

132 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Portland Natural Gas Transmission System

Docket No. RP09-2-002

ORDER ON REHEARING

(Issued July 15, 2010)

1. On April 30, 2009, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) filed a request for rehearing of the Commission's "Order on Compliance and Clarification or, Alternatively, Rehearing" issued on March 31, 2009.¹ In that order, the Commission determined that Maritimes is not permitted to charge Portland Natural Gas Transmission System (Portland) or its shippers for fuel attributable to Maritimes' Phase IV Expansion Project and directed Maritimes to refund, with interest, any fuel charges collected from Portland or its customers. As discussed below, the Commission denies rehearing.

I. Background

2. Maritimes and Portland are two separate interstate pipeline systems that join together at Westbrook, Maine, in the form of a Y from which point they each own undivided interests in jointly-owned pipeline facilities (Joint Facilities), which extend roughly 110 miles to an interconnection with Tennessee Gas Company at Dracut, Massachusetts. The Joint Facilities are operated by a third-party pursuant to an October 8, 1997 Operating Agreement (Operating Agreement).² The Operating Agreement, along with a Joint Ownership Agreement³ and an Engineering and

¹ *Portland Natural Gas Transmission System*, 126 FERC ¶ 61,317 (2009) (March 31, 2009 Order).

² See Supplemental Information of Portland Natural Gas Transmission System, Docket No. RP09-2-000 (filed November 18, 2008) at Appendix D.

³ *Id.* Appendix B.

Construction Management Agreement⁴ (together, the Definitive Agreements), and various settlements, make up the contractual arrangements between Maritimes and Portland, which are discussed in more detail below.⁵

3. As the Commission observed a number of years ago, construction and operation of the Joint Facilities under the Definitive Agreements have been replete with controversy almost from the inception of the Maritimes - Portland relationship.⁶ On May 16, 2006, following several years of disputes and negotiation with Portland over various iterations of expansion projects by one or the other of the parties, Maritimes filed a certificate application for its Phase IV Expansion Project.⁷ Maritimes' Phase IV Expansion Project was designed to provide Maritimes with the additional capacity necessary to accommodate supplies of regasified LNG from the proposed Canaport LNG import terminal (Canaport Terminal) to be located in Saint John, New Brunswick, Canada. Maritimes' Phase IV Expansion Project consisted of additional compression, metering, and pipeline looping facilities designed to increase the mainline capacity of the Maritimes' wholly-owned system upstream of Westbrook from 415,480 Dth/d to 833,317 Dth/d, an increase of approximately 418,000 Dth/d, and to increase Maritimes' capacity downstream of Westbrook on the Joint Facilities by 393,000 Dth/d. Maritimes entered into a precedent agreement for firm transportation service with Repsol Energy North

⁴ *Id.* Appendix C.

⁵ The Definitive Agreements were approved by the Commission on November 4, 1997 in *Maritimes & Northeast Pipeline, L.L.C., et al.*, 81 FERC ¶ 61,166, at 61,724-25 (1997). Further amendments to the Definitive Agreements were made in settlements entered into in 2002 (*see Maritimes & Northeast Pipeline*, 101 FERC ¶ 61,348 (2002)) and in 2006 (*see Maritimes & Northeast Pipeline, L.L.C., et al.*, 118 FERC ¶ 61,193 (2007)).

⁶ *Maritimes & Northeast, L.L.C., et al.*, 101 FERC ¶ 61,348, at P 7 (2002).

⁷ On January 31, 2002, Maritimes filed its original application for a Phase IV Expansion Project in Docket No. CP02-78-000, which it later withdrew because the proposed Phase IV shipper terminated its precedent agreement with Maritimes. *See Maritimes & Northeast, L.L.C.*, 115 FERC ¶ 61,069, at P 5 (2006). In addition, Maritimes applied for, and was granted, a certificate to construct its Phase III Expansion consisting of Maritimes' wholly-owned Methuen lateral interconnected with the Joint Facilities mainline at Methuen, Massachusetts, and which extends 25 miles to an interconnect with Algonquin Gas Transmission Company at Beverly, Massachusetts. Maritimes' Phase III facilities went into service on November 24, 2003. *See Maritimes & Northeast, L.L.C.*, 117 FERC ¶ 61,143, at P 2 (2006).

America Corporation (Repsol) with a Maximum Daily Transportation Quantity of 730,000 Dth/d. Maritimes stated that it would use a combination of turnback capacity, existing capacity on its mainline system, and capacity created by the Phase IV Project to provide the 730,000 Dth/d of firm service required by Repsol.⁸

4. Of relevance here, in addition to three new compressor stations which Maritimes proposed to construct on its own, wholly-owned system upstream of the interconnect with Portland, Maritimes also proposed to construct two other new compressor stations that involved construction on the Joint Facilities: one compressor station at the Westbrook, Maine interconnect with Portland and the other compressor station some 50 miles downstream on the Joint Facilities at Eliot, Maine. The proposed Westbrook compressor station consisted of two 13,330 HP compressor units: (a) one unit located on Maritimes' wholly-owned facilities immediately upstream of the interconnect with Portland, and (b) the other unit located immediately downstream of the Portland interconnect on the Joint Facilities. While Maritimes originally planned to locate both the Westbrook units on its wholly-owned facilities, in its May 16, 2006 certificate application, it proposed to re-locate one of the Westbrook units to downstream of the interconnect with Portland on the Joint Facilities purportedly to accommodate Portland's system pressure limitations so that its lower-pressure gas could continue to enter the Joint Facilities once the Phase IV Expansion was constructed.⁹

5. In its May 16, 2006 Phase IV Expansion Project certificate application, Maritimes also proposed to increase the capacity of the Joint Facilities mainline an additional 150,000 Dth/d for the account of Portland. However, in an amended certificate application, filed September 11, 2006, Maritimes stated that it no longer proposed to construct and operate facilities to accommodate the additional 150,000 Dth/d of capacity for Portland on the Joint Facilities because Portland was not able to make a definitive commitment to the new capacity on the Joint Facilities in the time frame necessary for the Phase IV Expansion Project to be in service in order to commence deliveries from the Canaport Terminal. To implement the elimination of Phase IV Expansion capacity for Portland, Maritimes proposed to reduce the amount of compression at the proposed Eliot Compressor Station on the Joint Facilities from 18,085 HP to 8,960 HP.

6. Accordingly, Portland did not acquire additional capacity on the Joint Facilities as a result of Maritimes' Phase IV Expansion Project and, indeed, Portland actually had its

⁸ As a result of a reverse open season held in the summer of 2005, Maritimes executed turnback precedent agreements with its existing mainline firm shippers to relinquish a total of 257,258 Dth/d of capacity.

⁹ Request for Rehearing at 22-23.

own capacity on its wholly-owned facilities upstream of the Westbrook interconnect physically reduced by 42,000 Dth/d as a result of Maritimes' Phase IV Expansion.¹⁰ In part because of this and because Portland believed Maritimes' Phase IV Expansion Project would result in a subsidy to Maritimes' affiliates, Portland had heavily protested both the original and amended Phase IV Expansion certificate applications, which led to further negotiations between the parties and settlement. On December 18, 2006, Maritimes and Portland filed a settlement proposal in the Phase IV Expansion proceeding (2006 Settlement) in which Portland agreed to withdraw its protests in the Phase IV Expansion proceeding. The 2006 Settlement generally set forth the agreement of Maritimes and Portland regarding the rights of each party to engage in future expansions of their own capacity or to opt to participate in future expansions of the other party, including the then-pending Maritimes' Phase IV Expansion Project. On February 21, 2007, the Commission issued an order granting a certificate of public convenience and necessity for Maritimes' amended Phase IV Expansion Project, conditionally approving initial rates for the project, including compressor fuel rates, to be charged the Phase IV Expansion shipper.¹¹ On March 12, 2007, the Commission issued an order approving, in part, the December 18, 2006 settlement proposal.¹²

7. On October 1, 2008, Portland filed tariff sheets in the instant proceeding in Docket No. RP09-2-000 to implement an in-kind fuel surcharge effective October 1, 2008, to recover fuel it claimed it would be required to provide when Maritimes' Phase IV Expansion Project commenced service. In its October 1, 2008 filing, Portland stated that,

¹⁰ In a Declaratory Order issued June 19, 2008, the Commission found that, despite having originally transported 178,000 Mcf/d (with the capability of transporting as much as 210,000 Mcf/d), Portland would be physically incapable of transporting on a firm, year-round basis, more than 168,000 Mcf/d from the inlet to its wholly-owned system in Pittsburg, New Hampshire, through the Westbrook interconnect with Maritimes' system, to the terminus of the Joint Facilities at Dracut, Massachusetts, as a result of the Phase IV Expansion approved the year before. *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,275, at P 28 (2008), *reh'g denied*, 125 FERC ¶ 61,198 (2008), *appeal dismissed sub nom. PNGTS Shipper Group, et al. v. FERC*, 592 F.3d 132 (D.C. Cir. 2010).

¹¹ *Maritimes & Northeast, L.L.C.*, 118 FERC ¶ 61,137 (2007), *reh'g denied*, 120 FERC ¶ 61,055 (2007) (Phase IV Certificate Order). Maritimes was conditionally authorized to charge its existing system-wide rates. Maritimes' Phase IV Expansion Project facilities were authorized to go into service by unreported letter order in Docket No. CP06-335-000 issued January 15, 2009.

