

134 FERC ¶ 61,062  
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. RP11-1495-001

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

(Issued January 28, 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 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. For the reasons discussed below, the Commission grants in part and denies in part Ozark's request for clarification or rehearing.

**I. Background**

3. Ozark owns and operates approximately 565 miles of jurisdictional interstate natural gas pipelines in Arkansas, Missouri, and Oklahoma, with a capacity of 500 million cubic feet per day. Ozark provides to shippers firm and interruptible transportation services, no-notice transportation service, park and loan service, and transportation aggregation balancing service.

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

<sup>2</sup> *Id.*

4. Ozark's current transportation and storage rates were established as part of a settlement filed on October 27, 2000, in a NGA section 4 rate case.<sup>3</sup> The settlement also provided for Ozark to recover its system's fuel requirements and lost and unaccounted for (LAUF) gas through fixed fuel retention percentages, without any true-up mechanism. The settlement imposed a moratorium on Ozark filing a new section 4 rate case until October 31, 2002 and Ozark was under no obligation to file a new rate case.

5. In the November 2010 Order, the Commission stated that it had reviewed the cost and revenue information provided by Ozark in its Form 2 for the years 2008 and 2009. Based upon its review of this information, the Commission calculated Ozark's estimated return on equity, excluding the sale of shipper-supplied gas, for 2008 and 2009 to be 15.25 percent and 25.63 percent, respectively. When the revenue Ozark generated from the sale of shipper-supplied gas for 2008 and 2009 was considered, Ozark's estimated return on equity for 2008 and 2009 totaled 27.81 percent and 31.01 percent, respectively.<sup>4</sup>

6. Based upon its preliminary analysis of the information provided by Ozark in its Form 2 for 2008 and 2009, the Commission found that 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.

7. The November 2010 Order also 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

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<sup>3</sup> *Ozark Gas Transmission, L.L.C.*, 93 FERC ¶ 61,281 (2000).

<sup>4</sup> November 2010 Order, 133 FERC ¶ 61,158 at P 5-8. Details of the Commission's derivation of the return on equity are fully set forth in the November 2010 Order.

<sup>5</sup> November 2010 Order, 133 FERC ¶ 61,158 at P 10 (citing 18 C.F.R. § 154.312 (2010)).

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 does not have a NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, Ozark did not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture.<sup>7</sup>

## II. Request for Clarification or Rehearing

8. In its request for clarification or rehearing, Ozark states that the Commission should clarify the following: (a) that the November 2010 Order's preclusion of test period adjustments in the cost and revenue study does not mean that section 5 proponents are not required to propose and support test period adjustments as part of their direct case in this proceeding; (b) that because the November 2010 Order prohibits test period adjustments to the cost and revenue study, Ozark is not required to calculate a rate as part of such study; and (c) that Ozark may submit test period adjustments into the record. If the Commission declines to provide these clarifications, Ozark alternatively requests rehearing of the November 2010 Order.

9. First, Ozark contends that the Commission should clarify that the November 2010 Order's preclusion of test period adjustments in the cost and revenue study is not intended to modify the burden of section 5 proponents, as part of their direct case, to propose and support appropriate test period adjustments. Ozark defines "test period adjustments" as adjustments for known and measureable changes that become effective during the nine-month period following the base period.<sup>8</sup> Ozark states that the Commission bears a double burden under section 5 of the NGA: the Commission must prove that Ozark's rates are unjust or unreasonable and the Commission must prove that its new proposed rates are just and reasonable. In making these determinations, Ozark states that it is important that the Commission have a complete picture of the facts, which requires the use of both historical, base-period data and forward-looking test period

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<sup>6</sup> November 2010 Order, 133 FERC ¶ 61,158 at n.10 (citing 18 C.F.R. § 154.312 (2010)).

<sup>7</sup> November 2010 Order, 133 FERC ¶ 61,158 at P 10 (citing *Pub. Serv. Comm'n of New York*, 115 FERC ¶ 61,368, at P 6 (2006)).

