

130 FERC ¶ 61,134
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company

Docket No. RP10-148-001

ORDER DENYING REHEARING

(Issued February 24, 2010)

1. On November 19, 2009, the Commission, after finding that Northern Natural Gas Company (Northern) may be substantially over-recovering its cost of service, thereby causing Northern's existing rates to be unjust and unreasonable, issued an order¹ initiating an investigation, pursuant to section 5 of the Natural Gas Act (NGA), to determine whether the rates currently charged by Northern are just and reasonable, and setting the matter for hearing. The order directed Northern to file a full cost and revenue study within 45 days of the issuance of the order.² Northern filed a request for rehearing, or, in the alternative, reconsideration, of the November 19 Order. For the reasons set forth below, the Commission denies Northern's request.

The November 19 Order

2. The November 19 Order described Northern as operating an interstate natural gas pipeline system extending from its Field Area in the Permian Basin in Texas to its Market Area in the upper Midwest, with 15,141 miles of natural gas pipeline. Northern provides service to 76 utilities and numerous end-users, under a number of rate schedules.

3. The November 19 Order recognized that Northern's current transportation and storage rates were established as part of a settlement approved by the Commission on June 20, 2005.³ The settlement established base rates effective November 1, 2003, and permitted annual adjustments to the base rates through November 1, 2006, and included a

¹ *Northern Natural Gas Co.*, 129 FERC ¶ 61,159 (2009) (November 19 Order).

² The Chief Judge extended the time to file the study until February 4, 2010.

³ *Northern Natural Gas Co.*, 111 FERC ¶ 61,444 (2005).

rate moratorium that prevented Northern from effectuating new base rates under NGA section 4 before November 1, 2007. Northern's total cost of service underlying its currently effective rates is approximately \$481.0 million.

4. In March 2008, the Commission issued Order No. 710,⁴ a Final Rule to change the forms and reporting requirements for interstate natural gas pipelines, including FERC Form No. 2 (Form 2), the annual report for major natural gas companies. The Commission stated that the revised forms and reporting requirements would provide, in greater detail, additional information the Commission needs to help carry out its responsibilities under the NGA to ensure just and reasonable rates.

5. In April 2009, Northern filed its Form 2 for 2008. The November 19 Order stated that using the cost and revenue information provided therein, the Commission developed a cost of service for Northern with an estimated 12.00 percent return on equity and compared this to Northern's actual revenues.⁵ The total revenue reported by Northern on Form 2, as adjusted, was \$726,083,362, and the cost of service calculated by the Commission was \$558,727,906, a difference of \$167,355,456. The order stated that for 2008 this analysis indicated that Northern's currently effective tariff rates may allow it to recover revenue substantially in excess of its costs of services, resulting in an estimated return on equity, net of income taxes, of about 24.36 percent. Accordingly, the Commission initiated an investigation to examine the justness and reasonableness of Northern's rates pursuant to section 5 of the NGA, and set the matter for hearing.⁶

6. Consistent with recent Commission actions initiating section 5 investigations of other pipeline's rates,⁷ the order directed Northern to file, within 45 days of the date the order's issuance, a cost and revenue study which should include actual data for the latest

⁴ *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 73 FR 19389 (Apr. 10, 2008), FERC Stats. & Regs. ¶ 31,267 (2008), *reh'g and clarification*, Order No. 710-A, 123 FERC ¶ 61,278 (2008), *remanded American Gas Ass'n v. FERC*, No. 05-1266 (D.C. Cir., Jan. 22, 2010).

⁵ The details of the Commission's cost and revenue analysis were contained in the Appendix to the November 19 Order.

⁶ The order made no finding as to what would constitute a just and reasonable return on equity for Northern but that would be one of the issues set for hearing.

⁷ See *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).

