

147 FERC ¶ 61,124  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

ANR Pipeline Company

Docket No. RP13-743-002

ORDER ON REHEARING AND ESTABLISHING HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued May 14, 2014)

1. On May 29, 2013, ANR Pipeline Company (ANR) requested rehearing of the “Order Accepting And Suspending Tariff Record Subject To Refund and Conditions” issued in the above-captioned docket on April 29, 2013.<sup>1</sup> As discussed below, the Commission establishes hearing procedures to determine the justness and reasonableness of ANR’s tariff filing.

**I. Background**

2. On March 28, 2013, ANR filed a tariff record<sup>2</sup> and supporting workpapers pursuant to the Deferred Transportation Cost Adjustment (DTCA)<sup>3</sup> provisions set forth in section 6.26 of the General Terms and Conditions (GT&C) of its FERC Gas Tariff.

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<sup>1</sup> *ANR Pipeline Co.*, 143 FERC ¶ 61,073 (2013).

<sup>2</sup> ANR Pipeline Company, FERC NGA Gas Tariff, [4.17 - Statement of Rates, Deferred Transportation Cost Adjustment, 3.0.0](#).

<sup>3</sup> The DTCA is a “cost tracker.” Generally, the tracking of one element in a pipeline’s cost of service to the exclusion of others is disfavored because it allows a change in one cost element without a review of changes in other cost elements as would occur in a general rate case review under the Natural Gas Act (NGA). However, the Commission has allowed narrowly-drawn tracking mechanisms for certain recurring costs, such as those for compressor fuel where costs are trued-up periodically – *see, e.g.*,

(continued...)

3. ANR's filing is based on certain tariff provisions established in a settlement of its November 1, 1993 rate case.<sup>4</sup> Specifically, these provisions have to do with contracts that include transportation service agreements under which ANR incurs costs for the transmission and compression of gas by others, as well as several "no fee" exchange agreements. Schedule I-4 of ANR's 1993 rate case filing lists those contracts whose "qualifying transportation costs" ANR may track under FERC Account No. 858. Section 6.26 of the GT&C provides that only costs arising from these contracts or from contract amendments and replacements of these contracts may be included in the DTCA.

4. The following provisions in ANR's GT&C set forth the relevant information underlying its tariff filing:

- a. Section 6.26 (a) "establishes the mechanism (Deferred Transportation Cost Adjustment) for the passthrough by Transporter of the over/under recovery of costs related to FERC Account No. 858 capacity that Transporter is authorized pursuant to Commission orders to maintain or replace, as defined in Section 6.26(a)(1), below, (Qualifying Transportation Costs). The base rates and charges applicable to all Rate Schedules shall be adjusted, where applicable, by Transporter on an annual basis to reflect an adjustment of Qualifying Transportation Costs."
- b. Section 6.26(a)(1) provides, in pertinent part, that "the term Qualifying Transportation Costs shall mean the fixed monthly charges and commodity costs which Transporter incurs for the transmission and compression of gas by others recorded in FERC Account No. 858, for service set forth on Schedule I-4 of the rate case filed by Transporter on November 1, 1993, as adjusted by compliance filing dated April 7, 1994. Qualifying Transportation Costs shall include the costs of any contract amendments and contract replacements."
- c. Section 6.26 (a)(2) states, in part, that "Transporter shall file to place into effect on each May 1, beginning with May 1, 1995, a Deferred Transportation Cost Adjustment, provided, however, that such filings shall only be required to be made by Transporter to the extent that the level of Qualifying Transportation Costs varies by greater than 10 percent (10%)

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*ANR Pipeline Co.*, 110 FERC ¶ 61,069, at P 7 n.13 (2005) – and some Account No. 858 cost trackers, such as the DTCA here with costs limited to specific contracts.

