UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Rockies Express Pipeline LLC	)	Docket Nos.	RP11-1844-000
	)		RP12-399-000

MOTION FOR LEAVE TO INTERVENE OUT-OF-TIME, OR IN THE ALTERNATIVE, TO FILE AN AMICUS BRIEF, AND BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA ON EXCEPTIONS TO THE INITIAL DECISION

Pursuant to Rules of Practice and Procedure 212, 214 and 711 of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212, 385.214, and 385.711 (2013), the Interstate Natural Gas Association of America ("INGAA") files this motion for leave to intervene out-of-time or, in the alternative, to file an amicus brief, and the brief set forth below, to assist the Commission in its consideration of exceptions to the Initial Decision in *Rockies Express Pipeline LLC*, 143 FERC ¶ 63,017 (2013) ("I.D.").

I. MOTION TO INTERVENE

Because the I.D. in this case has the potential to set a troublesome and prejudicial precedent for the interstate gas pipeline industry, INGAA respectfully requests leave to intervene out-of-time and, in the alternative, to file an amicus brief. INGAA, a trade organization representing the majority of U.S. interstate natural gas pipeline companies, has a strong and legitimate interest apart from the outcome of this single case. INGAA is moved to intervene and submit this brief on exceptions out of concern about the impacts of the I.D. on INGAA's members, on the natural gas industry, and on natural gas consumers. INGAA's prominence as an industry trade group for interstate gas pipelines makes INGAA uniquely qualified to present an industry perspective on the I.D., and this perspective should be considered desirable and relevant to the case.

INGAA could not have known about the importance of this case prior to the I.D. The I.D. reopens a closed proceeding that the Presiding Judge admits was not set for hearing.[1] Thus, INGAA could not have known about this issue until now. Points in the I.D. with industry-wide ramifications also merit clarification from the Commission. Therefore, for good cause shown, INGAA's participation should be permitted.

II. INTRODUCTION

A. Principles Applicable to Amicus Filings.

The Commission occasionally treats late motions to intervene as amicus filings.[2] It also has considered the permissibility of such a filing in view of the Federal Rules of Appellate Procedure, Fed. R. App. P. 29.[3] Under that Rule, after the movant has requested leave to file an amicus brief, the Commission would consider the movant's interest, Fed. R. App. P. 29(b)(1), and whether the amicus brief is "desirable" and "relevant to the disposition of the case." Fed. R. App. P. 29(b)(2).

B. The Initial Decision as Relevant to INGAA's Interests.

INGAA disagrees with the I.D. on one point and seeks clarification on a second, each of which has wide implications in the natural gas pipeline industry. First, INGAA is concerned with the Presiding Judge's reliance on boilerplate language appearing in numerous Commission orders, holding that FERC has authority under Natural Gas Act ("NGA") section 4 to order retroactive refunds for a prior period Fuel and Lost and Unaccounted-for Reimbursement Quantities ("FL&U") filing that was accepted without suspension and permitted to take effect

[1] I.D. at P 118.
[2] *See, e.g., Transcon. Gas Pipe Line Corp.*, 88 FERC ¶ 61,155, at p. 61,521, *reh'g denied*, 88 FERC ¶ 61,295 (1999); *Tex. E. Transmission Corp.*, 88 FERC ¶ 61,167, at p. 61,559, *reh'g denied*, 88 FERC ¶ 61,291 (1999).
[3] *See Mass. Mun. Wholesale Elec. Co. v. Power Auth. of the State of N.Y.*, 20 FERC ¶ 63,103, at p. 65,379 (1982).

without being subject to refund.[4] As grounds for this action, the I.D. cites an Office of Energy Market Regulation delegated letter order accepting Rockies Express Pipeline LLC's ("REX") 2010 FL&U Filing ("REX Letter Order"), which states:

> This acceptance for filing shall not be construed as constituting approval . . . such acceptance is without prejudice to any findings or orders which have been or any which may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against REX Pipeline LLC.[5]

