

134 FERC ¶ 61,193  
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.

Ozark Gas Transmission, L.L.C.

Docket No. RP11-1495-002

ORDER GRANTING IN PART AND DENYING IN PART  
REQUEST FOR CLARIFICATION AND REHEARING

(Issued March 17, 2011)

1. On November 18, 2010, the Commission found that Ozark Gas Transmission, L.L.C. (Ozark) may be substantially over-recovering its cost of service and fuel and lost and unaccounted-for (LAUF) gas. Therefore, the Commission initiated an investigation, pursuant to section 5 of the Natural Gas Act (NGA), to determine whether Ozark's current rates are just and reasonable and set the matter for hearing.<sup>1</sup> The Commission also directed Ozark to file a full cost and revenue study within 75 days of the issuance of the order.<sup>2</sup>

2. On December 16, 2010, Ozark filed a request for clarification or, in the alternative, rehearing of the November 2010 Order. Ozark's request for clarification or rehearing centered on the November 2010 Order's instruction that Ozark refrain from including with its cost and revenue study nine months of adjustment period data, as set forth in section 154.303(a) of the Commission's regulations. Ozark generally sought clarification that, despite this limitation on the cost and revenue study, the Commission would nevertheless consider cost and revenue changes occurring during a full nine-month adjustment period of the type provided for in the Commission's regulations and precedent applicable to section 4 rate cases before determining whether Ozark's existing rates are unjust and unreasonable or establishing new just and reasonable rates. On January 28,

---

<sup>1</sup> *Ozark Gas Transmission, L.L.C.*, 133 FERC ¶ 61,158 (2010) (November 2010 Order).

<sup>2</sup> *Id.* Ozark filed its cost and revenue study on February 1, 2011.

2011, the Commission granted in part and denied in part Ozark's request for clarification and rehearing.<sup>3</sup>

3. On February 15, 2011, Ozark filed a request for expedited clarification and rehearing of the January 2011 Order.

### **I. Background**

4. In the November 2010 Order, the Commission found that, based upon its preliminary analysis of the information provided by Ozark in its Form 2 for 2008 and 2009, Ozark's currently effective tariff rates, including fuel and LAUF retention percentages, may be unjust and unreasonable. The Commission's analysis indicated that Ozark's currently effective tariff rates may allow Ozark to recover revenue substantially in excess of its estimated costs of service and fuel and LAUF gas. Accordingly, the Commission initiated an investigation to examine the justness and reasonableness of Ozark's rates pursuant to section 5 of the NGA and set the matter for hearing.<sup>4</sup>

5. The November 2010 Order directed Ozark to file a cost and revenue study within 75 days of the date the order issued and to include all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations.<sup>5</sup> Because the Commission was seeking actual cost and revenue information for the latest twelve-month period available, the Commission clarified that the information submitted by Ozark must exclude any adjustments or projections that may be attributable to a test period referenced in the schedules and statements set forth in section 154.312 of the regulations. Thus, Ozark was instructed not to file nine months of post-base period adjustment data required by section 154.303(a) at this point in the proceeding. However, the November 2010 Order stated that Ozark may, if fully supported, reflect changes to costs and revenues for a known and measurable change that took place during the twelve-month period. For example, if a general pay raise became effective during month five of the twelve-month period, an adjustment to the cost of service could be made to annualize the impact of this cost change.<sup>6</sup> Additionally, because Ozark did not have a NGA section 4 burden in this section 5 proceeding and would be filing testimony in response to other parties, Ozark did not need

---

<sup>3</sup> *Ozark Gas Transmission, L.L.C.*, 134 FERC ¶ 61,062 (2011) (January 2011 Order).

<sup>4</sup> November 2010 Order, 133 FERC ¶ 61,158.

<sup>5</sup> *Id.* P 10 (citing 18 C.F.R. § 154.312 (2010)).

<sup>6</sup> *Id.* at n.10 (citing 18 C.F.R. § 154.312 (2010)).

to file the Statement P required by section 154.312(v) of the Commission's regulations at that time.<sup>7</sup>

6. As in other section 5 proceedings, due to the potential for continued over-recovery of revenues by Ozark, the November 2010 Order established a date for an initial decision in order to expedite the proceeding.<sup>8</sup> Accordingly, the proceeding was to be conducted in accordance with the Track II hearing timeline, with the hearing to commence on June 30, 2011 and the initial decision to be issued within 32 and 47 weeks, respectively, of the designation of the presiding administrative law judge (ALJ).