<sup>8</sup> Ozark Request for Clarification or Rehearing at 4 & n.3.

adjustments.<sup>9</sup> Otherwise, new rates could be based on historical data that bear no resemblance to the circumstances that the pipeline will face when the rates are effective. Moreover, Ozark contends that costs, revenues and market forces may change after the base period in a manner that would materially change what a just and reasonable for the pipeline would be<sup>10</sup> and that is why the Commission has always required adjustments to base period data. Ozark contends that without such information, the section 5 proponents will not have the information necessary to meet their section 5 burdens and accordingly, will have to propose and support their own test period adjustments to satisfy their section 5 burden.

10. Ozark contends that test period adjustments have been a fundamental part of setting just and reasonable rates at the Commission for decades.<sup>11</sup> For example, Ozark states that, in *Iroquois*, the Commission stated that it “has a clear policy preference that the determination of ‘just and reasonable’ rates be based on the most accurate and current information available with the test period.”<sup>12</sup> Ozark states that the Commission’s regulations also require use of a nine-month adjustment period. Ozark states that section 154.303(a) of the Commission’s regulations provides that a pipeline’s Statements A through M, O, P, and supporting schedules “must be based upon a test period” and that “the test period consists of a base period followed by an adjustment period . . . of up to 9 months immediately following the base period.”<sup>13</sup> Ozark states that the fact that, in this

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<sup>9</sup> Ozark Request for Clarification or Rehearing at 8 (citing 18 C.F.R. §§ 154.303(a) & 154.312 (2010); *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164, at 61,621 (2004) (*Williston I*); *Southwest Gas Storage Co.*, 47 FERC ¶ 61,286, at 62,010 (1989) (*Southwest Gas*); *Kansas Gas and Electric Co.*, 25 FERC ¶ 61,171, at 61,472 (1983) (*Kansas Gas and Electric*); *Baca Gas Gathering System, Inc.*, 54 FPC ¶ 1541, at 1541 (1975) (*Baca*).

<sup>10</sup> Ozark Request for Clarification or Rehearing at 8 (citing *Northwest Pipeline Corp.*, 82 FERC ¶ 61,266, at 62,028 (1999); *Williston Basin Interstate Pipeline Co.*, 84 FERC ¶ 61,081, at 61,362 (1998) (*Williston II*)).

<sup>11</sup> Ozark Request for Clarification or Rehearing at 10 (citing *Williston I*, 107 FERC at 61,621; *Iroquois Gas Transmission System, L.P.*, 84 FERC ¶ 61,086, at 61,468 (1998) (*Iroquois*); *Kansas Gas and Electric*, 25 FERC at 61,472).

<sup>12</sup> Ozark Request for Clarification or Rehearing at 10 (citing *Iroquois*, 84 FERC at 61,468).

<sup>13</sup> Ozark Request for Clarification or Rehearing at 11 (citing 18 C.F.R. § 154.303(a) (2010)).

case, the Commission has decided not to require such test period adjustments does not change the regulations or the Commission's duty to consider such adjustments and to support them based on a sufficient record developed in the proceeding.

11. Ozark also contends that the November 2010 Order is unprecedented with respect to section 5 proceedings. Ozark states that the Commission has not forbidden pipelines from submitting test period adjustments in their cost and revenue studies in other proceedings.<sup>14</sup> Ozark argues that, when the November 2010 Order departed from this policy without acknowledging its departure from precedent or attempting a reasoned explanation for it, its actions were arbitrary and capricious.

12. Second, Ozark requests that the Commission clarify that the November 2010 Order does not require Ozark to derive a rate. Ozark contends that ratemaking requires the use of test period adjustments, both through the regulations, including the regulations that require the Schedule J-2,<sup>15</sup> and through Commission precedent.<sup>16</sup> Ozark contends that a rate derived without the benefit of test period adjustments would be incorrect because it would not reflect an accurate picture of the pipeline's circumstances, which would render such a rate affirmatively misleading. Ozark contends that absent this requested clarification, the November 2010 Order would be contrary to law and otherwise not the product of reasoned decision-making.<sup>17</sup>

13. Lastly, Ozark requests that the Commission clarify that the November 2010 Order does not prohibit Ozark from proposing test period adjustments. Ozark contends that the Commission's statement that "Ozark should not file nine months of post-base period adjustment data required by section 154.303(a) *at this point in the proceeding*" (emphasis added by Ozark) implies that Ozark may supply such data at a later point in the

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<sup>14</sup> Ozark Request for Clarification or Rehearing at 12 (citing *Great Lakes Gas Transmission Limited Partnership*, 129 FERC ¶ 61,160, at P 7 (2009); *Northern Natural Gas Co.*, 129 FERC ¶ 61,159, at P 7 (2009); *Natural Gas Pipeline Company of America LLC*, 129 FERC ¶ 61,158, at P 8 (2009)).