Second, the I.D. proceeds to adjust the prior period 2010 FL&U Filing under the auspices of NGA section 4. The I.D. concludes that it is "appropriate under NGA Section 4 to use a prior period adjustment to correct REX's 2010 FL&U Filing miscalculations and refund REX's unjust and unreasonable over-recovery that stemmed from these miscalculations."[6] The I.D. even goes so far as to order disgorgement of "unjust" profits collected through the 2010 FL&U Filing under NGA section 16.[7]

INGAA seeks clarification on the second issue, which concerns the Presiding Judge's finding that Section 11.6 of the General Terms and Conditions ("GT&C") of REX's FERC Gas Tariff ("Tariff") does not permit operational sales of "shipper-supplied gas pursuant to the fuel tracker."[8] The Presiding Judge found the pipeline in violation of its tariff by "retaining and selling the proceeds of shipper-supplied gas through the FL&U mechanism."[9] As a result, the Presiding Judge ordered REX to refund "incremental profits from these unlawful 'operational

[4] *Id.* at P 28.
[5] *Id.* at P 116 (quoting *Rockies Express Pipeline LLC*, Docket No. RP10-410-000, at 2 (Mar. 22, 2012) (delegated letter order)).
[6] *Id.* at P 128.
[7] *Id.* at P 143. NGA section 16 provides FERC with power "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the Act]." 15 U.S.C. § 717o (2006).
[8] I.D. at P 93.
[9] *Id.* at P 97.

sales'" and "submit a compliance filing to ensure that all refunds are accounted for under NGA section 4."[10] GT&C Section 11.6 of REX's Tariff provides:

> Transporter may purchase and/or sell Gas to the extent necessary to maintain System pressure, to acquire, maintain or manage line pack Gas on the System, to implement the cashout procedures under this Section 11 and/or to perform other System management or operational functions deemed necessary from time-to-time in connection with providing transportation services.[11]

Without further clarification, the I.D. suggests that a pipeline can never make an operational sale of excess gas obtained through the operation of its fuel tracker mechanism, even if a broad provision in its tariff seemingly grants that authority.[12]

III. DISCUSSION

Pursuant to 18 C.F.R. § 385.711(b)(2)(ii), INGAA excepts to the following:

1. The Presiding Judge erred in reopening a closed proceeding and ordering retroactive refunds under NGA section 4; and, if affirmed, this finding will have widespread and disruptive ramifications in the pipeline industry.

INGAA also seeks clarification on the I.D.'s finding concerning operational sales of excess gas that, if affirmed, will make it more difficult for pipelines to manage their systems.

A. NGA Section 4 Does Not Permit FERC to Reopen Dockets Subject to Final Commission Orders and Order Retroactive Refunds.

When a tariff filing has been accepted through a final Commission order, the Commission cannot order refunds of amounts collected under the approved tariff. The Commission's refund authority comes from NGA section 4.[13] FERC has no statutory authority under NGA section 4 to order retroactive refunds of rates that have not been suspended and set for hearing. The statute does not permit refunds unless FERC first suspends the rate with written

[10] *Id.* at P 110.
[11] REX FERC Gas Tariff, GT&C § 11.6.
[12] The I.D. excludes the sale of excess fuel gas from REX's broadly worded tariff provision based on the maxim of *expressio unius est exclusio alterius*. I.D. at P 93 (citing Black's Law Dictionary 581 6th ed. (1990)).
[13] 15 U.S.C. § 717c(e); *Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1224 (1st Cir. 1984).

justification for the suspension and permits the rates to take effect following the suspension period. Only in that circumstance are refunds possible.[14] Even then, it is only the increased rate that can be made subject to refund; the preexisting lawful rate is the refund floor.[15]

REX's 2010 FL&U Filing was never suspended. The I.D. ignores NGA section 4 when it holds that a closed docket may be re-opened and refunds ordered because of boilerplate language in a FERC letter order.[16] According to the I.D., REX's 2010 FL&U Filing remained subject to adjudication because the REX Letter Order stated: "[t]his acceptance for filing shall not be construed as constituting approval of the referenced filing . . . such acceptance is without prejudice to any findings or orders which…may hereafter be made by the Commission in any proceeding . . . hereafter instituted by or against REX."[17] The I.D. then rejects any notion that REX should have relied on the finality of the REX Letter Order because "letter orders issued under delegated authority are also non-precedential."[18] Additionally, the Presiding Judge relies on a proceeding decided under NGA section 5 for the proposition that FERC, in an NGA section 4 context, is not barred from "'subsequent revisions to the account balances and the appropriate recognition . . . of errors'" in the 2010 FL&U Filing.[19]