¹² *Maritimes & Northeast, L.L.C.*, 118 FERC ¶ 61,193 (2007).

although it was not participating in the Phase IV Expansion Project, the Phase IV Project adds compressor stations to the Joint Facilities owned by both Portland and Maritimes and, pursuant to section 2.14(a) and (c) of the Operating Agreement, Portland is obligated to furnish gas in-kind for compressor fuel usage in proportion to its share of the total gas transported through the Joint Facilities.¹³ Portland stated that it previously had no need for a fuel charge in its tariff because there had been no compressor stations located on the Joint Facilities.¹⁴ However, it asserted, once it is required to provide fuel as a result of the foregoing provisions, it is critical that it have in place provisions for the recovery of fuel. Three parties filed protests to the filing raising several issues, including whether Portland provided sufficient information regarding its proposed filing and whether allocation of fuel to Portland's shippers as a result of Maritimes' Phase IV Expansion is consistent with the Commission's no subsidization policy, and urged the Commission either to reject the filing or suspend it and set it for hearing.¹⁵

8. By order issued October 29, 2008,¹⁶ the Commission accepted and suspended the October 1, 2008 filing for 5 months, to be effective March 31, 2009, subject to refund and

¹³ Section 2.14(a) of the Operating Agreement provides that the Operator of the Joint Facilities "shall estimate line losses that occur in the normal daily operation of the Joint Facilities for the Mainline." Section 2.14(a) states: "Each owner is obligated to furnish gas for losses in proportion to its share of the total gas transported through the Mainline and each other Portion on that Day." And, section 2.14(c) provides that the provisions of section 2.14(a) "shall also apply to gas used as fuel for the operation of the Joint Facilities."

¹⁴ Portland stated that it also has no compression facilities on its own, wholly-owned pipeline facilities upstream of the interconnect with Maritimes' system at Westbrook, Maine.

¹⁵ These parties are: (1) National Grid Gas Delivery Companies (National Grid) which includes Brooklyn Union Gas Company, KeySpan Gas East Corporation, Boston Gas Company, Colonial Gas Company, Essex Gas Company, EnergyNorth Natural Gas, Inc., Niagara Mohawk Power Corporation, and the Narragansett Electric Company; (2) The Shippers Group which includes Bay State Gas Company, Northern Utilities, Inc., DTE Energy Trading Inc., H.Q. Energy Services (U.S.) Inc., New Page Corporation and Wausau Papers of New Hampshire, Inc.; and (3) DTE Energy Trading, Inc. (DTE Energy).

¹⁶ *Portland Natural Gas Transmission System*, 125 FERC ¶ 61,110 (2008) (October 29, 2008 Order).

to Portland filing additional information and explanations. The Commission stated that the filing raised significant issues as to whether Portland's proposed fuel charge is just and reasonable, including (a) whether the Operating Agreement requires Portland to compensate Maritimes for fuel use on the Joint Facilities incurred as a result of an expansion project in which Portland did not participate and, (b) if so, whether Portland should be allowed to flow those costs through to its shippers. Because the Commission did not have enough information to resolve those issues and to ensure that Portland's proposed tariff changes comply with Commission regulations and precedent and do not violate shippers' rights, the Commission directed Portland to file additional information and explanations that address those issues and all other issues raised by the parties and to file up-to-date revised Definitive Agreements. The Commission permitted the parties to file reply comments.

9. To comply with the Commission's directive, Portland made a filing on November 18, 2008, as amended on November 20, 2008. Portland did not assert a position on the merits of the issue, leaving that determination for the Commission. Maritimes filed reply comments responding to Portland's compliance filing, vigorously defending the claim that Portland was obligated to pay for an allocated portion of the fuel used on the Phase IV Expansion Project facilities. DTE Energy and the Shippers Group each filed reply comments responding to Portland's compliance filing, arguing against charging Portland for such fuel. Portland and Maritimes also filed requests for clarification or, alternatively, rehearing of the Commission's October 29, 2008 Order.

10. In the March 31, 2009 Order, as more fully detailed in the discussion below, the Commission found that Maritimes is not permitted to charge Portland or its shippers for fuel attributable to Maritimes' Phase IV Expansion Project and, accordingly, rejected the October 1, 2008 filing. The Commission found that section 2.14 of the Operating Agreement does not permit Portland to be allocated any fuel requirements as a result of Maritimes' Phase IV Expansion Project. The Commission also found that the 2006 Settlement relied on by Maritimes only provided for the continuation of whatever fuel reimbursement provisions were previously agreed to, including the fuel provisions of the Operating Agreement as so defined. The Commission further found that making Portland and its customers responsible for fuel on Maritimes' Phase IV Expansion Project would violate the Commission's policy, adopted in its Certificate Policy Statement on certification of new construction,¹⁷ that pipelines proposing new projects must be

¹⁷ *Certification of New Interstate Natural Gas Pipeline Facilities* (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), *order clarifying statement of policy*, 90 FERC ¶ 61,128 (2000); *order further clarifying statement of policy*, 92 FERC ¶ 61,094 (2000).

prepared to financially support the project without relying on subsidization from existing customers and must not adversely affect existing customers or other pipelines. In that regard, the Commission noted that Maritimes never informed the Commission in Maritimes' Phase IV Expansion certificate application proceeding that the project would result in additional fuel costs being imposed on Portland or its shippers and, if it had, the Commission would have conditioned the certificate on Maritimes allocating all of Maritimes' Phase IV Expansion Project fuel to Maritimes' own customers.

II. Discussion

A. The Definitive Agreements

1. The Operating Agreement

11. Section 2.14(a) of the Operating Agreement provides that the Operator of the Joint Facilities "shall estimate line losses that occur in the normal daily operation of the Joint Facilities for the Mainline and each other Portion on a daily basis, utilizing the methodology described in Attachment B. Each Owner shall be obligated to furnish Gas for such losses in proportion to its share of the total Gas transported through the Mainline and each other Portion on that Day." Section 2.14(c) provides that the provisions of section 2.14(a) "shall also apply to gas used as fuel for the operation of the Joint Facilities." Attachment B of the Operating Agreement, at page B-1, provides, in relevant part:

In order to equitably allocate differences in inlet and delivery quantities that are attributable to normal pressure variances and line losses or that the Operator is not able to attribute to a particular Owner's respective shippers, and after taking into account any procedures or methods specifically prescribed in the Operating Agreement, such differences shall be allocated based on the following formula

12. In its comments, Maritimes argued that section 2.14(a) requires a portion of Phase IV fuel consumption be allocated to Portland. In the March 31, 2009 Order, the Commission found that section 2.14(a) of the Operating Agreement requires the Operator to allocate 100 percent of the fuel used by the Phase IV Expansion compressors to Maritimes and its shippers because their share of the total gas transported through their Phase IV Expansion is 100 percent. The Commission explained that, since Portland is not allocated any Phase IV Expansion capacity and is not utilizing these facilities or the Phase IV capacity to transport its shippers' gas, Portland's share of the total gas transported through the Phase IV Expansion portion of the Joint Facilities under section 2.14(a) is zero.

13. In addition, the Commission held that Attachment B limits the *pro rata* allocation of fuel volumes to volumes which cannot be attributed to a particular owner's respective shippers. Because the Phase IV Expansion facilities were constructed solely to provide service to Maritimes' shippers, the Commission determined that all fuel used by the Phase IV Expansion compressor facilities can, and should, be attributed to Maritimes' shippers. Accordingly, the Commission concluded that section 2.14(a) and Attachment B provide for zero fuel volumes to be allocated to Portland and its shippers.¹⁸

a. Request for Rehearing

14. Maritimes argues that the Commission's determination that Portland is not required to bear cost responsibility for a proportionate share of compressor fuel used on the Joint Facilities disregards the plain meaning of the Definitive Agreements which Maritimes asserts plainly and unambiguously state that Portland must bear cost responsibility for its share of fuel. Maritimes argues that the single most important rule of contract interpretation is that the plain language of an agreement is controlling.¹⁹ Maritimes argues that the formula in the Operating Agreement must apply and fuel must be apportioned based on the relative volumes flowing through the Joint Facilities, which Maritimes argues reflects the intent of the joint owners when they signed the Definitive Agreements and is clear from the text of the Operating Agreement.²⁰

15. According to Maritimes, the Operating Agreement contains a clear obligation for Portland to bear cost responsibility for fuel.²¹ Maritimes notes that section 2.14(c) of the

¹⁸ 126 FERC ¶ 61,317, at P 47. The Commission also concluded that Portland having an ownership interest in the Phase IV Expansion facilities is not relevant and does not command a different result. *Id.*

¹⁹ Request for Rehearing at 13 (*citing Texaco Refining & Marketing, Inc., et al. v. SFPP, L.P.*, 117 FERC ¶ 61,285, at P 14 (2006) ("Its first argument . . . flies in the face of the plain language of the contract . . ."); *Louisville Gas and Electric Company, et al.*, 114 FERC ¶ 61,282, at P 44 (2006); *Wisconsin Public Power, Inc. v. Wisconsin Power and Light Company, et al.*, 95 FERC ¶ 61,412, at 62,530 (2001) (following an interpretation of a tariff based on the plain language, there was no "need . . . to go beyond the relevant contracts' four corners and examine extrinsic evidence"); *Cinergy Services, Inc.*, 94 FERC ¶ 61,146, at 61,555 (2001) (finding that the plain language of an agreement was unambiguous so there was no need to examine further documents)).

²⁰ Request for Rehearing at 16-17.

²¹ According to Maritimes, all of the gas on the Joint Facilities is commingled. Request for Rehearing at 10.

Operating Agreement provides that the provisions applying to line losses will also apply to fuel gas. Thus, Maritimes asserts, everywhere “line losses” appears in the document, the words “and fuel” are included by reference. Maritimes states that section 2.14(a) provides that the:

“Operator shall estimate line losses [and fuel] that occur in the normal daily operation of the Joint Facilities for the Mainline and each other portion on a daily basis, utilizing the methodology described in Attachment B. Each Owner shall be obligated to furnish Gas for such losses [and fuel] in proportion to its share of the total Gas transported through the Mainline and each other Portion on that Day.” (Emphasis added.)²²

Maritimes further states that Attachment B provides the methodology whereby such fuel is estimated, and provides the following:

In order to equitably allocate differences in inlet and delivery quantities that are attributable to normal pressure variances and line losses [and fuel] or that the Operator is not able to attribute to a particular Owner’s respective shippers, and after taking into account any procedures or methods specifically prescribed in the Operating Agreement, such differences shall be allocated based on the following formula where: [formula follows] (emphasis added).²³

16. Taken together, Maritimes argues that section 2.14(a) and Attachment B mean that the Operator must estimate daily fuel usage based on a formula that applies to various factors that cause differences in inlet and outlet quantities, including fuel usage. Then, according to Maritimes, with respect to the applicable day, each owner must provide gas using this formula, based on the owner’s pro rata percentage of the total gas delivered into the Joint Facilities on that day.²⁴

²² Request for Rehearing at 13.

