

138 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MIGC LLC

Docket No. RP12-122-001

ORDER DENYING REQUESTS FOR REHEARING
AND GRANTING EXTENSION OF TIME TO FILE COST AND REVENUE STUDY

(Issued January 6, 2012)

1. On December 9, 2011, MIGC LLC (MIGC), filed a limited request that the Commission grant rehearing of the November 17, 2011 order¹ requiring MIGC to file a cost and revenue study containing all of the schedules required for a Natural Gas Act (NGA) section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations.² MIGC asserts that since it is a "small pipeline," the Commission should have required it to provide a cost and revenue study based upon the requirements of section 154.313³ of the Commission's regulations which are applicable to minor rate changes.

2. MIGC requests the Commission to grant a suspension or stay of both MIGC's obligation to file a cost and revenue study on January 31, 2012 and the commencement of the 47-week Track II Hearing Timeline, pending the Commission's decision on this request concerning which section governs MIGC's cost and revenue study. MIGC further requests that it be allowed 75 days from the date of the rehearing order to prepare and submit the cost and revenue study, with the 47-Week Track II Hearing Timeline running from the date the cost and revenue study is due, and that the cost and revenue study should be based upon the then-most recent 12 months of data available, with the

¹ *MIGC, LLC, Order Instituting Investigation and Setting Matter for Hearing Pursuant to Section Five of the Natural Gas Act*, 137 FERC ¶ 61,135 (2011) (November 2011 Order).

² 18 C.F.R. § 154.312 (2011).

³ 18 C.F.R. § 154.313 (2011).

six-month adjustment period similarly modified to track the procedures set forth in the November 2011 Order.⁴

3. On December 19, 2011, MIGC filed a request for rehearing of the November 2011 Order. MIGC argued that in the November 2011 Order the Commission exceeded its statutory authority under the NGA when it ordered MIGC to file cost and revenue data in the same format as an NGA section 4 rate case and to derive and file new rates as though MIGC were submitting an NGA section 4 rate filing.

4. MIGC asserted that the type of information required by the November 2011 Order goes beyond the type of information that the Commission may require from pipelines under NGA sections 10, 14, and 16. MIGC contended that it is a small pipeline, and the Commission's decision to require MIGC to file a cost and revenue study based upon section 154.312 is arbitrary, capricious and not reasoned decision making because the Commission's established policy is to require small pipelines to file cost and revenue studies based upon the less demanding requirements of section 154.313.

5. Further, if the Commission is changing that policy, MIGC argues the November 2011 Order failed to provide any explanation, much less a reasoned one, for that change.

6. For the reasons set forth below, the Commission denies MIGC's requests for rehearing that it be required to file a cost and revenue study that complies only with section 154.312, but grants in part its request for an extension of the January 31, 2012 deadline for the cost and revenue study and requires MIGC to file the cost and revenue study by February 29, 2012.

I. Background

7. MIGC is a 256-mile jurisdictional interstate pipeline operating in the Powder River Basin of Wyoming, with a capacity of 175 million cubic feet per day. MIGC provides firm and interruptible transportation services to its shippers.

8. MIGC's current transportation rates were established as part of a settlement filed by MIGC on May 17, 1995, in an NGA section 4 rate case. The Commission approved the settlement on September 15, 1995.⁵ Pursuant to Article V(C) of the settlement, the rates established by the settlement became effective as of September 1, 1993 and

⁴ MIGC indicated that this request was limited to the issue of whether section 154.312 or section 154.313 should govern the cost and revenue study required by the November 2011 Order, but reserved its rights to seek rehearing of other aspects of the November 2011 Order at a later date.

⁵ *MIGC, Inc.*, 72 FERC ¶ 61,238 (1995).

terminate on the date that a new general rate increase filing by MIGC pursuant to section 4 of the NGA is made effective or on the effective date of any general rate change ordered by the Commission pursuant to section 5 of the NGA.

9. In the November 2011 Order, the Commission stated that it had reviewed the cost and revenue information provided by MIGC in its Form 2 for the years 2009 and 2010. Based upon that review of this cost and revenue information, the Commission estimated MIGC's return on equity for those calendar years to be 47.74 percent, and 57.14 percent, respectively. Based upon its preliminary analysis of the information provided by MIGC in its Form 2 for 2009 and 2010, the Commission found that MIGC's currently effective tariff rates may allow MIGC to recover revenue substantially in excess of its estimated cost of service. Accordingly, the Commission initiated an investigation to examine the justness and reasonableness of MIGC's rates pursuant to section 5 of the NGA and set the matter for hearing.

10. The Commission also directed MIGC to file a cost and revenue study within 75 days, based on cost and revenue information for the latest 12-month period available. The Commission directed that the study 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. Because the Commission is seeking actual cost and revenue information, the Commission stated that the information submitted by MIGC 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, MIGC was instructed not to file nine months of post-base-period adjustment data required by section 154.303(a). Additionally, because MIGC does not have an NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, the Commission stated that MIGC does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture.⁶

11. However, in addition to the cost and revenue study required above, the Commission permitted MIGC to file a separate cost and revenue study that does reflect adjustments for changes MIGC projects will occur during a six month time frame after the 12-month base period used in the cost and revenue study.⁷

⁶ November 2011 Order, 137 FERC ¶ 61,135 at P 10. *See Pub. Serv. Comm'n of New York v. National Fuel Gas Supply Corp.*, 115 FERC ¶ 61,368, at P 6 (2006) (*Public Service v. National Fuel*).

⁷ November 2011 Order, 137 FERC ¶ 61,135 at P 9. *See, e.g., Ozark Gas Transmission, L.L.C.*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 (2011) (*Ozark*).

