UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Natural Gas Supply Association,)
American Forest and Paper Association,)
American Public Gas Association,) Docket No. RP11-1538-000
Independent Petroleum Association of America, and)
Process Gas Consumers Group)

REQUEST OF THE
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
FOR CLARIFICATION, REHEARING AND RECONSIDERATION

Per the Federal Energy Regulatory Commission (Commission) Rules of Practice and Procedure, particularly rule 713,[1] and section 19(a) of the Natural Gas Act (NGA),[2] the Interstate Natural Gas Association of America (INGAA) respectfully requests clarification, rehearing[3] and reconsideration of the Order on Petition issued April 21, 2011, in the above-captioned proceeding.

REQUEST FOR CLARIFICATION

1. The Commission should clarify that a pipeline's decision to continue operating in accordance with its approved tariff provisions does not present an enforcement issue for the pipeline, even if the tariff is different in some respects from the revenue crediting policy articulated in the Order on Petition.

The Order on Petition is unprecedented. The Natural Gas Supply Association and other joint petitioners (collectively, Petitioners) asked the Commission to invoke its authority under NGA section 5[4] "to enforce its policy regarding pipeline crediting during outages" by ordering interstate natural gas transmission pipelines (pipelines) to amend their tariffs or make a "show

[1] 18 C.F.R. § 385..713.

[2] 15 U.S.C. § 717r(a).

[3] In this pleading INGAA's request for clarification precedes its request for rehearing because a failure to clarify the order as requested would constitute a separate legal error and ground for rehearing.

[4] 15 U.S.C. § 717d.

cause" filing demonstrating that their tariffs already conform. Instead of granting the section 5 relief Petitioners requested, the Commission "urge[d] pipelines to review their tariffs to determine whether their individual tariff is in compliance and, if not, make an appropriate filing to come into compliance."[5] The Commission backed its urging with the threat of "corrective action" against the non-compliant:

> The Commission is directing the Division of Audits in the Office of Enforcement that future audits of interstate pipelines conducted by the Division of Audits should include whether the tariffs comply with the Commission's reservation charge crediting policy. Of course, if any shipper or shippers on a particular pipeline believe that pipeline's tariff does not comply with Commission policy and the pipeline is not taking appropriate action to bring its tariff into compliance, they can file a complaint alleging non-compliance, and seek section 5 relief, or raise the issue in any section 4 filing by that pipeline. Finally, in the event of significant non-compliance with the Commission's reservation charge crediting policy, the Commission will consider other appropriate actions to obtain compliance.[6]

Never before has the Commission taken an "urge and audit" approach to a section 5 petition.

Before it can embark on this completely uncharted approach, the Commission needs to clarify how this course squares with section 5 jurisprudence, as well as the Commission's prior approval of the tariffs at issue. The Commission characterizes the "urge and audit" approach as "voluntary,"[7] suggesting that the Order on Petition should be regarded as a policy statement. If this is the case, the Commission should act within recognized policy statement jurisprudence and make it clear that a pipeline's continued operation under its tariff will not subject it to enforcement action, even if the tariff differs from the reservation charge crediting "policy" articulated in the Order on Petition.

[5] Order on Petition, P 1.

[6] *Id*., P 13 (internal citations omitted).

[7] *Id*., P 12.

Failure to grant this clarification would contravene the long-standing principle that a pipeline is permitted to implement and enforce a Commission-approved tariff provision, even if the provision may no longer comply with Commission policy or regulation, until the Commission requires the pipeline to modify the provision, on a prospective basis, pursuant to section 5.[8] Absent a clarification recognizing and upholding currently effective tariff provisions, it appears the Order on Petition would leave pipelines no choice but to carry the burden of reviewing their tariffs to ascertain compliance with the "policy" stated in the Order on Petition and then, for tariffs not precisely in compliance, to make filings either to change the tariff or to demonstrate why the currently-effective Commission-approved tariff provision is just and reasonable. This not only shifts the Commission's section 5 burden to the pipeline, it also violates the NGA and court precedent by essentially mandating that a pipeline justify an existing, Commission-approved tariff provision as just and reasonable under section 4, even though the pipeline has not proposed a change to the provision.[9]

In short, not granting this clarification would, in itself, constitute an error and provide a separate basis for rehearing.