²³ Request for Rehearing at 14.

²⁴ For instance, Maritimes asserts, if the total gas delivered into the Joint Facilities on a particular day was 100,000 Dth, of which Maritimes delivered 90,000 Dth and Portland delivered 10,000 Dth, Attachment B would allocate line loss and fuel for that day 90 percent to Maritimes and 10 percent to Portland. Therefore, Maritimes submits, if

(continued ...)

17. Maritimes argues that the Commission erroneously found that Attachment B essentially nullified this obligation when it focused on the phrase in Attachment B that reads “or that the Operator is not able to attribute to a particular Owner’s respective shippers,” and concluding that if one can attribute the fuel to a shipper then the allocation methodology in Attachment B does not apply. Maritimes argues that this is not what the provision says. Maritimes contends that section 2.14(c) includes the term “fuel” by definition in the term “line loss;” therefore, fuel is included in the Attachment B calculation. Maritimes states that Attachment B lists four items which are to be included in the calculation of losses and that these four items are added together. Maritimes states that one of the items to be added together is fuel and another is gas that cannot be attributed “to a particular Owner’s respective shippers.” Maritimes argues that there is no provision for eliminating from this calculation “gas which can be attributed to a particular Owner’s respective shippers.” Maritimes maintains that the list in Attachment B is intended to include all instances in which the Attachment B formula would apply; and that, in short, the formula includes all quantities for fuel, regardless of whether they are attributable to a particular Owner. This, Maritimes argues, is the opposite of the Commission’s reading in the March 31, 2009 Order.²⁵

18. Maritimes explains that the provisions regarding “quantities that are not attributable to a particular Owner’s respective shippers” is a catch-all provision and includes otherwise unidentifiable gas amounts. Maritimes contends that this “catch-all” provision is to be added to other categories, such as fuel, that are included by the list in this provision. According to Maritimes, if this provision operated to exclude fuel gas identifiable with a shipper, it would make Attachment B a nullity with respect to fuel. Maritimes argues that under the Commission’s interpretation there would be no provision in the Definitive Agreements describing how such “attributable gas” is to be allocated, and the Operating Agreement in particular would be silent about how amounts that are attributable to a particular owner would be allocated. Maritimes argues that all of the gas flowing through the Joint Facilities is, under ordinary circumstances, “attributable” to a particular shipper and saying that such “attributable” gas is taken out of the Attachment B calculation would mean that the only provision that calculated how fuel is to be apportioned does not even apply to the fuel used on the Joint Facilities. This, it argues would make the provision meaningless.

fuel usage for the day were 100 Dth, Maritimes’ proportionate share would be 90 Dth and Portland’s proportionate share would be 10 Dth, which Maritimes contends is a clear obligation for each owner to bear its proportionate share of line loss and fuel responsibility for the Joint Facilities. *Id.*

²⁵ Request for Rehearing at 15.

19. Maritimes argues that the Commission's conclusion appears to be based on the premise that Maritimes owns the whole of the downstream compressor unit at Westbrook and the entire Eliot compressor station, which it states are both on the Joint Facilities, and therefore the Operator can deem all gas flowing through these facilities to exclude the Portland portion of the commingled stream. Maritimes contends that such a result is directly contrary to: (a) the physical reality, because all of the commingled gas stream flows through these units; and (b) the terms of the Operating Agreement, which provides that the facilities are operated jointly for the benefit of both owners.²⁶

b. Commission Decision

20. Section 2.14 does not, on its face, require allocation of fuel to Portland because it only requires allocation of fuel for transportation of gas needed for the "normal daily operation of the Joint Facilities for the Mainline." The Joint Facilities for the Mainline require no fuel for their normal daily operation. The only fuel consumption at issue is fuel consumed at Maritimes' Phase IV Expansion compressor facilities to create additional expansion capacity solely for the account of Maritimes and its shippers. As the Commission noted in the March 31, 2009 Order, Portland is not allocated any Phase IV Expansion capacity and only utilizes its share of Joint Facilities mainline capacity; therefore, none of its shippers' gas is transported by Phase IV Expansion facilities or the compression created by those facilities.

21. The fact that two of Maritimes' Phase IV Expansion compressor units are located downstream of the interconnect between Portland's and Maritimes' systems at Westbrook, Maine, on the Joint Facilities mainline does not justify treating fuel consumption by those compressor units as occurring "in the normal daily operation of the Joint Facilities for the Mainline." According to Maritimes' own account of the facts, Maritimes originally planned to locate both of the Westbrook compressor station units upstream of the Westbrook interconnect on Maritimes' own wholly-owned system facilities, but decided to re-locate one of the units downstream of the interconnect purportedly as part of a concession Maritimes made to Portland to permit lower-pressure Portland shipper gas to continue to enter the Joint Facilities, albeit at a loss of some Joint Facilities capacity by Portland, once the Phase IV Expansion went into service. Thus, the re-location of that Maritimes' Phase IV Expansion Westbrook compressor unit did not convert that unit into Joint Facilities. Further, in accordance with Maritimes' amended Phase IV Expansion certificate application of September 8, 2006, Maritimes' Phase IV Expansion Eliot Compressor Station also specifically was downsized to eliminate an increase in 150,000 Dth of Joint Facilities Mainline capacity that Maritimes originally proposed for Portland's account, but later dropped when Portland failed to commit to the

²⁶ Request for Rehearing at 16.

extra capacity.²⁷ Thus, the consumption of fuel by the subject Maritime's Phase IV Expansion facilities compressors is no more relevant to the daily operation of the Joint Facilities Mainline than, for example, the consumption of fuel at any of the Maritimes' compressors located on Maritimes' wholly-owned pipeline facilities upstream of the Portland-Maritimes interconnect at Westbrook.

22. Maritimes focuses on the part of section 2.14(a) of the 1997 Operating Agreement which states: "Each owner is obligated to furnish gas for losses in proportion to its share of the total gas transported through the Mainline and each other Portion on that day." That provision was formulated at a time when, and in light of the fact that, the only facilities south of the Westbrook interconnect were "Joint Facilities" and there was no compression south of the Westbrook interconnect. Thus, that provision relates to fuel consumed to transport gas by Joint Mainline Facilities and sheds no light on the situation presented by the later addition of Maritimes' non-Joint Facilities Phase IV Project Compression units on the Joint Facilities Mainline which created new capacity allocable solely to Maritimes.

23. Indeed, Portland and Maritimes constantly battled over new Joint Facilities expansions, ultimately not resolving such issues over future Joint Facilities expansions until the 2006 Settlement. Thus, we believe the reference to the "Mainline" in the Operator Agreement was to the original Joint Facilities Mainline in existence at the time of execution of the Operating Agreement or subsequent jointly-owned expansions of those facilities, and the agreement contemplated that only gas transported by those Joint Facilities would be subject to an allocation of any fuel used to perform that Joint Facilities transportation service. Obviously, it would not be meant to refer to Maritimes' or Portland's own respective wholly-owned non-Joint Facilities "Mainlines" upstream of the Westbrook, Maine, interconnect. Likewise, we believe it would not be intended to refer to any other non-Joint Facilities such as Maritimes' future Phase IV Expansion Project compressors. Thus, the gas to which any such Joint Facilities fuel must be allocated would be gas transported by Joint Facilities Mainline compression facilities. But, there are no such Joint Facilities Mainline compression facilities; the only compression facilities on that mainline are the non-Joint Facilities Maritimes' Phase IV Expansion facilities, which consist of two Maritimes' Phase IV Expansion Project compressors. None of the Portland shipper gas requires compression for its transportation on the Joint Facilities and, thus, none of that gas can be allocated any of Maritimes' Phase IV Expansion Project compressor fuel costs. Except for the fact that Portland actually lost some of its capacity as a result of Maritimes' Phase IV Expansion,

²⁷ Maritimes Amendment to Abbreviated Application for Certificate, Docket No. CP06-335-001, Transmittal at 1-2 (filed September 11, 2006).

the practical effect of Maritimes' Phase IV Expansion is no different than if Maritimes had constructed a separate, wholly-owned, non-Joint Facilities pipeline with its own compression parallel to the Joint Facilities mainline in order to transport the Phase IV Expansion shippers' gas through that separate pipeline. Maritimes could not allocate any fuel consumed on such a separate pipeline to Portland and, likewise, should not allocate any Phase IV Expansion compressor fuel to Portland.

24. Further, Attachment B of the Operator Agreement only established a formula to allocate Joint Facilities fuel between Portland and Maritimes, not fuel consumed by Maritimes on its own facilities, such as any of Maritimes' facilities upstream of Westbrook or any fuel consumed by the Maritimes' Phase IV Expansion compressor facilities. With zero Joint Facilities fuel being consumed, Attachment B is irrelevant, as the Commission noted in the March 31, 2009 Order.

25. Finally, the fact that all Portland shipper gas that is flowing through Portland's capacity on the Joint Facilities also physically flows through Maritimes' Phase IV Expansion compressors also is irrelevant. All of Maritimes' own Phase IV Expansion shipper gas also physically flows through the same Joint Facilities Mainline as Portland shipper gas, but that fact does not support allocation to Maritimes and its shippers of the cost of Joint Facilities Mainline capacity allocated to Portland and its shippers. Like Maritimes, all of Portland's shippers' gas physically flows through the Joint Facilities, but it is only utilizing (and, therefore, must pay for) its portion of the capacity of those facilities. Likewise, while all of Portland's shippers' gas physically flows through Maritimes' Phase IV Expansion compressors, Portland has no capacity in those compressors, no additional Joint Facilities' capacity as a result of the construction of those compressors, and none of its shippers' gas is transported by that compression and, therefore, must not be allocated any of Maritimes' Phase IV Expansion compression costs.

