

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Commission of New York
Pennsylvania Public Utility Commission and
Pennsylvania Office of Consumer Advocate

Docket No. RP06-298-000

v.

National Fuel Gas Supply Corporation

ORDER SETTING COMPLAINT FOR HEARING,
SUSPENDING HEARING FOR SETTLEMENT PROCEDURES,
AND DENYING MOTION FOR SUMMARY DISPOSITION

(Issued June 7, 2006)

1. This order addresses a complaint filed by Public Service Commission of New York, Pennsylvania Public Utility Commission, and Pennsylvania Office of Consumer Advocate (collectively, the State Agencies) against National Fuel Gas Supply Corporation (National Fuel). The State Agencies allege that National Fuel's rates are unjust and unreasonable and they question whether National Fuel has the appropriate tariff authority to sell retained gas. The State Agencies also filed a Motion for Summary Disposition asking the Commission to immediately find that the amount of gas National Fuel retains from its shippers for transportation and storage compressor fuel, losses and company use gas is excessive and to order National Fuel to submit a compliance filing on which just and reasonable retention factors would be set.

2. The Commission finds that the State Agencies have provided adequate information to set the complaint for hearing and to initiate an investigation into National Fuel's rates under section 5 of the Natural Gas Act (NGA). However, the Commission denies the Motion for Summary Disposition. To allow parties an additional opportunity to resolve the complaint through settlement, the Commission will defer the hearing for an appropriate time and require the parties to meet with a settlement judge to attempt to reach a resolution.

I. Background

3. National Fuel engages in gathering, transportation, and storage of natural gas subject to the Commission's jurisdiction under the NGA. National Fuel's operations are primarily in New York and Pennsylvania. National Fuel's transportation and storage services are provided to local distribution companies and electric generating plants in New York and Pennsylvania. In addition, National Fuel provides gathering services to Appalachian natural gas producers in Pennsylvania and New York. National Fuel is a wholly owned subsidiary of National Fuel Gas Company. National Fuel's current rates for jurisdictional service were established in two separate settlements, each approved by the Commission in a letter order issued February 16, 1996.¹

4. The settlement that governs most of National Fuel's rates became effective on June 1, 1995 and provides that the rates will remain in effect until changed by Commission action under either NGA section 4 or section 5 (the 1995 Rate Settlement). Among other things, the 1995 Rate Settlement requires National Fuel to fund its Post-employment benefits other than pension (OPEB) trusts in the amount of \$1,187,653 each quarter and that "to the extent actual [OPEB] accruals in the years between rate cases differ from the amounts contributed to the trusts, regulatory assets (Account No. 182.3) or regulatory liabilities (Account No. 254) will be recorded for the differences" and deferred until National Fuel's next rate case where the regulatory asset or liability would be amortized and reflected in future rates.

5. The other settlement addresses the rates, terms and conditions of National Fuel's gathering service and provides for the allocation of National Fuel's production cost-of-service (the 1995 Gathering Settlement). Under the 1995 Gathering Settlement, National Fuel uses formulae to establish interruptible and firm gathering rates. The term of the 1995 Gathering Settlement was five years. However, in 2000 National Fuel proposed to continue to determine its gathering rates under the 1995 Gathering Settlement. In a letter order dated February 7, 2001, the Commission accepted National Fuel's proposal.²

6. As further described below, National Fuel recovers the fuel it uses to operate its system through fixed fuel retention percentages, which have not been changed since before the 1995 settlements. National Fuel's tariff contains no mechanism for tracking its actual fuel costs or for truing-up any over- or under-recoveries.

¹ *National Fuel Gas Supply Corp.*, 74 FERC ¶ 61,165 (1996).

² *National Fuel Gas Supply Corp.*, Docket No. RP94-367-011 (February 7, 2001) (unpublished letter order).