7. Following the November 2010 Order, Ozark filed a request for clarification or, in the alternative, rehearing of the November 2010 Order. Ozark's request for clarification and rehearing centered on the November 2010 Order's instruction that Ozark refrain from including with its cost and revenue study nine months of adjustment period data, as set forth in section 154.303(a) of the Commission's regulations. Ozark generally sought clarification that, despite this limitation on the cost and revenue study, the Commission would nevertheless consider cost and revenue changes occurring during a full nine-month adjustment period of the type provided for in the Commission's regulations and precedent applicable to section 4 rate cases before determining whether Ozark's existing rates were unjust and unreasonable or establishing new just and reasonable rates.

8. The Commission granted in part and denied in part Ozark's request for clarification. The January 2011 Order, among other things, clarified that the Commission's directive concerning the cost and revenue study required by the November 2010 Order was not intended to preclude consideration of evidence concerning changes in Ozark's cost and revenues occurring after the twelve-month period covered by that study. However, the Commission rejected Ozark's contention that the Commission must consider cost and revenue changes occurring during a full nine-month adjustment period of the type provided for in the Commission's regulations and precedent applicable to section 4 rate cases.<sup>9</sup>

9. The Commission found that, while it was using the schedules and statements in the section 154.312 regulations as a template for the cost and revenue study, the section 154.303 test period regulations did not apply to section 5 proceedings, such as the instant

---

<sup>7</sup> *Id.* P 10 (citing *Pub. Serv. Comm'n of New York*, 115 FERC ¶ 61,368, at P 6 (2006)).

<sup>8</sup> *Id.* P 11. *See, e.g., Indicated Shippers v. Sea Robin Pipeline Co.*, 76 FERC ¶ 61,151 (1996) (*Sea Robin*).

<sup>9</sup> January 2011 Order, 134 FERC ¶ 61,062 at P 18.

case.<sup>10</sup> Subpart D of Part 154 of the Commission regulations, which includes sections 154.303 and 154.312, only applies to interstate pipelines filing for a change in rates or charges – i.e. a section 4 rate proceeding.<sup>11</sup> Further, while the Commission applies the same basic test period concepts in section 5 proceedings as in section 4 proceedings, because of the very different procedural posture of a section 5 proceeding, as compared to a section 4 rate case, the section 154.303 provisions concerning the timing and duration of the base and adjustment periods were not suited to a section 5 proceeding. The Commission explained,

the nine-month adjustment period provided by section 154.303 takes into account the fact that section 4 permits the Commission to suspend a pipeline's proposed rate increase for five months, with the result that there is generally a nine-month period between the base period used by the pipeline in its section 4 rate filing and the date its proposed rate increase takes effect subject to refund. However, in a section 5 proceeding, there is no comparable nine-month period between the base period and the effective date of a rate change, because the Commission has neither rate suspension nor refund authority in a section 5 proceeding. Thus, the reason for setting the length of the adjustment period at nine months does not exist in a section 5 proceeding.<sup>12</sup> (footnotes omitted)

10. Based on the Track II hearing timeline, the Commission determined that an adjustment period ending February 2011 was appropriate.<sup>13</sup> This was the last month for which actual data could reasonably be expected to be available sufficiently in advance of the hearing and thereby ensure that the participants had an opportunity to fully litigate the accuracy and reliability of the test period data for purposes of projecting Ozark's costs and revenues. The Commission stated that the ALJ may also consider adjustments to the current procedural schedule to account for use of data after the period covered by the cost and revenue study, as requested by the participants in the proceeding.<sup>14</sup>

---

<sup>10</sup> *Id.* P 22.

<sup>11</sup> *See* 18 C.F.R. ¶ 154.301 (2010).

<sup>12</sup> January 2011 Order, 134 FERC ¶ 61,062 at P 23.

<sup>13</sup> *Id.* P 30.