2. The Ownership Agreement

a. Request for Rehearing

26. Maritimes further contends that the Ownership Agreement makes it clear that the downstream compression units at Westbrook and Eliot, which are part of Maritimes' Phase IV Expansion, are part of the undivided interests in the Joint Facilities as a whole and not separate and discrete facilities owned entirely by Maritimes. In particular, Maritimes states that section 3.1 of the Ownership Agreement provides that "the Owners shall own the Joint Facilities as tenants-in-common, with no rights of partition by sale, with undivided Ownership Interests for each Portion of the Joint Facilities" and that section 1.32 states that "Joint Facilities" shall mean "the Initial Joint Facilities and any

Expansions thereto.”²⁸ Maritimes argues that the March 31, 2009 Order makes no attempt to square its ruling that all of the gas flowing through the compression on the Joint Facilities is attributable to Maritimes with the express terms of the Ownership Agreement that make it clear that the compression itself is owned in joint, undivided interests by both owners.

b. Commission Decision

27. Maritimes’ reliance on sections 1.32 and 3.1 of the Ownership Agreement is of no avail. Section 1.32 is irrelevant because the Maritimes Phase IV Expansion was an expansion of Maritimes’ transmission system and is wholly-owned by Maritimes; it was not an expansion of the Joint Facilities, which would be jointly owned. Section 3.1 is irrelevant for the same reason. While Maritimes is technically correct that Portland acquired a joint undivided interest in the Phase IV Expansion facilities under the Ownership Agreement, what it fails to point out is that, by not participating in the Maritimes Phase IV Expansion, section 11.1 of the Ownership Agreement, “Right of Expansion,” only allocates to Portland a token “Ownership Interest and a Capacity Entitlement Percentage of .000001% in the Expansion.” Any allocation of fuel to Portland based on that de minimis ownership percentage in the Maritimes’ Phase IV Expansion compression facilities would be so small that it would be rounded down to zero. Indeed, the fact that Portland bore none of the Phase IV Expansion construction costs demonstrates that it acquired no appreciable ownership interest in those facilities. Under section 8.2.1 of the Ownership Agreement, Joint Facilities Expansion construction costs are to be allocated to each party in proportion to the parties’ “relative share of additional capacity in the Expansion requested by each Party.” Portland acquired no additional transmission capacity in the Maritimes Phase IV Expansion.²⁹ The additional 393,000 Dth/d of physical capacity of the Joint Facilities mainline that resulted from the Maritimes Phase IV Expansion Project is owned entirely by Maritimes and used by Maritimes for the sole purpose of transporting Maritimes’ customer gas. For these reasons, fuel attributable to the Maritimes’ Phase IV Expansion compressors should be allocated in the same way (i.e., all to Maritimes and none to Portland) and nothing in the Operating Agreement contradicts that allocation.

²⁸ Request for Rehearing at 16.

²⁹ As discussed below, nor was Portland allocated any Phase IV Expansion construction costs under the 2006 Settlement.

3. Extrinsic Evidence of the Intent of the Parties

a. Request for Rehearing

28. Maritimes argues that, assuming that the plain language is not determinative of the issues in this case, the intention of the parties is manifest as it is an important rule of contract interpretation to give effect to the intention of the parties.³⁰ According to Maritimes, the intention of the joint owners has always been that each owner would bear cost responsibility for its proportionate share of fuel use on the Joint Facilities. Maritimes contends that the joint owners contemplated that any fuel use on the Joint Facilities would be shared proportionately between them as evidenced by: (a) the Definitive Agreements; (b) the treatment of compression as a result of expansions by the joint owners, including the Phase IV Expansion; (c) the course of conduct of the joint owners in reaching the 2006 Settlement; and (d) Portland's course of conduct in this proceeding. Maritimes argues that the Commission's reliance on Portland's subsequent, non-committal position in its November 18, 2008 Compliance Filing regarding its responsibility for compressor fuel use as being probative of Portland's intent disregards years of actions by Portland and Maritimes, as well as numerous statements on the record in Commission proceedings.³¹

29. First, Maritimes points to the fact that Portland made the October 1, 2008 tariff filing which it argues reflects Portland's belief that the Operating Agreement allocates responsibility to Portland for a portion of the compressor fuel use. Second, Maritimes points to Portland's statement in the tariff filing that, while Portland is not participating in the Phase IV Expansion, the Operating Agreement obligates Portland to furnish in-kind gas for actual compressor fuel usage in proportion to its share of the total gas transported through the Joint Facilities.³² Maritimes asserts that Portland's statement in the tariff filing conflicts with its non-committal position in its compliance filing, which it argues is an example of opportunism and not behavior instructive of a party's intention. Maritimes argues that if Portland did not think it was obligated to bear cost responsibility for fuel on

³⁰ Request for Rehearing at 17 (*citing Southern California Edison Co. v. FERC*, 502 F.3d 176, 181 (D.C. Cir. 2007) (effect must be given to the unambiguously expressed intent of the parties); *Tennessee Gas Pipeline Company*, 62 FERC ¶ 61,052, at 61,278 (1993) (Commission found that service agreements show the unambiguous intent of the parties, thus no need to resort to extrinsic evidence).

³¹ Request for Rehearing at 1, 2, and 17.

³² Request for Rehearing at 18 (*citing* October 1, 2008 tariff filing Transmittal at 2).

the Joint Facilities, it would never have made the tariff filing in the first place. Maritimes states Portland had never suggested there was any ambiguity until after the protests to the tariff filing were made and subsequently moved away from its clearly-stated position. In doing this, Maritimes contends that Portland afforded itself an opportunity to have it both ways, i.e., to reap all the benefits of the compression and not have to make, what Maritimes claims is, a relatively insignificant contribution of fuel. Even still, Maritimes points out that Portland did not take the position that it does not bear cost responsibility for the fuel, instead leaving it up to the Commission to decide.³³

30. Maritimes contends that the record in the Phase IV proceeding and the joint owners' actions regarding the 2006 Settlement demonstrate the intent of the parties concerning Portland's responsibility for compressor fuel use on the Joint Facilities. Maritimes argues that, contrary to the statements in the March 31, 2009 Order, Maritimes' Phase IV Application made it clear that Portland would bear cost responsibility for its proportionate share of the fuel used by the compression on the Joint Facilities. Specifically, Maritimes states that Exhibit G to the Phase IV application showed that, on a design basis, neither owner was allocated compressor fuel responsibility on the Joint Facilities prior to the installation of compression on the Joint Facilities, but following the in-service date of Phase IV, Portland would have compressor fuel responsibility for up to 1,504 Dth/d and Maritimes would have compressor fuel responsibility for up to 3,377 Dth/D. Maritimes also relies on an answer to a Commission data request in that certificate proceeding and a series of protests and answers in Maritimes' Phase IV Expansion certificate proceeding.

31. Finally, Maritimes contends that the joint owners' actions regarding the 2006 Settlement demonstrate the intent of the parties concerning Portland's responsibility for compressor fuel use on the Joint Facilities. In its original Phase IV Expansion certificate application in Docket No. CP06-335-000, filed on May 16, 2006, Maritimes proposed to configure the two-unit Westbrook compressor station by locating one of the units on the Joint Facilities Mainline downstream of Portland's interconnect with Maritimes' line and locating the other unit upstream on Maritimes' wholly-owned system mainline.³⁴ Following amendment of the application to remove the 150,000 Dth of capacity originally proposed for Portland, Maritimes states that it filed a settlement proposal on

³³ Request for Rehearing at 19. Maritimes contends that these are the actions of a party that knows its obligations but is hoping to be relieved of them.

³⁴ Previously, in a Declaratory Order issued April 20, 2006, the Commission found that the proposed engineering design of Maritimes' Phase IV proposal in its May 16, 2006 certificate application in Docket No. CP06-335-000 was appropriate. *Maritimes & Northeast Pipeline, L.L.C.*, 115 FERC ¶ 61,069 (2006).

December 18, 2006 (the 2006 Settlement). Maritimes asserts that, “in connection with the 2006 Settlement,” and as a result of a separate “specific agreement regarding the configuration of the Westbrook Compressor Station,” the 2006 Settlement avoided Portland having to bear cost responsibility for a share of fuel for both units. Maritimes points to language of section 9.(A) of the 2006 Settlement which states: “[Portland] shall not be allocated or otherwise charged for additional capital, operating and maintenance expenses and fuel expenses associated with the compressor unit at the Westbrook Compressor Station that is contemplated under the Phase IV Application to be constructed on Maritimes’ wholly-owned facilities.”³⁵

b. Commission Decision

32. At the outset, Maritimes provides no support for its claim that, based on the parties’ course of conduct, the intention of the parties always has been that the cost of any fuel use “on” the Joint Facilities, even if from non-Joint Facilities, would be shared. Maritimes’ claim of a course of conduct is not supported.

33. There can be no course of conduct under the subject agreements with respect to fuel since no fuel had ever been consumed on the Joint Facilities before Maritimes constructed its Phase IV Expansion facilities. Portland’s alleged “admissions” in the instant proceeding are nothing more than its reiteration of Maritimes’ initial claim that Portland must share in fuel costs leading to Portland’s filing in this docket. Portland was completely non-committal in its comments on the merits of this issue, leaving it to the Commission to discern how the issue should be resolved.

34. In addition, statements by Portland in its protest to Maritimes’ original certificate application objecting to Maritimes’ proposed allocation of fuel to Portland also are irrelevant as that application proposed 150,000 Dth of Phase IV Expansion capacity to Portland which capacity allocation would certainly have supported some percentage allocation of fuel to Portland. However, on September 8, 2006, Maritimes amended its Phase IV Expansion certificate application, following a protest by Portland, to provide that Portland would receive zero additional capacity from Phase IV, and to provide that the Phase IV Expansion Eliot Compressor Station located on the Joint Facilities mainline be downsized to implement the elimination of the 150,000 Dth of capacity. The Commission approved the amended certificate application on February 21, 2007 in the Phase IV Certificate Order.³⁶

³⁵ Request for Rehearing at 23.

³⁶ 118 FERC ¶ 61,137, at P 6.