The Complaint

7. The State Agencies contend that in the 11 years since the Commission reviewed National Fuel's rates, the rates have become unjust and unreasonable. Based on National Fuel's Form 2 and Form 3-Q data, the State Agencies prepared a separate analysis for 2003, 2004 and the 12-month period ending September 30, 2005. For each time period, the State Agencies calculated National Fuel's estimated rate base and then performed a cost-of-service analysis to determine if the current rates produce sufficient revenues to cover all costs and provide a fair rate of return. The State Agencies also calculated a return on equity. Based on their analysis, the State Agencies allege that National Fuel earned excess revenues of approximately \$30 million in each time period studied (the State Agencies calculate National Fuel's system cost-of-service to be approximately \$146 million for each period studied). The State Agencies assert that for each period studied, National Fuel's after-tax equity return ranged from 18.5 to 20 percent.³

8. The State Agencies argue that the reasons for the excessive revenue and return are not driven by transitory or non-recurring events. For example, they assert that the primary reason for the excess revenue is due to National Fuel retaining more than twice as much fuel from its shippers than is necessary to operate the system. National Fuel then sells the excess gas on the spot markets and retains all of the revenue. The State Agencies also argue that the decline in capital costs since the Commission last reviewed National Fuel's rates results in National Fuel now over-recovering revenue. On this point, the State Agencies note that National Fuel claimed a 7.98 percent cost of long-term debt in its last rate filing (October 1994) and the State Agencies calculate that the cost of long-term debt is now 6.55 percent.

9. The State Agencies also argue that National Fuel's rates for firm and interruptible gathering services, which are based on formulae in the 1995 Gathering Settlement, generate excessive revenue due to an excessive rate for interruptible gathering service. The State Agencies argue that the interruptible rate is based on the commodity price for gas in Appalachia. The firm rate is based on a variety of factors, including the revenues generated by the interruptible rate. Under the formulae, all else being equal, an increase in the interruptible rate causes the firm gathering rate to decline. The State Agencies explain that high gas prices have driven up the interruptible rate and, as a result, the formula produces a firm gathering rate that dropped to zero. The State Agencies acknowledge that National Fuel has discounted the interruptible rate, but argue that the overall gathering revenues earned, even with the discounted interruptible rate and a firm rate of zero, are excessive.

³ Exhibit JSA-1, p. 10, lines 4-5.

10. Next, the State Agencies argue that National Fuel's treatment of OPEB is unjust and unreasonable. According to the State Agencies, National Fuel's OPEB liabilities and related funding requirements in recent years have significantly outpaced the level at which National Fuel is required to fund its trusts. As a result, according to the State Agencies, National Fuel is building up an OPEB regulatory asset consisting of the annual shortfalls in the OPEB contributions. The State Agencies indicate that National Fuel's Form 3-Q shows the asset as of September 30, 2005 to be \$6.99 million. The State Agencies indicate that they expect National Fuel to seek recovery of this regulatory asset from its ratepayers in its next rate case. Such recovery, however, raises a concern for the State Agencies because recovery of the regulatory asset would allow National Fuel to pass these costs to its ratepayers after National Fuel has enjoyed years of earning excessive revenue. The State Agencies also argue that the growing OPEB regulatory asset raises significant inter-generational equity issues by deferring these current OPEB costs to future ratepayers who may not be the same customers that took service when National Fuel incurred the costs. Thus, the State Agencies request that "the Commission should act to halt excessive accumulation" of National Fuel's OPEB regulatory asset.

11. The State Agencies argue that the Commission should base any new rates on a test period consisting of the 12 months ending September 30, 2005.

12. Finally, the State Agencies ask the Commission to determine whether National Fuel has the tariff authority to sell excess gas.

Motion for Summary Disposition

13. Contemporaneously with the complaint, the State Agencies also filed a Motion for Summary Disposition asking the Commission to summarily find that "the quantity of natural gas that [National Fuel] retains from shippers for transportation and storage compressor fuel, losses and company use gas ('fuel use and losses') is excessive and unjust and unreasonable; require [National Fuel] to make a compliance filing providing detailed information regarding its fuel use and retention use; and establish just and reasonable fuel and loss percentages for NFG [National Fuel] based on the information in [National Fuel's] compliance filing."⁴ The State Agencies explain that, under its tariff governing its transportation services (FT, FT-S, FST, and IT), National Fuel retains 2.00 percent of natural gas received from shippers for compressor fuel, losses and company use. The 2.00 percent fuel and loss charge pre-dates National Fuel's Order No. 636 restructuring proceeding but was not specifically addressed in the 1995 Rate Settlement.

⁴ Motion p. 1.

14. The State Agencies also explain that National Fuel's storage tariff permits National Fuel to retain 1.40 percent of injections and withdrawals of storage customer gas as a "surface operating allowance." The State Agencies indicate that this charge, which is intended to compensate National Fuel for compressor fuel and surface gas losses associated with compression and the delivery of gas into and out of storage, was implemented as part of National Fuel's Order No. 636 restructuring proceeding. The State Agencies indicate that the 1.40 percent retention factor for storage was continued in, but was not addressed in, the 1995 Rate Settlement.