12-month period available as of the date of the order. The cost and revenue study was to include all the schedules required in a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations,⁸ except that Northern was not required to file Statement P required by sub section 154.312(v), nor need it file nine months of post-base period adjustment data required by section 154.303(a).⁹

Northern's Rehearing Request

7. In its request Northern argues that the November 19 Order ignores the comprehensive settlement of tariff and rate issues reached by Northern, its customers, state commissions, and other interested parties in 2005. The 2005 Settlement, which resolved two separate section 4 rate cases, reflected a broad-based consensus of Northern and all of its stakeholders regarding all aspects of Northern's service, and also included a rate moratorium by which Northern agreed not to file a general section 4 rate case proceeding that would implement new base rates prior to November 1, 2007. Northern states that the agreement was complex and represented a careful balancing of many diverse and often competing interests. Indeed, as a result of the settlement, Northern states it has been able to maintain stable rates since November 2007, and Northern's customers enjoy the lowest transportation rates in the Upper Midwest. Northern asserts that the Commission's inexplicable decision to reverse its prior policy and order a rate review a mere four years after a comprehensive settlement effectively eviscerates the settlement process and sends an ominous signal to pipelines and customers alike that will undoubtedly hamper future rate settlements.

8. Northern argues that the November 19 Order also impermissibly crosses the line between the Commission's jurisdiction under NGA section 4, a rate increase proceeding initiated by the pipeline, and NGA section 5, a proceeding not initiated by the pipeline, by requiring Northern effectively to file a section 4 rate case and to defend its currently-approved just and reasonable rates based on a time period of the Commission's choosing. Northern asserts the fact that the Commission recently has ordered other pipeline companies to make such filings in section 5 proceedings, albeit in the context of third-party complaints rather than *sua sponte*, does not mean that the Commission's action here is permissible under the NGA.

9. Northern contends that the basic requirement under section 5 of the NGA is a two-part burden in which "the Commission must show that the rates it would alter are not just

⁸ 18 C.F.R. § 154.312 (2009).

⁹ The order stated that an initial decision should issue within 47 weeks of the designation of the presiding judge.

and reasonable, and that the ones it seeks to impose are.” *Public Serv. Comm’n of New York v. FERC*, 866 F.2d 487, 488 (D.C. Cir. 1986) (*Public Service*). In a section 5 proceeding, the Commission is the “proponent of change” and hence it bears that burden. *Id.* Here, Northern argues, while the Commission utilizes section 5 to initiate the proceeding, that proceeding in fact has all the elements of a section 4 proceeding since the November 19 Order seeks effectively to pin the burden on Northern by ordering what is, in all but name only, a full-blown section 4 case. Northern states, however, the statutory requirement that the Commission, not the pipeline, must adduce the evidence to support any section 5 finding could not be more clear.

10. The November 19 Order, Northern maintains, ignores this black-letter law. It contends that the November 19 Order not only requires Northern to make the specified cost and revenue filing, which the proponent must make in a section 4 proceeding, but it also imposes the specific 12-month period of data to be used (i.e., the “latest 12-month period available as of the date of this order.”). Northern states the Commission’s position is both arbitrary and capricious because it has made no reasonably supportable finding that Northern’s existing rates are unjust and unreasonable.

11. Northern contends that the single-page Appendix summarizing Form 2 data which the Commission relies upon for its action here to require Northern to file virtually a full-blown rate case to support its rates is insufficient as a matter of law, and contrary to sound public policy. Northern states that in a section 5 proceeding, the complainant (here the Commission), not the respondent, must make a prima facie case that the challenged rates are unjust and unreasonable and that the new rates that it proposes are just and reasonable. But under the approach taken by the Commission in this case, Northern essentially is required to make the Commission’s prima facie case for it and to ultimately prove that its existing rates are just and reasonable. This, Northern argues, is evident once one looks at what the Commission is ordering Northern to file because under the November 19 Order, Northern must file numerous statements that directly relate to meeting Northern’s burden had it filed for a rate increase under section 4 of the NGA, even though in this section 5 proceeding the Commission has the burden of proof.