35. Further, any comments related to fuel cost allocation in other documents that Portland later submitted in the Phase IV Expansion proceeding following Maritimes' amended application also do not reflect a course of conduct that supports Maritimes' position; they simply reflect Portland's continued opposition to Maritimes' Phase IV Expansion based, *inter alia*, on its prescient expectation that "Maritimes will thus likely demand that [Portland] and its shippers bear the costs associated with the increased pressure, such as increased compressor fuel and future increased costs of additional compression even though [Portland] and its shippers receive no benefit from the increased costs." Portland's opposition to the incurrence of Phase IV compressor fuel costs hardly reflects Portland's acceptance of Maritimes' claim of a right to charge Portland for such Phase IV compressor fuel. Moreover, Maritimes' comments were repeatedly non-committal as to Phase IV fuel, never specifically and clearly stating that Portland actually would be allocated any fuel. For example, in its October 13, 2006 answer, Maritimes only vaguely claimed that Portland "may" be allocated fuel, but that any such allocation would be in accordance with the Definitive Agreements, which are in dispute here.

36. Maritimes' reliance on Exhibit G to its amended Phase IV Expansion certificate application and on a Maritimes response to a staff data request in that certificate proceeding calling for engineering and environmental data is disingenuous at best.³⁷ Appendix G was Maritimes' non-public Critical Energy Infrastructure Information (CEII) filed to submit flow design engineering and environmental data and information. Contrary to Maritimes' assertion, it does not contain any declaration of a proposed cost allocation or "compressor fuel responsibility" of Phase IV fuel costs for Portland. A contract-based fuel cost allocation would not even qualify as CEII and would not have been reviewed by the Commission's engineering and environmental staff in any event.

37. The same can be said for gratuitous comments Maritimes made in its November 3, 2006 response to a staff data request regarding the engineering and environmental aspects of its then-proposed Phase IV Expansion compressors. Maritimes' unsolicited inclusion of its argument, that allocating Phase IV fuel costs to Portland would not be a subsidy, did not turn that response into notice of a request for Commission approval of that allocation and, in any event, would not even have been reviewed by the Commission's engineering and environmental staff because the argument was irrelevant to the

³⁷ Maritimes is reminded that information contained in CEII materials, such as materials contained in Exhibit G, are not permitted to be released to the public without prior Commission approval.

engineering issue under review.³⁸ Importantly, nor did it convey any mutual understanding with Portland regarding any allocation of Phase IV Expansion compressor fuel to Portland.

38. Finally, the 2006 Settlement also does not support Maritimes' claims. Maritimes does not dispute that the 2006 Settlement continued the provisions of the Operating Agreement regarding the allocation of Joint Facilities operating expenses, including fuel, but, as we reiterate above, that agreement does not permit allocation of non-Joint Facilities Phase IV Expansion fuel costs to Portland. The purpose of that settlement was to resolve differences Portland and Maritimes had over "future" expansions of capacity after the completion of the Maritimes' Phase IV Expansion facilities and to allocate cost responsibility for such future expansions "above the capacity constructed by Maritimes in connection with the Phase IV Application."³⁹ The only direct and immediate impact the 2006 Settlement had relative to the Maritimes' Phase IV Expansion was to require Portland to drop its opposition to Maritimes' then-pending Phase IV Expansion certificate application, as amended. Section 10 of the 2006 Settlement only provides that each owner's responsibility for operating costs, including fuel, of the Joint Facilities "shall continue to be governed by section 8.2.2 of the Ownership Agreement, the Operating Agreement, and any other agreement(s) . . ." which, as noted above, would not result in any fuel cost being allocated to Portland as a result of Maritimes' Phase IV Expansion.

39. In addition, the 2006 Settlement does not result in Portland acquiring any ownership interest in the Phase IV Expansion compressor facilities and only provides procedures for the sharing of costs of future expansions after the Maritimes Phase IV Expansion goes into service. By its terms, the 2006 Settlement resolved long-standing issues between Portland and Maritimes as to such future expansions by specifying that each is granted the right to expand the capacity of the Joint Facilities "for its own

³⁸ In its answer to Staff's engineering question 1 ("Justify on a technical basis Maritimes' proposed delivery pressure at Dracut shown on the flow diagrams provided in Exhibits G and G-1 of Maritimes' amended application."), Maritimes included a response to Portland's claim in comments discussed above that the Phase IV compressor station that Maritimes proposed to locate on the Joint Facilities Mainline at Eliot, Maine, should be re-located to Maritimes' wholly owned, non-Joint Facilities at Methuen on Maritimes' Phase III Lateral so that Portland would not have to bear Phase IV fuel costs and, therefore, would not be required to subsidize the Phase IV Project. *See* Maritimes' November 3, 2006 Responses to October 26, 2006 FERC Staff data request, Docket No. CP06-335-000, *et al.*, at 1, 5-6.

³⁹ 2006 Settlement, section 4, page 10.

account” up to a stipulated maximum amount of “Initial Expansibility” which is defined in section 2.(A) as a maximum of 500,000 Dth for Maritimes’ own account, with 393,000 Dth used up by its Phase IV Expansion; and, in section 2.(B), a maximum of 250,000 Dth for Portland’s own account. The 2006 Settlement provides the right for Maritimes and Portland to opt in or out of the other’s expansion projects that exceed the stipulated maximum “Initial Expansibility” levels. And, in section 9.(A), the 2006 Settlement only provides that the Phase IV Expansion Westbrook Compressor Station (both units) would become part of the Joint Facilities and Portland would acquire an undivided ownership interest in that compressor station equal to Portland’s undivided interest in the remainder of the Joint Facilities (which would cause it to be allocated a portion of the capital and operating costs thereof) only “upon the in-service date of the first of any facilities built at [Portland’s] request using Initial Expansibility.”⁴⁰ Portland has yet to either acquire or request such “Initial Expansibility” facilities be built; therefore, it did not acquire an undivided interest in the Westbrook Compressor Station under section 9.(A) of the 2006 Settlement. Thus, Maritimes takes out of context and reads too much into the reference to the Phase IV Expansion Project as a “Joint Facilities Expansion” as that can only have been a reference to the fact that the capacity of the Joint Facilities Mainline physically increased, but solely for the account of Maritimes. To read that reference as broadly as Maritimes does would flatly contradict the express provisions of section 2.(A). In any event, any such transfer of an ownership interest would require approval of certificate and abandonment applications by Portland and Maritimes, respectively, which did not occur.

⁴⁰ Maritimes’ assertion that “the 2006 Settlement avoided Portland having to bear cost responsibility for a share of fuel for both [Westbrook Compressor Station] units” (emphasis added) incorrectly implies that, by providing that Portland would not bear a share of the costs of the Phase IV Expansion Westbrook Compressor Station unit located upstream of the interconnect with Portland’s system on Maritimes’ wholly-owned facilities, Portland therefore would bear a share of the costs of the other Westbrook unit located downstream of the interconnect on the Joint Facilities. If that is what it intends by its reference to the 2006 Settlement, that conclusion simply does not follow. Thus, Maritimes has read too much into the following quoted language taken out of context from section 9.(A) of the 2006 Settlement: “[Portland] shall not be allocated or otherwise charged for additional capital, operating and maintenance expenses and fuel expenses associated with the compressor unit at the Westbrook Compressor Station that is contemplated under the Phase IV Application to be constructed on Maritimes’ wholly-owned facilities.”

B. The Phase IV Certificate and the Certificate Policy Statement

1. March 31, 2009 Order

40. In the March 31, 2009 Order, the Commission determined that to find Portland and its shippers responsible to pay for fuel for transportation of Maritimes' shippers' gas on Maritimes' Phase IV Expansion would violate the Commission's policy adopted in its Certificate Policy Statement addressing certification of new construction. Specifically, the Commission stated that the Certificate Policy Statement requires that pipelines proposing new expansion projects must be prepared to financially support such projects without relying on subsidization from existing customers.⁴¹ The Commission determined that this policy was applied in the February 21, 2007 Certificate Order authorizing the construction of the Phase IV Expansion Project in which the Commission concluded that Maritimes' Phase IV Expansion Project would not "adversely affect Maritimes' existing customers, or other pipelines and their customers."⁴² The Commission stated that to require Portland and its shippers to pay for Maritimes' Phase IV Expansion Project compressor fuel when they do not utilize that capacity (and do not have a right to) would subsidize Maritimes' Phase IV Expansion Project and its shippers. The Commission stated that, if it had been informed that Portland and its shippers would bear a portion of the cost of fuel attributable to the Phase IV Project compressor fuel, the Commission most certainly would have required Maritimes to provide a study to include an analysis of the impact on Portland and its customers. Accordingly, the Commission determined that Portland should not be subject to any fuel costs related to the Phase IV Expansion since all of the capacity on this expansion was built for the benefit and use of Maritimes and its shippers and Portland has no right to such capacity. The Commission found that any fuel volumes attributable to the Phase IV Expansion Project compression station operations must be attributed exclusively to Maritimes and its shippers and, therefore, the cost of such fuel volumes must be allocated to Maritimes and its shippers.

41. The Commission stated that, in its application for a certificate of public convenience and necessity for its Phase IV Expansion Project and subsequent pleadings in that proceeding, Maritimes never informed the Commission that the project would result in additional fuel costs being imposed on Portland or its shippers, and the absence of this information contributed to the Commission's finding in the certificate proceeding that the project would not adversely affect Maritimes' existing customers or other

⁴¹ See 126 FERC ¶ 61,317, at P 49 (citing *Certificate Policy Statement*, supra n. 17).

