup>

5. The Commission also stated that, as it has done in other instances at the initiation of a NGA section 5 proceeding, it would require Natural to file a cost and revenue study within 45 days of the issuance of the November 19, 2009 Order.<sup>5</sup> The Commission directed that the required cost and revenue study should include actual data for the latest 12-month period available and:

should include all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with one exception. Because Natural does not have a NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, Natural does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture. In

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<sup>2</sup> The Commission set forth the details of its cost and revenue analysis in the Appendix to the November 19, 2009 Order.

<sup>3</sup> 129 FERC ¶ 61,158 at P 6. Specifically, the Commission determined that Natural's overrecovery of gas for this period appeared to approximate some 30,933,022 Dth of gas. *Id.*

<sup>4</sup> *Id.* P 7.

<sup>5</sup> *Id.* P 8, citing, *Panhandle Complainants v. Southwest Gas Storage Co.*, 117 FERC ¶ 61,318 (2006); *Pub. Serv. Comm'n of New York v. National Fuel Gas Supply Corp.*, 115 FERC ¶ 61,299 (2006). Subsequently, the Chief Judge extended the time for the required cost and revenue study to be filed until February 4, 2010.

addition, Natural does not need to file nine months of post-base period adjustment data required by section 154.303(a) at this point in the proceeding. 129 FERC ¶ 61,158 at P 8. (footnotes omitted)

6. Lastly, in its November 19, 2009 Order the Commission emphasized several points. First, it stated that it was proceeding pursuant to section 5 of the NGA.<sup>6</sup> Second, the Commission clearly established that “Natural does not have a NGA section 4 burden in this section 5 proceeding,”<sup>7</sup> and it clarified that the Commission had not made any finding concerning what would constitute a just and reasonable return on equity for Natural.<sup>8</sup>

### **Requests for Rehearing**

7. In its request for rehearing, Natural contends that the Commission erred in requiring it to file statements and schedules required by section 154.312 of the Commission’s regulations<sup>9</sup> and to derive rates. Natural contends that this requirement ignores the distinction between NGA sections 4 and 5. Natural states that the Commission’s requirement is tantamount to requiring Natural to file a section 4 rate case, and therefore violates the well-established principle that the Commission cannot compel a pipeline to make a section 4 filing. Moreover, Natural states that the required cost and revenue study and rate derivation also violates NGA section 5 by effectively shifting to Natural the Commission’s burden to produce substantial evidence to show that Natural’s existing rates are unjust and unreasonable as well as exceeding the Commission’s authority under NGA sections 10 and 16.

8. Natural also contends that this requirement contradicts the Commission’s own recent Order No. 710, which it asserts held that NGA section 5 complainants will have to rely on data in the pipeline’s financial forms rather than a cost and revenue study filed by the pipeline to meet their section 5 burden.<sup>10</sup> Finally, Natural argues that this requirement will inhibit the development of needed natural gas and electric infrastructure.

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<sup>6</sup> 129 FERC ¶ 61,158 at P 1, 7, 8, and Ordering Paragraph (A).

<sup>7</sup> *Id.* P 8.

<sup>8</sup> *Id.* at fn.6.

<sup>9</sup> 18 C.F.R. § 154.312 (2009).

<sup>10</sup> *Citing Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, FERC Stats. & Regs. ¶ 31,267, at P 12 (2008) (Order No. 710), *order on*

9. For its part, Marathon argues that the Commission erred in not finding that Natural's existing FL&U rates were unjust and unreasonable. Marathon also argues that the Commission erred by not finding that Natural's lack of a tariff mechanism to track and true-up Natural's FL&U rates based upon Natural's actual experience in the previous 12 months is unjust and unreasonable. Marathon contends that the Commission erred in refusing to order Natural to file revised FL&U rates based upon Natural's actual losses and throughput in the last 12 months and to implement a tracking and true-up mechanism to annually adjust Natural's FL&U rate based upon actual losses and throughput.

10. Natural filed an answer to Marathon's request for rehearing. Because the Commission's rules do not permit answers to requests for rehearing,<sup>11</sup> the Commission rejects Natural's answer.

### **Discussion**

11. For the reasons discussed below, the Commission denies the requests for rehearing of both Natural and Marathon. The Commission also denies Natural's request for stay.