12. Moreover, Northern asserts, the November 19 Order requiring virtually a full-blown rate filing conflicts with the Commission’s recent order revising Form No. 2. Northern states that in Order No. 710, the Commission made it clear that it did not seek to blur the section 4 and section 5 distinction, and that it had no authority to require pipelines to make section 4 filings:

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. ...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.¹⁰

13. Northern asserts that by ordering Northern to file virtually a complete rate case to defend its rates in a section 5 case brought, *sua sponte*, by the Commission, the Commission not only blurs sections 4 and 5, but also is doing precisely what in Order No. 710 it said it could not do--require Northern to file a section 4 case.

14. Northern argues that in the past, the Commission has ordered pipelines subject to section 5 complaints to submit a cost and revenue study containing schedules set forth under section 154.313 of the Commission's regulations, rather than, as here, the more cumbersome section 154.312. *See Indicated Shippers v. Sea Robin Pipeline Co.*, 76 FERC ¶ 61,151 (1996) (*Sea Robin*). Northern contends the Commission changed course, without a reasoned basis, in *National Fuel*, when it ordered the pipeline in a section 5 complaint to file a cost and revenue study under section 154.312. *National Fuel*, 115 FERC ¶ 61,368 at PP 5-6. Northern asserts the Commission failed to satisfactorily explain the reason for such change in *National Fuel*, but even that deficient explanation fails here. Northern points out that in *National Fuel* the Commission justified imposing a higher burden on National Fuel compared to the burden on the pipeline in *Sea Robin* because "the Commission established an investigation into [Sea Robin's] rates within six years of the order approving a settlement of its last rate case. Here, National Fuel's rates were approved over 10 years ago." *Id.* Northern argues that not only is there no explanation why rates reviewed six years ago should be subject to a lesser filing requirement than rates reviewed ten years ago, but also this highlights the fact that Northern's rates were last reviewed four years ago in the 2005 Settlement, well within the six-year period asserted in *Sea Robin*. Northern argues that the Commission's own precedent supports a finding that the directive in this case--that Northern must file a cost and revenue study under section 154.312--is arbitrary and capricious and represents an unexplained departure from prior policy, and rehearing should be granted.

15. Northern also asserts that the stated basis for the Commission's action here is flawed because the information from a single year's Form 2 is an inadequate basis for instituting a section 5 proceeding *sua sponte*. Northern states that there can be events that may exist in such a narrow time frame that are unusual, and that in 2008 there were such unusual events. As a result, Northern argues its Form 2 data for 2008 does not reflect Northern's current system conditions. Since Northern was not given the opportunity to present these events before the Commission issued the November 19 Order, Northern

¹⁰ FERC Stats & Regs. ¶ 31,267 P 12 (emphasis added).

expresses concern that these events were not recognized or analyzed as part of the Commission's single-year evaluation, and thus the November 19 Order cannot stand.¹¹ Northern points out that this is in sharp contrast to third-party complaint cases where the Commission also considers the pipeline company's answer to the complaint, and any data it provides, *before* it acts on the complaint. *See, e.g., Sea Robin*, 76 FERC ¶ 61,151 at 61,824 ("The Commission has reviewed the analyses submitted by the Indicated Shippers, the answer submitted by Sea Robin and conducted our own preliminary cost and revenue study."). Clearly, in this case, the Commission did not base its hearing order on Northern's answer to any prior allegations, because there was none. Northern argues that limiting the analysis in such a rigid manner produces distorted results since the Commission's analysis did not adjust for at least two interrelated and highly significant events that affected Northern's costs and revenues and overall level of risk.

16. Finally, Northern argues that there are policy considerations which warrant granting rehearing. Northern contends that the Commission failed to recognize, or give consideration to, the fact that Northern had increased its capacity by 14 percent and storage capacity by 31 percent since 2006, while investing \$1 billion to improve system reliability for customers. Northern maintains that the Commission-initiated investigation, based on a single-year's data, raises the possibility of multiple and overlapping rate reviews, a prospect that could erode rate certainty just when credit markets are tight and unpredictable.