⁴² Id. (citing *Maritimes & Northeast Pipeline, L.L.C.*, 118 FERC ¶ 61,137, at P 25 and 27 (2007)).

pipelines and their customers, including Portland and its customers. In evaluating the potential for subsidies, the Commission stated that it was well-aware of the additional fuel consumption created by the Phase IV Expansion Project and, in the Phase IV Certificate Order, directed Maritimes to file an analysis to determine “what impact the new compression will have on system fuel, and whether the changes in fuel use combined with the decrease in its base transportation rates will adversely impact Maritimes’ existing shippers.”⁴³ The Commission stated that, had the Commission been informed that Portland and its shippers would also bear a portion of the cost of fuel attributable to the Phase IV Expansion Project compressors, the Commission most certainly would have required Maritimes’ analysis to include a study of the impact on Portland and its customers as well.⁴⁴

42. The Commission stated that the April 20, 2006 Order on Maritimes’ Petition for Declaratory Order only declared what total increase in capacity that a particular facilities’ design proposal would have had and clarified that the Commission would not make any decision on whether the project would be required by the public convenience and necessity until it had a complete certificate application before it.⁴⁵ Further, the Commission pointed out that Portland noted that “it and Maritimes agree that the Commission should not attempt to resolve the contractual issues between them in the context of Maritimes’ request in this proceeding.”⁴⁶ The Commission noted that one of the disputes between Maritimes and Portland was over the allocation of costs for what

⁴³ Id. P 50 (*citing Maritimes & Northeast Pipeline, L.L.C.*, 118 FERC ¶ 61,137, at P 32 (2007)).

⁴⁴ The Commission stated that Maritimes’ March 23, 2007 compliance response in Docket No. CP06-335-003 was limited entirely to a study of the impact on its own existing customers. *Accepted by unpublished delegation order* (July 23, 2007). In this regard, the Commission rejected the argument that Calpine Corporation’s (Calpine) December 23, 2005 filed in response to a request for declaratory order by Maritimes in Docket No. CP06-32-000 regarding one of Maritimes’ various proposals on the design of the Phase IV Expansion Project facilities somehow informed the Commission of the instant claim that Portland can be allocated Phase IV Expansion Project fuel.

⁴⁵ 126 FERC ¶ 61,317, at P 51 (2009) (*citing Maritimes & Northeast Pipeline, L.L.C.*, 115 FERC ¶ 61,069 (2006)). The referenced “particular facilities” were part of a different design proposal by Maritimes for an earlier version of a Phase IV Expansion, which design Maritimes later changed in its May 16, 2006 Phase IV Expansion Project certificate application in Docket No. CP06-335-000.

⁴⁶ *Id.* P 21.

Portland, at that time, proposed as an allocation to it of Phase IV Expansion transportation capacity. The Commission also noted Calpine's observation that "the preliminary proposal includes a potential expansion of the Joint Facilities on behalf of Portland of 150,000 Dth/d." The Commission concluded that, if Portland had acquired Phase IV Expansion capacity to provide transportation service to its own customers, an allocation of fuel to Portland and its customers would then certainly have been appropriate. However, the Commission stated that Portland ultimately acquired no Phase IV Expansion capacity (in fact, its capacity was reduced by 20 percent) and it transports its customers' gas using this reduced existing capacity. The Commission thus concluded that Calpine's comment regarding the potential allocation of fuel to Portland and its customers under an earlier Phase IV Expansion Project proposal is irrelevant.

43. The Commission stated that, if the Commission had prior knowledge of Maritimes' position on fuel, the Commission would have conditioned the authorization of Maritimes' Phase IV Expansion Project on Maritimes allocating all Phase IV Expansion Project fuel costs to its own customers; otherwise, the project would not have passed the Commission's threshold requirement under the no-subsidization requirement of the Certificate Policy Statement. The Commission also rejected Maritimes' claim that the Certificate Policy Statement is not directly applicable here. The Commission stated that the Certificate Policy Statement was issued before the execution of the 2006 Settlement and before Maritimes filed its application for a certificate for its Phase IV Expansion Project and was applied in its February 21, 2007 Certificate Order and, therefore, clearly is applicable.⁴⁷ Therefore, the Commission rejected Portland's October 1, 2008 filing and directed Maritimes to refund any fuel volumes collected from Portland with interest.

2. Request for Rehearing

44. Maritimes argues that the Commission's principal goal in interpreting the Operating Agreement and the 2006 Settlement appears to be in preventing, what Maritimes states the Commission has characterized as, "subsidization," as opposed to applying the standard rules of contract construction, i.e., the plain meaning and the intent of the parties. Maritimes asserts that the records in this proceeding and the Phase IV Expansion proceeding make it clear that Portland would not be subsidizing Maritimes by bearing fuel cost responsibility. To the contrary, Maritimes argues that, if the March 31, 2009 Order stands, Portland and its customers will be the parties receiving subsidies because Portland and its customers enjoy great cost avoidance and the numerous operational benefits of having their gas transported through facilities with compression.

⁴⁷ Id. P 52.

Maritimes asserts that, if it and its customers shoulder the entire burden for these costs, Portland and its customers receive a subsidy.⁴⁸

45. First, Maritimes argues that Portland and its customers have realized a considerable cost savings in light of Maritimes agreeing to reconfigure the Westbrook station and to lower the inlet pressure requirement. Maritimes points to the current design of the Westbrook Compressor Station, which has one unit on the Joint Facilities and one unit upstream on the Maritimes' wholly-owned facilities. According to Maritimes, this design was the result of a compromise between the joint owners, as part of the discussions resulting in the 2006 Settlement, which Maritimes claims was for the benefit of Portland and its shippers. Maritimes states that in 2004 Portland requested to amend the Ownership Agreement to reflect that the owners would be able to meet a higher inlet pressure of 1250 psig to deliver into the Joint Facilities at Westbrook, Maine, as opposed to the then current lower pressure of 1110 psig. Maritimes contends that the higher inlet pressure would have been advantageous to Portland, if it had been the first joint owner to expand the Joint Facilities and would have resulted in increased capital and fuel costs for Maritimes because Maritimes would have had to install compression on its wholly-owned facilities in order to meet the greater pressure requirement for delivering into the Joint Facilities at Westbrook. Thus, Maritimes asserts that Portland received substantial benefits.

46. According to Maritimes, both owners had prospects for expansion at the time of this earlier amendment to the Ownership Agreement. Maritimes states that, although Portland could have been the first owner to expand the Joint Facilities, Maritimes believed that it had solid prospects for future expansion and therefore agreed to the higher 1250 psig requirement at Westbrook as requested by Portland, as part of a larger agreement with Portland in January 2005, to swap ownership and capacity entitlement interests in various portions of the Joint Facilities.⁴⁹ However, Maritimes states that it was the first expansion project that would require compression on the Joint Facilities. According to Maritimes, it appears Portland recognized that its prospects for immediate expansion had declined and therefore informed Maritimes in early 2006 that it no longer wanted a pressure requirement of 1250. Maritimes asserts that the increased pressure would have required Portland to construct compression on its wholly-owned facilities in order to deliver into the Joint Facilities at the higher pressure. Therefore, Maritimes states that, to allow Portland to avoid the capital costs associated with such construction (as well as the cost of compressor fuel for such compression, which Maritimes asserts Portland would have been required to bear alone), Maritimes agreed, as part of the

⁴⁸ Request for Rehearing at 24.

⁴⁹ See Request for Rehearing at 25-26 and note 29.

settlement discussions leading to the 2006 Settlement, to a compromise inlet pressure at Westbrook of 1175 psig. Maritimes states that it was able to meet its requirements to its Phase IV anchor shippers and at the same time go forward with the lower Westbrook inlet pressure by configuring the Westbrook station so that Portland could deliver into the Joint Facilities between the two units at Westbrook. Maritimes explains that this configuration resulted in the Westbrook downstream unit being part of the Joint Facilities and the upstream unit being part of Maritimes' wholly-owned facilities. Maritimes submits that Portland and its customers have realized a considerable cost savings, in light of Maritimes agreeing to reconfigure the Westbrook station and to lower the inlet pressure requirement to 1175 psig.⁵⁰

47. Next, Maritimes asserts that Portland and its customers also receive operational benefits from the compression on the Joint Facilities. Maritimes states that Portland's customers' gas physically flows through the compressor stations that are now on the Joint Facilities. Maritimes explains that the Joint Facilities include mainline facilities, which now have compressors attached, and the gas transported by Maritimes and Portland all flow through these facilities. Thus, Maritimes contends that Portland's gas is actually compressed and that the operational benefits from such compression include (1) added deliverability, which it states is important to electric generator customers and (2) the blending of gas streams, which it contends is important to electric generators and local distribution companies. Therefore, according to Maritimes, Portland and its customers would receive a subsidy if they do not share in the cost responsibility for such compression.⁵¹ Maritimes further contends that Portland's customers also receive the benefit of the added reliability resulting from being shippers on a larger pipeline. Finally, Maritimes contends that Portland and its customers reap additional operational capacity as a result of the compression on the Joint Facilities and the 2006 Settlement. Maritimes states that, per section 6.(E) of the Settlement, Portland and its customers receive up to 20,000 Dth/d of operational capacity from the Phase IV Expansion.⁵²

⁵⁰ According to Maritimes, rather than flowing into the Joint Facilities between the two units at Westbrook, Portland could have located its tie-in downstream of both units and avoided contributing any fuel. However, Maritimes asserts that delivering into the Joint Facilities downstream of both units would have required Portland to deliver at 1250 psig, thereby requiring Portland to build its own compressor station upstream of Westbrook and bear cost responsibility for the fuel to run the wholly-owned compressor station when necessary to deliver into the Joint Facilities. Request for Rehearing at 27.

⁵¹ Request for Rehearing at 28.

⁵² Request for Rehearing at 27-28.

48. Next, Maritimes states that Portland and its customers also receive the added benefit of having a new supply source made available to them by the Phase IV Expansion. According to Maritimes, regasified LNG from the Canaport Terminal will be able to enter Portland's system at Westbrook. Maritimes asserts that increasing the sources of gas supply to a group of consumers introduces increased competition amongst suppliers, which it argues in turn has the potential to lead to increased pricing efficiency. Maritimes argues that the March 31, 2009 Order is not the product of reasoned decision-making because it disregards the evidence in the record regarding the benefits to Portland and its customers of compression on the Joint Facilities.⁵³

49. In addition, Maritimes argues that the March 31, 2009 Order fails to consider the actual cost to Portland and its customers for Portland's proportionate share of fuel on the Joint Facilities. According to Maritimes the Certificate Amendment Filing showed that, on a design basis, Portland would contribute less than 600 Dth/d of fuel. Assuming a nominal gas cost of five dollars per Dth, Maritimes states the actual cost would be \$3,000 per day.⁵⁴ Thus, Maritimes argues that all of the foregoing enumerated benefits are provided to Portland and its customers for, at most, 600 Dth/d of fuel gas, and likely much less. Maritimes contends that the Commission's failure to consider all of the benefits Portland receives as a result of the compression on the Joint Facilities and, on the other hand, the minimal cost responsibility for Portland is also error.⁵⁵

⁵³ Request for Rehearing at 28 and note 30 (*citing Public Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 227-28 (D.C. Cir. 1986)).