The REX Letter Order's language is no different from *hundreds* of other letter orders issued by the Commission and relied upon by the natural gas pipeline industry.[20] The industry makes business decisions based on those orders. The industry's interpretation is consistent with

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[14] 15 U.S.C. § 717c(e).
[15] *See, e.g. FPC v. Sunray DX Oil Co.* 391 U.S. 9, 22-25 (1968).
[16] Apart from not being set for hearing in Docket No. RP10-410, the I.D. ignores the fact the 2010 FL&U Filing was not set for hearing in the instant proceedings, Docket Nos. RP11-1844 and RP12-339, making the ALJ's actions extrajudicial and outside the scope of her delegated authority under 18 C.F.R. §§ 375.304 and 385.501.
[17] REX Letter Order (quoted by the I.D. at P 116).
[18] I.D. at P 117 (citing *Westar Energy, Inc.*, 124 FERC ¶ 61,057, at P 26 (2008); *Norwalk Power, LLC*, 122 FERC ¶ 61,273, at P 25 (2008)).
[19] *See id.* (citing and quoting *Dominion Transmission, Inc.*, 116 FERC ¶ 61,023 at P 21 (2006)).
[20] [20] *See, e.g., Tex. Gas Transmission, LLC*, Docket No. RP13-1025-000, at 2 (issued July 25, 2013); *N. Natural Gas Co.*, Docket No. RP13-980-000, at 2 (issued July 11, 2013) (delegated letter order); and *Kern River Gas Transmission Co.*, Docket No. RP13-948-000, at 2 (issued June 19, 2013) (delegated letter order).

FERC's own interpretations of its regulations—that letter orders constitute final agency action.[21] Indeed, the REX Letter Order specifically states, "This order constitutes final agency action," and states that rehearing petitions are due within 30 days. No rehearing petitions were filed.

Moreover, FERC has found letter orders to be final and binding notwithstanding their statements that they "not be construed as constituting approval of the referenced filing."[22] FERC has reasoned:

> A Director's Letter Order is issued by authority delegated from the Commission to the Director and, therefore, is as much a final Commission order as an order directly issued by the Commission. Thus, the Letter Order's specific statement that it constituted final agency action overrides any possible contrary implication from the disclaimer, which appears in all Director's Letter Orders.[23]

Like the acceptance of the tariff sheets in the Northwest Pipeline Corp. letter order referenced above, the REX Letter Order became "a final order on which the parties and the public could rely" when no requests for rehearing were filed.[24]

The further notion that letter orders are not final because they are "non-precedential" is erroneous. A letter order issued to Pipeline A may be non-precedential for Pipeline B even if Pipeline B is seeking a subject-matter relevant ruling. However, the letter order issued to Pipeline A is binding on Pipeline A. It is entirely proper for REX to rely on an unpublished letter order issued ***to REX***. All pipelines should be able to rely on the orders issued specifically to them by FERC. If the I.D. is permitted to stand, the legality and sufficiency of every similarly worded letter order will be called into question. And, FERC has issued over 800 of such similarly worded letter orders in the past twelve months alone.

[21] *See* 18 C.F.R. § 385.1902(a); *Nw. Pipeline Corp.*, 70 FERC ¶ 61,243 at p. 61,751 (1995).
[22] *Nw. Pipeline Corp.*, 70 FERC at p. 61,750.
[23] *Id.*
[24] *See id.*

INGAA is concerned that if the Commission were to adopt the I.D., the reasoning of the decision would not be limited to REX and its facts, but would extend industry-wide. This would call into question the industry's ability to rely on delegated letter orders as final agency action. The Commission should clearly and explicitly reverse the I.D. on this point to avoid setting conflicting and disruptive precedent.