17. In fact, Northern asserts, the Commission's action sends a strong message to pipelines, electric utilities and investors that will discourage infrastructure investment and lead to higher energy prices. Thus, Northern concludes, it is likely that the threat of ongoing rate proceedings will harm the very ratepayers the Commission seeks to protect by fundamentally undermining the ability of pipelines to obtain the capital needed to expand their systems.

¹¹ Northern refers to the utilization level of Northern's Field Area in 2008 compared to current utilization levels in the Field area, which is markedly different, and secondly to the initial in-service date of a new pipeline in the Mid-Continent region in January 2008 which had a temporary, but significant, impact on Midwest natural gas prices.

Discussion

18. The Commission has discretion whether to conduct an investigation under section 5 of the NGA.¹² Northern does not dispute the Commission's analysis of the data in its 2008 Form 2, nor does Northern dispute the Commission's conclusion based on that data that Northern's return on equity in 2008 was about 24.36 percent. In these circumstances, the Commission reaffirms its decision to initiate a section 5 hearing into the justness and reasonableness of Northern's rates.

19. The crux of Northern's request is that the November 19 Order disregards the limit of the Commission's jurisdiction under NGA sections 4 and 5 by requiring Northern to effectively file a section 4 rate proceeding under the guise of a purported section 5 proceeding. In addition it argues that the Commission's underlying reason for instituting the proceeding, namely, that from the data submitted in the recently-filed Form 2 it appears that Northern may be over-recovering its cost of service and earning an excessive rate of return on equity, is flawed because it is based on only one year's results, and that year is not a true representation of Northern's operations. Northern's arguments have no basis.

20. The November 19 Order clearly states a number of times that the Commission was acting under NGA section 5. Moreover, the order stated clearly that "Northern does not have a section 4 burden in this section 5 proceeding,"¹³ and states it was making no finding at this time as to what would constitute a just and reasonable return on equity for Northern, but that this would be an issue in the hearing. Thus, the Commission recognized that, consistent with *Western Resources, Inc. v. FERC*¹⁴ and other precedent cited by Northern, in this section 5 proceeding the Commission has the burden of establishing that Northern's existing rates are not just and reasonable, and the rates the Commission proposes to impose, on a prospective basis, are just and reasonable.

¹² 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.

¹³ November 19 Order at P 7.

¹⁴ 9 F.3d 1568, 1578 (D.C. Cir. 1993).

21. Underlying Northern's argument is that the November 19 Order requires it to file most of the items set forth in Commission Regulation section 154.312, the material required under a pipeline-initiated section 4 filing, although previously when the Commission initiated a section 5 proceeding it required the pipeline to only file the items required under section 154.313, so the Commission is in effect commencing a section 4 proceeding. The Commission disagrees. Contrary to Northern'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 Order did not require Northern to file any change in its existing rate schedules, and thus did not require Northern to make a section 4 filing, or place any section 4 burden on Northern to support its existing rates or the rate in the required cost and revenue study.

22. All that the November 19 Order did was to direct the company to file information the Commission needs to carry out its responsibilities under NGA section 5 to ensure that rates are just and reasonable. This action is authorized by Sections 10(a) and 14(a) of the NGA.¹⁵ 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."¹⁶ 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."

¹⁵ 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."

¹⁶ As Northern points out, the November 19 order did not expressly cite NGA section 10 as authority to require Northern to submit the subject information. In this order, we clarify that we are relying on NGA sections 5, 10, and 14 to require Northern to submit the information, as discussed above.

23. 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 Northern 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 newly-issued Commission regulation requiring pipelines to permit segmentation¹⁷ or explain 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:

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 Order clearly states that the Commission has the burden in this section 5 proceeding.

24. Northern 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 mechanical compilation of factual data by the pipeline. Rather, Northern argues, the cost and revenue study directed by the Commission requires the pipeline to pick and choose among alternatives regarding its claimed rate of return, how its costs are allocated among customer classes and rate zones, and how the rates for each customer class should be derived, among other matters. Northern contends that choosing among such alternatives is the essence of an NGA section 4 filing.