⁵⁴ Maritimes explains that the 600 Dth/d figure assumes that the Joint Facilities are flowing at a 100 percent load factor, meaning that both Maritimes and Portland would have to be flowing at their full design capacities on the Joint Facilities all the way to the terminus of the Joint Facilities at the interconnection with Tennessee at Dracut, which it states has never occurred since the 1999 in-service date of the Joint Facilities. Request for Rehearing at 29.

⁵⁵ Request for Rehearing at 29 and note 31 (*citing Public Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 227-28 (D.C. Cir. 1986). *See also TransCanada Pipelines Ltd. v. FERC*, 24 F.3d 305, 310 (D.C. Cir. 1994) (citations omitted) quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“[T]he Commission

(continued ...)

50. Maritimes argues that, even if the Commission found that it was unreasonable for Portland's customers to have to bear cost responsibility for the fuel, the remedy is not to bar Maritimes from recovering the fuel. Maritimes states that Maritimes, through its affiliate M&N Operating Company, is the Operator of the Joint Facilities. Maritimes, therefore, submits that the March 31, 2009 Order was incorrect when it says that Maritimes "does not provide transportation service for Portland or Portland's customers and, therefore, may not charge them for fuel."⁵⁶ As Operator of the Joint Facilities, Maritimes asserts that it provides transportation on Portland's share of the Joint Facilities and the Operating Agreement explains how Maritimes is to be reimbursed by Portland for such services. Maritimes argues that Portland must therefore bear cost responsibility for the fuel. Maritimes states that whether Portland's customers have to bear any cost responsibility to Portland is a separate issue to which Maritimes expresses no opinion.

51. Maritimes also contests the Commission's statement in the March 31, 2009 Order that Maritimes never informed the Commission that the Phase IV Expansion Project would result in additional fuel costs being imposed on Portland and its shippers. Maritimes asserts that the issue of fuel cost responsibility between the joint owners was discussed at length on the record in the Phase IV Expansion proceeding. According to Maritimes, it disclosed that Portland would be contributing fuel for the compression on the Joint Facilities in the Exhibit G flow diagrams included in both the Original Phase IV certificate application and in its Amendment Filing, as well as flow diagrams provided in response to several data requests.⁵⁷ In addition, Maritimes states that it further addressed the issue in response to Portland's protests and comments in the certificate proceeding.⁵⁸

'crossed the line from the tolerably terse to the intolerably mute.' ...Too much is lacking that a reasoned explanation would have supplied.'"))

⁵⁶ Request for Rehearing at 30 (*citing* 126 FERC ¶ 61,317, at P 21).

⁵⁷ Request for Rehearing at 30 and note 34 (*citing* Application for Certificate of Public Convenience and Necessity, Docket No. CP06-335-000 (May 16, 2006); Amendment to Application for Certificate of Public Convenience and Necessity, Docket No. CP06-335-000 (September 8, 2006); Responses to June 14, 2006 FERC Staff Data Request, Docket No. CP06-335-000 (June 19, 2006); Responses to October 26, 2006 FERC Staff Data Request Docket No. CP06-335-000 (November 3, 2006)).

⁵⁸ Request for Rehearing at 30 and note 35 (*citing* Motion to Intervene and Protest of Portland Natural Gas Transmission System, Docket No. CP06-335-000 (June 16, 2006) at pp. 9-10; Comments and Protest of Portland Natural Gas Transmission System, Docket Motion for Leave to Answer and Answer of Maritimes & Northeast Pipeline, L.L.C., Docket No. CP06-335-001 (October 30, 2006) at P 2; Addendum to Portland Natural Gas Transmission System's Answer to Motion for Leave to Answer and Answer

(continued ...)

According to Maritimes, the focus of these discussions was Portland's concern that the expansion facilities were oversized and that this would result in Portland having to bear cost responsibility for too much fuel (Maritimes contends that this shows Portland recognized it would have to bear cost responsibility for fuel to Maritimes). Maritimes states that it also discussed at length, in that proceeding, the benefits of the proposed Joint Facilities compression to Portland's shippers. Maritimes states that Portland ultimately withdrew with prejudice its protests, as well as two additional submittals, pursuant to the terms of the 2006 Settlement.

52. Maritimes argues that the Commission decision in the March 31, 2009 Order requiring Portland to bear cost responsibility violates the Phase IV Certificate Order⁵⁹ and is arbitrary and capricious because it failed to address the record in the Phase IV Expansion proceeding regarding the benefits that Portland's shippers receive from the compression on the Joint Facilities. Maritimes states that the record evidence in the Phase IV proceeding shows the benefits that Portland's shippers would receive from the proposed compression on the Joint Facilities.

53. Finally, Maritimes asserts that it explained in the Phase IV Expansion proceeding the substantial benefit that Portland shippers would receive from what it asserts is "the compression on the Joint Facilities," namely, the Phase IV Expansion compression. It asserts that, in response to Portland's argument that the proposed Eliot compressor station should be relocated from the Mainline (at Eliot) to Maritimes' wholly-owned Phase III facilities (downstream of Eliot at Methuen), it explained that, if the Eliot station was relocated on the Maritimes Phase III facilities rather than on the Joint Facilities, there would be clear operational preference for using the Algonquin delivery point [on Phase III] over the Tennessee delivery point at Dracut [on the Joint Facilities]. Moreover, it notes, it stated that shippers on Maritimes and Portland, as well as the New England pipeline grid, would lose the benefits associated with delivering at higher pressures at the delivery points located downstream of Eliot, which include, in addition to the Tennessee Dracut point and the Maritimes' Phase III Methuen point, deliveries into the Newington Energy power plant, KeySpan Energy Delivery New England, Granite State Gas Transmission and the Haverhill interconnection with the Tennessee system.⁶⁰ Maritimes

of Maritimes & Northeast Pipeline, L.L.C., Docket No. CP06-335-001 (November 1, 2006) at Response to Question 3 (containing the Responses of Portland Natural Gas Transmission System to FERC Data Request dated October 26, 2006)).

⁵⁹ Request for Rehearing at 32, note 39.

⁶⁰ Request for Rehearing at 32 and note 37 (*citing* Maritimes November 3, 2006 Responses to October 26, 2006 FERC Staff Data Request, Docket No. CP06-335-000, at 5).

states that it also filed flow diagrams in the Phase IV proceeding which, it asserts, demonstrated that locating the station at Eliot, rather than on Maritimes' Phase III lateral, maximizes the benefits of this compression for Repsol (Maritimes' Phase IV expansion shipper) and Maritimes' other firm shippers, as well as the shippers on Portland's system.⁶¹

3. Commission Decision

54. Contrary to Maritimes' arguments, the record of the Phase IV Expansion proceeding makes it clear that Portland would be subsidizing Maritimes by bearing responsibility for the cost of Maritimes' Phase IV Expansion fuel and that Portland and its customers will not be the parties receiving subsidies. Nor do any of what Maritimes claims are benefits to Portland and its shippers from the Maritimes' Phase IV Expansion support approving the allocation of Maritimes' Phase IV Expansion compressor fuel costs to Portland or its customers.

55. Maritimes' argument, that Portland and its customers have realized a considerable cost savings in light of Maritimes' agreeing to reconfigure the Westbrook compressor station and to lower the Joint Facilities inlet pressure requirement, is without merit. It is hardly a benefit to Portland to avoid costs it would not have to incur at all if Maritimes had not proposed its Phase IV Expansion Project in the first place. It received no additional capacity under that project and, indeed, lost a portion of its Joint Facilities Mainline capacity to accommodate Maritimes' Phase IV Expansion Project. As noted earlier herein, note 10, in a Declaratory Order issued June 19, 2008, the Commission found that, despite having originally transported 178,000 Mcf/d (with the capability of transporting as much as 210,000 Mcf/d), Portland would be physically incapable of transporting on a firm, year-round basis, more than 168,000 Mcf/d from the inlet to its wholly-owned system near Pittsburg, New Hampshire, through the Westbrook interconnect with Maritimes' system, to the terminus of the Joint Facilities at Dracut, Massachusetts, as a result of the Maritimes Phase IV Expansion approved the year before.⁶² Accordingly, the Commission ruled that Portland's annual certificated system-wide capacity upon the in-service date of the Maritimes' Phase IV Project would only be 168,000 Mcf/d.⁶³ Moreover, any claimed benefit emanating from Maritimes' Phase IV

⁶¹ Request for Rehearing at 32 and note 38.

⁶² *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,275, at P 28 (2008), *reh'g denied*, 125 FERC ¶ 61,198 (2008), *appeal dismissed sub nom. PNGTS Shipper Group, et al. v. FERC*, 592 F.3d 132 (D.C. Cir. 2010).

⁶³ *Id.* P 29.

Expansion that Portland was to use to facilitate a future Portland expansion of 150,000 Mcf/d never manifested itself as Maritimes withdrew that part of its original certificate application. The 2006 Settlement specifically governs matters, such as the allocation of capital and fuel costs, relative to any other future Portland expansions.

56. Further, Maritimes' assertion, that Portland and its customers receive operational benefits from the compression on the Joint Facilities simply because Portland's customers' gas physically flows through Maritimes' Phase IV Expansion compressor stations that are located on the Joint Facilities, is without merit. The fact that Portland shippers' gas physically flows through and is compressed by Maritimes' Phase IV Expansion compressors is irrelevant, as we previously discussed at P 25, *supra*.⁶⁴ Portland's shippers' gas does not need to be compressed to be transported by Portland on the Joint Facilities Mainline, which is why it is not to be allocated any of Maritimes' Phase IV Expansion compressor fuel costs.