If the Order on Petition is nothing more than a policy statement, then maintaining a Commission-approved tariff that is different from the policy does not constitute non-compliance

[8] *See, e.g., Algonquin Gas Transmission Co, et al.*, 94 FERC ¶ 61,383 (2001) (concluding that pipeline companies had the right to continue implementing and enforcing a tariff provision until the Commission acts under section 5 to require a prospective modification to the provision). *See also INGAA v. FERC*, 285 F.3d 18, 54 (D.C. Cir. 2002); *Wyoming Interstate Company, Ltd.*, 129 FERC ¶ 61,022 at P 13 (2009) (directing WIC, pursuant to section 5, to revise its tariff to make it consistent with the Commission's policy or to show cause why it should not be required to do so); *Petal Gas Storage, L.L.C.*, 124 FERC ¶ 61,082 at P 10 (2008) (affirming that "the Commission has authority pursuant to section 5 . . . to require a pipeline to revise an existing tariff provision that violates Commission policy"); *Colorado Interstate Gas Company*, 122 FERC ¶ 61,256 at P 2 (2008) (initiating an investigation under section 5 and requiring the pipeline to "show cause why its existing tariff provisions related to the unauthorized overrun rate during non-critical periods are just and reasonable and comport with Commission policy").

[9] *See Public Service Comm'n of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980).

and should not expose the pipeline to adverse audit rulings or enforcement exposure. The converse is also true. The Commission cannot claim to have adopted a voluntary approach if a decision to maintain an existing Commission-approved tariff provision that is different in some respects from the stated policy could result in enforcement action or exposure to adverse audit findings.

Other points of clarification are discussed in the remainder of this pleading.

REQUEST FOR REHEARING

SPECIFICATIONS OF ERROR

1. In issuing the Order on Petition, the Commission acted in excess of its statutory authority, contrary to section 706(2)(C) of the Administrative Procedure Act[10] and NGA section 5 by taking action under NGA section 5 without making the requisite findings, supported by substantial evidence, that pipelines' current tariffs and rates are not just and reasonable, and that rates and tariffs conforming to the reservation charge crediting policy, such as it is, are just and reasonable.

2. By neglecting to affirm the continued validity of Commission-approved tariffs in place, and instead urging pipelines to examine their tariffs to assess compliance with Commission policy, and subjecting pipelines with non-conforming tariffs to audit exposure and other enforcement action, the Order on Petition violates section 706(2)(D) of the Administrative Procedure Act[11] by giving the reservation charge crediting policy the force of regulations without first conducting notice and comment rulemaking.

3. Characterizations to the contrary notwithstanding, the Order on Petition announces an industry-wide reservation charge crediting standard far different from the Commission's longstanding policy of handling reservation charge crediting through individual pipeline cases; by shifting its longstanding policy without explaining the reasonableness of the change (or grounding the decision in factual findings supported by substantial evidence of record), the Commission acted arbitrarily and capriciously. *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738 (D.C. Cir. 2001).

[10] 5 U.S.C. § 706(2)(C).

[11] 5 U.S.C. § 706(2)(D).