25. The Commission finds this argument to be without merit. We recognize that completing the cost and revenue study required by the November 19 Order will require Northern 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

¹⁷ 18 C.F.R. § 284.7(d)(2009).

an NGA section 4 filing. Responding to the November 19 Order's request for information requires no greater exercise of judgment by Northern 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.¹⁸ Nor does responding to such a directive shift the burden on proof on these issues from the Commission to Northern.

26. The Commission readily admits that the information that it has requested from Northern is the type of information necessary to craft rates. Whether rates are changed pursuant to the procedures and burdens in section 4 or in 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 Northern provide most of the same information it would require had Northern filed to change its rates under NGA section 4, particularly since the required information is in the hands of Northern and no one else. In this regard, the Form No. 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 determinants, 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 Northern to submit such information simply does not require it to make a filing under NGA section 4 to change or justify its rates.

27. Further, the Commission's November 19 Order specifically exempted Northern from submitting certain types of information in order to ensure that it avoided placing any inappropriate burden on Northern in this proceeding:

Because Northern does not have a NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, Northern does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture. In addition, Northern 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 at P 8 (footnotes omitted).

¹⁸ This was particularly the case on a complicated system such as Northern's, as illustrated by the Commission orders on Northern's proposal to comply with the segmentation requirement. *See, Northern Natural Gas Co.*, 101 FERC ¶ 61,203 (2002) at P 15-41, *order on reh'g*, 105 FERC ¶ 61,174 at P 6-102 (2003).

28. There is nothing to the contrary in the court decisions relied upon by Northern. 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.¹⁹ However, the court in *Public Service* did not find that the Commission could not request information from the regulated entity, as suggested by Northern. 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 Northern 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 Northern’s rates.

29. In *Consumers Energy Company v. FERC*,²⁰ the Commission required a Hinshaw pipeline performing certain NGA jurisdictional services to file, at three-year intervals, 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 section 4 filings, the court remanded the case to the Commission.²¹ However, the court also stated:

¹⁹ 488 F.2d. at 490-92.

²⁰ 226 F.3d 777 (6th Cir. 2000) (Consumers Energy).

²¹ Subsequently, the Commission issued the order for further information with the clarity and precision directed by the *Consumers Energy* court. In *Consumers Energy Co.*, 94 FERC ¶ 61,287 (2001) the Commission issued an order on remand from the court. The Commission stated at 62,029:

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,

(continued...)

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)

30. Here, consistent with *Consumers Energy*, the Commission has expressly stated that it is not requiring Northern 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 Northern.

31. That in other cases in the past, such as *Sea Robin*, which Northern relies upon, the Commission has required certain material is no bar to the Commission seeking other material based upon the situation presented at that later time. The November 19 Order cited to other NGA section 5 proceedings where the Commission required the pipeline to file a cost and revenue study, *supra* n.7, and these orders, which reflect current Commission policy, preceded issuance of Order No. 710. When the Commission finds that based upon the information furnished in the revised Form No. 2 there is good reason to believe the pipeline may be over-recovering, it follows that the Commission can require the pipeline to file the asked-for material in section 154.312.

32. Northern argues that the Commission's requirement that it file a section 154.312 cost and revenue study is inconsistent with the Commission's actions in certain other proceedings. First, Northern argues that the November 19 Order conflicts with Order No. 710²² which recognized that the Commission could not order a pipeline to make a section 4 filing. Northern asserts that the November 19 Order did just that, by requiring Northern to file a cost and revenue study which amounts to virtually a complete rate case.

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.

²² *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, FERC Stats. & Regs. Regs. Preambles ¶ 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).

33. 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.”²³ 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.”²⁴ 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*²⁵ 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 5.²⁶ 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.

34. Order No. 710 has no bearing on the information that the Commission may thereafter require once it has determined to initiate an NGA 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. 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. Moreover, given the complexity of Northern’s operations, as evident from the Appendix, the material requested was necessary for the Commission to determine whether Northern’s rates are just and reasonable at this time.

35. Northern also argues that the Commission’s requirement that Northern file a cost and revenue study in the form required for major section 4 rate increases by section 154.312 of the Commission’s regulations is inconsistent with *Indicated Shippers v.*

²³ Order No. 710 at P 1.