### **Natural's Rehearing Request**

12. The Commission has discretion whether to conduct an investigation under section 5 of the NGA.<sup>12</sup> No party has questioned this discretion and Natural has explicitly stated that "Natural does not dispute the Commission's authority to review its rates under NGA section 5."<sup>13</sup> Further, Natural does not dispute the Commission's assertions that Natural's return on equity in 2008 was approximately 24.50 percent<sup>14</sup> or the Commission's finding that Natural had substantially over recovered its FL&U from its

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*reh'g and clarification*, 123 FERC ¶ 61,278 (2008) (Order No. 710-A), *remanded*, *American Gas Ass'n v. FERC*, No. 08-1266 (D.C. Cir. Jan. 22, 2010).

<sup>11</sup> 18 C.F.R. § 385.713(d) (2009).

<sup>12</sup> *See General Motors Corp. v. FERC*, 613 F.2d 939, 944-45 (D.C. Cir. 1979). The Commission has discretion in determining to initiate proceedings and the termination of such proceedings. *Cf. Wisconsin v. FPC*, 373 U.S. 294 (1963). Moreover, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court set forth a general rule that an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way is presumptively not subject to judicial review. *Id.* at 831-832.

<sup>13</sup> Natural Request for Rehearing at 4.

<sup>14</sup> 129 FERC ¶ 61,158 at P 5.

customers.<sup>15</sup> In fact, Natural does not dispute any aspect of the Commission's analysis of the data in its 2008 Form 2.

13. Natural's contentions on rehearing center on the Commission's requirement that Natural file a cost and revenue study including actual data for the latest available 12-month period and including all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with the exception of a Statement P. Natural argues that this requirement disregards the boundaries between sections 4 and 5 of the NGA as set forth by the courts,<sup>16</sup> and effectively requires it to submit an NGA section 4 rate filing.

14. The Commission disagrees. Contrary to Natural's contention, requiring such an informational filing does not improperly transform this proceeding from a section 5 proceeding to a section 4 proceeding. NGA section 4(c) requires the pipeline to file with the Commission, and keep open for public inspection, "schedules showing all rates and charges" for jurisdictional services. Section 4(d) states that a pipeline may propose to change those rates by "filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." The November 19, 2009 Order did not require Natural to file any change in its existing rate schedules, and thus did not require Natural to make a section 4 filing, or place any section 4 burden on Natural to support its existing rates or the rate in the required cost and revenue study.

15. The November 19, 2009 Order directed the company to file information we need to carry out our responsibilities under NGA section 5 to ensure that rates are just and reasonable. The Commission recognizes that, consistent with *Western Resources*,<sup>17</sup> in order to require Natural to reduce its rates, we will have the burden under NGA section 5 both to show that Natural's current rates are unjust and unreasonable and that any new rates we may impose are just and reasonable. The November 19, 2009 Order clearly stated a number of times that the Commission was acting under NGA section 5, and

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<sup>15</sup> 129 FERC ¶ 61,158 at P 6.

<sup>16</sup> Natural Request for Rehearing at 9, citing *Western Resources Inc. v. FERC*, 9 F.3d at 1578 (D.C. Cir. 1993) (*Western Resources*); *Consumers Energy Co. v. FERC*, 226 F.3d 777 (6th Cir. 2000) (*Consumers Energy*); *Pub. Serv. Comm'n of New York v. FERC*, 866 F.2d 487 (D.C. Cir. 1989) (*Public Service*).

<sup>17</sup> 9 F.3d at 1578.

expressly recognized that “Natural does not have a section 4 burden in this section 5 proceeding.”<sup>18</sup>

16. Sections 10(a) and 14(a) of the NGA authorize the Commission to require Natural to submit the information required by the November 19, 2009 Order in order to carry out its responsibility under NGA section 5 to ensure that the pipeline’s rates are just and reasonable.<sup>19</sup> Section 10(a) permits the Commission to require any and all reports that are “necessary or appropriate to assist the Commission in the proper administration of [the NGA].” Section 10(a) also permits the Commission to “prescribe the manner and form in which such reports shall be made, and require from such natural gas companies specific answers to all questions upon which the Commission may need information.”<sup>20</sup> Similarly, section 14 permits the Commission “to investigate any facts, conditions, practices, or matters which it may find necessary or proper . . . to aid in the enforcement of the provisions of this chapter.”