<sup>15</sup> Ozark Request for Clarification or Rehearing at 13-14 (citing 18 C.F.R. §§ 154.303(a) & 154.312 (2010)).

<sup>16</sup> Ozark Request for Clarification or Rehearing at 14 (citing *Williston I*, 107 FERC at 61,621; *Iroquois*, 84 FERC at 61,468; *Kansas Gas and Electric*, 25 FERC at 61,472).

<sup>17</sup> Ozark Request for Clarification or Rehearing at 13-14.

proceeding. If the Commission fails to make this clarification, Ozark argues that the November 2010 Order is arbitrary and capricious and otherwise contrary to law and accordingly, requests rehearing thereof.<sup>18</sup>

14. On January 3, 2011, the American Public Gas Association (APGA) filed an answer in opposition to Ozark's request for clarification. APGA argues that Ozark's reliance on the regulations and case law prescribing the filing requirements for pipelines submitting rate cases under section 4 is misplaced. APGA states that the Commission's regulations do not set forth specific requirements regarding the type of evidence that must be filed to satisfy the burden of proof in a section 5 rate case. Accordingly, APGA argues, the Commission should reject Ozark's request to import the section 4 regulations into section 5 cases. Further, APGA argues that, under section 10(a) of the NGA, the Commission has authority to require Ozark to calculate rates as part of its cost and revenue study, without adjustments. On the other hand, APGA states that any test period adjustments that the parties elect to propose should be filed with and supported by testimony submitted pursuant to the procedural schedule established in the proceeding where the appropriateness of the adjustments can then be considered in the context of the entire record.

15. On January 12, 2011, Ozark filed an answer to APGA's answer. In its answer, Ozark states that APGA mischaracterized its request for clarification or rehearing regarding test period adjustments. Ozark states that it did not oppose or request any relief with respect to the Commission's directive that Ozark provide a cost and revenue study without test period adjustments. Rather, Ozark states, it requested that the Commission clarify that section 5 proponents eventually will have to utilize appropriate test period adjustments in order to establish a record that meets the Commission's section 5 burden. Ozark also maintains that nothing in section 10(a) permits the Commission to require a misleading rate, which would be the result of not permitting adjustments.

### **III. Discussion**

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

17. Ozark's request for clarification or rehearing centers 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. As detailed above, the November 2010 Order directed Ozark to file actual cost and revenue information for the latest twelve-month period available and exclude from such study any adjustments or projections that may be attributable to a test period

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<sup>18</sup> Ozark Request for Clarification or Rehearing at 15-16.

referenced in the schedules and statements set forth in section 154.312 of the Commission's regulations. Ozark generally seeks clarification that, despite this limitation on the cost and revenue study, the Commission will consider evidence concerning appropriate adjustments for cost and revenue changes which occur after the twelve-month period, before determining whether Ozark's existing rates are unjust and unreasonable or establishing new just and reasonable rates.

18. For the reasons discussed below, the Commission clarifies that its directive concerning the cost and revenue study required by the November 2010 Order 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 that study. However, the Commission rejects 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. In addition, the Commission clarifies the appropriate base and adjustment period to be used in this section 5 proceeding in which the Commission has directed the use of a Track II hearing timeline.

19. When the Commission determines just and reasonable rates, whether in a section 4 or a section 5 proceeding, the Commission projects the pipeline's costs and volumes for the period when the new rates will be in effect, based upon the pipeline's actual costs and volumes during a prior period before the new rates take effect. The Commission's method of doing this in a section 4 rate case initiated by the pipeline is set forth in its test period regulations in section 154.303. Those regulations are tailored to the normal procedural schedule in a section 4 rate proceeding. In particular, the requirements concerning the commencement and duration of the base and adjustment periods are designed so that the overall test period generally ends the day before the pipeline's proposed rate increase takes effect, subject to refund, after a five-month suspension. As the Commission explained in *Williston III*:

The rates for pipelines are based on actual data for a one-year base period, as adjusted to reflect known and measurable changes that will occur within the following nine months (adjustment period). The regulations require that the base period used by the pipeline end no more than four months before the pipeline makes its filing. The adjustment period must begin immediately after the base period. Generally, the nine-month adjustment period ends ... the day before the pipeline's rates take effect after a five month suspension period. The rate factors (including costs and volumes) may be adjusted for changes in revenues and costs during the adjustment period. However, those changes must be known and measurable with reasonable accuracy at the time of the filing. And both the regulations in effect when *Williston*

made this filing and the current regulations expressly require that the changes “become effective within” the adjustment period.<sup>19</sup> (footnotes omitted)

20. While the pipeline’s proposed rates in a section 4 rate case take effect upon the concurrent conclusions of the test and suspension periods, the rates remain subject to refund until after the hearing and a Commission order on the merits. Further, section 154.311 of the Commission’s regulations requires that, within 45 days after the end of the test period, the pipeline update statements and schedules that include test period data with actual data.<sup>20</sup> This ensures that actual data for the adjustment period is available sufficiently before the hearing so that participants have an opportunity to perform discovery and prepare testimony for the hearing based on actual data for the entire test period, including the adjustment period. For example, in a case conducted under the Track III hearing timeline generally used for major pipeline section 4 rate cases, the 45-day update filing would be submitted approximately 28 weeks after the appointment of the ALJ, and the hearing would commence 14 weeks later.<sup>21</sup> Thus, the parties have somewhat more than three months in which to conduct discovery and prepare testimony concerning the updated data before the hearing commences.

21. As a result, when the Commission determines just and reasonable rates in a section 4 rate case, there is a generally a fully developed hearing record concerning the pipeline’s actual costs and revenues during the last twelve months of the test period (i.e., the last three months of the base period and the nine-month adjustment period). Accordingly, the Commission generally uses such data to project the pipeline’s costs and volumes on the ground that the most recent actual data before the filed rates took effect is the best evidence for what the costs and volumes will be after the proposed rates take effect.<sup>22</sup> While the Commission generally makes its merits holdings in a section 4 rate case a year or more after the pipeline’s proposed rates take effect, the Commission’s section 4 refund authority allows the Commission to apply its holdings retroactively back to the time the proposed rates took effect. In short, the section 154.303 test period regulations permit the pipeline’s rates in a section 4 rate case to be determined based on cost and volume data from a test period immediately preceding the effective date of those rates, but at the same

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<sup>19</sup> *Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,265, at 62,021 (1999) (*Williston III*).

<sup>20</sup> 18 C.F.R. § 154.311 (2010).

<sup>21</sup> Under the Track III hearing timeline, the hearing commences 42 weeks after the appointment of the ALJ.

<sup>22</sup> *See, e.g., Williston II*, 84 FERC ¶ 61,081; *Williston III*, 87 FERC ¶ 61,265.

time provide all interested participants a full opportunity to litigate the reliability and accuracy of the test period data for purposes of projecting the pipeline's costs and volumes.

22. Ozark contends that the Commission must use the same base and adjustment period in a section 5 case, as in a section 4 case, despite the significant procedural differences between the two types of proceedings. The Commission rejects this contention. While we are using the schedules and statements in the section 154.312 regulations<sup>23</sup> as a template for the cost and revenue study, the section 154.303 test period regulations do not apply to section 5 proceedings, such as the instant case. 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. Section 154.301, the first section of Subpart D, makes this clear:

Except for changes in rates pursuant to subparts E, F, and G, of this part, any natural gas company filing for a change in rates or charges, except for a minor rate change, must submit, in addition to the material required by subparts A, B, and C of this part, the Statements and Schedules described in § 154.312.<sup>24</sup>

23. Second, 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 are not suited to a section 5 proceeding. As explained above, 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.<sup>25</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 change, because the Commission has neither rate

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<sup>23</sup> Because Ozark does not have an NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, the November 2010 Order did not require Ozark to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture.

<sup>24</sup> 18 C.F.R. § 154.301 (2010).

<sup>25</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.

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.

24. As in a section 4 proceeding, 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. This includes an opportunity to perform discovery and prepare testimony for submission at the hearing concerning the appropriate costs and volumes projections to be made based on that data. That opportunity can only take place after completion of the test period and after actual data for that test period is made available to the participants.<sup>26</sup> It follows that, because the Commission can only make its section 5 determinations effective prospectively, there must inevitably be a significant lag between the end of whatever test period is used in a section 5 proceeding and the effectiveness of any reduced just and reasonable rates resulting from the section 5 proceeding.