<sup>14</sup> *Id.*

11. On February 15, 2011, Ozark filed a request for expedited clarification and rehearing.<sup>15</sup>

## **II. February 15 Request for Clarification and Rehearing**

12. In its February 15, 2011 request for clarification and rehearing, Ozark argues that the Commission erred when it established an ad hoc test period. Ozark states that the decision to shorten the test period appears to be driven by the Commission's previous decision to set this proceeding for hearing under the Track II procedural schedule, which, Ozark argues, is a post hoc rationalization that truncates the test period such that relevant and necessary cost and volume data will not be considered in this proceeding. Ozark states that the use of the shortened test period created by the Commission will lead to the inequitable result of a rate that would not otherwise have been considered just and reasonable had Ozark initiated a section 4 rate case using the same base period. Accordingly, Ozark argues that the Commission's departure from the standard test period is without basis and is arbitrary and capricious.

13. Ozark also argues that the Commission's decision to establish fundamental restrictions on the scope and timing of test period adjustments several months after the commencement of the hearing process is fundamentally unfair and constitutes a lack of reasoned decision-making. Ozark states that, not only did the Commission go beyond the scope of Ozark's December 16, 2010 request for clarification or rehearing, it arbitrarily created a test period well after the procedural process had commenced in the proceeding. Ozark's contends that it would have been more appropriate for the Commission to have allowed participants to come up with a new procedural schedule that would have allowed for test period data to come in at a later date, changed the Track II schedule to a Track III schedule, or extended the Track II schedule.

14. If the Commission does not grant rehearing with respect to establishing a truncated test period, Ozark requests expedited clarification that the only restriction the Commission has imposed with respect to the end of the test period for this proceeding is that the test period must end by the time necessary for Ozark to provide actual test period data sufficiently in advance of hearing. Granting this clarification, Ozark contends, will ensure that no participant can argue to exclude from the record significant contract terminations and other events that Ozark claims are certain to occur with sufficient time for discovery to be conducted and testimony filed. If the Commission does not provide the requested clarification, Ozark states that it may need to file a section 4 rate case in order to protect its interest and ensure that its rates are not adjusted in any manner that fails to reflect its actual cost and revenue situation.

---

<sup>15</sup> Notice of Ozark's clarification request was issued on February 23, 2011 and comments were due on February 28, 2011. No comments were filed.

15. Ozark also argues that the Commission erred in the January 2011 Order when it required Ozark to propose adjustments in its answering testimony.<sup>16</sup> Ozark states that this statement unlawfully shifts the burden of going forward to Ozark and ignores the distinctions between sections 4 and 5 of the NGA. Ozark contends that Trial Staff and other proponents of this proceeding should shoulder the initial burden of production by proposing and supporting adjustments.

16. Similarly, Ozark argues that the Commission erred when it suggested that it could rely on Ozark's calculation of rates in the cost and revenue study as evidence of how Ozark believes its rates should be derived.<sup>17</sup> Ozark states that the Schedule J-2 it submitted in its cost and revenue study reflects Ozark's historical rate design and is not evidence or an example of Ozark's preferred method for designing rates and allocating costs as Ozark would typically submit if it were proposing a change in rates under section 4 of the NGA. Accordingly, Ozark states that the Commission should find that Ozark's Schedule J-2 does not serve as evidence of Ozark's preferred rate design or cost allocation or as the first-proposed rate design in the proceeding and that Trial Staff and the other proponents of the proceeding, as opposed to Ozark, have the initial burden of going forward with respect to Ozark's cost allocation and rate design.

### **III. Discussion**

17. As discussed below, the Commission grants in part and denies in part Ozark's request for clarification and rehearing.

18. In its request for clarification and rehearing, Ozark's raises several objections to the truncated adjustment period established by the Commission in the January 2011 Order. Ozark claims that the Commission's decision came "[w]ithout notice or request by any participant"<sup>18</sup> and is based upon a post hoc rationalization that will result in relevant and necessary cost and volume data not being considered in this proceeding. In particular, Ozark states that significant contract terminations that would take effect during a typical nine-month test period may be excluded from the record if the truncated test period is allowed to stand. Ozark also argues that the Commission's decision was untimely, given it came after the procedural process had commenced.

---

<sup>16</sup> Ozark February 15, 2011 Request for Clarification and Rehearing at 15 (citing January 2011 Order, 134 FERC ¶ 61,062 at P 30).

<sup>17</sup> *Id.* at 17 (citing January 2011 Order, 134 FERC ¶ 61,062 at P 35).

<sup>18</sup> *Id.* at 12.