STATEMENT OF ISSUE

1. The Natural Gas Supply Association and four other petitioners (collectively, Petitioners) asked the Commission "to enforce its policy regarding pipeline crediting during outages" by ordering interstate natural gas transmission pipelines (pipelines) to amend their tariffs or make a "show cause" filing showing that their tariffs already conform. Instead of granting the section 5 relief Petitioners requested, the Commission "urge[d] pipelines to review their tariffs to determine whether their individual tariff is in compliance and, if not, make an appropriate filing to come into compliance." Although the Commission characterized its approach as voluntary, it backed its urging by subjecting non-compliant pipelines to audit liability and other "corrective" enforcement action. In exposing non-compliant pipelines to liability, the Commission acted under section 5 without meeting the statutory requirements, it imposed regulations without following required rulemaking procedures, and it departed from its well-established reservation charge crediting policy without reasonable explanation or foundation in the record.

ARGUMENT

1. IN ISSUING THE ORDER ON PETITION AND, SPECIFICALLY, IN EXPOSING NON-COMPLIANT PIPELINES TO AUDIT AND OTHER ENFORCEMENT LIABILITY, THE COMMISSION ACTED UNDER NGA SECTION 5 WITHOUT MAKING THE STATUTORILY REQUIRED FINDINGS AND MEETING THE STATUTORILY REQUIRED STANDARDS.

Petitioners asked the Commission to use its section 5 authority to issue an industry-wide order requiring pipelines to amend their tariffs or demonstrate why they believe their tariffs are in compliance. The Commission has invoked this "generic" section 5 authority in only a handful of cases, prescribing the mandatory, industry-wide adoption of one practice after finding that an existing industry-wide practice was unlawful.[12]

Under section 5, the burden of coming forward and the burden of proof rest with the party seeking to change an existing tariff or rate, whether the party advocating that change is a private party or the Commission. When the Commission is operating under Section 5, it has the

[12] *E.g.*, *United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996)("UDC")(upholding industry-wide unbundling of sales and transportation per Order No. 636); *INGAA v. FERC*, 285 F.3d 18, 37-39 (D.C. Cir. 2002)(upholding industry-wide segmentation per Order Nos. 636 and 637); *see also Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985)(upholding Order No. 380, which found minimum bill provisions unlawful).

burden of going forward and the burden of proof to show both that the current tariff provisions are unjust and unreasonable and that any replacement tariff provisions are themselves just and reasonable.[13] In both instances, the burden must be borne by substantial evidence meeting each of the two discrete standards.[14]

While the Order on Petition did not grant the specific relief requested by petitioners, in all pertinent respects the Order on Petition is tantamount to section 5 relief and the Commission's issuance of this order is tantamount to action under section 5. The Commission claims it is not acting under section 5 because the specified pipeline actions are "voluntary;"[15] but an action cannot be classified as voluntary where the failure to act triggers audit exposure and other enforcement action.

The Order on Petition serves to shift the burden of coming forward and the burden of proof that Congress established when it enacted section 5. The Order on Petition places the burden on the pipeline to assess its Commission-approved tariff for compliance with the reservation charge crediting policy. If the pipeline declines to do so, or declines to make a tariff filing to cure its supposed deficiency, the pipeline will be subject to adverse findings in a subsequent Commission audit as well as other "corrective" enforcement action.

While the Commission declined to institute the section 5 action Petitioners requested,[16] the Order on Petition has the effect of section 5 action and is subject to section 5 requirements. The Commission did not make an industry-wide finding that tariff provisions governing capacity

[13] *See, e.g., Western Resources v. FERC,* 9 F.3d 1568 (D.C. Cir. 1993); *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182-183-87 (D.C. Cir. 1986); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 513-14 (D.C. Cir. 1985).

[14] *Id.*

[15] Order on Petition, P 12.

[16] *Id.*, P 2.

reservation credits are unlawful, nor did it make a finding that the so-called “current policy” articulated in the Order on Petition is just and reasonable. In failing to meet these requirements, the Commission acted outside its section 5 authority and the Order on Petition is unlawful.

2. THE ORDER ON PETITION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BY IMPOSING A RULE OF GENERAL APPLICABILITY, IN EFFECT, A REGULATION, WITHOUT NOTICE AND COMMENT RULEMAKING.