II. MIGC's Rehearing Requests

12. In its first rehearing request, MIGC asserts that it should only be required to submit the cost and revenue study required by section 154.313 for minor rate changes. MIGC contends that it is a very small pipeline since as the November 2011 Order states at P 2 "MIGC is a 256-mile jurisdictional pipeline ... with a capacity of 175 million cubic feet per day." MIGC argues that requiring it to submit a cost and revenue study consisting of the full panoply of information required by section 154.312 is contrary to well-established Commission practice with respect to NGA section 5 investigations of a small pipeline.

13. MIGC asserts the Commission's practice when conducting NGA section 5 investigations of small pipelines is to require those pipelines to file cost and revenue studies based upon the requirements of section 154.313 of the Commission's regulations, Composition of Statements for Minor Rate Changes, rather than under section 154.312, which MIGC claims is applicable in section 5 investigations of large major pipelines.

14. MIGC contends there are significant distinctions between sections 154.312 and 154.313 in the information and level of detail required, and in essence, much of the detailed information and data required by section 154.312 is not required by section 154.313.

15. MIGC asserts that the Commission adopted its policy with respect to the data to be supplied by small pipelines in NGA section 5 investigations in *Indicated Shippers v. Sea Robin Pipeline Company*, 76 FERC ¶ 61,151 (1996) (*Sea Robin*). MIGC continues that in a recent case, *Natural Gas Pipeline Company of America (NGPL)*⁸ the Commission explained that the reason why it permitted the pipeline in *Sea Robin* to file under section 154.313, while it was requiring Natural to file under section 154.312, related to the size of the pipelines and the nature of their operations

16. MIGC asserts that in *NGPL* the Commission made clear the fact that in *Sea Robin* the Commission noted that Sea Robin's rates had been established for over 10 years was not a significant factor in determining which section applied. Rather, the Commission stated that its choice of section 154.313 versus 154.312 is not influenced by how stale the rates are, but rather is "driven only by the nature of the pipelines involved."⁹

17. MIGC states that while the Commission imposed the more demanding standards of section 154.312 on the pipeline subjects of the Commission's recent *sua sponte* NGA

⁸ 130 FERC ¶ 61,133 (2010).

⁹ *Id.* P 29.

section 5 investigations, that is not surprising, given the size and complexity of those pipelines, all of whom operated several hundred miles of pipeline, with large, operationally complex systems, and several diverse service offerings.¹⁰

18. On the other hand, MIGC asserts, where the pipeline at issue is small, operationally simple, has fewer services, and few shippers, it follows that the analysis of that pipeline's costs and revenues will be less complex than for a large pipeline.

19. In fact, MIGC asserts it is also much smaller and less complex than even the "relatively small" pipeline that the Commission examined in *Sea Robin*. In *NGPL*, the Commission described Sea Robin as 450 miles long, with a capacity of 1 Bcf/day, only three services, and no storage. The Commission's preliminary calculation of providing Sea Robin's cost of service was approximately \$27 million.

20. MIGC states that, by contrast, it is a 256-mile long pipeline, with a certificated capacity of 175 MMcf/day that operates in a defined area of a single state, Wyoming's Powder River Basin. MIGC provides only firm and interruptible transportation services and like Sea Robin does not provide storage service.¹¹ MIGC has just 13 shippers, only 6 of which are firm, with the vast majority of volumes transported directly or indirectly for affiliates. MIGC states that actual flows on MIGC's system for 2011 were just 29 Bcf through October 31, 2011. The November 2011 Order preliminarily calculates MIGC's cost of service as approximately \$8.7 million in 2010, in contrast to Sea Robin's \$27 million cost of service.

21. MIGC argues that since the Commission did not need the full complement of section 154.312 schedules and data to perform analysis of the reasonableness of Sea Robin's rates, a significantly larger pipeline with a more complex operation than MIGC, the Commission does not need that level of detailed information required under section 154.312 to conduct the same type of investigation of MIGC.

22. MIGC asserts that all the reasons why the Commission permitted Sea Robin to file under section 154.313 apply to it. MIGC states that it is by far the smallest pipeline that has been the focus of the recent *sua sponte* section 5 investigations by the Commission. MIGC further states that given its small size and limited operations it does not have access to a large pool of personnel to draw upon for compiling information and data in

¹⁰ MIGC cites to *Great Lakes Gas Transmission Limited Partnership*, 129 FERC ¶ 61,160 (2009); *Kinder Morgan Interstate Gas Transmission, L.L.C.*, 133 FERC ¶ 61,157 (2010); *Ozark Gas Transmission, L.L.C.*, 133 FERC ¶ 61,158 (2010) and *Northern Natural Gas Co.*, 129 FERC ¶ 61,159 (2009).

¹¹ November 2011 Order, 137 FERC ¶ 61,135 at P 2.

the form and detail required by section 154.312. Moreover, at this time of year, the personnel that are available are also responsible for performing year-end close out and preparation of annual reports.

23. MIGC concludes that the Commission should grant rehearing and permit MIGC to file a cost and revenue study based on section 154.313, or the Commission should provide a reasoned explanation for the Commission's decision to abandon the policy of treating small pipelines in a different manner than large pipelines.

24. MIGC requests that the Commission act without delay to suspend or stay both MIGC's obligation to file a cost and revenue study on January 31, 2012, and the commencement of the 47-week Track II Hearing Timeline, pending the Commission's decision on whether section 154.312 or 154.313 should govern MIGC's cost and revenue study. MIGC further requests that it be allowed 75 days from the date of the rehearing order to prepare and submit the cost and revenue study, with the Track II Hearing Timeline running from the date the cost and revenue study is due. That cost and revenue study should be based upon the then-most recent 12 months available, with the six-month adjustment period similarly modified to track the procedures set forth in the November 2011 Order.