B. The Commission Should Clarify that Pipelines Have Discretion to Manage Their Systems through the Operational Sale of Fuel Gas.

FERC allows interstate pipelines to make unbundled sales of operational gas to better manage their systems, provided their individual tariffs specify that authority.[25] REX's Tariff includes a provision that permits it to make operational sales for several purposes, including maintaining system pressure and managing line pack, as well as "to perform other System management or operational functions deemed necessary from time-to-time in connection with providing transportation services."[26] The I.D. finds that because this provision does not specifically "mention sales of shipper-supplied gas," such sales are not "operational sales" as defined by the Tariff.[27] The I.D. suggests that pipelines without specific tariff language can never make operational sales of shipper-supplied fuel gas. INGAA seeks clarification from FERC that operational sales can encompass excess gas obtained through a pipeline's fuel tracker mechanism.

The language in GT&C Section 11.6 of REX's Tariff is not unique to REX. Numerous pipelines have tariffs granting them broad authority to make operational sales to better manage

[25] *Millennium Pipeline Co., L.L.C.*, 129 FERC ¶ 61,089, at P 19 (2009) (accepting the pipeline's operational sales tariff provision "to maintain system pressure and line pack, manage system imbalances, perform other operational functions, and protect operational integrity of its system."); *Wyo. Interstate Gas Co., Ltd.*, 122 FERC ¶ 61,303, at P 35 (2008) (holding "WIC is required to make operational sales and purchases to maintain system operation for all shippers on the pipeline system."); *Colo. Interstate Gas Co.*, 107 FERC ¶ 61,312, at P 13 (2004).

[26] REX FERC Gas Tariff, GT&C § 11.6. This section also requires REX to submit an annual report to FERC stating the counterparty to the sale, the date of the sale, the volume sold and the sale price for transactions during the previous calendar year. *Id.*

[27] I.D. at P 93.

their systems.[28] This is consistent with FERC's grant of deference to pipelines' "reasonable discretion to manage their own systems."[29] Moreover, many INGAA members have tariffs that allow them to collect gas in-kind. Even if the fuel is retained to be used at gas-fired compressor stations, the amount collected will rarely be the exact amount required. To the extent there is an over-collection, the pipeline must have the right to sell the excess gas. Otherwise, the safe and efficient management of pipelines will be jeopardized by the need to always retain shipper-supplied fuel gas. This result would be absurd and impractical. Pipelines need authority to make incidental sales regardless of the source of the gas. If a tariff provision as broad as REX's does not permit pipelines to make operational sales when necessary to manage its system, it is unclear to INGAA what provision would suffice.

FERC acknowledges that natural gas is a fungible product.[30] Tracking gas on a pipeline's system is an accounting function, not a forensic exercise whereby pipelines can always trace the origin of the molecules.[31] Pipelines require flexibility to dispose of gas on their system for operational reasons regardless of the source. INGAA requests clarification that pipelines with tariff provisions granting them broad discretion to make operational sales can continue to do so, regardless of the source of the gas.

[28] *See, e.g.*, Columbia Gas Transmission, LLC, FERC Tariff, GT&C § 49.1 (Operational Transactions); Fayetteville Express Pipeline LLC, FERC Gas Tariff, Part 6 – GT&C § 10.6 (Purchase and Sale of Gas); and Millennium Pipeline Co., LLC, FERC Gas Tariff, GT&C § 41.1 (Operational Transactions).
[29] *Gulf South Pipeline Co., LP*, 132 FERC ¶ 61,199, at P 63 (2010); *see also Rockies Express Pipeline, LLC*, 124 FERC ¶ 61,215, at P 19 (2008).
[30] *See ANR Pipeline Co.*, 131 FERC ¶ 61,115 at P 91 (2010).
[31] *Id.*

IV. CONCLUSION

For all of the foregoing reasons, the Commission should reject the I.D.'s interpretation of NGA section 4, as applied to delegated letter orders, and clarify that pipelines may make operational sales of excess fuel gas.

Respectfully submitted,

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Dated: July 29, 2012

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding.

Dated this 29th day of July, 2013, at Washington, D.C.

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