19. First, the January 2011 Order responded directly to Ozark's request for clarification and rehearing. In Ozark's request for clarification and rehearing of the November 2010 Order, Ozark argued that the Commission could not satisfy its NGA section 5 burden in this proceeding "without considering appropriate test period adjustments to historical data that are adequately supported by sufficient evidence in the record."<sup>19</sup> Further, Ozark requested clarification that it had "the right to propose test period adjustments in this proceeding and the Commission will consider such evidence in rendering its decision. Ozark noted the "test period adjustments to which the instant pleading refers are the adjustments for known and measureable changes occurring during the nine-month adjustment period" following the base period.<sup>20</sup>

20. In response, to Ozark's request, the January 2011 Order clarified that the directive in the November 2010 Order concerning the cost and revenue study was not intended to preclude consideration in this section 5 proceeding of evidence concerning changes in Ozark's cost and revenues occurring after the twelve-month period covered by Ozark's cost and revenue study.<sup>21</sup> However, the Commission rejected Ozark's request for a full nine-month adjustment period of the type used in section 4 rate cases, and instead authorized an abbreviated adjustment period. On rehearing, Ozark again contends that in order to determine just and reasonable rates in a section 5 proceeding the Commission must use the same nine-month adjustment period as in a section 4 rate case and the Commission's failure to do so constitutes an unexplained departure from Commission policy.

21. As explained in the January 2011 Order, the nine-month adjustment period provided by section 154.303 for section 4 rate cases takes into account the fact that section 4 permits the Commission to suspend a pipeline's proposed rate increase for five months, with the result that there is generally a nine-month period between the base period used by the pipeline in its section 4 rate filing and the date its proposed rate increase takes effect subject to refund.<sup>22</sup> However, in a section 5 proceeding, there is no comparable nine-month period between the base period and the effective date of a rate

---

<sup>19</sup> Ozark December 16, 2010 Request for Clarification and Rehearing at 8-9.

<sup>20</sup> *Id.* at 15-16.

<sup>21</sup> Ozark's cost and revenue study covered the 12-month period ending October 31, 2010, the latest consecutive twelve-month period available as of the date of the order. Ozark, Cost and Revenue Study, Docket No. RP11-1495-000, at 1 (filed Feb. 1, 2011).

<sup>22</sup> Usually, the base period ends three months before the pipeline makes its filing. That three-month period, together with the 30-day notice period before the suspension order and the five-month suspension, add up to nine-months.

change, because the Commission has neither rate suspension nor refund authority in a section 5 proceeding. Thus, the reason for setting the length of the adjustment period at nine-months does not exist in a section 5 proceeding. While Ozark claims that our denial of its request to use a full nine-month adjustment period in this section 5 case is a departure from established Commission practice, it cites no Commission precedent establishing such a practice for section 5 cases. In fact, as discussed in the January 2011 Order, in *Indicated Shippers v. Sea Robin*,<sup>23</sup> the Commission held that just and reasonable rates could be determined in a section 5 proceeding based solely on a twelve-month base period, without any adjustment period.

22. In the January 2011 Order, the Commission did not strictly follow the *Sea Robin* precedent of using no adjustment period, because under the Track II procedural time line adopted in this case the hearing would not commence until June 30, 2011, eight-months after the October 31, 2010 end of the annual period covered by Ozark's cost and revenue study. The Commission recognized that, as in a section 4 rate case, there is an interest in determining rates based on cost and revenue data as close in time as possible to the effectiveness of any revised rates established as a result of the section 5 proceeding.<sup>24</sup> Accordingly, the Commission determined that it would be reasonable to consider cost and revenue changes occurring during at least part of this eight-month period.

23. In deciding what length adjustment period could be used in this case, the Commission considered several factors. Because the Commission can only make its section 5 determinations effective prospectively, the Commission has sought to expedite this proceeding in order to minimize the potential for continued over-recovery of revenues by Ozark.<sup>25</sup> At the same time, interested participants need to have an opportunity to fully litigate the accuracy and reliability of the test period data for purposes of projecting the pipeline's costs and volumes. As Ozark recognizes, this requires that the test period end sufficiently before the hearing to provide time, prior to hearing, for (1) Ozark to submit actual test period data for that test period, (2) the participants to conduct discovery concerning that data, and (3) the participants to prepare testimony concerning the appropriate costs and volumes projections to be made based on that data. Therefore, balancing these interests, along with the interest in using data in as close in time as possible to the effectiveness of any revised rates established as a result of this proceeding, the Commission determined to permit an adjustment period ending "approximately February 2011."