25. MIGC's second rehearing request, filed on December 19, 2011, repeats much of MIGC's December 9, 2011 limited request for rehearing. MIGC contends that the Commission lacks the authority in an NGA section 5 proceeding to require it to submit a cost and revenue study including all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with the exception of a Statement P. MIGC argues that this requirement disregards the boundaries between sections 4 and 5 of the NGA as set forth by the courts,¹² and effectively requires it to submit an NGA section 4 rate filing. MIGC argues that NGA sections 10, 14, and 16 do not authorize the Commission to require a cost and revenue study of the type at issue here, because the required study goes beyond a compilation of factual data by the pipeline and the investigative powers under those sections cannot trump the limitations imposed by NGA section 5. MIGC points out that section 154.312(p)(2) requires a pipeline to submit a Schedule J-2 showing "the derivation of each rate component of each rate." MIGC states that this requires a pipeline with different customer classes to show the derivation of rates for each customer class, including a break-down of cost

¹² MIGC Request for Rehearing at p. 3-4 (citing *Public Service Commission of New York v. FERC*, 488 F.2d 487, 492 (D.C. Cir. 1989) (*Public Service v. FERC*); *Western Resources Inc. v. FERC*, 9 F.3d 1568 at 1578 (D.C. Cir. 1993) (*Western Resources*); and *Consumers Energy Co. v. FERC*, 226 F.3d 777 (6th Cir. 2000) (*Consumers Energy*)).

components for each such class. MIGC argues that these requirements are not simple extractions of information. Rather, they require MIGC to undertake studies and make a multitude of allocations of costs and volumes for each of the various rate components, which it states is a burden that properly belongs with the Commission in a section 5 proceeding.

26. MIGC asserts that the November 2011 Order shifted the initial burden of production to it, in contravention of NGA section 5. It contends that the Commission did not merely seek information from MIGC that would enable the Commission on its own to calculate what it believes to be a just and reasonable rate, but required MIGC to develop and file what MIGC believes to be just and reasonable rates when the initial burden in a section 5 proceeding is on the Commission.

27. Finally, MIGC argues that the Commission cannot rely on *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), to support its position that it may compel a pipeline to derive new rates and file a cost and revenue study in the form required by section 154.312.

III. Discussion

28. The Commission denies MIGC's requests for rehearing. However, the Commission grants MIGC an extension until February 29, 2012, to file its cost and revenue study. In addition, the Commission makes a corresponding change in the deadlines under the Track II timeline under which the hearing is being conducted so that the deadlines will run from the revised date the pipeline's cost and revenue study is due. Therefore, the initial decision must issue within 47 weeks of the February 29, 2012 date the cost and revenue study is due.

A. Nature of Cost and Revenue Study

29. We deny MIGC's request that it be required to meet only the filing obligations of section 154.313. Given the serious questions raised by preliminary analysis of MIGC's Form 2 filings in 2009 and 2010 and the need to minimize the delays and burdens of discovery in this NGA section 5 proceeding, we find that the more extensive schedules and information required by section 154.312 are necessary to perform an appropriately thorough evaluation of MIGC's rates.

30. MIGC relies on the August 1996 Order in *Sea Robin* to contend that the Commission has a policy of requiring relatively small pipelines with few services to file only a section 154.313 cost and revenue study in an NGA section 5 investigation, while imposing the more onerous section 154.312 cost and revenue study only on larger

pipelines. However, since our June 2006 Order in *Public Service v. National Fuel*,¹³ establishing a section 5 hearing concerning the rates of National Fuel Gas Supply Corp., the Commission has consistently required pipelines subject to section 5 investigations to file a section 154.312 costs and revenue study, regardless of their size or the complexity of their services. Thus, in *Panhandle Complainants v. Southwest Gas Storage Co.*¹⁴ the Commission required a pipeline offering only firm and interruptible storage service to a single customer to file a section 154.312 cost and revenue study. Similarly, in *Public Utilities Commission of Nevada v. Tuscarora Gas Transmission Co.*,¹⁵ the Commission required a 240-mile pipeline offering four transportation services and no storage services to file a section 154.312 cost and revenue study.

31. The Commission recognizes that in *NGPL*, it suggested that it might be sufficient in a section 5 investigation to only require a relatively small pipeline to file a costs and revenue study pursuant to section 154.313 applicable to minor rate changes. However, upon further consideration of this issue, the Commission has concluded the more detailed costs and revenue study provided for by section 154.312 is necessary for the efficient conduct of an NGA section 5 investigation, regardless of the size of the pipeline or the complexity of its services. Because of the potential for continued over recovery of revenues by the pipeline, it is necessary that section 5 investigations be conducted as efficiently and expeditiously as possible. In *Public Service v. National Fuel*, where we first required a pipeline to file a section 154.312 cost and revenue study in a NGA section 5 proceeding, we pointed out that in *Sea Robin* significant discovery had occurred before issuance of the Commission order and therefore much information had already been provided by the pipeline. Accordingly, based on the experience in *Sea Robin*, we held that “the parties here should have the benefit of being provided the additional schedules and information required by section 154.312 at the outset of the proceeding, rather than having to obtain much, if not all, of the same information later through the discovery process.”¹⁶

32. Permitting MIGC to file only a section 154.313 cost and revenue study would require the parties to rely on a more extended discovery process in order to obtain the information necessary to evaluate MIGC’s rates. As discussed below, while MIGC asserts that it is operationally simple, with only two services and 13 shippers, a section 154.313 cost and revenue study would not provide sufficient information to evaluate the

¹³ 115 FERC ¶ 61,299, at P 38, *reh’g*, 115 FERC ¶ 61,368 (2006).

