

154 FERC ¶ 61,029  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Empire Pipeline, Inc.

Docket No. RP16-300-000

ORDER INSTITUTING INVESTIGATION AND SETTING MATTER FOR  
HEARING PURSUANT TO SECTION FIVE OF THE NATURAL GAS ACT

(Issued January 21, 2016)

1. As discussed in more detail below, based upon our review of publicly available information on file with the Commission, it appears that Empire Pipeline, Inc. (Empire) may be substantially over-recovering its cost of service, causing Empire's existing rates to be unjust and unreasonable. Therefore, the Commission is initiating an investigation, pursuant to section 5 of the Natural Gas Act (NGA), to determine whether the rates currently charged by Empire are just and reasonable and setting the matter for hearing. The Commission directs Empire to file a full cost and revenue study within 75 days of the issuance of this order.

**I. Background**

2. Empire is an affiliate of National Fuel Gas Company, and started operations as a non-jurisdictional Hinshaw natural gas pipeline in 1993, transporting natural gas imported from Canada to locations within the state of New York. In 1995, the Commission granted Empire a limited jurisdiction certificate to perform interstate natural gas service pursuant to section 284.224 of the Commission's regulations.<sup>1</sup> In 2006, the Commission issued Empire an NGA section 7 certificate to expand its system to an interconnection with Millennium Pipeline, and Empire thus become a natural gas company subject to the Commission's NGA jurisdiction.<sup>2</sup>

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<sup>1</sup> *Empire State Pipeline*, 70 FERC ¶ 61,162 (1995).

<sup>2</sup> *Millennium Pipeline Co.*, 117 FERC ¶ 61,319 (2006).

3. In 2011, the Commission authorized Empire to construct the Tioga County Extension Project, which expanded Empire's system south to Jackson, Pennsylvania.<sup>3</sup> That expansion enabled Empire to provide bi-directional transportation service, so that it can both transport Canadian natural gas south from the Canadian border and Marcellus shale production north from Pennsylvania. The 2011 Certificate Order also granted Empire a predetermination that it could roll in the costs of the Tioga County Extension Project in its next NGA general section 4 rate case, finding that the revenues from that project would exceed its costs every year through 2021. However, the Commission denied a request that Empire be required to file a cost and revenue study within three years of the in-service date of the project. Empire recovers its system's fuel requirements and lost and unaccounted for gas pursuant to a tracking mechanism set forth in section 23<sup>4</sup> of its General Terms and Conditions (GT&C). Empire has not filed an NGA general section 4 rate case since it became subject to the Commission's NGA jurisdiction, nor is it currently under any obligation to file a new rate case at any time in the future.

## II. Discussion

4. In March 2008, the Commission issued Order No. 710,<sup>5</sup> a Final Rule to change the forms and reporting requirements for interstate natural gas pipelines to enhance the transparency of financial reporting and better reflect current market and cost information relevant to interstate natural gas pipelines and their customers. The revised forms included FERC Form No. 2 (Form 2), the annual report for major natural gas companies, and FERC Form No. 3-Q (Form 3-Q), the quarterly financial report of natural gas companies, electric utilities and licensees. The Commission stated that the revised forms and reporting requirements would provide, in greater detail, the information the Commission needs to carry out its responsibilities under the NGA to ensure just and reasonable rates. The Commission required major interstate pipelines to use the revised Form 2 in making their annual reports beginning in calendar year 2008.

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<sup>3</sup> *Empire Pipeline Inc.*, 135 FERC ¶ 61,163 (2011) (2011 Certificate Order).

<sup>4</sup> *Empire Pipeline, Inc. FERC NGA Gas Tariff, Empire Tariff, 23 – Fuel, 23 – Fuel, Company-Use, & Lost and Unaccounted for Gas, 2.0.0.*

<sup>5</sup> *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 73 FR 19389 (Apr. 10, 2008), FERC Stats. & Regs. ¶ 31,267 (2008), *reh'g and clarification*, Order No. 710-A, 123 FERC ¶ 61,278 (2008), *remanded sub nom. American Gas Ass'n v. FERC*, 593 F.3d 14 (D.C. Cir. 2010), *order on remand*, Order No. 710-B, 134 FERC ¶ 61,033, *order on reh'g*, Order No. 710-C, 136 FERC ¶ 61,109 (2011).