<sup>4</sup> *ANR Pipeline Co.*, 82 FERC ¶ 61,145 (1998).

from the level of such costs as of the effective date of the rates established by Transporter's settlement at Docket No. RP94-43-000 . . . ."<sup>5</sup>

5. ANR is a party to an exchange agreement (X-1 Agreement) entered into in 1970 between ANR, Great Lakes Gas Transmission Limited Partnership (Great Lakes), and TransCanada Pipelines Limited (TransCanada), all of which are now affiliated companies. The X-1 Agreement is one of the no-cost contracts which is tracked in the DTCA. The X-1 Agreement requires Great Lakes to deliver 506,500 Dth/day of TransCanada gas to ANR at Fortune Lake, Michigan, and ANR to redeliver the equivalent gas volume to Great Lakes at Farwell, Michigan. However, TransCanada decided to reduce its contracted demand on Great Lakes from 698,727 Dth/day to 100,000 Dth/day as of November 1, 2012. As a result, ANR maintained that although it considered other options, it decided to enter into a new Part 284 firm transportation service with Great Lakes for 406,500 Dth/day so that it could fulfill its firm contract obligations in Wisconsin.

6. The issue presented by ANR's filing is whether the costs from the new Part 284 firm transportation service agreement (Contract No. FT 17593) with Great Lakes may be included in the DTCA cost tracker.

7. ANR argued that the Great Lakes transportation agreement functions as a contract replacement for services provided for in the original X-1 Agreement, which was (and remains) a no-cost exchange between ANR and Great Lakes, and which is reflected in the DTCA at zero cost to the shipper parties. For the period beginning November 1, 2012 and ending April 30, 2013, ANR stated that it would owe Great Lakes approximately \$19.3 million in reservation charges and an additional \$447,349 in usage charges under the new agreement with Great Lakes, which ANR states replaces part of the function of the X-1 Agreement in light of TransCanada's flow reduction on Great Lakes. ANR included these costs in the DTCA for the period beginning May 1, 2012 and ending April 30, 2013.

8. Because of this new contract, ANR calculated a net deferred transportation cost of \$11.325 million for May 1, 2012 through April 30, 2013, as compared to the previous 12-month credit of \$7.75 million. Therefore, ANR proposed to implement a DTCA surcharge beginning May 1, 2013 through April 30, 2014 that would recover the approximately \$20 million attributable to the transportation agreement with Great Lakes.

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<sup>5</sup> The settlement established a base level for Account No. 858 trackable costs of \$40,732,091, ANR Pipeline Company, Stipulation and Agreement, Article VII, October 17, 1997.

9. Integrys Gas Group (IGG),<sup>6</sup> Wisconsin Distributor Group (WDG)<sup>7</sup> and Northern States Power Company – Minnesota and Northern States Power Company – Wisconsin (NSP) filed timely protests and comments. On April 19, 2013, ANR filed an answer to the protests and comments. Based on the prohibition against answers to protests at 18 C.F.R. § 385.213(a)(2) (2013), the Commission rejected ANR’s answer.

10. IGG, WDG, and NSP all argued that the contract between ANR and Great Lakes cannot be classified as a contract replacement under the Qualifying Transportation Cost definition in section 6.26 of ANR’s GT&C. Among other things, they argued that the Great Lakes contract is a new contract, rather than one that is replacing a contract. Moreover, IGG contended that further inquiry is necessary to determine whether the new contract between ANR and Great Lakes was entered into with operational and business considerations in mind, considering that all parties involved in the three-party exchange agreement (X-1 Agreement) are affiliates and that the new contract was entered into at maximum rates.<sup>8</sup> They also argued the Great Lakes contract is not a contract replacement because the original X-1 Agreement is still in place and was entered into as a zero cost agreement. Alternatively, WDG called for a technical conference to address the proposed DTCA rate increase.<sup>9</sup> In addition to arguing that the new Great Lakes contract does not meet the criteria for cost recovery under the DTCA, NSP requested, in the alternative, that the Commission establish a paper hearing to examine whether the costs of the Great Lakes contract are recoverable under the DTCA and were reasonable and prudent.<sup>10</sup>

11. In its order of April 29, 2013, the Commission agreed with IGG, WDG, and NSP that the Great Lakes agreement cannot validly be characterized as a contract replacement for the X-1 Agreement and does not therefore qualify for cost recovery under the DTCA. The Commission relied on the fact that the “existing X-1 Agreement continues in force today, and ANR states that it will continue to use the existing X-1 Agreement . . . .” Moreover, the Commission concluded that even if the X-1 Agreement were terminated, it

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<sup>6</sup> Integrys Gas Group consists of Michigan Gas Utilities Corp., North Shore Gas Co., and The Peoples Gas & Light and Coke Co.