The Administrative Procedure Act (APA) draws a distinction between regulations and policy statements, requiring notice and comment for rules while granting an express exemption for policy statements.[17] The distinction between the two is that regulations have the force of law, binding on the regulated, while policy statements are statements of position that are binding on neither the issuing agency nor the parties it oversees:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance.
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> A general statement of policy, on the other hand, does not establish a “binding norm.” It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. * * * When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. [18]

[17] 5 U.S.C. § 553(b)(3)(A).

[18] *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)(internal citations omitted); *see also*, *U.S. Telephone Assn. v. FCC*, 28 F.3d 1232, 1235 (D.C. Cir. 1994); *Syncor Int’l Corp. v. Shalala*, 127 F.2d 90, 94 (D.C. Cir. 1997).

As written, (that is, without an express affirmation of the justness, reasonableness and continuing effectiveness of existing tariffs, per INGAA's request for clarification), the Order on Petition subjects pipelines to audit exposure and other enforcement action for failure to conform to the Commission's reservation charge crediting policy. By invoking enforcement via the audit process and otherwise, the Order on Petition vests the reservation charge crediting policy with the legal force of regulations. A pipeline can resist the Commission's "urging," but the consequence of doing so is foreordained: the pipeline will be penalized.

As written, the Order on Petition operates as a regulation and has the impact of a regulation, but it was issued without the rulemaking procedures required for a regulation. The Order on Petition fails to meet the APA rulemaking requirements and is, therefore, unlawful.

3. THE ORDER ON PETITION DEPARTS FROM A LONGSTANDING COMMISSION POLICY OF RESOLVING RESERVATION CHARGE CREDITING THROUGH INDIVIDUAL PIPELINE CASES WITHOUT REASONABLE EXPLANATION OR SUBSTANTIAL EVIDENCE IN THE RECORD.

The Commission characterizes the Order on Petition as restating "a well-established and longstanding policy concerning the reservation charge credits which all interstate pipelines must provide their firm shippers during both *force majeure* and non-*force majeure* situations."[19] The facts do not bear this out.

The Commission's longstanding practice, in fact, has been to take a pipeline-by-pipeline approach to reservation charge crediting. This practice dates back to the beginning of the open-access era and pipeline Order No. 636 restructuring proceedings. In many of these cases, reservation charge crediting was a significant issue, which the Commission permitted to be resolved on a pipeline-by-pipeline basis. Reservation charge crediting provisions in many

[19] Order on Petition, P 12.

pipeline tariffs during this time resulted from settlement or litigation. The pipeline-by-pipeline approach continues today, with the Commission allowing pipelines to tailor reservation charge crediting provisions to their unique circumstances.[20]

The Commission cannot arbitrarily or discriminatorily change its policies;[21] instead, the Commission bears the burden of explaining the reasonableness of any departure from a long-standing practice, and any facts underlying its explanation must be supported by substantial evidence. General statements regarding a generic policy that applies to all pipelines without regard to the unique circumstances that may underlie the Commission's earlier approval of a tariff provision that does not precisely conform in all respects to the Commission's purported policy does not provide the substantial evidence necessary to overturn a policy of approving

[20] *See, e.g., Kern River Gas Transmission Co.*, 129 FERC ¶ 61,262 (2009), *order on reh'g,* 132 FERC ¶ 61,111 (2010).

[21] *See, e.g., Otter Tail Power Co. v. FERC*, 583 F.2d 399, 408 (8th Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971); *Grace Petroleum Corp. v. FERC*, 815 F.2d. 589 (10th Cir. 1987); *NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981)*; Union Elec. Co. v. FERC*, 890 F.2d 1193, 1195 (D.C. Cir. 1989); *Tennessee Gas Pipeline Co. v. FERC*, 824 F.2d 78, 82 (D.C. Cir. 1987); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 519-20 (D.C. Cir. 1985).

reservation charge crediting provisions on a pipeline-by-pipeline basis.[22] The Order on Petition is unlawful because it contains neither a reasonable explanation nor substantial record evidence supporting a departure from is longstanding, pipeline-by-pipeline approach.