15. According to the State Agencies, National Fuel retains more than twice the amount of gas through these retention factors that National Fuel actually needs to operate its system. The State Agencies reach this conclusion by comparing line 12 with line 25 on page 520 of National Fuel's Form 2 reports for several years. Line 12 shows amounts of "Gas Retained from Shippers as Compressor Station Fuel" and line 25 shows "Gas Used for Compressor Station Fuel." The State Agencies argue that National Fuel sells excess retained gas and keeps all of the revenue. The State Agencies assert that, based on a review of the Form 2 data and the revenue National Fuel has recorded in Account No. 495 (Other Gas Revenues), between 2000 and 2004 National Fuel earned approximately \$62 million by selling excess retained gas.

II. Notice And Responses

16. Public notice of the State Agencies' complaint was issued on April 10, 2006, providing for motions to intervene, comments and answers to be filed by April 27, 2006. On April 19, 2006, the Commission denied a request by National Fuel to extend the due date for filing motions to intervene, comments and answers, but clarified that the response to the complaint and the Motion for Summary Disposition should be filed on April 27, 2006.

17. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2005)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.⁵

18. National Fuel filed answers to both the complaint and the Motion for Summary Disposition. Independent Petroleum Association of America, American Forest & Paper

⁵ The record contains requests from several individual retail ratepayers that the Commission review National Fuel's rates. Because these individuals did not seek to intervene, the Commission will not make them parties to this proceeding.

Association and Process Gas Consumers Group filed comments in support of the complaint.

19. The State Agencies requested permission to respond to National Fuel's answer to the complaint and Motion for Summary Disposition. National Fuel then sought permission to answer the State Agencies' responses. The Commission's rules generally do not permit answers to answers. However, because of the importance of the issues raised by the complaint and Motion, and because the additional pleadings assisted the Commission in its evaluation of the complaint and Motion, the Commission will waive its regulations and accept for filing the State Agencies' and National Fuel's responsive pleadings.

National Fuel's Answers

The Complaint

20. In response to the complaint, National Fuel states that the State Agencies have failed to make a prima facie case that National Fuel's rates are unjust and unreasonable. According to National Fuel, the Commission's order in *Indicated Shippers v. Sea Robin Pipeline Company*,⁶ established that Form 2 data is "unreliable in a Section 5 complaint case."⁷ National Fuel states that, once all appropriate changes are made to the Form 2 data, it becomes clear that National Fuel's 2005 revenues exceeded costs by only \$3.2 million, not by \$35.4 million as alleged in the complaint. National Fuel then indicates that its review yields a return on equity of 14.81 percent.⁸ National Fuel contends that this level of return does not warrant an investigation because National Fuel is investing substantial capital in pipeline infrastructure and will incur future costs in excess of the level in the underlying cost of service. National Fuel also indicates that discretionary capital may be allocated to other business segments if the State Agencies' proposed 10.17 percent return on equity were adopted.

21. National Fuel asserts that the complaint fails to show a connection between any alleged excess revenues and the revenues from sales of excess gas. National Fuel argues that it has only been since the recent increases in the market price of gas that National Fuel has been earning higher revenues on the sales of excess gas. Thus, National Fuel

⁶ *Indicated Shippers v. Sea Robin Pipeline Company*, 76 FERC ¶ 61,151 (1996) (*Sea Robin*)

⁷ National Fuel's Answer p. 3.

⁸ National Fuel's Answer p. 12.

asks the Commission to evaluate National Fuel's earnings from such sales under a 10-year average rather than just look at the earnings in the recent years. National Fuel also states that the State Agencies grossly overstate National Fuel's earnings because they fail to acknowledge that the revenue earned on the sales of retained gas is taxed. National Fuel argues that, once the revenue is reduced by the 41 percent combined federal/state tax rate, it becomes clear that National Fuel did not earn the excessive amounts alleged by the State Agencies. Further, National Fuel explains that a purpose of allowing a pipeline to retain any revenue earned on selling retained gas is to provide an incentive to the pipeline to operate its system more efficiently. National Fuel states that it would be fundamentally unfair to "strip the company" of the incentive just because gas prices have increased. Further, National Fuel argues that the 1995 Rate Settlement was a "black box" settlement that incorporated a number of compromises, that volatility in gas prices was obvious when the parties entered into the 1995 Rate Settlement, and the complainants had the opportunity to insist on a mechanism to track National Fuel's fuel use but did not do so.