<sup>7</sup> Wisconsin Distributor Group consists of City Gas Co., Madison Gas & Electric Co., Wisconsin Electric Power Co. and Wisconsin Gas LLC, Wisconsin Power & Light Co. and Wisconsin Public Service Corp.

<sup>8</sup> IGG Comments at 3-5.

<sup>9</sup> WDG Protest at 8-10.

<sup>10</sup> NSP Protest at 10-13.

is not persuaded that the Great Lakes agreement is a contract replacement because its “characteristics. . . bear no resemblance to those of the X-1 Agreement.” Specifically, the Commission referred to the fact that the X-1 Agreement is included on Schedule I-4 at “zero cost,” while the Great Lakes agreement “involves substantial new costs of approximately \$20 million for a partial year of cost recovery.” Moreover, the Great Lakes agreement is a firm transportation agreement, while the X-1 Agreement is an exchange agreement.<sup>11</sup>

12. As a result, in the April 29 Order, the Commission accepted and suspended the tariff record to be effective May 1, 2013, subject to ANR filing a revised tariff record to remove the costs associated with the new Great Lakes transportation agreement.<sup>12</sup> The Commission stated that ANR was free to pursue recovery of the new contract costs in a general NGA section 4 rate proceeding in which changes to all of ANR’s costs since its last rate case would be subject to review.

## **II. Rehearing Request**

13. The primary focus of ANR’s request for rehearing is its argument that the Commission erred by finding that its firm transportation contract with Great Lakes is not a replacement for the X-1 Agreement.<sup>13</sup> According to ANR, the reasons given by the Commission to support its conclusion that the new Great Lakes agreement (Contract No. FT 17593) is not a contract replacement cannot withstand scrutiny.<sup>14</sup> Simply put, ANR’s position is that the Great Lakes agreement functionally replaces the service previously provided by the X-1 Agreement and is therefore a contract replacement for purposes of the DTCA.

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<sup>11</sup> *ANR Pipeline Co.*, 143 FERC ¶ 61,073 at P 14.

<sup>12</sup> On June 24, 2013, the Commission issued a Letter Order accepting ANR’s filing on May 14, 2013, as amended May 29, 2013, to comply with the April 29, 2013 order.

<sup>13</sup> ANR Request for Rehearing at 8-9.

<sup>14</sup> ANR argued that the Commission erred by adopting the arguments made in the parties’ comments and protests without considering ANR’s answer in response to such arguments. *Id.* at 7-8. ANR states that, to the extent necessary, it incorporates its April 19 answer in response to the arguments made in the comments and protests filed by the parties in this proceeding. *Id.* at 4 n.5.

14. Citing Black's Law Dictionary and Oxford's English Dictionary for support, as well as a decision by the United States Court of Appeals for the Fifth Circuit,<sup>15</sup> ANR contends that the plain meaning of the phrase contract "replacement" is a contract that provides a substitute for the service that the pre-existing contract provided. ANR also relies on the "functional similarity" between the X-1 Agreement and the Great Lakes contract.<sup>16</sup>

15. As explained by ANR, prior to the reduction in TransCanada volumes that rendered the X-1 Agreement largely inoperable, ANR was able to have gas delivered from its Michigan system to Fortune Lake to meet its firm service obligations in Wisconsin through the X-1 Agreement. Now, because of TransCanada's actions, ANR can no longer rely on the X-1 Agreement to meet those requirements. ANR therefore chose to enter into the substitute Contract No. FT 17593 with Great Lakes to deliver up to the same quantity of gas from this same Michigan system to Fortune Lake to meet these same Wisconsin obligations.<sup>17</sup>

16. ANR argues that there is no requirement in either the Docket No. RP94-43-000 settlement or the tariff provision incorporating that settlement that requires that the terms of a contract replacement be the same as the contract it replaced. Because the costs under the qualifying Account No. 858 contracts could change as contemplated by the tracker, ANR believes that contract replacements could include contracts that increase the costs that ANR must pay.<sup>18</sup>

17. In ANR's view, when TransCanada significantly reduced its gas flow on Great Lakes, the new Great Lakes contract was needed as a substitute for, or replacement of, most of the service previously provided by the X-1 Agreement. As a result, ANR states that both the X-1 Agreement and the Great Lakes contract provide the same functionality,

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<sup>15</sup> ANR Request for Rehearing at 10 (citing *Nunez v. Allstate Ins. Co.*, 604 F.3d 840, 846 (5<sup>th</sup> Cir. 2010)), (quoting Webster's Third New International Dictionary (Merriam-Webster, Inc. 1993) (Replace means "to place again: restore to a former place, position, or condition" or "to take the place of: serve as a substitute for or successor of.")).