REQUEST FOR RECONSIDERATION

On rehearing, the Commission should correct these errors by (1) eliminating references subjecting pipelines to self-examination and audit exposure and (2) either denying the initial petition without comment or substantially revising the order to correct its numerous flaws.

It is imperative the Commission withdraw its "urge and audit" approach in its entirety. Reservation charge crediting is a rate issue, and the Commission should not force pipelines to make changes to crediting requirements outside the context of a rate case or a section 5 complaint proceeding. Audit and enforcement exposure is unprecedented, contravenes longstanding policy, and is legally indefensible on section 5 and APA grounds. Unless this approach is withdrawn in its entirety, the Order on Petition will continue to be legally defective.

[22] *Grace Petroleum Corp. v. FERC*, 815 F.2d. 589, 591 (10th Cir. 1987)(acknowledging that an agency has a right to change previous precedent, but in doing so, the "agency must provide a reasoned explanation for any failure to adhere to its own precedents")(citations omitted); *NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981)(holding that FERC did not act arbitrarily or discriminatorily in changing its policy because FERC adequately supported its findings with evidence); *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1195 (D.C. Cir. 1989)(holding that FERC did not satisfy the standard of amply supporting both factually and legally their contract interpretations); *Tennessee Gas Pipeline Co. v. FERC*, 824 F.2d 78, 82 (D.C. Cir. 1987)(stating that the Commission may not "cavalierly disregard" its prior decisions and adopt a new or different standard, and that "[i]n the absence of a clear explanation, imposition of costs on one group rather than another appears completely arbitrary"); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 519-20 (D.C. Cir. 1985)(reversing the Commission's decision because the Commission failed to "present substantial evidence that the differing [rate] treatment" compared to its previous treatment under similar circumstances was necessary and appropriate); *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001)(stating the rule that an "agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reasons for doing so"); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 585-86 (D.C. Cir. 1979)(rejecting the Commission's generic assertion that a new rate formula would result in a better distribution of cost responsibility and holding that the Commission needed to provide a reasoned explanation for its decision to depart from a formula that had been applied for twenty-five years).

Assuming the Commission withdraws the “urge and audit” approach, the remaining legal and policy defects can be cured by issuing an order on rehearing that denies the petition without further comment. Taking this approach would preserve the Commission’s central holding, while allowing reservation charge crediting issues to be decided in individual pipeline cases.

If the Commission declines to reject the petition without further comment, the order on rehearing will have to come to grips with the following fundamental flaws in the substance of its reservation charge crediting policy.

1. THE POLICY ALTERS ONE ELEMENT OUT OF THE SET OF INDEPENDENT FACTORS THAT COMPRISE COST LEVELS, COST ALLOCATION, RATE DESIGN AND THE COMMERCIAL RELATIONSHIPS BETWEEN PIPELINES AND THEIR SHIPPERS.

Reservation charge crediting is inextricably intertwined with the level of a company’s rates, and it is inappropriate to address reservation charge crediting provisions in a pipeline’s tariff on a stand-alone basis outside the context of a rate case or a section 5 complaint proceeding.

Crediting does not alter a pipeline’s fixed costs or its need to recover them fully. Crediting simply alters the way fixed costs are reflected in rates. Each credit is a deduction against a pipeline’s revenue requirement, and these deductions will need to be recovered either through increases in rates, adjustments to billing units or increases in costs, to be recovered through rates, for business interruption insurance. Absent a cost tracker, which is not contemplated in this docket, cost allocation, rate design and billing determinants are properly addressed in general rate cases or section 5 complaint cases, not by policies that unfairly treat one rate matter apart from the rest.