¹⁴ 117 FERC ¶ 61,318, at P 18 (2006).

¹⁵ 135 FERC ¶ 61,174, at P 30 (2011).

¹⁶ 115 FERC ¶ 61,368 at P 5.

justness and reasonableness of MIGC's rates, including analyzing its cost of service and determining appropriate billing determinants for purposes of designing its rates. For example, MIGC's status as a wholly owned subsidiary of another entity raises various ratemaking issues whose resolution requires information required by section 154.312, but not section 154.313. In MIGC's 2010 Form 2, it reported that effective May 14, 2008, MIGC became a wholly owned subsidiary of WGR Operating, LP (WGO), referred to as the "Parent." WGO is a partnership owned by Western Gas Operating, LLC and Western Gas Partners, LP (WES). WES, in turn, is a publicly traded partnership owned by two wholly owned subsidiaries of Western Gas Resources, Inc. (WGR), Western Gas Holdings, LLC and WGR Holdings LLC, as well as other shareholders. WGR is a wholly owned subsidiary of Anadarko Petroleum Corporation (APC).

33. This ownership of MIGC raises the issue of whether its rate of return should be determined based on the capital structure of a parent, rather than its own capital structure. Section 154.312(f) concerning the rate of return claimed by the pipeline requires it to submit information relevant to this issue, whereas the corresponding provision of section 154.313 does not. Specifically, section 154.312(f) requires that, where any component of the capital of a pipeline is not primarily obtained through its own financing, but is primarily obtained from a company by which the pipeline is controlled, the pipeline must provide data in Statements F-1 through F-4 with respect to debt capital, preferred stock capital, and common stock capital of such controlling company or any intermediate company through which such funds have been secured. Section 154.313(f) simply requires the pipeline to show the rate of return claimed with a "brief explanation of the basis."

34. Similarly, the ownership of MIGC raises issues concerning the determination of its operation and maintenance expenses, particularly whether corporate overhead of any affiliated entities is allocated to MIGC and included in its cost of service. Statement H-1(2)(j) of section 154.312 requires a complete disclosure of all corporate overhead allocated to MIGC. That information is not required under section 154.313.

35. In addition, section 154.312(c) requires the pipeline to submit detailed schedules concerning the cost of plant included in its rate base, while section 154.313(e)(5) only requires the pipeline to submit limited information concerning its balances at the end of the 12-month base period. For example, section 154.312(c) requires the pipeline to submit a Statement C showing the pipeline's gas utility plant as of the beginning of the 12-month base period, book additions and reductions during the 12 months, and the balance at the end of the 12-month period. That section also requires that the Statement C show any claimed adjustments to the book balances and the total cost of plant to be included in rate base. By contrast, section 154.313(e)(5) only requires the pipeline to submit a Statement C showing its cost of plant by function at the end of the base period, with no information concerning changes during the base period or any claimed adjustments. However, verifying whether the plant balances included in MIGC's rate

base as of the end of the base period are accurate will inevitably require an analysis of any book additions and reductions during the base period, as well as any claimed adjustments to the balances and cost of plant to be included in rate base. This is particularly true in this case, where MIGC included a net acquisition adjustment to gas plant in service in its Form 2s for both 2009 and 2010.

36. Further, section 154.312(d) requires the pipeline to submit detailed schedules concerning its accumulated provision for depreciation, while section 154.313(e)(6) only requires the pipeline to submit limited information concerning its accumulated provision for depreciation at the beginning and end of the test period. For example, section 154.312(d) requires the pipeline to submit a detailed Statement D, showing the pipeline's accumulated provision for depreciation as of the beginning of the 12-month base period, book additions and reductions during the 12 months, and the balance at the end of the 12-month period. That section also requires that the Statement D show any claimed adjustments to the book balances and total adjusted balances and explain any adjustments. By contrast, section 154.313(e)(6) only requires the pipeline to submit a Statement D showing its accumulated provision for depreciation as of the beginning and end of the test period, with no information concerning changes during the base period or any claimed adjustments. However, verifying the accuracy of MIGC's claimed accumulated provision for depreciation will inevitably require the more detailed information submitted in a section 154.312 cost and revenue study

37. Finally, while both sections 154.312(o) and 154.313(b) require pipelines to submit the same Statements I-1 through I-3 showing how the pipeline functionalizes, classifies and allocates its cost of service,¹⁷ only section 154.312(p) requires the pipeline to file Statements J-1 and J-2 summarizing its billing determinants and showing the derivation of each rate component of each rate. The value of those statements for purposes of this section 5 proceeding is not the actual per-unit rates calculated in those statements, but information contained in those statements concerning the rate derivation methods underlying the pipeline's existing rates, particularly the formulas used to develop MIGC's per-unit firm reservation and usage charges and its per-unit interruptible rates. For example, Statement J-1 requires that, if the pipeline imputes billing determinants for

¹⁷ Section 154.312(o) requires the pipeline to file Schedule I-1 showing the functionalization of its cost of service, Schedule I-2 showing the classification of costs between fixed costs and variable costs, and Schedule I-3 showing the allocation of its cost of service among the pipeline's services and rate schedules. Section 154.312(o)(3)(iii) requires that Schedule I-3 show, among other things, the "formulae used in the allocation," and "the factors underlying the allocation of costs." 18 C.F.R. § 154.312(o)(3)(iii) (2011). Section 154.313(b) requires that the pipeline file the same Schedules I-1 through I-3 required by section 154.312.

interruptible service, the pipeline must explain the method for calculating the billing determinants. Statement J-2 requires the pipeline to show how it divides its allocated cost of service among each component of its rates and which billing determinants it uses to derive each rate component. Without those statements, the participants would have no way of knowing how MIGC's existing per-unit rates are designed.