<sup>16</sup> *Id.* (citing *Fitzhugh 25 Partners v. Kiln Syndicate KLN*, 501, 261 S.W. 3d 861, 864 (Tex. App. 2008)).

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 11-12.

and the Great Lakes contract is a contract replacement for the X-1 Agreement within the generally accepted meaning of the word replacement.<sup>19</sup>

18. ANR also states that while the Great Lakes agreement may not be viewed as a complete replacement of the X-1 Agreement in the narrow sense, the contract is a complete replacement in the sense that the reliability of the X-1 Agreement no longer existed after TransCanada's actions, and had to be in the main replaced with a substitute agreement that ensured ANR the reliability of service needed to meet its firm obligations.

19. ANR also argues that two prior ANR decisions in this docket cited by the Commission in support of its finding are irrelevant to the issue of whether the Great Lakes agreement is a contract replacement for the X-1 Agreement. ANR points out that the two cases relied on by the Commission (*ANR Pipeline Co.*, 69 FERC ¶ 61,322 (1994) and *ANR Pipeline Co.*, 70 FERC ¶ 61,143 (1994)) preceded the settlement of the rate case (*ANR Pipeline Co.*, 82 FERC ¶ 61,145 (1998)), which gave rise to the DTCA tracker. In that settlement, ANR asserts that the parties agreed to, and the Commission approved, an Account No. 858 tariff provision that allows ANR to recover the costs incurred not only under its then existing Account No. 858 contracts, but also under amendments of, and replacements for, those contracts.<sup>20</sup>

20. In this regard, ANR contends that the possibility that a contract replacement might allow ANR to recover substantially more costs under its tracker than under the then-existing no-fee exchange agreement was part of that bargain.<sup>21</sup> ANR also objects that the Commission did not consider its answer to the shippers' protests because the Commission often waives the procedural rule barring such answers.

21. Finally, ANR suggests that the Commission is unlawfully attempting to require it to make a filing under section 4 of the NGA, noting that the United States Court of Appeals for the District of Columbia Circuit "has repeatedly admonished the Commission for blurring the distinction between sections 4 and 5 of the NGA." ANR bases its view on the Commission's refusal to allow it to recover the costs of the Great Lakes agreement through its Account No. 858 tracker without prejudice to its right to pursue recovery in a general section 4 rate proceeding.<sup>22</sup>

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<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.* at 18-20.

<sup>21</sup> *Id.* at 18-20.

<sup>22</sup> *Id.* at 20-21.

### III. Commission Determination

22. Among other things, ANR faults the Commission for not considering its answer to the protests below, and for suggesting that if the DTCA was not intended to track the costs at issue here, then a general NGA section 4 rate case was another avenue for recovery. The fact remains, however, that answers to protests are barred by the agency's procedural rules,<sup>23</sup> and unless that prohibition is waived by the Commission, the answer is a procedural nullity. Nevertheless, rehearing of the order may be pursued by the filing party, where it may properly make its arguments to persuade the agency to modify its decision. Here, the Commission was faced with interpreting a tariff tracker, the DCTA, to determine whether the costs it was "tracking" were appropriately to be recovered under the DCTA. In deciding in the negative, the Commission noted that ANR could still seek to recover these costs in a general NGA section 4 rate proceeding, but did not mandate that it do so.<sup>24</sup>

23. ANR has explained that it was TransCanada's sharp reduction in its capacity needs on the Great Lakes system, as evidenced by the reduction in its contract demand to 100,000 Dth/day that rendered the X-1 Agreement largely dysfunctional for DTCA purposes.

24. As ANR explained further, the Account No. 858 tracker provision was part of the package that led to a settlement in Docket No. RP94-43-000, which was approved by the Commission.<sup>25</sup> In ANR's view, the issue is what the parties intended by allowing ANR to recover the costs of contract replacements through the tracker. The Commission finds the evidence is simply inconclusive as to what the parties to the settlement intended by

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<sup>23</sup> 18 C.F.R. § 385.213(a)(2) ((2013) ("an answer may not be made to a protest . . . unless otherwise ordered . . .").