An example of the interplay between rate elements illustrates the point. In the Order on Petition, the Commission claims that since its 2006 order in *Rockies Express*,[23] it has consistently disfavored tariff provisions that deny reservation charge credits when a pipeline schedules at least 98 percent of a shipper's nominations.[24] These "98 percent" provisions generally reflect metering variance, not scheduled or unscheduled maintenance. They are unrelated to fulfilling the pipeline's delivery obligation and they should not be part of, much less condemned by, a reservation charge crediting policy.

The Commission should embrace the approach it already recognizes in cases involving market-based rates. In these proceedings, the Commission has made it clear that companies with market-based rate authority have the flexibility to negotiate a lower rate for service that does not allow for reservation charge credits during outages for either force majeure or non-force majeure events. The basis for these rulings has been that reservation charge crediting, both for *force majeure* events and others, is essentially a rate matter.[25]

2. THE POLICY CENTERS ON ANTIQUATED CONCEPTS OF FAULT, WHEN IT INSTEAD SHOULD ALLOW PIPELINES TO DEVELOP SOLUTIONS THAT MINIMIZE IMPACTS ON SHIPPERS.

The Commission's reservation charge crediting policy traces its roots to situations where the line between *force majeure* events and outages attributable to events within a pipeline's control was fairly stark. That is not the case now, and it will be even less so going forward.

[23] *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006).

[24] Order on Petition, P. 24.

[25] *See Golden Triangle Storage, Inc.*, 134 FERC ¶ 61,036 at P 8 (2011); *see also Southern LNG, Inc.*, 130 FERC ¶ 61.146 (2010); *Empire State Pipeline, Inc.*, 116 FERC ¶ 61,074 (2006); *Katy Gas Storage and Transportation, L.P.*, 106 FERC ¶ 61,145 (2004).

More liberal crediting during periods of scheduled reduction was justified on the theory it would promote more prudent pipeline management. At the outset, it should be noted that scheduled maintenance is the hallmark of prudent management, even though scheduled maintenance necessarily reduces a pipeline's capacity to serve. Characterizing scheduled maintenance as "mismanagement," as occurred in a passage from Order No. 406 that was quoted in the Order on Petition,[26] is false, offensive, and has no place in current policy.

A blame-based approach disregards fundamental aspects of system design. One could build a system that was so redundant there would never be a service interruption, but that system would be so expensive no shipper would want to use it. The appropriate forum for balancing system redundancy against the consequences of interruption is not a policy statement but a general rate case.

A blame-based approach also devalues the efforts pipelines make to work with their customers to develop maintenance schedules that minimize customer impact. In these cases, a scheduled maintenance outage is not the "fault" of the pipeline, but rather the product of prudent customer outreach and system operations. Several pipelines and their customers have established crediting exemptions to encourage pipelines to schedule maintenance during shoulder and off-peak months. These provisions benefit pipelines and shippers alike, and many of them have been in place since the advent of open-access without complaint from the vast majority of stakeholders.

If the Order on Petition's stated rule on crediting during scheduled maintenance outages is applied generically to all pipelines, the opportunity to develop exceptions to crediting through a more collaborative approach or through the settlement process in a rate case setting would be

[26] Order on Petition, P 19.

unavailable to pipelines and their shippers. Instead, pipelines and shippers would be subject to a one-size-fits-all approach that would be unable to take critical differences among pipelines (different peak seasons, shipper load profiles, etc.) into account.

3. HISTORICAL DIFFERENCES BETWEEN *FORCE MAJEURE* AND PIPELINE-CONTROLLED OUTAGES IS NOT USEFUL TODAY, WHEN SERVICE IS AND INCREASINGLY WILL BE AFFECTED BY ACTIONS NECESSITATED BY SAFETY AND ENVIRONMENTAL COMPLIANCE.