5. The Commission has reviewed the cost and revenue information provided by Empire in its Form 2 for the years 2013 and 2014. Based upon our review of this cost and revenue information, the Commission estimates Empire's return on equity for those calendar years to be 15.8 percent, and 20.2 percent, respectively. Based upon these figures, the Commission is concerned that Empire's level of earnings may substantially exceed its actual cost of service, including a reasonable return on equity. A description of how the Commission arrived at these figures is set forth below.<sup>6</sup>

6. Based upon the information provided by Empire in its Form 2 for 2013, the Commission calculated Empire's 2013 cost of service to be \$35.66 million, excluding equity return and related income taxes.<sup>7</sup> Next, the Commission compared estimated cost of service to Empire's 2013 Form 2 reported revenues, as adjusted, of \$76.38 million. The difference between Empire's reported adjusted revenues<sup>8</sup> and the estimated cost of service is \$40.72 million before income taxes. After taking into consideration income taxes, Empire's equity return totals approximately \$24.59 million for 2013. This equates to an estimated return on equity of 15.8 percent.

7. An identical analysis, based upon the cost and revenue information provided by Empire in its 2014 Form 2, generated a similar estimated return on equity. Based upon the information contained in Empire's Form 2 for 2014, the Commission calculated Empire's cost of service for 2014 to be \$34.43 million, exclusive of equity return and related income taxes. Next, the Commission compared this estimated cost of service to Empire's 2014 Form 2 reported revenues, as adjusted, which total \$81.82 million. The

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<sup>6</sup> Details of the Commission's derivation of the return on equity are set forth in the Appendix to this order. The Appendix, where applicable, provides a page and line reference to Empire's Form 2's for 2014 and 2013 for each item utilized by the Commission in its calculations.

<sup>7</sup> The reported capital structure in Empire's Form 2 was used to calculate the pipeline's cost of service. However, in this order, we make no finding as to what would constitute a just and reasonable capital structure for Empire. That is among the issues set for hearing in this order and should be decided consistent with the Commission's capital structure policies. *See Transcontinental Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084, at 61,413-5, *reh'g denied*, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998), *petition for review denied sub nom. North Carolina Utilities Comm'n v. FERC*, D.C. Cir. Case No. 99-1037 (Feb. 7, 2000) (*per curiam*).

<sup>8</sup> As detailed in the Appendix, for purposes of this analysis, the total Other Revenues reflected in column (f) of page 301 of the Form 2 were adjusted to include annual charge adjustment (ACA) revenues and properly reflect the exclusion of revenues from the sale of excess retained gas.

difference between Empire's reported adjusted revenues and the estimated cost of service is \$47.39 million before income taxes. After taking into consideration income taxes, Empire's equity return totals approximately \$28.62 million. This equates to an estimated return on equity of 20.2 percent.

8. The Commission finds that, based upon its preliminary analysis of the information provided by Empire in its Form 2's for the calendar years 2013 and 2014, Empire's currently effective tariff rates may be unjust and unreasonable. The Commission's analysis of this information indicates that Empire's currently effective tariff rates may allow Empire to recover revenue substantially in excess of its estimated cost of service. While NGA section 4 permits Empire to seek authorization from the Commission to adjust its rates to establish just and reasonable rates, Empire has not filed an NGA general section 4 rate case since it became subject to the Commission's NGA jurisdiction. Accordingly, the Commission is initiating an investigation to examine the justness and reasonableness of Empire's rates pursuant to section 5 of the NGA and setting the matter for hearing.<sup>9</sup>

9. As the Commission has done in other cases initiating section 5 investigations of a pipeline's rates,<sup>10</sup> it directs Empire to file a cost and revenue study based on cost and revenue information for the latest 12-month period available. The filing shall be made

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<sup>9</sup> In this order, we make no finding as to what would constitute a just and reasonable return on equity for Empire. That is among the issues set for hearing by this order and should be decided consistent with the Commission's Policy Statement *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048 (2008).