<sup>24</sup> Similarly, with respect to a fuel tracking mechanism where a pipeline sought to recover extraordinary costs that shippers argued were inappropriately included in a tracker, the Commission stated that general rate case recovery under NGA section 4 was another avenue to recovery. In affirming the Commission's rejection of the use of the tariff tracker mechanism, the court noted the alternative, where all cost of service elements could be considered in a general NGA section 4 rate case remained available. A pipeline is not being deprived of its ability to recover prudently incurred costs where recovery in a tracker is disallowed. *See Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698 (D.C. Cir. 2010).

<sup>25</sup> *ANR Pipeline Co.*, 82 FERC ¶ 61,145 (1998).

the term “contract replacement.” Moreover, this is not a pure matter of contract law, but also implicates the Commission’s policy of allowing trackers as narrowly construed exceptions for certain recurring costs.

25. That said, it is evident that the undefined term “contract replacement” in ANR’s DTCA tariff is subject to interpretation. ANR argues in its request for rehearing that the Great Lakes contract is precisely the kind of contract replacement that was contemplated by the parties to the settlement agreement – whether its costs are small, medium, or large. However, the protestors, many of which were parties to the settlement, are just as adamant that the significant cost increase effectuated by the Great Lakes contract does not qualify as a contract replacement.

26. As discussed above, in its April 29, 2013 order, the Commission agreed with the protestors that the Great Lakes contract cannot be validly characterized as a contract replacement because it was not terminated, its characteristics differ so much from those of the X-1 Agreement, and the Commission defined the scope of ANR’s DTCA provision very narrowly.<sup>26</sup> In its request for rehearing, however, ANR contends that the Commission erred in relying on such arguments.<sup>27</sup> The Commission also is concerned that the genesis of the cost increase, and its resolution, arise from the contracting actions of three affiliated entities among themselves.

27. On reconsideration of all the factors discussed above, and the arguments made by ANR on rehearing, the Commission finds that there is sufficient ambiguity as to what the parties reasonably agreed to in the settlement, particularly with regard to the term “contract replacement,” and the circumstances surrounding the contract replacement, to send this case to hearing before an Administrative Law Judge. The Commission acknowledges the ANR decisions cited in the order below are not dispositive insofar as it can be shown that the parties agreed to track costs of replacement contracts in the DTCA. The question remains, however, what may be considered as appropriate replacement contract costs under the DTCA. The hearing should address all issues raised by the filing, including the meaning of the term “contract replacement” in the GT&C of ANR’s tariff, as well as whether the Great Lakes contract is consistent with that meaning, given the nature and circumstances of the contract and the Commission’s long-standing policy to narrowly construe cost trackers. The circumstances giving rise to the need for the new contract may also be examined, as well as what other remedies were available and

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<sup>26</sup> *ANR Pipeline Co.*, 143 FERC at PP 14-16.

<sup>27</sup> ANR Request for Rehearing at 8-20.

considered by ANR to address the impact of TransCanada's decision to reduce its demand charges on ANR and to reduce its flow on Great Lakes.

28. In sum, it is ANR's burden to demonstrate that its proposal to track the costs of the Great Lakes contract through its Account No. 858 is just and reasonable. In this regard, when the Commission granted rehearing and permitted ANR to implement its Account No. 858 tracker for upstream capacity at an earlier stage in this proceeding, it stated, "In granting rehearing, we emphasize that our decision here does not relieve ANR of the burden of demonstrating that any costs it seeks to flow through to its customers in this manner . . . are reasonable and were prudently incurred."<sup>28</sup>

29. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>29</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.<sup>30</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority of the Natural Gas Act, particularly sections 4, 5, 8, 9, and 15 thereof, and the Commission's rules and regulations, a public hearing shall be held in the captioned docket concerning the lawfulness of ANR's proposed tariff filing.

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<sup>28</sup> *ANR Pipeline Co.*, 69 FERC at 62,226.

<sup>29</sup> 18 C.F.R. § 385.603 (2013).

<sup>30</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

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

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.