²⁴ Order No. 710 at P 16.

²⁵ *Pub. Serv. Comm’n of New York, et al. v. National Fuel Gas Supply Corp.*, 115 FERC ¶ 61,299, at P 37 (2006).

²⁶ Order No. 710, at P 5.

Sea Robin Pipeline Co, 76 FERC ¶ 61,151 (1996) (*Sea Robin*), where the Commission only required the less detailed cost and revenue study required for minor rate increases by section 154.313. Northern 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, Northern argues that the rationale the Commission presented in *National Fuel*, that *Sea Robin*'s rates had last been reviewed six years earlier while *National Fuel*'s rates had not been reviewed for more than 10 years, is inapplicable in this case. Northern points out that its rates were last reviewed four years ago in the 2005 Settlement.

36. The Commission has required Northern to file the more detailed information required by section 154.312, rather than the less detailed information required in *Sea Robin* because of the different 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), and Rate Schedule ITS (interruptible)). *Sea Robin* provided no storage services. By contrast, Northern operates a complex pipeline system extending from the Permian Basin in Texas to the upper Midwest, with numerous rate schedules, including seasonal rates for certain rate schedules. Northern's system includes 15,141 miles of natural gas pipeline, and is generally divided into two regions – the Field Area and Market Area. The Market Area is reticulated, and has an operational capacity of 5.3 billion cubic feet per day. The Field Area has an operational capacity of 2.0 billion cubic feet per day. Northern's system includes five natural gas storage facilities with a total firm and operational capacity of 73 billion cubic feet. Northern provides service to 76 utilities and numerous end-users. Northern offers a wide array of transportation and storage services under twelve rate schedules. Therefore, the Commission needs more detailed information to fully consider the rates on Northern's system than it would on a system such as *Sea Robin*'s.

37. Northern also argues that certain unusual circumstances occurred on its system in 2008, and thus that year is not a true representation of Northern's operations, and relying upon data from the single year of 2008 can not be a basis for initiating a section 5 proceeding. Northern claims that in 2008 there were two interrelated significant events that affected its costs and revenues. First, it asserts that in late 2007 many of its long-term contracts for service in its field area expired and were not renewed so over a billion cubic feet per day of capacity became available. Northern states that it sold this capacity primarily to natural gas marketers on a short-term basis. Northern contends that the 2008 results reflected a high value for this field area capacity which no longer continues as a result of changes in the market price of gas and other market conditions. Second, January 2008 was the in-service date of a new pipeline to the Mid-Continent region, and this resulted in an increase in Northern's field area transportation volumes. However, Northern states this was only a temporary impact, and since July 2009, Northern's field area transportation volumes have dropped significantly.

38. While elsewhere in its rehearing request, Northern complains that the Commission improperly dictated that the cost and revenue study required by the November 19 Order include data for the most recently available twelve-month period,²⁷ that study should reflect the more recent events described by Northern. The hearing will present Northern with the opportunity to more fully explain its position that more recent events justify the level of its current rates. Since the Commission will make its determination based upon all the evidence submitted, the hearing will address Northern's concern.

39. Northern also argues that the discussion at the Commission's November 19, 2009 open meeting "indicated that a number of factors were considered that inappropriately singled out Northern and two other pipelines at this time."²⁸ Northern claims that among the factors mentioned were infrastructure investment in 2008 and the level of additional estimated infrastructure investments that will be made. Northern asserts that the impact of these factors was not explained. Northern contends that these factors are not discussed or addressed anywhere in the November 19 Order or the one-page analysis attached to the Order.

40. The Commission considered these two factors, because of a concern that if a pipeline had made investments in infrastructure that were not fully operational in 2008, the Form 2 data for that year might not fully reflect the effect of those investments on the pipeline's rates. The Commission estimated additional infrastructure investments based upon the amount of construction work in progress stated in the pipeline's Form 2. There is nothing to indicate that by this consideration Northern was being singled out. While Northern states that since 2005 it has significantly increased its system and storage capacity, it does not point to any significant expansion that went into service in 2008 or that is currently under construction. Significantly, where Northern asserted that there were significant events in 2008 and 2009, none of the events related to expansion of Northern's system but to changes in market conditions and the commencement of service of another pipeline serving the Mid-Continent region, *supra* P 37.

