

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Duke Energy Guadalupe Pipeline, Inc.

Docket No. PR05-17-002

ORDER GRANTING REHEARING
AND INSTITUTING STAFF PANEL PROCEDURES

(Issued June 2, 2006)

1. Mewbourne Oil Company (Mewbourne) has requested rehearing of the Commission's December 29, 2005 Order¹ approving a settlement of all issues raised in Duke Energy Guadalupe Pipeline, Inc.'s (Guadalupe) petition for rate approval filed on August 1, 2005. For the reasons discussed below, we grant rehearing of our approval of the settlement and institute staff panel procedures.

Background

2. Guadalupe operates approximately 500 miles of pipelines in Texas, extending from Katy in the Gulf Coast area of Texas to Waha in West Texas. On August 1, 2005, Guadalupe filed in Docket No. PR05-17-000 a petition for rate approval for the firm and interruptible transportation services rendered under section 311 of the Natural Gas Policy Act of 1978 (NGPA).² Guadalupe proposed, among other things, a maximum system-wide rate for firm and interruptible transportation service of \$.1906 per MMBtu, plus a 1.85 percent Fuel and Lost and Unaccounted For charge. Mewbourne, a producer of gas that is transported on Guadalupe, protested Guadalupe's filing, asserting that Guadalupe's proposed 14 percent return on equity was too high and should be reduced to 10.6 percent. Mewbourne also protested the proposed fuel charge. A settlement (Settlement) of the issues was reached by Guadalupe and the Commission staff (Staff), and Guadalupe filed the settlement offer on November 18, 2005.

3. The major elements of the Settlement were as follows: (1) effective August 1, 2005, Guadalupe is authorized to charge a maximum system-wide rate for firm and interruptible transportation of natural gas and parking and lending service of \$.1810 per

¹ *Duke Energy Guadalupe Pipeline, Inc.*, 113 FERC ¶ 61,326 (2005) (December 29, 2005 Order).

² 15 U.S.C. § 3371 (2000).

MMBtu, plus a 1.85 percent Fuel and Lost and Unaccounted For charge on all services rendered on its intrastate pipeline system under NGA section 311(a)(2); (2) the Commission, through approval of the settlement, represented that it had determined a fair and equitable rate for Guadalupe's transportation of natural gas under NGPA section 311(a)(2) only, and that it had not determined rates for any other purpose; and (3), Guadalupe will revise its Statement of Operating Conditions to include its maximum Fuel and Lost and Unaccounted For charge and to clarify that the Fuel and Lost and Unaccounted For charge will be charged in a nondiscriminatory manner.

4. Mewbourne filed comments in opposition to the settlement offer. In its comments, Mewbourne incorporated by reference arguments made in its original protest. In addition, Mewbourne objected to the 1.85 percent fuel charge, on the grounds that this fuel charge would discriminate unduly against shippers using Guadalupe's service under NGPA section 311. Mewbourne argued that the settlement fuel charge is substantially higher than the fuel charges Guadalupe assesses on transportation for some of its intrastate customers. Mewbourne pointed to two intrastate contracts on file with the Texas Railroad Commission that showed Guadalupe had negotiated fuel charges of one percent with one shipper and 0.5 percent with another shipper. Mewbourne argued that it would be inequitable for Guadalupe's shippers under section 311 of the NGPA to be required to subsidize the fuel consumption of Guadalupe's intrastate customers in this manner.

5. In the December 29, 2005 Order approving the settlement, the Commission stated that no party objected to the maximum rate of \$.1810 per MMBtu provided by the settlement. However, the Commission stated that Mewbourne opposed the settlement's fuel charge. The Commission found that Guadalupe's proposed fuel charge of 1.85 percent was calculated correctly, because it was based on actual fuel consumption as a percentage of total throughput. The Commission stated that the Guadalupe's fuel percentage was not derived by taking into account the discounting of the fuel percentage for Guadalupe's intrastate customers as Mewbourne inferred, and that Mewbourne's claim that Guadalupe's section 311 interstate customers are subsidizing the fuel use of Guadalupe's intrastate customers was not supported by the record.³

Requests for Rehearing

6. Mewbourne argues that the Commission erred in finding that no party objected to the settlement's maximum rate of \$.1810 per MMBtu. It points out that its comments on the settlement incorporated the arguments found in its original protest. In that protest, Mewbourne argued that Guadalupe's return on equity should be 10.6 percent, which is 0.5 percent below the 11.1 percent median of Guadalupe's proxy group. Mewbourne

³ *Id.* at P 20.

argued that Guadalupe's proof in support of its proposed 14 percent return is threadbare, consisting of nothing more than cursory arguments that it faces intense competition, lacks a two-part rate, and is not a local distribution company.

7. Mewbourne argued that Guadalupe had not shown it faces greater risk than its proxy group. Mewbourne stated that, despite Guadalupe's assertion that a large portion of its revenues are derived from commodity-only rates, two-part rates are prominent among Guadalupe's current long-term intrastate transportation portfolio. Mewbourne argued that because intrastate volumes have accounted for more than 80 percent of Guadalupe's throughput for the years 2002 through 2004, Guadalupe, in fact, appears to benefit substantially from the moderating effect of demand charge revenues on its risk. Mewbourne also pointed out that Guadalupe has operated at a high load factor.