22. National Fuel also argues that the State Agencies ignore the increase in the value of National Fuel's base gas and equity return attrition when analyzing National Fuel's rates.

23. National Fuel disputes the assertion that its treatment of OPEB is unjust and unreasonable. National Fuel states that the parties to the 1995 Rate Settlement specifically agreed to the accumulation procedure now challenged. Further, National Fuel argues that the current growth in the regulatory asset could be reversed in the future. National Fuel explains that an increase in interest rates and a better than expected performance of the stock market may generate future actuarial gains which could potentially lower National Fuel's OPEB accruals. Finally, National Fuel indicates that a pipeline's rate base often changes between rate cases and the change in the OPEB regulatory asset is simply a change in a rate base item that should be addressed in the next rate case.

24. With regard to whether National Fuel has the tariff authority to sell excess gas, National Fuel states that its tariff, as reinforced by various filings with the Commission, provide National Fuel with all of the tariff authority it needs to sell excess gas.

25. Finally, National Fuel asks that, if the complaint is set for hearing, the Commission suspend the hearing procedures to allow the parties an opportunity to settle the case.

The Motion for Summary Disposition

26. National Fuel states the Motion or Summary Disposition should be denied. According to National Fuel, the State Agencies acknowledge that key facts are missing.

For example, National Fuel argues that the Commission should not determine a lower fuel retention factor without considering National Fuel's entire cost of service. Further, National Fuel argues that because the Motion requires National Fuel to file more data before the Commission may determine new just and reasonable retention factors, the record is missing key facts and, therefore, inadequate on which to rule summarily. National Fuel notes that the State Agencies' calculation of fuel used and retained "ignores lost and unaccounted for [gas] and also aggregates the gas retained under separate 2% and 1.4% retainage rates."⁹

27. National Fuel also argues that selecting one item, such as fuel retention factors, out of a pipeline's rates for separate and immediate review is inconsistent with Commission policy and precedent.

Responsive Pleadings

State Agencies' Response to National Fuel

28. The State Agencies dispute National Fuel's assertion that *Sea Robin* precludes a party from basing a request for a hearing on Form 2 data or that every adjustment made in *Sea Robin* is required before the data are useful. In any event, the State Agencies indicate that they made similar adjustments to National Fuel's Form 2 data as were done in *Sea Robin* and the analysis still showed excessive revenues for National Fuel.

29. The State Agencies assert that National Fuel was able to show a return on equity of 14.81 percent by making improper adjustments to its Form 2 data. For example, State Agencies argue that National Fuel should not have replaced the actual Efficiency Gas Revenues of \$27,606,669 in its 2005 Form 2 with a ten-year average of \$12,852,777 because such a change is contrary to the policy to base an analysis on actual data. Next, the State Agencies argue that National Fuel supports its 14.81 percent ROE on inapposite precedent rather than any data while, in contrast, the State Agencies' proposed 10.17 percent ROE is fully supported. Finally, the State Agencies argue that National Fuel made adjustments that would be treated as impermissible out-of-period adjustments in a comprehensive rate review. The State Agencies conclude that, if National Fuel's own analysis is adjusted to address just these three items, National Fuel's analysis shows excess revenue of \$35.3 million and a return on equity of 19.45 percent.

⁹ National Fuel's Answer to Motion for Summary Disposition n.7.

30. The State Agencies argue that National Fuel's attack on the State Agencies' 10.17 percent return on equity is flawed because National Fuel's argument is, at bottom, a collateral attack on the Commission's DCF method. Further, the State Agencies assert that certain adjustments proposed by National Fuel, such as inclusion of a flotation adjustment, are not based on facts.

31. The State Agencies respond that they considered taxes in analyzing National Fuel's rates by calculating an after-tax ROE, and that National Fuel's approach would result in the reduction for taxes twice.

32. On OPEB, the State Agencies acknowledge that the accumulation process was contemplated and authorized by the 1995 Rate Settlement. However, the State Agencies assert that adoption of a process in a prior settlement does not preclude a section 5 review. The State Agencies also acknowledge that the OPEB regulatory asset could decrease, but that actual data released since the complaint was filed indicate that the asset is growing.