38. As clarified in the next section, in performing the calculations required by Statements J-1 and J-2, the pipeline may use whatever rate design methodology underlies its rates, without indicating whether that constitutes its currently preferred rate design methodology. However, by illustrating how MIGC's rates are currently designed, the Statements J-1 and J-2 will enable all participants to determine whether to challenge MIGC's existing rate design, or seek lower rates solely by challenging the justness and reasonableness of the cost or service or billing determinants underlying MIGC's existing rates.

39. Finally, the Commission notes that MIGC's burden of preparing the necessary data required under section 154.312 is lessened by the fact that it provides only firm and interruptible transportation services, has no storage, and otherwise appears to have a relatively simple cost of service. For example, section 154.312(b)(2) requires the pipeline to submit detailed information concerning its regulatory assets and liabilities. However, in its 2009 and 2010 Form 2s, MIGC stated it had no regulatory assets or liabilities. If this continues to be the case, MIGC may simply state that Schedule B-2 concerning regulatory assets and liabilities is not applicable to it. Similarly, a number of other schedules may be inapplicable to MIGC, such as the various schedules related to storage assets and service.

40. The Commission concludes that, regardless of MIGC's relatively small size, the information to be furnished under section 154.312 is necessary to enable the Commission to determine the issues in this proceeding. However, to ensure that compliance with the November 2011 Order will not be unduly burdensome to MIGC, we will extend the deadline for MIGC to file the cost and revenue study for one month to February 29, 2012.

B. Legal Authority to Require Cost and Revenue Study

41. MIGC contends that the Commission lacks the authority in an NGA section 5 proceeding to require it to submit a cost and revenue study including all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with the exception of a Statement P. MIGC argues that this requirement disregards the boundaries between sections 4 and 5 of the NGA as set

forth by the courts,¹⁸ and effectively requires it to submit an NGA section 4 rate filing. The Commission disagrees.

42. Contrary to MIGC's assertions, requiring a pipeline to supply the Commission with an informational filing as directed by the November 2011 Order does not improperly transform this section 5 proceeding into a section 4 proceeding. NGA section 4(c) requires the pipeline to file with the Commission, and keep open for public inspection, "schedules showing all rates and charges" for jurisdictional services. Section 4(d) states that a pipeline may propose to change those rates by "filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." Pursuant to sections 4(d) and (e), the changed rate schedules generally take effect after a 30-day notice period, unless the Commission exercises its authority under section 4(e) to suspend the changed rate schedule for up to five months.

43. The November 2011 Order did not require MIGC to file any change in its existing rate schedules, which would take effect after 30 days notice or a five month suspension by the Commission. Thus, the Commission did not require MIGC to make a section 4 filing. In addition, as explained further below, the Commission did not place any section 4 burden on MIGC to support either its existing rates or any rates MIGC derives in the required cost and revenue study.

44. The November 2011 Order directed MIGC to file information that the Commission needs to carry out its responsibilities under NGA section 5 to ensure that rates are just and reasonable. The Commission recognizes that, consistent with *Western Resources*,¹⁹ in order to require MIGC to reduce its rates, the Commission will have the burden under NGA section 5 both to show that MIGC's current rates are unjust and unreasonable and that any new rates imposed by the Commission are just and reasonable. The November 2011 Order clearly stated a number of times that the Commission was

¹⁸ MIGC Request for Rehearing at p. 3-4 (citing *Western Resources*, 9 F.3d at 1578; *Consumers Energy*, 226 F.3d 777).

¹⁹ 9 F.3d at 1578.

acting under NGA section 5,²⁰ and expressly recognized that “MIGC does not have an NGA section 4 burden in this section 5 proceeding”²¹

45. Sections 10(a) and 14(a) of the NGA authorize the Commission to require MIGC to submit the information required by the November 2011 Order in order to carry out its responsibilities under NGA section 5.²² 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.”

46. MIGC argues that NGA sections 10 and 14 do not authorize the Commission to require a cost and revenue study of the type at issue here, because the required study goes beyond a compilation of factual data that would enable the Commission, on its own, to calculate what it believes to be a just and reasonable rate. MIGC contends that, instead, the Commission has required MIGC to perform numerous studies that involve not mere fact gathering, but require MIGC to make numerous judgment calls, including on such important issues as cost allocation and return. MIGC points out that section 154.312 ultimately requires the pipeline to submit a Statement J including a derivation of rates. MIGC contends that this would improperly require it to develop new rates that it has no independent intention of proposing.

47. Citing the Commission’s January 2011 Order in *Kinder Morgan Interstate Gas Transmission LLC*,²³ MIGC contends that the Commission’s goal in requiring it to derive

²⁰ See, e.g., November 2011 Order, 137 FERC ¶ 61,135 at P 1 (“Therefore, the Commission will initiate an investigation, pursuant to section 5 of the Natural Gas Act (NGA), to determine whether the rates currently charged by MIGC are just and reasonable and set the matter for hearing.”); *id.* P 8 (“Accordingly, the Commission will initiate an investigation to examine the justness and reasonableness of MIGC’s rates pursuant to section 5 of the NGA and set the matter for hearing.”).

²¹ *Id.* P 10.

²² 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.”