17. In *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), the United States Court of Appeals for the District of Columbia Circuit rejected a contention similar to that made by Natural here. In that case, the Commission in Order No. 637 had directed each pipeline to file *pro forma* tariff sheets showing how it intended to comply with a regulation requiring pipelines to permit segmentation<sup>21</sup> or explaining why its system’s configuration justified curtailing segmentation rights. The pipelines contended that requiring them to submit these filings impermissibly shifted the burden of proof, and the Commission had, in essence, required pipelines to make section 4 filings to defend their current rates. The court rejected this argument, finding that the Commission had stated that it “will indeed shoulder the burden under § 5 of the NGA.” *INGAA*, 285 F.3d at 38. As pertinent here, the court expressly stated that:

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<sup>18</sup> 129 FERC ¶ 61,158 at P 7.

<sup>19</sup> NGA section 10 states “Every natural-gas company shall file with the Commission such... special reports as the Commission may by . . . order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act.”

<sup>20</sup> As Natural points out, the November 19, 2009 Order did not expressly cite NGA section 10 as authority to require Natural submit the subject information. In this order, we clarify that we are relying on NGA sections 5, 10, and 14 to require Natural to submit the information, as discussed above.

<sup>21</sup> 18 C.F.R. § 284.7(d) (2009).

As to the Commission's determination **to extract information from pipelines relevant to the practical issues, we see no violation of the NGA.** The Commission has authority under § 5 to order hearings to determine whether a given pipeline is in compliance with FERC's rules, 15 U.S.C. § 717d(a), and under § 10 and § 14 to require pipelines to submit needed information for making its § 5 decisions, 15 U.S.C. §§ 717i & 717m(c). *Id.* (emphasis added).

The same conclusion applies here, since the November 19, 2009 Order clearly states that the Commission has the burden in this NGA section 5 proceeding.

18. Natural argues that NGA section 10 does not authorize the Commission to require a cost and revenue study of the type at issue here, because the required study goes beyond a compilation of factual data by the pipeline, as contemplated by section 10(a). Rather, Natural argues, the cost and revenue study directed by the Commission requires the pipeline to make multiple subjective decisions regarding composition of its rate base, cost allocation, rate design, and claimed return on equity, among other matters, which are the kinds of decisions that are made by a pipeline only when it is proposing changes in rates in an NGA section 4 filing.

19. The Commission finds this argument to be without merit. We recognize that completing the cost and revenue study required by the November 19, 2009 Order will require Natural to make judgments concerning the appropriate composition of its rate base, how its costs should be allocated among its services, how its rates should be designed, and what its return on equity should be. However, this fact does not transform that study into an NGA section 4 filing. Responding to the November 19, 2009 Order's request for information requires no greater exercise of judgment by Natural than Order No. 637's directive, affirmed in *INGAA*, that pipelines file *pro forma* tariff sheets showing how they intended to comply with the new segmentation regulation or explain why they should be exempted from that requirement. Nor does responding to such a directive shift the burden of proof on these issues from the Commission to Natural.

20. The Commission readily admits that the information that it has requested from Natural is the type of information necessary to craft rates. Whether rates are changed pursuant to the procedures and burdens in NGA section 4 or in NGA section 5, the same information and calculations are required to determine the rates. The pipeline's cost of service must be determined, including an appropriate return on equity, and that cost of service must be allocated among the pipeline's various services, and per unit rates must be determined for each service. Therefore, it cannot be surprising that the Commission has requested that Natural provide most of the same information it would require had Natural filed to change its rates under NGA section 4, particularly since the required information is in the hands of Natural. In this regard, the Form 2 does not require pipelines to provide the information necessary to allocate costs among customers or to

derive per unit rates, such as the contract demands of the shippers in each customer class, annual billing requirements, zonal throughput, how much throughput flowed at a discount and what those discounts were. Such information is squarely within the scope of this proceeding and to require Natural to submit such information simply does not require it to make a filing under NGA section 4 to change or justify its rates.

21. Further, although mostly ignored by Natural in its arguments, the Commission's November 19, 2009 Order specifically exempted Natural from submitting certain types of information in order to ensure that it avoided placing any inappropriate burden on Natural in this proceeding:

Because Natural does not have a NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, Natural does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture. In addition, Natural does not need to file nine months of post-base period adjustment data required by section 154.303(a) at this point in the proceeding. 129 FERC ¶ 61,158 at P 8 (footnotes omitted).