33. The State Agencies respond that National Fuel still has not explained whether it had adequate tariff authority to sell the excess retained gas. The State Agencies indicate that its inquiry was prompted by the Commission rulings authorizing pipelines to buy and sell gas incidental to operations after imposing conditions on the authority. The State Agencies indicate that National Fuel has not indicated whether the sales it made were the same type of sales allowed in those cases.

34. The State Agencies ask that, if the Commission sets the complaint for hearing, the Commission should specify the test period and require National Fuel to file a cost and revenue study within 30 days of the hearing order. Also, the State Agencies ask that the hearing procedures not be deferred for settlement discussions because the parties met prior to the filing to discuss settlement and allowing more time for talks will only delay ratepayers benefits.

35. Finally, in response to National Fuel's answer to the Motion for Summary Disposition, the State Agencies argue that it is immaterial that the record does not contain specific data as to which of the retention percentages are unjust and unreasonable. Further, the State Agencies indicate that they assumed that the Form 2 data showing gas retained and used included retention for lost and unaccounted for gas. The State Agencies find it "troubling" that the data in National Fuel's Form 2 does not include gas retained for lost and unaccounted for purposes because the National Fuel's Form 2 does not otherwise report lost or unaccounted for gas. The State Agencies propose that, rather than deny the Motion for Summary Disposition, the Commission should require National Fuel to file more information. In addition, the State Agencies argue that they do not seek to change one element of National Fuel's rates, but seek to change an element before

others are addressed in the complaint. In this response, the State Agencies indicate that all they seek in the Motion is a ruling that the existing retention is excessive.

National Fuel's Response to State Agencies' Answer

36. National Fuel reiterates that, because the current fuel retention provisions are the result of a package settlement that reflected compromises and that there is no demonstrated relationship between any excess revenue and the revenues earned by selling excess gas, the Motion should be dismissed. National Fuel again contends that, as part of the negotiated compromise, the fuel retention factors were set at a specific level in exchange for the pipeline not pursuing higher levels of other costs. National Fuel reiterates that Commission policy precludes alteration of one element of a pipeline's rates in isolation.

III. Discussion

37. It has been over ten years since the Commission has reviewed the justness and reasonableness of National Fuel's rates in a general section 4 rate case. The Commission finds that the State Agencies have raised serious questions as to whether the rates established in the 1995 settlements allow National Fuel to recover revenue substantially in excess of its costs. These questions warrant a hearing and an investigation into National Fuel's rates under section 5 of the NGA. For example, the State Agencies cite to National Fuel's Form 2 data to argue that between 2000 and 2004, National Fuel retained twice as much gas as it actually needed during that period. The State Agencies contend that National Fuel recovered between \$3 million to up to \$23 million per year during the 2000 to 2004 period from selling that excess retained gas.¹⁰ While National Fuel asserts that the State Agencies' demonstration is flawed, National Fuel's response does not satisfy the Commission that no further investigation is warranted.¹¹ The Commission rejects National Fuel's contention that the detailed cost and revenue study of the type considered in *Sea Robin* is the sole means of justifying a hearing and investigation into a pipeline's rates under section 5 of the NGA. Indeed, in *Sea Robin* the starting point for the complainant and for the Commission setting *Sea Robin*'s rates for

¹⁰ The State Agencies assert that National Fuel's annual cost of service is \$146 million, while National Fuel asserts that its annual cost of service is \$172 million. According to the State Agencies, National Fuel earned a total of \$62 million between 2000 and 2004 from selling the excess retained gas.

¹¹ National Fuel, in effect, concedes that it is over-recovering its costs, but not by as much as the State Agencies allege nor in a manner contrary to Commission policy. National Fuel may raise these issues in the hearing established by this order.

hearing was Form 2 data. Further, the Commission has discretion whether to conduct an investigation under section 5 of the NGA in response to a complaint that a pipeline's rates are too high.¹²

38. Based on the foregoing, the Commission will set the complaint for hearing and initiate an investigation into National Fuel's rates. The Commission directs National Fuel to file a cost and revenue study within 30 days of the date of this order. The filing should include actual data for the latest 12 month period available as of the date of this order. 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.¹³ Parties may raise any other issues at the hearing, including but not limited to, the types of sales that National Fuel makes that generate the revenue recorded in Account No. 495 and whether National Fuel has the appropriate tariff authority to make those sales.