²³ 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*).

rates is to obtain the pipeline's position on what are just and reasonable rates and that this improperly shifts the burden of going forward to the pipeline. MIGC is referring to a statement in *Kinder Morgan* explaining the requirement that Kinder Morgan derive rates "will provide useful information for the section 5 proceeding by showing, among other things, how Kinder Morgan believes costs should be allocated among services to derive per-unit rates and how the necessary calculations are performed."²⁴ MIGC states that it should not be required in this section 5 proceeding to set forth its preferred method for designing rates and allocating costs as MIGC would typically submit if it were proposing a change in rates under NGA section 4.

48. MIGC's reliance on *Kinder Morgan* to contend that the Commission is requiring it set forth its preferred method of cost allocation and rate design is misplaced. MIGC fails to recognize that, while the pipeline in *Kinder Morgan* did not seek rehearing of that order, Ozark Gas Transmission L.L.C. (Ozark) did seek rehearing of the Commission's similar holding in its section 5 case, in an order issued simultaneously with *Kinder Morgan*.²⁵ In its rehearing request, Ozark stated that the rates in the cost and revenue study it had submitted in response to *Ozark 1* reflected its historical rate design and were not evidence of Ozark's preferred method for designing rates and allocating costs as Ozark would typically submit if it were proposing a change in rates under NGA section 4. The Commission granted rehearing in part. The Commission held, "In light of Ozark's statement that the rate design used in its cost and revenue study does not necessarily reflect its preferred rate design, that rate design will not serve as evidence of Ozark's preferred rate design or cost allocation."²⁶

49. Therefore, consistent with *Ozark 2*, MIGC may submit Statements I-1 through I-3 and Statements J-1 and J-2, using the cost allocation and rate design methods underlying its existing rates, without indicating whether those methods constitute its currently preferred cost allocation and rate design methodology.²⁷ Accordingly, the rate design

²⁴ *Id.* P 30.

²⁵ *Ozark Gas Transmission, L.L.C.*, 134 FERC ¶ 61,062, at P 35 (2011) (*Ozark 1*). In that order, the Commission stated, "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."

²⁶ *Ozark Gas Transmission, L.L.C.*, 134 FERC ¶ 61,193, at P 31-32 (2011) (*Ozark 2*).

²⁷ If MIGC desires to use a revised cost allocation and rate design methodology in its cost and revenue study, it may do so. But, in that event, it must explain the changes from the exiting methodology, as required by section 154.312(o)(3)(iv).

used in MIGC's cost and revenue study will not serve as evidence of MIGC's preferred rate design or cost allocation methods. Requiring MIGC to show in its cost and revenue study how its costs are currently allocated among its services and how its per-unit rates are currently designed does not transform that study into an NGA section 4 filing. To the contrary, as discussed below, such information is important factual information necessary to the conduct of this NGA section 5 proceeding, both for purposes of properly allocating the burden of proof under section 5 and for purposes of enabling the Commission, on its own, to calculate just and reasonable rates for MIGC.

50. With regard to the burden of proof, the Commission must know what cost allocation and rate design methodologies underlie the pipeline's existing rates to determine who has the burden of justifying a change in those methodologies. As the Commission explained in *Ozark 2*, when a pipeline proposes in a section 4 rate case to increase its rates because of an increased cost of service or reduced throughput but proposes to continue using its existing rate design, the pipeline has no section 4 burden to support a continuation of its presumptively just and reasonable existing rate design.²⁸ It follows that in a section 5 proceeding, parties seeking a rate reduction based only on assertions that the pipeline's cost of service has decreased or its throughput has increased, have no burden to support a continuation of the pipeline's "presumptively just and reasonable"²⁹ existing rate design. As the court has held, the NGA "allocates the burden of proving that a rate change is just and reasonable according to the source of the proposed change."³⁰ Consistent with that principle, if Trial Staff and other intervenors do not propose any change in MIGC's existing rate design, they have no burden to show that a continuation of the existing rate design is just and reasonable. If, however, Trial Staff or an intervenor proposes a change in MIGC's existing rate design, it would have the section 5 burden to demonstrate both that the existing rate design is unjust and unreasonable and that its proposed changed rate design is just and reasonable. By contrast, if MIGC seeks to modify its existing rate design, it would only have the burden to show that its proposed new rate design is just and reasonable, and it would not need to show that its existing rate design is unjust and unreasonable.

²⁸ See, e.g., *Public Service Comm'n of New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980); *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 456 (D.C. Cir. 1988) (*Tennessee*); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 514 (D.C. Cir. 1985).

²⁹ *Tennessee*, 860 F.2d at 456 (D.C. Cir. 1988).

³⁰ *East Tennessee Natural Gas Co.*, 863 F.2d 932, 937 (D.C. Cir. 1988) (*East Tennessee*). See also *Western Resources*, 9 F.3d at 1578; *Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999).

51. If Trial Staff and other intervenors present sufficient evidence that MIGC's cost of service has decreased and/or its throughput has increased in order to satisfy their section 5 burden to show that MIGC's existing rates are unreasonably high, but no party presents evidence to support a change in MIGC's rate design, the Commission will then have the burden of persuasion under NGA section 5 to justify and fix new just and reasonable rates using MIGC's existing cost allocation and rate design methods. In order to meet that burden, the Commission must, of course, know what those cost allocation and rate design methods are. Otherwise, we would not be able to calculate the new just and reasonable rates. It follows that MIGC's existing cost allocation and rate design methods are squarely within the scope of this section 5 proceeding, and NGA sections 10(a) and 14(a) authorize the Commission to require MIGC to submit a cost and revenue study showing its existing cost allocation and rate design methods.