22. There is nothing to the contrary in the court decisions relied upon by Natural. In *Public Service*, the Commission expressly required that a pipeline file rates under NGA section 4 every three years. The Commission determined that this action was necessary because of the inadequate protection provided by NGA section 5 and concluded that good cause existed to require periodic section 4 refilings. The court found that the Commission had improperly shifted the burden of proof from the Commission to the pipeline.<sup>22</sup> However, the court in *Public Service* did not find that the Commission could not request information from the regulated entity, as suggested by Natural. Rather, the court found that in that proceeding "the Commission has made clear that its purpose in requiring a § 4 filing was precisely to avoid the 'insufficient protection' afforded by § 5, see *Ozark Gas Transmission System*, 39 FERC ¶ 61,142 at 61,512, i.e., to avoid its procedural constraints." *Id.* at 491. In this case, unlike *Public Service*, the Commission has not required Natural to file new rate schedules under section 4, and the Commission fully recognizes that it is proceeding under NGA section 5, and bears the burden to make the findings required by section 5 in order to modify Natural's rates.

23. In *Consumers Energy Company v. FERC*,<sup>23</sup> the Commission required a Hinshaw pipeline performing certain NGA jurisdictional services to file, at three-year intervals,

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<sup>22</sup> 488 F.2d. at 490-92.

<sup>23</sup> 226 F.3d 777 (6<sup>th</sup> Cir. 2000) (*Consumers Energy*).

petitions “for rate approval to justify its current rate or to establish a new maximum rate.” The court held that it was unclear whether the Commission intended to require the pipeline to make periodic section 4 filings modifying its rates, or simply require periodic informational filings. Finding that the Commission lacks authority to order pipelines to make NGA section 4 filings, the court remanded the case to the Commission.<sup>24</sup> However, the court also stated:

Should FERC wish [the Pipeline] **to make periodic informational filings, it may of course so require pursuant to § 10(a) of the NGA.** This will allow FERC to do what it insists it has been trying to do all along, and will permit both sides to get what they have assured us they want. *Id.* at 781 (emphasis added).

24. Here, consistent with *Consumers Energy*, the Commission has expressly stated that it is not requiring Natural to file revised rate schedules under NGA section 4, but is simply requiring an informational filing of the type the court held is permissible under NGA section 10(a). Accordingly, the above cases do not prohibit the Commission from requiring information in the instant proceeding as suggested by Natural.

25. Natural argues that the Commission’s requirement that Natural file a section 154.312 cost and revenue study is inconsistent with the Commission’s actions in certain other proceedings. First, Natural asserts that the Commission’s actions in this case are inconsistent with Order No. 710.<sup>25</sup> Order No. 710 revised the requirements for Form 2

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<sup>24</sup> Subsequently, in *Consumers Energy Co.*, 94 FERC ¶ 61,287 (2001), the Commission issued an order on remand from the court in *Consumers Energy*. The Commission stated:

We now clarify that, under our NGA section 10(a), 15 U.S.C. § 717i(a), authority, we are requiring Consumers to submit, on or before December 1, 2001, data and information we need to monitor Consumers’ rates in accordance with NGA section 5. Accordingly, the rates approved for Consumers in the April 15, 1999 letter order are accepted, to be effective as proposed, subject to the condition that Consumers must file cost and throughput data and other information on or before December 1, 2001, sufficient to allow the Commission to determine whether any change in Consumers’ rate pursuant to NGA section 5, which would apply prospectively, should be ordered. This cost and throughput data should be in the form specified in § 154.313 of the regulations. *Id.* at fn.8.

(continued...)

and other forms “to provide the Commission and pipeline customers with information that will aid their ability to make a reasonable assessment of a pipeline’s cost of service.”<sup>26</sup> Natural states that Order No. 710 recognized that the Commission lacked the authority to require pipelines to file cost and revenue studies of the type compelled here, and specifically refused to require pipelines to file cost and revenue studies as part of Form 2.<sup>27</sup> Therefore, Natural argues that the Commission has explicitly acknowledged that parties filing a section 5 complaint will have to carry their burden of proof based on

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<sup>25</sup> *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, FERC Stats. & Regs. ¶ 31,267, at P 12 (2008) (Order No. 710), *order on reh’g and clarification*, 123 FERC ¶ 61,278 (2008) (Order No. 710-A), *remanded*, *American Gas Ass’n v. FERC*, No. 08-1266 (D.C. Cir. Jan. 22, 2010).

<sup>26</sup> Order No. 710 at P 12.