---

<sup>23</sup> *Indicated Shippers v. Sea Robin Pipeline Co.*, 81 FERC ¶ 61,146, at 61,655 (1997) (*Sea Robin*).

<sup>24</sup> January 2011 Order, 134 FERC ¶ 61,062 at P 27.

<sup>25</sup> November 2010 Order, 133 FERC ¶ 61,158 at P 11.

24. Based on the current procedural schedule under which the hearing is scheduled to commence on June 30, 2011, the Commission stated:

it would appear that the last month for which actual data could reasonably be expected to be available sufficiently in advance of the hearing would be approximately February 2011. Ozark should be able to complete providing actual data for the period through February to all participants by mid-April, approximately two and a half months before the June 30, 2011 commencement of the hearing. Ozark could then propose in its answering testimony (currently, due May 31, 2011) adjustments based on such actual data, and staff and the other intervenors could address those adjustments, as well as proposing their own adjustments, in cross-answering and rebuttal testimony (currently, due June 17, 2011).<sup>26</sup>

The Commission also authorized the ALJ to consider adjustments to the current procedural schedule to account for the Commission's partial grant of Ozark's rehearing request to permit use of data after the November 2009 through October 2010 period covered by Ozark's cost and revenue study.

25. In its instant rehearing request, Ozark claims that a truncated test period ending on February 28, 2011 will fail to take into account certain imminent contract terminations. Ozark asserts that the firm capacity subscribed on its system will decrease by 220,000 Dth/d between January 1 and April 1, a reduction in excess of 40 percent. A comparison of Ozark's January 2011 Index of Customers with a draft of its April 2011 Index of Customers<sup>27</sup> indicates that Ozark expects that Southwestern Energy Services Co. will not renew three negotiated rate contracts with total contract demand of 230,000 Dth/d expiring on March 31, 2011.

26. The January 2011 Order recognized that Ozark may experience further changes in its cost and revenues after the cut-off date for updated cost and revenue data in this proceeding. Without such a cut-off date, the Commission stated, the participants would

---

<sup>26</sup> January 2011 Order, 134 FERC ¶ 61,062 at P 30.

<sup>27</sup> Ozark states that the list of contracts to be effective on April 1, 2011 attached to its rehearing request "reflects the April Index of Customers based on Ozark's current data base and will be filed as reflected herein, assuming no other changes." Ozark February 15, 2011 Request for Clarification and Rehearing at 6 & n.6.

be faced with a constantly moving target and the section 5 proceeding would never end.<sup>28</sup> However, the interest in maintaining such a cut-off date can be overridden in unusual circumstances. The Commission does permit the use of post-test period data in establishing pipeline rates where “the post-test period data show that projections based on test period data will be seriously in error.”<sup>29</sup> For example, in *Distrigas of Mass. Corp.*,<sup>30</sup> the Commission allowed use of post-test period data, because the test period in that case produced rates 45 percent higher than the post-test period data suggested was appropriate. Similarly, in this case, if actual data for the period after February 2011 were to show that projections based solely on data for the year ending February 2011 will be seriously in error, then it could be appropriate to consider such post-February 2011 cost and revenue data in this section 5 proceeding.

27. In this connection, the Commission reiterates its statement in the January 2011 Order that the ALJ may modify the current procedural schedule to account for use of data after the period covered by Ozark’s cost and revenue study. Because this is a section 5 proceeding in which our determinations will be effective prospectively only, we continue to expect the ALJ to conduct this proceeding as expeditiously as possible. However, the ALJ also has a responsibility to ensure that the hearing in this case produces a record on which we can determine just and reasonable rates, taking into account system changes with substantial rate effects. The ALJ conducting the hearing is in a better position than we to determine an appropriate procedural schedule consistent with these principles, as well as the due process interests discussed above and in the January 2011 Order. Therefore, the ALJ may, as necessary, modify the procedural schedule in this case, including the dates for the hearing and the initial decision.