52. The Commission recognizes that developing a cost and revenue study using its existing cost allocation and rate design methods may require MIGC to exercise some degree of judgment concerning how those methods should be applied to MIGC's current costs and billing determinants. Also, the fact MIGC's current rates are the result of a black box settlement may require MIGC to make certain assumptions concerning whether and how that settlement may have affected the cost allocation and rate design methods previously used in its Order No. 636 restructuring proceeding.³¹ However, the fact MIGC may have to exercise some degree of judgment in developing the cost and revenue study required by this order does not improperly shift the burden of proof in this section 5 proceeding to MIGC or otherwise violate NGA section 5.

53. In *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), the United States Court of Appeals for the District of Columbia Circuit rejected a contention similar to the one made here by MIGC. In *INGAA*, the Commission in Order No. 637 had directed each pipeline to file *pro forma* tariff sheets showing how it intended to comply with a regulation requiring pipelines to permit segmentation³² or to explain why its system's configuration justified curtailing segmentation rights. As in the instant proceeding, the pipelines contended that requiring them to submit these filings impermissibly shifted the burden of proof, and the Commission had in essence required pipelines to make section 4 filings to defend their current rates. The court rejected this argument, finding that the Commission had stated that it "will indeed shoulder the burden under § 5 of the NGA." *INGAA*, 285 F.3d at 38. As pertinent here, the court expressly stated that:

³¹ *MIGC, Inc.*, 63 FERC ¶ 61,008, *reh'g*, 63 FERC ¶ 61,281 (1993). However, the Commission notes that Article III of the settlement of MIGC's last rate case does generally describe the rate design used in that settlement. *MIGC*, 72 FERC at 61,238.

³² 18 C.F.R. § 284.7(d) (2011).

As to the Commission's determination **to extract information from pipelines relevant to the practical issues, we see no violation of the NGA.** The Commission has authority under § 5 to order hearings to determine whether a given pipeline is in compliance with FERC's rules, 15 U.S.C. § 717d(a), and **under § 10 and § 14 to require pipelines to submit needed information for making its § 5 decisions,** 15 U.S.C. §§ 717i & 717m(c). *Id.* (emphasis added).

54. The November 2011 Order's requirement that MIGC submit a cost and revenue study is similar to Order No. 637's directive, affirmed in *INGAA*, that pipelines file *pro forma* tariff sheets showing how they intended to comply with the new segmentation regulation or explain why they should be exempted from that requirement. Contrary to MIGC's suggestion that the Commission directive at issue in *INGAA* was limited to requiring pipelines to provide "factual information" relevant to segmentation,³³ the requirement to file *pro forma* tariff sheets went beyond a requirement simply to provide such factual information. It required each pipeline to state in its compliance proceeding how it believed shippers on its system should be permitted to segment their capacity in light of the operational requirements of their systems and to propose specific tariff language implementing the pipeline's proposed segmentation plan.³⁴ Moreover, here as in *INGAA*, the Commission has clearly recognized that it has the burden of proof in this NGA section 5 proceeding.

55. The Commission readily admits that the information that it has requested from MIGC is the type of information necessary to craft rates. Whether rates are changed pursuant to the procedures and burdens in a NGA section 4 or NGA section 5 proceeding, the same information and calculations are required to determine the rates. The pipeline's cost of service must be determined, including an appropriate return on equity, and that cost of service must be allocated among the pipeline's various services, and per unit rates

³³ MIGC states that the *INGAA* Court held that the Commission's decision to require that the pipeline make *pro forma* tariff sheets relevant to its compliance with the regulation governing segmentation was not a violation of the NGA because they were "in the nature of informational filings," Rehearing Request at 8, but argues that the November 2011 Order "requires MIGC to derive rates that MIGC believes are just and reasonable." It asserts that this goes beyond the information gathering at issue in *INGAA*. Rehearing Request at 9.

³⁴ See, e.g., *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,084, at P 12-14 (2002). The pipeline describing the pipeline's Order No. 637 compliance filing virtual pool proposal in light of its assertion that physical pathing was not operationally feasible on its system.

must be determined for each service. Therefore, the Commission has requested that MIGC provide most of the same information it would require had MIGC filed to change its rates under NGA section 4, particularly since the required information is in the hands of MIGC. In this regard, the pipeline's Form 2 does not require pipelines to provide the information necessary to allocate costs among customers or to derive per-unit rates, such as the contract demands of the shippers in each customer class, annual billing requirements, how much throughput flowed at a discount and what those discounts were.

56. The court decisions set forth by MIGC do not prohibit the Commission's actions here as suggested by MIGC. In *Public Service v. FERC*, the Commission expressly required that a pipeline file new rate schedules under NGA section 4 every three years. The Commission determined that this action was necessary because of the inadequate protection provided by NGA section 5, and concluded that good cause existed to require periodic section 4 refilings. The court found that the Commission had improperly shifted the burden of proof from the Commission to the pipeline.³⁵ However, the court found that in that proceeding "the Commission has made clear that its purpose in requiring a § 4 filing was precisely to avoid the 'insufficient protection' afforded by [NGA] § 5, see *Ozark Gas Transmission System*, 39 FERC ¶ 61,142 at 61,512, i.e., to avoid its procedural constraints." *Id.* at 491. In this case, unlike *Public Service v. FERC*, the Commission has not required MIGC to file new rate schedules under NGA section 4, and the Commission fully recognizes that it is proceeding under NGA section 5, and bears the burden to make the findings required by section 5 in order to modify MIGC's rates.