<sup>27</sup> Natural argues that the Commission recognized that requiring such a filing would cross the line between NGA sections 4 and 5:

As an initial matter, *the Commission has no intention of obscuring the distinction between sections 4 and 5 of the NGA* by any changes implemented here to the financial forms filed by natural gas companies. Therefore, the Commission will not reinstate a periodic rate review absent a concomitant benefit as was the case when, in exchange for recovering purchased gas costs through a tracker, pipelines were required to restate their rates every three years. In addition, the Commission rejects the proposal to order companies to file cost and revenue studies as part of these forms. Also, the changes being implemented here do not affect existing rates nor change any rate on file. In like vein, the Commission cannot alter the rights and obligations of pipelines and their customers under sections 4 and 5 of the NGA. Under section 4 of the NGA, a pipeline has the right to file a rate case at any time. *The Commission cannot compel a pipeline to file under section 4, nor can it preclude it from filing under section 4 for any reason*, including the presence of a section 5 complaint. . . . Greater transparency is essential to the Commission’s oversight responsibilities and, as implemented here, will not affect the burden of proof in section 5 proceedings. A party filing a section 5 complaint would still have the burden to show why the information in the Commission’s financial forms support an allegation that the pipeline’s existing rates are unjust and unreasonable. *Id.* (emphasis added) (footnotes omitted). *See also* Order No. 710-A at P 16.

the information in the Form 2, without the benefit of the pipeline having provided a section 154.312 cost and revenue study and rate derivation. Therefore, Natural argues it is now unnecessary and inappropriate for the Commission to require Natural to file a cost and revenue study and to derive rates in the form required by section 154.312 of the Commission's regulations.

26. In Order No. 710, the Commission revised Form 2 and other financial forms "to provide in greater detail, the information the Commission needs to carry out its responsibilities under the NGA to ensure that rates are just and reasonable, and to provide pipeline customers and the public the information that they need to assess the justness and reasonableness of pipeline rates."<sup>28</sup> Similarly, Order No. 710-A stated that the revisions to the financial forms "were designed to provide a level of information that would enhance the ability of the Commission and pipeline customers to assess the reasonableness of pipeline rates."<sup>29</sup> The purpose of this assessment is to allow customers and the Commission to determine if there is a sufficiently serious question as to the justness and unreasonableness of the pipeline's existing rates to justify the customers filing a complaint and the Commission exercising its discretion to establish a hearing under NGA section 5. As Order No. 710 explained, one of the reasons the Commission initiated that rulemaking was that in *National Fuel*<sup>30</sup> the pipeline had asserted that the Form 2 data the complainants relied on in their complaint against the pipeline's rates was insufficient to justify a hearing and investigation into a pipeline's rates under NGA section 5.<sup>31</sup> Thus, the focus of Order No. 710 was to ensure that the Form 2 obtains sufficient information to determine whether to initiate a section 5 proceeding. There was no intent in Order No. 710 to restrict the information that the Commission may require once it has determined that the Form 2 data justifies initiating a NGA section 5 proceeding and the Commission determines additional information is required to meet its burden of establishing whether the subject rates are just and reasonable, and if not, to establish just and reasonable rates to be thereafter followed by the pipeline. Indeed, in *National Fuel*, once the Commission determined the Form 2 data did raise a sufficiently serious question concerning the reasonableness of the pipeline's rates to justify a hearing, the Commission required the pipeline to file the same cost and revenue study as it has required here.

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<sup>28</sup> Order No. 710 at P 1.

<sup>29</sup> Order No. 710-A at P 16.

<sup>30</sup> *Pub. Serv. Comm'n of New York, et al. v. National Fuel Gas Supply Corp.*, 115 FERC ¶ 61,299, at P 37 (2006) (*National Fuel*).

<sup>31</sup> Order No. 710 at P 5.

27. Natural also argues that the Commission's requirement that Natural file a cost and revenue study in the form required for major section 4 rate increase by section 154.312 of the Commission's regulations is inconsistent with *Indicated Shippers v. Sea Robin Pipeline Company*, 76 FERC ¶ 61,151 (1996) (*Sea Robin*), where the Commission only required a cost and revenue study in the form required for minor rate increases by section 154.313. Natural argues that there are significant distinctions between sections 154.312 (Composition of Statements for major rate changes) and 154.313 (Composition of Statements for minor rate changes) in the information and level of detail required; in brief, much information that is required by section 154.312 is not required by section 154.313. Natural recognizes that in more recent cases, including *National Fuel* discussed above, the Commission has required the pipeline to file the more detailed section 154.312 cost and revenue study. However, Natural argues that the rationale the Commission presented in *National Fuel*, that National Fuel's rates had not been reviewed in a much longer time than was the case in *Sea Robin*,<sup>32</sup> does not pass the test for reasoned decision-making because the amount of time is immaterial for purposes of considering what type of data a pipeline should be required to file. Natural also asserts that *National Fuel* and another similar order<sup>33</sup> were not reviewed by the Commission on rehearing or challenged on appeal. Therefore, Natural argues that no court has ever sanctioned the Commission's claim that it may, having initiated an NGA section 5 hearing, then require the pipeline to submit a section 154.312 cost and revenue study.