More and more, activities that might trigger service interruptions are prompted not by pipeline management decisions but by environmental and safety laws, regulations and mandated work practices, *e.g.*, the comprehensive safety regulations issued by the federal Pipeline and Hazardous Materials Safety Administration.[27] Regulatory compliance activities are distinct from pipeline-scheduled maintenance on three grounds: first, they are prompted by regulation, not management decision; second, they are not within the pipeline's control, either as to timing or extent; and finally, they are unexpected: they are not contemplated in the design of the pipeline's rates, they may be triggered by a regulatory response to occurrences on other pipelines, and pipelines cannot anticipate what further compliance actions will be required of them in the future.

4. ANY POLICY STATEMENT ON RESERVATION CHARGE CREDITING SHOULD BEGIN BY SPECIFYING THAT AGREEMENTS REACHED DURING THE ORDER NO. 636 COMPLIANCE PROCEEDINGS AND IN OTHER SETTLEMENT OR COLLABORATIVE FORUMS DO NOT HAVE TO BE CHANGED.

The Order on Petition seems to recognize the need to preserve existing tariffs and honor the settlements, litigation and Commission approvals that brought those tariffs into existence: "Where the pipeline and its shippers have entered into currently effective agreements that include provisions that differ from the Commission's reservation charge crediting policy, and which the Commission has accepted, those agreements need not be changed."[28] Whether a pipeline's reservation charge crediting provisions trace to a previous Commission proceeding (*e.g.*, an Order No. 636 restructuring proceeding), an agreement between a pipeline and its customers, or a collaborative process involving the initial certification of a pipeline,[29] the pipeline should not be required to disturb a Commission-approved tariff outside a general section 4 rate case.

5. NO POLICY STATEMENT, INCLUDING ONE ON RESERVATION CHARGE CREDITING, SHOULD OPEN THE DOOR FOR RAISING ISSUES IN PIPELINE TARIFF FILING PROCEEDINGS THAT ARE NOT GERMANE TO THE TARIFF FILINGS AT ISSUE.

The Order on Petition grants shippers *carte blanche* to raise reservation charge crediting in any section 4 case, even if there is no connection between this issue and the issues raised in the pipeline's initial filing.[30] Pushed to its logical conclusion, such latitude could turn even the simplest tariff filing, including ministerial filings and filings resulting from their efforts to accommodate customers, into major pipeline tariff restructurings. This approach runs contrary to the fundamental structure of the NGA, in which pipelines determine the breadth of their tariff filings in section 4 proceedings and the Commission and other parties determine the breadth of the issues in section 5 proceedings. The *carte blanche* approach also threatens to complicate and delay the processing of section 4 proceedings, and deter pipelines from making section 4 tariff filings altogether. Without the necessary clarification, the Commission could effectively change

[27] 49 C.F.R. Part 192.

[28] Order on Petition, n. 12 (citations omitted).

[29] *E.g., Alliance Pipeline, L.P.*, 84 FERC ¶ 61,239 (1998); *Alliance Pipeline*, 92 FERC ¶ 61,249 (2000).

[30] Order on Petition, P 13 ("Of course, if any shipper or shippers on a particular pipeline believe [a] pipeline's tariff does not comply with Commission policy and the pipeline is not taking appropriate action to bring its tariff into compliance, they can . . . raise the issue in **any** section 4 filing by that pipeline.")(emphasis added, citation omitted).

fundamental, historically acknowledged, legal distinctions between pipeline filings under section 4 and customer filings under section 5.

CONCLUSION

There are several legal flaws at the heart of the Order on Petition, including one that will be resolved if the Commission clarifies that a pipeline does not expose itself to enforcement liability if it continues to operate under its Commission-approved tariff. On rehearing, the Commission must remove the "urge and audit" provisions or its order will remain legally infirm. The Commission also must fundamentally re-write the order, either to deny the petition without further comment or to address the serious flaws identified in INGAA's request for reconsideration.

Respectfully submitted,

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