39. Due to the potential of continued over-recovery of revenues, the Commission will establish a date for an initial decision from an administrative law judge. Such a date will expedite the proceeding. We believe that an initial decision within twelve months from the date of commencement of the hearing procedures is reasonable.

40. The State Agencies and National Fuel met prior to the filing of the complaint to discuss settlement. The meetings were not fruitful and the State Agencies believe that further settlement discussions would only delay ultimate relief. The Commission believes, however, that it would be in the best interest of the parties to resolve this dispute expeditiously and consensually, rather than through litigation. Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁴ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.¹⁵ The settlement judge

¹² *General Motors Corp. v. FERC*, 613 F.2d 939, 944-45 (D.C. Cir. 1979).

¹³ 18 C.F.R. § 154.312 (2005).

¹⁴ 18 C.F.R. § 385.603 (2005).

¹⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov - click on Office of Administrative Law Judges).

shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

41. The Commission will deny the Motion for Summary Disposition. The Commission may grant a motion for summary disposition if there is no genuine issue of fact material to the decision of a proceeding or a part of a proceeding. 18 C.F.R. § 385.217(b) (2005). The Commission also imposes two conditions when addressing motions for summary disposition. First, the proponent of an opposing position, which in this case is National Fuel, must be given an opportunity to present support which is viewed in its most favorable light.¹⁶ Second, the Commission must find that a hearing is unnecessary and would not affect the ultimate disposition on an issue because there are no material facts related to that issue in dispute or because the facts presented by the proponent have been accepted in reaching the decision.¹⁷

42. Here, once the facts are viewed in a light most favorable to National Fuel, it becomes apparent that there are material facts in dispute that are not resolved by the record. Absent the provision of additional information, the record does not contain facts that are necessary to resolve the gas retention issue. For example, the State Agencies ask the Commission to find that the that “the quantity of natural gas that [National Fuel] retains from shippers for transportation and storage compressor fuel, losses and company use gas (‘fuel use and losses’) is excessive and unjust and unreasonable.” However, National Fuel retains gas under two different retention factors, the 2.00 percent for compressor fuel, losses and company use and 1.40 percent of storage injections and withdrawals. The record does not indicate whether the 2.00 percent or the 1.40 percent, or both retention percentages, result in National Fuel over-retaining shipper gas. In addition, it is unclear from the record whether the information from National Fuel’s Form 2 showing the amount of “Gas Retained from Shippers as Compressor Station Fuel” and the “Gas Used for Compressor Station Fuel,” which is the basis for the allegation, includes only gas retained under the retention factors and, if not, whether some other retention factor or mechanism should be changed because it is the cause of National Fuel retaining the amount of gas that it does. Further, the fact that the State Agencies acknowledge in their response to National Fuel’s answer that more information is needed

¹⁶ *Pacific Gas and Electric Co. v. FERC*, 746 F.2d 1383 at 1386 (9th Cir. 1984).

¹⁷ *KN Interstate Gas Transmission Co.*, 86 FERC ¶ 61,229 at 61,824 (1999); *Columbia Gulf Transmission Co.*, 79 FERC ¶ 61,351 (1997).

to answer these questions indicates that the record, when viewed in a light most favorable to National Fuel, is not adequate for the Commission to summarily rule. The State Agencies may raise these issues in the hearing. However, the Commission authorizes the ALJ to determine whether it may be appropriate to phase the proceeding and first issue an initial decision to address the fuel retention issue raised in the Motion for Summary Disposition (Phase I) and then later issue a separate initial decision to address the other issues (Phase II). Both phases, however, would have to be completed pursuant to the time requirements in this order.

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 (18 C.F.R., Chapter I), a public hearing shall be held concerning whether National Fuel's rates are unjust, unreasonable or otherwise unlawful. The hearing shall also address, but shall not be limited to, the types of sales that National Fuel makes that generate the revenue recorded in Account No. 495 and whether National Fuel has the appropriate tariff authority to make those sales. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(C) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The Commission directs that an initial decision be issued in this proceeding within 12 months of the commencement of the hearing procedures.

(F) The State Agencies' Motion for Summary Disposition is denied.

(G) National Fuel shall file a cost and revenue study within 30 days of this order. The filing should include actual data for the latest 12 month period available as of the date of this order. 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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁸ 18 C.F.R. § 154.312 (2005).