28. Natural's argument that the Commission has failed to explain its departure from its so-called *Sea Robin* "policy" of only requiring a section 154.313 cost and revenue study carries little weight. The Commission's only "policy" is to obtain the information needed to carry out its regulatory obligations and statutory mandate. The fact that it required the quality and amount of information required by section 154.312 of the regulations in the instant proceeding and required the pipeline in *Sea Robin* to file a cost and revenue study including schedules normally required for a minor rate increase pursuant to section 154.313 of the regulations was driven only by the nature of the pipelines involved. *Sea Robin* is a relatively small pipeline, with some 450 miles of jurisdictional pipeline with a capacity of one BCF of gas a day. In 1996, it offered three services, Rate Schedule FTS (firm service), Rate Schedule FTS-2 (volumetric firm service), Rate Schedule ITS (interruptible service). *Sea Robin* provided no storage services. On the other hand, Natural is one of the largest transporters of natural gas in the country and the largest into the Chicago, Illinois, market. Its interstate system has approximately 9,800 miles of

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<sup>32</sup> *National Fuel*, 115 FERC ¶ 61,368 at P 5.

<sup>33</sup> *Panhandle Complainants v. Southwest Gas Storage Co.*, 117 FERC ¶ 61,318, at P 18.

pipeline, 275 Bcf of working gas storage, and peak day market area deliverability of nearly 5.0 Bcf per day. Natural offers a wide array of transportation and storage services under at least ten rate schedules

29. Therefore, the Commission needs more detailed information to fully consider the rates on Natural's system than it would on a system such as Sea Robin's. This reason alone reflects why the Commission required information from Natural in contemplating a review of its rates beyond that of what it required from Sea Robin when it examined the rates on that pipeline. The Commission's policy remains the same, it will request the information it requires to meet its obligations in each situation.<sup>34</sup> The Commission finds that, contrary to Natural's contention, *National Fuel* and *Panhandle Complainants* are final Commission orders and constitute valid Commission precedent concerning the production of information wholly within the scope of the instant proceeding.

30. Natural argues that the Commission erred in failing to consider that its actions will inhibit the development of needed gas and electric infrastructure. Natural asserts that by instituting an investigation into Natural's rates on its own motion, without being presented with a complaint by a state commission, the Commission has taken a step that will discourage investment in energy infrastructure and create regulatory uncertainty.

31. Natural states that the settlement in Natural's last rate case in 1997<sup>35</sup> placed most of the risk of recovering decontracting costs on Natural and that since that settlement Natural has undertaken significant efforts to make its system more competitive and operate more efficiently. Natural argues that the Commission's action in this proceeding has upset the expectations of all parties and threatens serious harm to investors that sought to invest in a company with stable and predictable returns. Natural also speculates that this proceeding may also result in new regulatory requirements that may discourage Natural from maximizing efficiency on its system as well as rendering it more difficult for the pipeline industry to attract needed investment dollars.

32. Furthermore, Natural states that the Commission in its budget submission to Congress identified the development of a strong energy infrastructure as its number one

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<sup>34</sup> See, e.g., *Dominion Transmission, Inc.*, 118 FERC ¶ 61,036, at P 21 (2007) ("The Commission may use its own expertise in determining what information it requires in fulfilling its statutory mandate to ensure just and reasonable rates and is granted express authority under section 10 of the NGA to require reports.").

<sup>35</sup> *Natural Gas Pipeline Co. of America*, 81 FERC ¶ 61,160 (1997) (order approving settlement).

goal<sup>36</sup> and recognized that a critical element in stimulating infrastructure development involves cost recovery for investors through wholesale rates:

To invest in electric transmission facilities and natural gas and oil pipelines, investors need to know with sufficient certainty how and when they will have the opportunity to recover their costs. The Commission must therefore establish and consistently apply policies that provide a fair opportunity for cost recovery. The Commission must also ensure that rates are just and reasonable and not unduly discriminatory or preferential, but it cannot ignore the impact of its actions on investment in infrastructure. Natural Request for Rehearing at 29 (footnotes omitted).