<sup>10</sup> See *Wyoming Interstate Company, L.L.C.*, 141 FERC ¶ 61,117(2012) (*WIC*); *Viking Gas Transmission Co.*, 141 FERC ¶ 61,118 (2012) (*Viking*); *Bear Creek Storage Co. L.L.C.*, 137 FERC ¶ 61,134 (2011), *order denying reh'g*, 138 FERC ¶ 61,019 (2012); *MIGC LLC*, 137 FERC ¶ 61,135 (2011), *order denying reh'g*, 138 FERC ¶ 61,011 (2012); and *ANR Storage Co.*, 137 FERC ¶ 61,136 (2011); *Ozark Gas Transmission, LLC*, 133 FERC ¶ 61,150 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 (2011) (*Ozark*); *Kinder Morgan Interstate Gas Transmission LLC*, 133 FERC ¶ 61,157 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*); *Natural Gas Pipeline Co. of America LLC*, 129 FERC ¶ 61,158 (2009), *reh'g denied*, 130 FERC ¶ 61,133 (2010) (*Natural*). As the Commission explained in the *Natural* rehearing order, "[s]ections 10(a) and 14(a) of the NGA authorize the Commission to require [the pipeline] to submit the information required by the [order instituting investigation] in order to carry out its responsibility under NGA section 5 to ensure that the pipeline's rates are just and reasonable." See *Natural*, 130 FERC ¶ 61,133 at P 16.

within 75 days of the date this order issues and 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>11</sup> Because the Commission is seeking actual cost and revenue information, the information submitted by Empire 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, Empire should not file nine months of post-base-period adjustment data required by section 154.303(a).<sup>12</sup> The cost and revenue study required herein will provide a baseline of actual annual costs and revenues, which can then be used as a starting point for further analysis of Empire's costs and revenues.<sup>13</sup> Additionally, because Empire does not have an NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, Empire does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture.<sup>14</sup>

10. However, as we have done in other recent section 5 proceedings, in addition to the cost and revenue study required above, Empire may file a separate cost and revenue study that reflects adjustments for changes Empire projects will occur during an abbreviated six-month adjustment period following the 12-month base period used for the cost and revenue study.<sup>15</sup> Given the expedited hearing schedule established herein, the abbreviated adjustment period must be limited to six-months to permit the parties

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<sup>11</sup> 18 C.F.R. § 154.312 (2012).

<sup>12</sup> However, Empire may, if fully supported, reflect changes to costs and revenues for a known and measurable change that took place during the 12-month period. For example, if a general pay raise became effective during month 5 of the 12-month period, an adjustment to the cost of service could be made to annualize the impact of this cost change.

<sup>13</sup> *Ozark*, 134 FERC ¶ 61,062 at P 26.

<sup>14</sup> *See Pub. Serv. Comm'n of New York, Pennsylvania Public Utilities Commission, and Pennsylvania Office of Consumer Advocate v. National Fuel Gas Supply Corporation*, 115 FERC ¶ 61,368, at P 6 (2006).

<sup>15</sup> *See, e.g., Ozark*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193.

to perform discovery and prepare testimony for the hearing based on actual data for both the base period and the adjustment periods.<sup>16</sup>

11. Finally, due to the potential for continued over-recovery of revenues, the Commission is establishing a date for an initial decision from an administrative law judge. Such a date will expedite the proceeding. We believe that conducting the hearing in this case pursuant to the Administrative Law Judges' Track II Hearing Timeline is reasonable. However, to provide more time to the parties to conduct discovery concerning the cost and revenue study, the Commission orders that the deadlines in the Track II timeline run from the date the pipeline's cost and revenue study is due, rather than the date of the order designating the presiding judge. Therefore, the initial decision must issue within 47 weeks of the date the cost and revenue study is due.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Natural Gas Act, particularly section 5 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Natural Gas Act, a public hearing shall be held concerning whether Empire's rates are unjust, unreasonable, or otherwise unlawful.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304, shall, within thirty (30) days of the date of this order, convene a prehearing conference in these proceedings in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The prehearing conference shall be held for the purpose of clarification of the positions of the participants and consideration by the presiding judge of any procedural issues and discovery dates necessary for the ensuing hearing. The Presiding Administrative Law Judge is authorized to conduct further proceedings in accordance with this order and the Commission's Rules of Practice and Procedure.

(C) The Commission directs that the hearing be conducted pursuant to the Track II Hearing Timeline starting the date the cost and revenue study is due and that an

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<sup>16</sup> *WIC*, 141 FERC ¶ 61,117 at P 10. *Viking*, 141 FERC ¶ 61,118 at P 10. For a detailed explanation why the adjustment period in the section 5 proceeding differs from the adjustment period in a section 4 proceeding *see Ozark*, 134 FERC ¶ 61,062 at PP 17-36, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 at PP 21-27. *See also Kinder Morgan*, 134 FERC ¶ 61,061 at PP 36-51.

initial decision be issued in this proceeding within 47 weeks of that date, as discussed in the body of this order.