25. Therefore, while the Commission applies the same basic test period concepts in section 5 proceedings as in section 4 rate proceedings, the particular test period requirements applicable to section 4 proceedings under section 154.303 must be modified and adapted to the realities of a section 5 proceeding. While the Commission cannot use a test period immediately preceding the effective date of its section 5 rate determinations, it does expect to make those determinations, based on actual cost and volume data from as recent a twelve-month period as possible.

26. To this end, the November 2010 Order required Ozark to submit a cost and revenue study for the latest twelve-month period available. The Commission required Ozark to exclude any adjustments for changes it projects may occur after the twelve-month period, in order to obtain a study showing Ozark's actual costs and revenues during the most recent twelve-month period undistorted by projections of changes that may or may not occur in the future. Such a study should provide all participants with a baseline of actual annual costs and revenues, which can then be used as a starting point for further analysis of Ozark's costs and revenues.

27. By restricting the cost and revenue study to the most recently available actual costs and revenues, the Commission did not intend to preclude Ozark and other

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<sup>26</sup> For example, if the actual data made available after the end of the test period showed that the pipeline had entered into discounted rate transactions during the final months of the test period, there should be an opportunity for the participants to conduct discovery concerning whether competition required those discounts. Such evidence would be relevant to a determination whether the pipeline's rate design volumes should be reduced to account for discounts.

participants from subsequently presenting evidence in this proceeding supporting adjustments to Ozark's costs and revenues to reflect changes occurring after the twelve-month period covered by that study. The Commission recognizes 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. Such data would generally be most representative of the pipeline's costs and revenues once any revised rates take effect.

28. However, the interest in using recent data must be balanced with the interest in providing all participants an opportunity to develop a full record concerning what just and reasonable rates should be established based on the data from whatever annual period is ultimately used for projecting the pipeline's costs and revenues. In this proceeding, 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>27</sup> Accordingly, this proceeding is being conducted in accordance with the Track II hearing timeline, with the hearing to take place and the initial decision to be issued within 32 and 47 weeks, respectively, of the designation of the presiding judge. Consistent with that timeline, the participants have agreed to a procedural schedule under which (1) staff and intervenors will file direct testimony by April 11, 2011, (2) Ozark will file answering testimony by May 31, 2011, (3) staff and intervenors will file cross-answering and rebuttal testimony by June 17, (4) final discovery requests will be due by June 21, 2011, and (5) the hearing will commence on June 30, 2011.<sup>28</sup>

29. Based on this timeline, it is clear that any updated data to be used in this case must be limited to an adjustment period substantially shorter than the nine-month adjustment period used in a section 4 rate case. Assuming Ozark's cost and revenue study uses an annual period ending on October 31, 2010, a nine-month adjustment period would not end until July 31, 2011, one month after the hearing is to be held. Moreover, actual data for the entire adjustment period would likely not be available until mid-September 2011 (i.e., 45 days after the end of the nine-month adjustment period), which would be two and a half months after the hearing and after reply briefs are due (currently, August 29, 2011). Such actual data is necessary to show whether any projected changes "become effective within" the adjustment period, as would be required in a section 4 rate case. In short, a

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<sup>27</sup> November 2010 Order, 133 FERC ¶ 61,158 at P 11. *See, e.g., Indicated Shippers v. Sea Robin Pipeline Co.*, 76 FERC ¶ 61,151 (1996) (*Sea Robin*).

<sup>28</sup> *Ozark Gas Transmission, L.L.C.*, Docket No. RP11-1495-000 (Jan. 7, 2011) (Order Establishing Procedural Schedule, Other Procedural and Discovery Matters).

nine-month adjustment period would prevent the parties from performing discovery and preparing testimony for the hearing based on actual data for the test period.<sup>29</sup>

30. Therefore, while we will permit an adjustment period, it must be abbreviated. Based on the current procedural schedule, 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 proposing their own adjustments, in cross-answering and rebuttal testimony (currently, due June 17, 2011).<sup>30</sup> 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.

31. While Ozark may experience further changes in its costs and revenues after the cut-off date for updated cost and revenue data in this proceeding, there must be such a cut-off date.<sup>31</sup> Otherwise, the participants would be faced with a constantly moving target, and the section 5 proceeding would never end.