33. Contrary to Natural's contentions, the Commission's actions here in no way conflict with the Commission's policy that seeks to encourage infrastructure investments. As the Commission stated in adopting the revised Form 2 to require pipelines to furnish greater detail of their operations, it did so to help the Commission carry out its responsibilities under the NGA to ensure just and reasonable rates. The Commission has always recognized that, at the same time, it must weigh the effect of its actions on the ability of the pipeline to provide the essential facilities through capital investment. From the very outset of the NGA it has been understood that the Commission must balance conflicting demands.<sup>37</sup> The Commission remains committed to encouraging investment in needed infrastructure. The NGA requires that the Commission provide pipelines an opportunity to recover their costs, including a reasonable return on their equity investments. However, in the present circumstances, where from an analysis of data of the pipeline's current operations it appears that the pipeline may be substantially over recovering its cost of service and may be earning a return on equity in excess of 24 percent, an investigation of Natural's rates is warranted. Providing appropriate incentives for investment in infrastructure does not require the Commission to insulate pipelines from any investigation of their rates, no matter how large the apparent over recovery those rates may be permitting. Natural will have a full opportunity in the hearing established by this order to defend its existing rates, and the Commission will

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<sup>36</sup> Natural Rehearing Request at 28, *citing* Federal Energy Regulatory Commission, Fiscal Year 2010 Congressional Performance Budget Request at 9 (*available at* <http://www.ferc.gov/about/strat-docs/FY10-budg.pdf>) (last accessed Dec. 13, 2009) (FY 2010 Budget Request).

<sup>37</sup> *Federal Power Commission v. Hope Gas Co.*, 320 U.S. 591, 603 (1944) ("The rate-making process under the Act, i.e. the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests.").

only order a rate reduction if and only to the extent it can satisfy its burden under NGA section 5 to show that Natural's existing rates are unjust and unreasonable.

### **Marathon's Request for Rehearing**

34. Marathon argues that the Commission erred in not finding that Natural's existing FL&U rates were unjust and unreasonable. Marathon also argues that the Commission erred by not finding that Natural's lack of a tariff mechanism to track and true-up Natural's FL&U rates based upon Natural's actual experience in the previous 12 months is unjust and unreasonable. Marathon contends that the Commission erred in refusing to order Natural to file revised FL&U rates based upon Natural's actual losses and throughput in the last 12 months and to implement a tracking and true-up mechanism to annually adjust Natural's FL&U rate based upon actual losses and throughput.

35. Marathon asserts that Natural's current FL&U retention factors have been in effect since April 1, 1996 and that Natural's tariff does not require it to submit periodic fuel filings, or to true-up FL&U over/under-collections. Marathon argues that pursuant to section 5(a) of the NGA, when the Commission determines that an existing rate is unjust or unreasonable, the Commission must determine a new just and reasonable rate. Marathon also notes that section 5(a) of the NGA also empowers the Commission to order a decrease where existing rates are "unjust ... unlawful, or are not the lowest reasonable rates."<sup>38</sup> Therefore, Marathon argues that section 5 of the NGA requires the Commission to stop the ongoing FL&U over recovery by Natural and to implement just and reasonable FL&U rates.

36. Moreover, Marathon asserts that the Commission has adopted a policy requiring pipelines with fuel trackers to implement a true-up mechanism in order for the pipelines to accurately adjust their fuel use charges and to keep all parties whole. Marathon states that requiring Natural to modify its FL&U mechanism is consistent with this action.<sup>39</sup>

37. Marathon argues that Natural has over-collected approximately 233 Bcf of FL&U, and therefore these retention rates, which result in Natural over recovering its FL&U costs without returning any portion of the FL&U over recovery or related revenues to its customers, are clearly unjust and unreasonable and in violation of the NGA.<sup>40</sup> Marathon

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<sup>38</sup> Citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).

<sup>39</sup> *ANR Pipeline Co.*, 108 FERC ¶ 61,050 (2004), *reh'g denied*, 110 FERC ¶ 61,069 (2005) (*ANR II*).

<sup>40</sup> Marathon asserts that Natural retained more than 233 Bcf over and above its actual FL&U for the ten (10) year period of 1999-2008; plus, based on past experience,

(continued...)

points out that the Commission's policy is that FL&U recovery mechanisms should not be profit centers for pipelines, but rather, that such mechanisms should allow the pipeline to recover the FL&U costs that the pipeline incurred.<sup>41</sup> Marathon argues that the significant over recovery of FL&U in the instant proceeding warrants Commission action under its section 5 authority to find that Natural's currently effective FL&U mechanism and currently effective FL&U retention rates are unjust and unreasonable.