57. Indeed, under the February 21, 2007 Certificate Order, had Maritimes not shown that its own non-Phase IV Expansion existing shippers would have their fuel rates lowered by a roll-in of the Phase IV Expansion compressor fuel costs, those customers would not have been allocated any of the Phase IV Expansion compressor fuel costs despite the fact that their gas also flows through and is compressed by these very same Phase IV Expansion compressors.⁶⁵ Moreover, the February 21, 2007 Certificate Order

⁶⁴ For example, in applying the Certificate Policy Statement, the Commission required the cost of fuel and electric power for compression added to an existing mainline as part of an expansion to be incrementally priced and charged to expansion shippers who obtain the additional capacity created by that compression notwithstanding the fact that non-expansion shipper gas was commingled with expansion shipper gas and physically flowed through and was compressed by the expansion compressors. *See, e.g., Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299, at 62,125-126 (2007), *reh'g*, 112 FERC ¶ 61,170 (2005), *aff'd sub nom. Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916 (D.C. Cir. 2008).

⁶⁵ In the Phase IV Certificate Order, the Commission directed Maritimes to submit an analysis of the effect of the incurrence of the additional Phase IV Expansion compressor fuel on its existing, non-Phase IV Expansion customers and to file an incremental fuel retention rate if they would be adversely impacted. Phase IV Certificate Order, 118 FERC ¶ 61,137 at P 32. In a compliance filing in Docket No. CP06-335-003 dated March 23, 2007, Maritimes reported that its existing, non-Phase IV Expansion customers would not be adversely impacted and would obtain a fuel rate reduction if the fuel costs were rolled into its system rates. The March 23, 2007 compliance filing was accepted by unreported order issued July 23, 2007.

applied the Certificate Policy Statement and resolved the matter of whether the capital costs of the Phase IV Expansion Project should be rolled-in to Maritimes' general system rates or incrementally priced solely on the basis of finding that Phase IV Expansion Project revenues were expected to exceed the costs.⁶⁶ That preliminary determination was made without regard to claimed operational benefits to existing Maritimes' shippers or other pipelines.

58. Further, we reject Maritimes' claim that both Portland and Portland's customers should pay for Phase IV Expansion compressor fuel because they both allegedly receive "operational capacity" from the Phase IV Expansion under section 6.(E) of the 2006 Settlement. Section 6.(E) only provides that up to 20,000 Dth/d of "operational capacity" from the Phase IV Expansion "may" be available to Maritimes and Portland, not to Portland's customers. In addition, it is irrelevant as Maritimes does not contend, nor does Portland concede, that Portland needs or even actually uses any of that allegedly available surplus of operational capacity to provide service for its customers.⁶⁷ Indeed, this claim conflicts with Maritimes' basic position in this case. Maritimes contends that 100 percent of Portland shipper transportation volumes should be allocated fuel costs exactly the same as Maritimes' Phase IV Expansion shipper transportation volumes. It has never contended that there is a 20,000 Dth/d cap on such transportation volumes or that it intends to charge only for fuel attributable to Portland's discretionary use of this alleged 20,000 Dth/d surplus operational capacity. In the end, however, agreeing to an allocation of capacity of any form not certificated by the February 21, 2007 Certificate Order carries no weight. Maritimes did not request, and the Commission did not grant, a certificate authorizing any Phase IV Expansion capacity of any sort (including the claimed 20,000 Dth/d of operational capacity) to be allocated to Portland. To allocate any Phase IV Expansion capacity of any sort to Portland would have required that Portland obtain a certificate along with Maritimes for such capacity. That did not occur.

59. Contrary to Maritimes' position, it also is a speculative benefit to Portland and its customers that Maritimes' Phase IV Expansion made a new supply source available to them, i.e., Maritimes' claim that regasified LNG from the Canaport Terminal in Newfoundland will be able to enter Portland's capacity at Westbrook. At present, all the incremental Phase IV take away capacity on Maritimes' system north of Westbrook is contracted by a single Maritimes' customer, Repsol. However, even if Maritimes raised the possibility of some such residual benefits of the Phase IV Expansion Project, as noted above, based on application of the Certificate Policy Statement, the Commission issued

⁶⁶ *Id.* P 31.

⁶⁷ Section 6.(E) further provides that each party shall have the right to determine, based on their own engineering analysis, when and how they would use such capacity.

Maritimes a certificate authorizing its Phase IV Expansion Project with the understanding that only Maritimes and/or its customers would pay for the project, including paying for compressor fuel, and that they would not be subsidized. Finally, Maritimes' claim that the impact on Portland is small, i.e., allegedly 600 Mcf/d, in relation to the foregoing claimed benefits begs the issue: Portland should be allocated none of Maritimes' Phase IV Expansion fuel costs.

60. We next reject Maritimes' argument that Maritimes, through its affiliate M&N Operating Company, is the Operator of the Joint Facilities and, therefore, the March 31, 2009 Order was incorrect when it states that Maritimes "does not provide transportation service for Portland or Portland's customer and, therefore, may not charge them for fuel." The gas being transported at issue is Portland shipper-owned gas, not Portland's, and neither Maritimes nor its affiliate Operator "transports" Portland shipper-owned gas;⁶⁸ only Portland does that and then only with its own Joint Facilities capacity. Otherwise, if Maritimes does "transport" the Portland shipper-owned gas, those shippers would no longer be Portland's shippers; they would become Maritimes' shippers. However, Maritimes is not authorized to charge them transportation charges.⁶⁹

61. Maritimes' May 16, 2006 Phase IV Expansion Project certificate application in Docket No. CP06-335-000 states on its face (Transmittal Letter at 1): "The Project is designed to expand Maritimes' mainline system to accommodate up to 730,000 Dth/d of throughput in the form of regasified LNG from the Canaport LNG import terminal to be located in Saint John, New Brunswick." Maritimes' Phase IV Expansion Project certificate application, at 7, described the Phase IV Project as a project "that will increase throughput on the Maritimes' system." At that point, the only part Portland played in the project was that it was to be allocated 150,000 Dth/d of Phase IV capacity; which, as

⁶⁸ Indeed, if Maritimes' affiliate were, in fact providing a transportation service, it would be doing so illegally without certificate or tariff authorization.

⁶⁹ Maritimes does not qualify as the Operator of the Joint Facilities simply because it is affiliated with the actual Operator. In any event, the "Operator" of facilities does not "transport" the gas flowing through the facilities it operates. To be considered the entity engaged in jurisdictional "transportation" of natural gas, an entity must first obtain a certificate of public convenience and necessity under section 7 of the Natural Gas Act (NGA), have a rate schedule on file under NGA section 4, and contract for such service with shippers. By functioning as an Operator of the subject facilities, Maritimes' affiliate does not qualify for that status; nor would Maritimes vis-à-vis Portland shipper-owned gas even if we were to accept Maritimes' self-characterization as the "Operator" of the Joint Facilities.

previously mentioned, Maritimes later removed in its amended application in Docket No. CP06-335-001 filed September 8, 2006.

62. Earlier herein, *supra* P 35-37, we rejected Maritimes' claim that certain documents reflect a course of conduct that Portland would be contributing fuel for the compression on the Joint Facilities, to wit: the non-public Exhibit G flow diagrams included in both the Original Phase IV Expansion certificate application and in its Amendment Filing, as well as flow diagrams provided in response to several data requests, and its response to Portland's protests and comments in the Phase IV Expansion certificate proceeding. For the same reasons, as discussed earlier herein, we reject Maritimes' arguments reiterating the same unfounded claims as evidence that in the Phase IV Expansion certificate proceedings it disclosed an intent to charge Portland for Phase IV Expansion fuel.

63. Finally, Maritimes asserts that its response to Portland's argument, that the proposed Eliot compressor station should be relocated from the Mainline (at Eliot) to Maritimes' wholly-owned Phase III facilities (downstream at Methuen), somehow shows a "substantial benefit" to Portland and its shippers from the Phase IV Expansion compression. This assertion is unsupported. In its Phase IV Expansion certificate proceeding, Maritimes contended that Portland would benefit from the downstream line pressure increase resulting from locating one of its proposed Phase IV Expansion compressors at Eliot. Portland opposed the installation of the Eliot compressor station on the Joint Facilities, *inter alia*, for operational and economic reasons (i.e., the resulting pressure increase at the downstream interconnection at Dracut was not needed and only was designed to benefit Maritimes' affiliates who interconnect with the Joint Facilities at Dracut).⁷⁰ However, these protested issues never were resolved on the merits as, on November 30 and December 1, 2006, Portland withdrew its protests in Docket No. CP06-335 as required under the 2006 Settlement, which the parties later filed on December 18, 2007.

⁷⁰ See Portland Comments and Protest filed September 29, 2006, in Docket No. CP06-335-001, at 4; Portland Response A3 to FERC Data request dated October 26, 2006, in Portland's November 1, 2006 Addendum to its October 30, 2006 Answer in Docket No. CP06-335-001 (Public version).

64. The fact that Portland objected to the Eliot compressor station cannot be read as recognition of any benefit to Portland or its customers from that component of Maritimes' Phase IV Expansion Project. Maritimes' arguments are an attempt to embroil the Commission in the past quagmire of operational issues raised over the years in the underlying Maritimes Phase IV Expansion certificate proceeding and predecessor certificate proceedings dealing with various iterations of Maritimes' expansion proposals and have no bearing on the issue of what conditions the Commission attached to the certificate actually issued Maritimes in the February 21, 2007 Certificate Order. As discussed earlier herein and in more detail in the March 31, 2009 Order, that certificate requires Maritimes' and/or its customers to bear the cost of all Maritimes Phase IV Expansion Project compressor fuel. For these reasons, and the other reasons discussed above, rehearing is denied.

The Commission orders:

Rehearing of the March 31, 2009 Order is denied.

By the Commission. Commissioner LaFleur voting present.

(S E A L)

Kimberly D. Bose,
Secretary.