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<sup>29</sup> See also *SFPP, L.P.*, 129 FERC ¶ 61,050 (2009) (Commission clarified that it did not intend to modify the proposed base period or adjustment period; Commission trial staff had argued that without such clarification the adjustment period would have ended *after* the hearing and accordingly, a new procedural schedule would have been warranted) (emphasis added).

<sup>30</sup> Consistent with section 154.303, these adjustments must be limited to known and measurable changes that “become effective within” the modified test period determined by the ALJ.

<sup>31</sup> *Kansas Gas and Electric*, 25 FERC at 61,473. The Commission explained that:

[t]he parties opposing a rate increase often invest substantial time and money probing the utility's cost data. When the utility is permitted to submit new data in the course of the proceeding, it often becomes necessary for intervenors to scrap much of their original investigations and begin anew. If the utility can show that certain costs have increased from its actual or estimated test period costs, the intervenors can

(continued)

As is evident, we disagree with Ozark that a test period that includes a nine-month adjustment period is essential for determining a just and reasonable rate in the context of a section 5 proceeding. The precedent Ozark cites for this assertion generally involved section 4 rate cases.<sup>32</sup> The few orders in section 5 cases cited by Ozark did not directly address the issue of the appropriate test period to be used in a section 5 rate case. In the three orders establishing section 5 proceedings in November 2009,<sup>33</sup> the Commission simply stated that the pipelines did “not need to file nine months of post-base period adjustment data required by section 154.303(a)” with their cost and revenue studies. Because the proceedings were either settled or terminated, the Commission never decided what adjustment period, if any, should be used to determine whether the pipelines rates were unjust and unreasonable.<sup>34</sup> Further, as the Supreme Court has specifically acknowledged, the “just and reasonable” standard was not intended to imply any

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sometimes show that other costs have declined or that revenues have increased. Unless and until a line is drawn somewhere, there is no end to such a rate proceeding.

*Id.*

<sup>32</sup> *Williston I*, 107 FERC ¶ 61,164; *Iroquois*, 84 FERC ¶ 61,086.

<sup>33</sup> *Great Lakes*, 129 FERC ¶ 61,160; *Northern*, 129 FERC ¶ 61,159; *Natural*, 129 FERC ¶ 61,158.

<sup>34</sup> In *Southwest Gas*, for example, the Commission initiated a section 5 investigation against Southwest Gas Storage Company (Southwest Gas) and required it to file a cost and revenue study showing actual data for the most recently available twelve-month period. *Southwest Gas*, 47 FERC at 62,010. The Commission then made a finding as to Southwest Gas’ cost of service based on “a base period of twelve months ended November 30, 1988, as adjusted.” *Id.* Contrary to Ozark’s suggestion, nowhere in the order does the Commission indicate that the phrase “as adjusted” refers to the use of a nine-month adjustment period. Similarly, use of the word “adjustments” in *Baca* was in reference to potential adjustments to a company’s rates, not the company’s cost information. In *Baca*, the Federal Power Commission (FPC), the Commission’s predecessor, instituted a section 5 investigation to determine whether the rates charged by a small producer for its sales of gas to Baca Gas Gathering, Inc. (Baca) were just and reasonable. *Baca*, 54 FPC ¶ 1541. The FPC ordered the small producer to submit “cost evidence in order that [the FPC] may determine the justness and reasonableness of Baca’s rates and make appropriate adjustments, if found necessary, to the small producer rates.” *Id.* As in *Southwest Gas*, there is no evidence that the FPC’s use of the word “adjustment” in *Baca* refers to adjustments of the nature Ozark is requesting here, as Ozark claims.

particular methodology of ratemaking: “Under the statutory standard of ‘just and reasonable’ it is the result reached, not the method employed which is controlling.”<sup>35</sup>