(D) Empire shall file a cost and revenue study within 75 days of this order. The filing should include only actual data for the latest 12-month period available as of the date of this order, and may include adjustments for known and measurable changes during that period. The filing should include all of the schedules required for the submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations (18 C.F.R. § 154.312), as modified above.

(E) Any person wishing to become a party to this proceeding must file a notice of intervention or motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214). Such notice or motion must be filed within 30 days of the date of this order. The Commission encourages electronic submission of interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

(F) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding under section 5 of the NGA in Docket No. RP16-300-000.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## Appendix

<u>Empire Pipeline, Inc.</u>	Form 2 Reference	2014	2013
<b>Rate Base</b>			
Gas Plant in Service	p. 110; ln. 2, col. C	\$468,557,759	\$467,626,729
Accumulated Depreciation	p. 110; ln. 5	(\$187,680,676)	(\$176,260,937)
<b>Gas Stored Underground</b>			
Account 117.1 (Base Gas)	p. 220; ln. 5, col. b	\$0	\$0
Account 117.2 (System Balancing)	p. 220; ln. 5, col. c	\$0	\$0
<b>Working Capital</b>			
Prepayments	p. 230a; ln. 6	\$3,038,282	\$3,126,223
Materials and Supplies	p. 111; ln. 45	\$626,568	\$618,344
<b>ADIT</b>			
Account 190	p. 235; ln. 7, col. k, as adjusted on p. 552.1	\$0	\$780,221
Account 282	p. 275; ln. 7, col. k, as adjusted on p. 552.1	(\$41,557,922)	(\$37,761,296)
Account 283	p. 277; ln. 7, col. k, as adjusted on p. 552.1	(\$638,795)	(\$2,508,065)
Regulatory Assets	p. 232; ln. 40, col. g	\$3,017,729	\$3,940,689
Regulatory Liabilities	p. 278; ln. 45, col. g	(\$1,062,369)	(\$259,230)
<b>Total Rate Base</b>		<b>\$244,300,576</b>	<b>\$259,302,678</b>
<b>Capital Cost</b>			
Cost of Debt <sup>(1)</sup>	p. 218a	5.58%	6.17%
<b>Capitalization<sup>(2)</sup></b>			
Debt	p. 218a	42.05%	39.97%
Equity		57.95%	60.03%
Weighted Cost of Debt		2.35%	2.47%
<b>Cost of Service</b>			
Interest on Debt		\$5,732,244	\$6,394,790
Other Taxes	p. 114; ln. 14, col. c	\$10,466,149	\$9,664,121
Depreciation	p. 337; ln. 12, col. h	\$11,715,250	\$11,713,239
<b>O&amp;M</b>			
Production & Gathering	p. 317; ln. 30	\$0	\$0
Net Storage Costs	p. 322; ln. 177 (less ln. 106)	\$0	\$0
Net Transmission Costs	p. 323; ln. 201 (less ln. 184)	\$2,323,903	\$2,881,807
Administrative & General	p. 325; ln. 270	\$4,195,853	\$5,007,076
<b>Total Cost of Service Excl. Return and Taxes</b>		<b>\$34,433,399</b>	<b>\$35,661,033</b>
<b>Operating Revenue</b>			
Other Revenues	p. 301; ln. 21, col. f	\$81,551,263	\$78,121,755
ACA Revenues	p. 300; ln. 21, col. d	\$273,530	\$333,215
(Less) Sales for Resales (Act. 480-484)	p. 301; ln. 4, col. f	\$0	\$0
(Less) Commercial & Industrial Sales	p. 301; ln. 2, col. f	\$0	\$0
(Less) Gas Sales & Oth Adj. from Acct 495	p. 308	\$0	(\$2,078,733)
<b>Total Adjusted Revenue</b>		<b>\$81,824,793</b>	<b>\$76,376,237</b>
<b>Income</b>			
Income Before Income Taxes		\$47,391,394	\$40,715,204
Composite Income Tax		\$18,774,814	\$16,129,941
<b>Net Income</b>		<b>\$28,616,580</b>	<b>\$24,585,263</b>
<b>Total Estimated ROE</b>		<b>20.2%</b>	<b>15.8%</b>
Composite Tax Rate		39.6%	39.6%

<sup>(1)</sup> The capital costs were those listed in the Form 2.

<sup>(2)</sup> The capitalization structure on p. 218a of the Form 2 was used.