41. What the Commission sought was to investigate those pipelines whose Form 2 suggested that under their current operations they were earning an unusually high rate of return, such as in excess of 20 percent as in Northern's case. Northern cites to *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,240, at P 116 (2009) (Opinion No. 486-C), where it asserts the Commission clearly stated that pipelines should not be punished for efficient and effective management and that "it would not lower a pipeline's ROE if its lower risk was the result of its own efficiency," and here Northern claims it is

²⁷ Rehearing request at 12.

²⁸ Rehearing Request at 19.

being punished because of its effective management and investment. What the Commission stated in *Kern River* was that, in establishing a pipeline's return on equity in a rate case, the Commission will not lower the return below the median of the range of reasonable returns, if the pipeline's lower risk is the result of its own efficiency. *Kern River* did not address the issue of the factors the Commission may consider when deciding whether to establish a section 5 proceeding to investigate a pipeline's rates. In fact, while the *Kern River* proceeding was commenced by the pipeline's filing of a general rate increase under section 4, the end result of that proceeding has been to lower most of the pipeline's rates pursuant to NGA section 5.²⁹

42. Northern also argues that the Commission failed to recognize that Northern's existing rates are set pursuant to a Commission-approved 2005 settlement. While Northern makes certain claims that customers have benefitted substantially from the settlement's "lowest transportation rates in the Upper Midwest,"³⁰ it is worth noting that none of the customers filed in support of Northern's rehearing request. Nor should a settlement be a bar to review of those rates when it later appears that the rates set by it may not be just and reasonable.

43. Northern contends that the Commission erred in failing to consider that its actions will inhibit the development of needed gas and electric infrastructure. It asserts that by instituting an investigation into Northern's rates *sua sponte*, based on one year's data, the Commission has taken a step that will discourage investment in energy infrastructure and create regulatory uncertainty because it upsets the expectations of all parties and threatens serious harm to investors that seek to invest in a company with stable and predictable returns.

44. Contrary to Northern's contention, 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 whether its actions do not endanger 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

²⁹ Opinion No. 486-C at P 123.

³⁰ Rehearing request at. 24.

Commission must balance conflicting demands.³¹ 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 20 percent, an investigation of Northern'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. Northern will have a full opportunity in the hearing established by this order to defend its existing rates, and the Commission will only order a rate reduction if and to the extent it can satisfy its burden under NGA section 5 to show that Northern's existing rates are unjust and unreasonable.

45. On February 4, 2010, Northern submitted a cost and revenue study to comply with the November 19 Order. Northern stated the base period for the study consisted of the 12 month period ended October 31, 2009, and indicated that the schedules therein include certain adjustments. Indicated Shippers,³² Industrials,³³ and the American Public Gas Association protested the filing asserting that by making adjustments to the base period data the filing did not comply with the November 19 Order that required the study to include "actual data" for the 12 month period, and request that the Commission reject the filing. 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 discovery process are more appropriately raised in, and should be resolved in, the hearing we have ordered.

³¹*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").

³² The Indicated Shippers is comprised of Anglo Suisse Texas Offshore Partners, LLC, Marathon Oil Company, Apache Corporation, Medco Energi US LLC, Anadarko Corp., BP Energy Company, BP American Production Company, Chevron U.S.A. Inc., ConocoPhillips Company, Occidental Energy Marketing, Inc., and Shell Energy North America (US) LP.

³³ The Industrials is comprised of AG Processing Inc a cooperative, American Forest & Paper Association, Process Gas Consumers Group, United States Gypsum Company, United States Steel Corporation, and Weyerhaeuser Company.

The Commission orders:

Northern's request for rehearing is denied.

By the Commission. Commissioner Moeller is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.