38. Marathon argues that because it is not reasonable to require Natural's shippers to tender year after year twice as much gas as Natural actually uses to operate its system the Commission should require a decrease in Natural's unjust and unreasonable FL&U retention rates to just and reasonable levels by requiring Natural to file, within 30 days of the instant order, revised FL&U rates based on actual throughput and FL&U in 2009. Further, Marathon argues that Natural should be required to adopt a fuel tracker to insure that its retention of fuel used for compressor stations and L&U gas is just and reasonable and that Natural should also be required to make annual true-up filings in order to accurately resolve any over/under collections on the Natural system. Marathon argues that such action will not disrupt or delay the Commission section 5 hearing or Natural's non-fuel rates.

39. The Commission declines to take the actions suggested by Marathon at this point in the proceeding. The Commission finds that such suggestions are premature. The Commission has made its determinations concerning Natural's FL&U rates based upon publicly available data and stated that these determinations are preliminary in nature. The Commission will not be able to finally determine these matters and, if necessary, move to implement any remedy, until Natural has had a full opportunity to file the cost and revenue study the Commission has required in this proceeding.<sup>42</sup> The Commission's analysis of the information it has required of Natural will determine the Commission's actions in this proceeding.

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an additional 24-30 Bcf for 2009. Marathon argues that to allow Natural to retain yet another 24-30 Bcf in 2010 over and above Natural's actual FL&U, pending Commission action is unnecessary.

<sup>41</sup>*Northern Natural Gas Co.*, 80 FERC ¶ 61,332, at P 62,106 (1997). *ANR II*, 110 FERC ¶ 61,069 at P 41.

<sup>42</sup>*Panhandle Complainants v. Southwest Gas Storage Co.*, 117 FERC ¶ 61,318, at P 20.

### **Motion for Stay**

40. On December 22, 2009, Natural requested a stay of the requirement in the Commission's November 19, 2009 Order that Natural file a cost and revenue study in accordance with section 154.312 of the Commission's regulations.<sup>43</sup> Natural states that it is not requesting a stay of the investigation and hearing ordered by the Commission pursuant to section 5 of the NGA or stay of, or any other modification to, the Track II procedural time standards that the Commission has designated for this case. Natural states that pending the resolution of Natural's request for rehearing, and during the pendency of any appeal, Natural seeks a stay of the requirement that it submit a cost and revenue study. Natural asserts that "granting the requested stay will allow the Commission to consider the issue and make the appropriate determination, while preserving Natural's rights in the event that the Commission corrects itself on rehearing."<sup>44</sup> Given our action here denying rehearing of the November 19, 2009 Order, the Commission also dismisses the requested stay as moot.

### **Cost and Revenue Study**

41. On February 4, 2010, Natural submitted a cost and revenue study to comply with the November 19, 2009 Order. Natural stated that the base period for the study consisted of the 12 month period ended October 31, 2009, and indicated that the schedules therein included certain adjustments. The Indicated Shippers,<sup>45</sup> the Industrials,<sup>46</sup> BP Energy,<sup>47</sup> and the American Public Gas Association responded asserting that by making adjustments to the base period data the filing did not comply with the November 19, 2009 Order that required the study to include "actual" data for the 12 month period. Issues concerning the adequacy of the cost and revenue study submitted by Natural and whether Natural should be required to provide additional information as a part of the ongoing

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<sup>43</sup> Natural Motion for Stay at 1, *citing*, 129 FERC ¶ 61,158 at P 8.

<sup>44</sup> *Id.* at p. 7.

<sup>45</sup> The Indicated Shippers is comprised of Anadarko Corp., Apache Corp., ConocoPhillips Co., Occidental Energy Marketing, Inc., and Shell Energy North America (US) LP.

<sup>46</sup> The Industrials is comprised of the American Forest & Paper Association, Grain Processing Inc., Process Gas Consumers Group, United States Gypsum Company, and United States Steel Corporation.

<sup>47</sup> BP Energy Co., BP Canada Energy Marketing Corp., and NextEra Energy Resources, LLC.

discovery process are more appropriately raised in, and should be resolved in, the hearing we have ordered.

The Commission orders:

(A) The Commission denies rehearing of the November 19, 2009 Order as discussed in the body of this order.

(B) The Commission dismisses the requested stay of its November 19, 2009 Order as moot.

By the Commission. Commission Moeller is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.