57. In *Consumers Energy*,³⁶ the Commission required a Hinshaw pipeline³⁷ performing certain NGA jurisdictional services to file, at three-year intervals, petitions "for rate approval to justify its current rate or to establish a new maximum rate." The court held that it was unclear whether the Commission intended to require the pipeline to make periodic NGA section 4 filings modifying its rates, or simply require periodic informational filings. Finding that the Commission lacked authority to order pipelines to make NGA section 4 filings, the court remanded the case to the Commission. However, the court also stated:

Should FERC wish [the Pipeline] **to make periodic informational filings, it may of course so require pursuant to § 10(a) of the NGA.** This will allow FERC to do what it insists it has been trying to do all along, and will

³⁵ *Public Service v. FERC*, 488 F.2d. at 490-92.

³⁶ 226 F.3d 777.

³⁷ A Hinshaw pipeline is exempt from the Commission's NGA jurisdiction by NGA section 1(c).

permit both sides to get what they have assured us they want. *Id.* at 781 (emphasis added).

58. Here, consistent with *Consumers Energy*, the Commission has expressly stated that it is not requiring MIGC to file revised rate schedules under NGA section 4, but is simply requiring an informational filing of the type the court held is permissible under NGA section 10(a). Accordingly, the above cases do not prohibit the Commission from requiring information in the instant proceeding as suggested by MIGC.

59. With regard to MIGC's contention that the Commission has improperly shifted the burden of producing evidence that its rates are unjust and unreasonable to MIGC, the D.C. Circuit has held that the statutory burden of proof requirement in a section 4 proceeding "relates to the burden of persuasion (or, more accurately, the risk of non-persuasion), not to the burden of production, and thus the identity of the party submitting evidence is not dispositive."³⁸ Therefore, the court held that the Commission could find that the pipeline had satisfied its burden to support a section 4 proposal even though it presented no evidence in support of that proposal, if there is other evidence in the record to show that the proposal is just and reasonable. Similarly, in this section 5 proceeding, the Commission has the burden of persuasion to show both that MIGC's existing rates are unjust, unreasonable and that any new rates the Commission imposes are just and reasonable. However, the Commission may rely on any evidence in the record to satisfy that burden, regardless of the source of that evidence.³⁹ The information the Commission

³⁸ *Complex Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999) (citing *City of Winnfield, La. v. FERC*, 744 F.2d 871 (D.C. Cir. 1984)).

³⁹ In support of its argument that the initial burden of going forward in this section 5 proceeding is with Trial Staff and other participants, MIGC cites *Transwestern Pipeline Co.*, 36 FERC ¶ 61,174, at 61,433 (1986). In that case, complainants alleged that the pipeline's different minimum bills applicable to two customers were unduly discriminatory. The Commission held that the complainants always have the burden of persuasion under NGA section 5. The Commission also held that the complainants have an initial burden of producing evidence showing that the customers are similarly situated but are being treated differently. However, the Commission held that the production of such evidence would shift the burden of production to the pipeline to justify the disparity on the basis of factual differences. These holdings reasonably required the complainants alleging undue discrimination to make a *prima facie* showing of undue discrimination, while then requiring the pipeline to produce evidence in its possession as to the reasons why it was treating the two customers differently. See *East Tennessee*, 863 F.2d at 938 (finding that the Commission may, consistent with its burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill,

(continued...)

has required MIGC to submit in its cost and revenue study is information possessed by MIGC. This includes the information concerning the cost allocation and rate design methods underlying MIGC's existing rates. MIGC, as the pipeline charging those rates, should be in a better position to know how it designed those rates than either the Commission or any other participant in this proceeding.

60. Finally, the Commission's November 2011 Order specifically exempted MIGC from submitting certain types of information in order to ensure that it avoided placing any inappropriate burden on MIGC in this proceeding:

Additionally, because MIGC does not have an NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, MIGC does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture. 137 FERC ¶ 61,135 at P 9 (footnote omitted).

61. Therefore, as discussed above, MIGC's request for rehearing of the November 2011 Order is denied. Because the Commission has denied the request for rehearing, MIGC's request for a stay pending action on its request for rehearing is denied as moot. However, in order to give MIGC more time to prepare the cost and revenue study required by this order, the Commission grants in part its request for an extension of the January 31, 2012 deadline for the cost and revenue study and requires MIGC to file the cost and revenue study by February 29, 2012. In addition, the Commission makes a corresponding change in the deadlines under the Track II timeline under which the hearing is being conducted so that the deadlines will run from the revised date the pipeline's cost and revenue study is due. Therefore, the initial decision must issue within 47 weeks of the February 29, 2012 date the cost and revenue study is due.

once a *prima facie* showing is made that the minimum bill is anticompetitive). In this case, our analysis of MIGC's 2009 and 2010 Form 2s, estimating that its return on equity for those years was 47.74 percent and 57.14 percent, makes a *prima facie* showing that its rates are unjust and unreasonable, and, as described above, our requirement that MIGC submit a cost and revenue study is intended solely to obtain evidence within its possession necessary to evaluate whether, in fact, its rates are unjust and unreasonable. The Commission will at all times have the burden of persuasion in this section 5 proceeding. The Administrative Law Judge's decision in *Vermont Yankee Nuclear Power Corp.*, 40 FERC ¶ 63,006 at 65,043, *reversed on other grounds*, 40 FERC ¶ 61,372 (1987), relied on by MIGC, made only a passing reference to the burden of production in a discussion whose primary purpose was to find that the Commission had the "ultimate burden of persuasion" under section 206 of the Federal Power Act; the Commission's order on the initial decision found that the burden of persuasion had been satisfied without addressing the issue of the burden of production (40 FERC at 62,206).

The Commission orders:

- (A) MIGC's requests for rehearing are denied.
- (B) MIGC's request for stay is denied as moot.
- (C) The cost and revenue study is due on February 29, 2012, as discussed in the body of this order.
- (D) The initial decision in this proceeding must issue within 47 weeks of the February 29, 2012 date the cost and revenue study is due.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.