8. In its rehearing request, Guadalupe claims that the settlement's \$.1810 per MMBtu rate reflects a 12 percent return on equity, which is significantly higher than the 10.6 percent return on equity it argued for in its protest.

9. Regarding Guadalupe's postage stamp Fuel Charge of 1.85 percent, Mewbourne explains in its request for rehearing that Guadalupe charges some of its Texas intrastate customers a substantially lesser percentage fuel charge than the 1.85 percent postage stamp Fuel Charge the Commission approved in the December 29, 2005 Order. It notes that Guadalupe has stated the fuel charges for both intrastate and NGPA section 311 interstate customers are based on the fuel use calculated for the various operational segments of the pipeline. Mewbourne agrees that fuel charges should mirror, or at least approximate, fuel consumption and takes no issue with Guadalupe's differentiation in fuel charges to its intrastate customers based upon distance of haul. However, Mewbourne argues that Guadalupe's NGPA section 311(a)(2) interstate shippers should receive the same treatment as its intrastate shippers. Mewbourne argues that because the 1.85 percent fuel charge represents a finding by the Commission of Guadalupe's variable cost of fuel, Guadalupe does not have the authority to discount such rate to its interstate customers.

10. On February 13, 2006, Guadalupe filed an answer to Mewbourne's request for rehearing. Our rules of practice and procedure, section 385.713(d), do not permit answers to requests for rehearing, and accordingly, Guadalupe's answer is rejected.

Discussion

11. Under Rule 602 of the Commission's Rules of Practice and Procedure, the Commission may approve an uncontested settlement offer upon finding that the settlement appears to be fair and reasonable and in the public interest.⁴ However, where

⁴ 18 C.F.R. § 385.602(g)(3) (2005).

a settlement is contested, the Commission must make an independent finding supported by substantial evidence on the record as a whole that the proposal will establish rates consistent with the statutory standard,⁵ here that the rate be “fair and equitable.” NGPA section 311(a)(2)(B). Consistent with this requirement, Rule 602(h)(1)(i) of the Commission's settlement rules provides that, if the Commission determines that an offer of settlement is contested in whole or in part, the Commission may decide the merits of the contested settlement issues, only if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.⁶

12. In this proceeding, it is clear that Mewbourne is contesting not only the settlement's fuel retention rate, but also the \$.1810 per MMBtu base rate for transportation services.⁷ Mewbourne contends that the settlement transportation rate reflects an excessive return on equity. Because the settlement proposed in this proceeding is a black box settlement, it does not reflect any agreement on the individual components of Guadalupe's cost of service. Since the settlement is contested, the Commission could only approve it, if the Commission could find on the merits that the overall \$.1810 MMBtu settlement transportation rate is less than or equal to the fair and equitable transportation rate the Commission would approve based on a merits resolution of all issues concerning Guadalupe's cost of service and rate design volumes.⁸ The present record is insufficient to make such merits holdings.

⁵ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974). *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,339 (1998).

⁶ 18 C.F.R. § 385.602(h)(1)(i) (2005).

⁷ Mewbourne also argues that the Commission should vacate the Settlement Agreement because it is the product of *ex parte* communications between Guadalupe and Staff, which are prohibited by Rule 2201 of the Commission's Rules of Practice and Procedures. The alleged *ex parte* communications consisted of three e-mails from Staff to Guadalupe, including two e-mails that were also addressed to Mewbourne but were inadvertently sent to the wrong e-mail address. Mewbourne states that it presumes the communications were not intended to exclude Mewbourne from the settlement process. The Commission notes that Mewbourne did obtain copies of all three e-mails before comments on the settlement were due and did not request any extension of time for filing comments due to the delay in its receipt of the e-mails. In any event, because we are granting rehearing of our approval of the settlement and setting the issues in this proceeding for Staff Panel procedures, no party will have been injured by any alleged *ex parte* communications concerning the settlement.

⁸ *See Indicated Shippers v. Sea Robin Pipeline Co.*, 81 FERC ¶ 61,146 at 61,652 (1997).

13. Accordingly, the Commission will grant rehearing of its approval of the settlement and institute a Staff Panel proceeding pursuant to section 284.123(b)(2)(ii) of its regulations. In that proceeding, parties may raise all issues concerning whether Guadalupe's proposed rates are fair and equitable, including not only issues concerning Guadalupe's proposed base rates but also issues concerning its proposed fuel retention percentage. A Staff Panel shall be convened for that purpose as soon as practicable. Staff Panel hearings are advisory, non-evidentiary proceedings to permit the parties an opportunity to present oral views, data and arguments in accordance with section 502(b) of the NGPA.⁹ Within 90 days of the date of the issuance of this order, the Staff Panel will certify the record of the proceeding to the Commission and any recommendation to the Commission.

The Commission orders:

(A) Rehearing is granted as discussed in the body of this order.

(B) Pursuant to the Commission's authority under section 311 of the NGPA and section 284.123(b)(2)(ii) of the Commission's regulations, a proceeding shall be instituted to determine whether the rates reflected in Guadalupe's rate petition are fair and equitable. A Staff Panel shall convene and shall certify the record of the proceeding and any recommendation within 90 days of the issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹ 15 U.S.C. § 3412(b) (2000).