32. Also, in *Sea Robin*, the Commission rejected a contention similar to that raised by Ozark here about the need to use a nine-month adjustment period in a section 5 rate case. Following a complaint filed by the Indicated Shippers, the Commission determined that Sea Robin’s revenues appeared to exceed its costs of service causing its rates to be unjust and unreasonable. Accordingly, acting under section 5, the Commission established a hearing to investigate Sea Robin’s rates and directed Sea Robin to file a cost and revenue study similar to the cost and revenue study Ozark was directed to file here. The Commission directed that the cost and revenue study should include actual data for the latest 12-month period, “but should not include a traditional test period – 12 months of actual data and a nine month test period that includes projections.”<sup>36</sup> The Commission rejected a challenge to its decision to exclude the nine-month adjustment period from Sea Robin’s cost and revenue study, stating:

[T]he Commission disagrees that the use of a twelve-month base period, as annualized to reflect trends experienced during the base period, is inconsistent the Commission’s test period policies. This method, like that of the traditional test period which relies on 12 months of actual experience as adjusted by nine months of known and measurable projections, relies on present evidence to predict future activity.<sup>37</sup>

Similarly, we believe that the test period method adopted here, which relies on the most recent actual data available based on the procedural schedule, is reasonably consistent with the Commission’s traditional test period methodology and will be appropriate for determining just and reasonable rates.

33. Ozark also requested that the Commission clarify that it is not required to calculate a rate as part of its cost and revenue study because the November 2010 Order prohibited a nine-month adjustment period. Ozark acknowledges that the Commission has the authority to require cost and revenue studies in furtherance of its statutory duties.

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<sup>35</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 287, 88 L. Ed. 333 (1944).

<sup>36</sup> *Sea Robin*, 76 FERC at 61,826 & n.16.

<sup>37</sup> *Indicated Shippers v. Sea Robin Pipeline Co.*, 81 FERC ¶ 61,146, at 61,655 (1997).

However, based on its assertion that ratemaking requires the use of a nine-month adjustment period, Ozark contends that a rate derived without the benefit of test period adjustments would be incorrect. Such a rate allegedly would not reflect an accurate picture of the pipeline's circumstances and therefore, would be affirmatively misleading.

34. As discussed above, contrary to Ozark's assertions, the Commission is not bound to use a nine-month adjustment period to calculate rates in a section 5 proceeding. Thus, the premise underlying Ozark's contention that it should not be required to calculate rates is incorrect. Moreover, as Ozark concedes, sections 10(a) and 14(a) of the NGA authorize the Commission to require Ozark to submit the cost and revenue study required by the November 2010 Order in order to carry out its responsibility under NGA section 5 to ensure that the pipeline's rates are just and reasonable.<sup>38</sup> Section 10(a) permits the Commission to require any and all reports that are "necessary or appropriate to assist the Commission in the proper administration of [the NGA]." Section 10(a) also permits the Commission to "prescribe the manner and form in which such reports shall be made, and require from such natural gas companies specific answers to all questions upon which the Commission may need information." Similarly, section 14 permits the Commission "to investigate any facts, conditions, practices, or matters which it may find necessary or proper ... to aid in the enforcement of the provisions of this chapter."

35. As explained above, the Commission required Ozark to submit a study without projected test period adjustments in order to obtain a study showing Ozark's actual costs and revenues during the most recent twelve month period undistorted by projections of changes that may or may not occur in the future. The requirement that Ozark calculate rates based on those costs and revenues 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.

36. However, we will grant rehearing in part in order to permit Ozark to include with the cost and revenue study required by the November 2010 Order a separate cost and revenue study which does reflect adjustments for changes Ozark projects will occur during a time frame which may reasonably be taken into account in this proceeding consistent with the discussion above. This should address Ozark's concern about the misleading nature of any rates calculated based solely on actual costs during the annual period required by the November 2010 Order because it will give Ozark an opportunity to present the adjustments it believes are necessary to correctly calculate its rates. Further,

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<sup>38</sup> NGA section 10 states "Every natural-gas company shall file with the Commission such ... special reports as the Commission may by ... order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act."

we are permitting Ozark and the other parties to include in their filed testimony proposed adjustments related to a period for which actual data is available sufficiently before the hearing. This should result in a rate that reflects “an accurate picture of the pipeline’s circumstances,” as Ozark requested.<sup>39</sup> Accordingly, the Commission believes it is appropriate to require Ozark include all the schedules set forth in section 154.312, including schedule J-2.

37. Therefore, as discussed above, Ozark’s request for clarification or rehearing of the November 2010 Order is granted in part and denied in part.

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 or rehearing.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>39</sup> Ozark Request for Clarification or Rehearing at 14.