---

<sup>28</sup> January 2011 Order, 134 FERC ¶ 61,062 at P 31. *See also Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,265, at 62,022 (1999) (*Williston*) (“[I]t is likely that many changes will occur to a pipeline’s anticipated costs and volumes after the test period. These changes may include increases in throughput or decreases in cost of service that offset any decreases in throughput that occur. . . . The Commission cannot allow pipelines to make adjustments that will favor the pipeline, if they eventually come to pass after the test period, since the pipelines would be unlikely to project changes unfavorable to them such as increases in throughput and decreases in costs.”)

<sup>29</sup> *Williston*, 87 FERC at 62,022.

<sup>30</sup> *See, e.g., DistriGas of Mass. Corp., Initial Decision*, 18 FERC ¶ 63,036 (1982); *Distrigas of Mass. Corp.*, Opinion No. 178, 23 FERC ¶ 61,416 (1983), *order denying reh’g*, Opinion No. 178-A, 24 FERC ¶ 61,250 (1983), *aff’d in part, vacated in part and remanded in part, DistriGas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1220 (D.C. Cir. 1984); *Williston*, 87 FERC at 62,022.

28. Ozark also argues that the January 2011 Order erred when it required Ozark to propose adjustments in its answering testimony.<sup>31</sup> Ozark argues that the initial burden of going forward in this section 5 proceeding is with Trial Staff and other participants who have the ultimate burden of persuasion that Ozark's rates should be reduced. Therefore, Ozark asserts, Trial Staff and the other participants should shoulder the initial burden of production by proposing and supporting adjustments, not Ozark. In making this argument, Ozark is referring to the January 2011 Order's description, quoted above, of the timeline for participants to propose adjustments based on the procedural schedule and the modified adjustment period in this proceeding. In that description, the Commission did not require Ozark to propose adjustments. The Commission only stated that Ozark "could" propose adjustments in its answering testimony.

29. Beginning with the November 2011 Order, the Commission has stated repeatedly that the Commission was acting under NGA section 5, and expressly recognized that "Ozark does not have a section 4 burden in this section 5 proceeding."<sup>32</sup> Rather, the Commission has the burden to show that Ozark's current rates are unjust and unreasonable and that any new rates that may be imposed as a result of this section 5 proceeding are just and reasonable.<sup>33</sup> When Trial Staff and other intervenors submit their direct testimony, currently due on April 11, they should include whatever evidence they believe is necessary for the Commission to satisfy its section 5 burdens in this case, including any adjustments they believe appropriate consistent with the test period framework discussed above.<sup>34</sup> Similarly, Ozark may propose whatever adjustments it believes are necessary to determine just and reasonable rates in its answering testimony consistent with the test period framework discussed above. In their rebuttal testimony, Trial Staff and the other intervenors may address Ozark's adjustments, as well as proposing any additional adjustments suggested by actual data not available to them in time for inclusion in their direct testimony.

---

<sup>31</sup> Ozark February 15, 2011 Request for Clarification and Rehearing at 15 (citing January 2011 Order, 134 FERC ¶ 61,062 at P 30).

<sup>32</sup> November 2010 Order, 133 FERC ¶ 61,158 at P 10.

<sup>33</sup> *East Tennessee Natural Gas Co.*, 863 F.2d 932, 937 (D.C. Cir. 1988).

<sup>34</sup> As stated in the January 2011 Order and not contested by Ozark, actual data for an adjustment period ending February 2011 will likely not be available until mid-April, which is after the direct testimony of Trial Staff and the other intervenors is currently due. As stated above, the ALJ may adjust the current procedural schedule to account for use of data after the period covered by the cost and revenue study.

30. With regard to Ozark's contentions concerning the burden of producing evidence that its rates are unjust and unreasonable, the D.C. Circuit has held that the statutory burden of proof requirement in a section 4 proceeding "relates to the burden of persuasion (or, more accurately, the risk of non-persuasion), not to the burden of production, and thus the identity of the party submitting evidence is not dispositive."<sup>35</sup> Therefore, the court held that the Commission could find that the pipeline had satisfied its burden to support a section 4 proposal even though it presented no evidence in support of that proposal, if there is other evidence in the record to show that the proposal is just and reasonable. Similarly, in this section 5 proceeding, we have the burden of persuasion to show both that Ozark's existing rates are unjust unreasonable and that any new rates we impose are just and reasonable. However, we may rely on any evidence in the record to satisfy that burden, regardless of the source of that evidence.<sup>36</sup>

31. Ozark also argues that the January 2011 Order erred when it suggested that the Commission could rely on Ozark's calculation of rates in the cost and revenue study as evidence of how Ozark believes its rates should be derived.<sup>37</sup> Ozark is referring to a statement in the January 2011 Order explaining why Ozark was required to derive rates as part of its cost and revenue study. The Commission explained that such information "will provide useful information for the section 5 proceeding by showing, among other things, how Ozark believes costs should be allocated among services to derive per-unit rates and how the necessary calculations are performed."<sup>38</sup> Ozark states that the rates in

---

<sup>35</sup> See, e.g., *Complex Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999) (*ConEd*) (citing *City of Winnfield, La. v. FERC*, 744 F.2d 871 (D.C. Cir. 1984)).

<sup>36</sup> In support of its argument that the initial burden of going forward in this section 5 proceeding is with Trial Staff and other participants, Ozark cites *Colorado Interstate Gas Co.*, 43 FERC ¶ 61,089, at n.24 (1988), among others. In those cases cited by Ozark, the Commission held that if Trial Staff or others produced evidence that the minimum bill caused anti-competitive effects, there would then be a presumption that the minimum bill was unjust and unreasonable. The Commission held that this would shift the burden of production to the pipeline to show that the minimum bill was necessary. See *East Tennessee*, 863 F.2d at 938 (holding that such a presumption could be imposed consistent with the Commission's burden of persuasion under section 5). However, in this case, the Commission is not relying on any similar presumption that once a particular showing is made the burden is shifted to the pipeline to show that its rates are just and reasonable.

<sup>37</sup> Ozark February 15, 2011 Request for Clarification and Rehearing at 17 (citing January 2011 Order, 134 FERC ¶ 61,062 at P 35).

<sup>38</sup> January 2011 Order, 134 FERC ¶ 61,062 at P 35.

its February 1, 2011 cost and revenue study reflect Ozark's historical rate design and is not evidence or an example of Ozark's preferred method for designing rates and allocating costs as Ozark would typically submit if it were proposing a change in rates under section 4 of the NGA.

32. The Commission grants in part Ozark's request for rehearing on this issue. In light of Ozark's statement that the rate design used in its February 1, 2011 cost and revenue study does not necessarily reflect its preferred rate design, that rate design will not serve as evidence of Ozark's preferred rate design or cost allocation. However, as Ozark states, the cost and revenue study is based on Ozark's existing rate design. When a pipeline proposes in a section 4 rate case to increase its rates because of an increased cost of service or reduced throughput but proposes to continue using its existing rate design, the pipeline has no section 4 burden to support a continuation of its presumptively just and reasonable existing rate design.<sup>39</sup> It follows that in a section 5 proceeding, parties seeking a rate reduction based only on assertions that the pipeline's cost of service has decreased or its throughput has increased, have no burden to support a continuation of the pipeline's "presumptively just and reasonable"<sup>40</sup> existing rate design. As the court has held, the NGA "allocates the burden of proving that a rate change is just and reasonable according to the source of the proposed change."<sup>41</sup> Consistent with that principle, if Trial Staff and other intervenors do not propose any change in Ozark's existing rate design, they have no burden to show that a continuation of the existing rate design is just and reasonable. If, however, Trial Staff or an intervenor proposes a change in Ozark's existing rate design, it would have the section 5 burden to demonstrate both that the existing rate design is unjust and unreasonable and that its proposed changed rate design is just and reasonable. By contrast, if Ozark seeks to modify its existing rate design, it would only have the burden to show that its proposed new rate design is just and reasonable, and it would not need to show that its existing rate design is unjust and unreasonable.

---

<sup>39</sup> See, e.g., *Public Service Commission of New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980); *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 456 (D.C. Cir. 1988); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 514 (D.C. Cir. 1985).

<sup>40</sup> *Tennessee*, 860 F.2d at 456 (D.C. Cir. 1988).

<sup>41</sup> *East Tennessee*, 863 F.2d at 937. See also *Western Resources*, 9 F.3d at 1578; *ConEd*, 165 F.3d at 1008.

The Commission orders:

As discussed in the body of this order, the Commission grants in part and denies in part Ozark's request for clarification and rehearing.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.