

154 FERC ¶ 61,273  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Tuscarora Gas Transmission Company

Docket No. RP16-299-001

(Issued March 31, 2016)

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

**I. Background**

1. In a January 21, 2016 order, the Commission instituted an investigation, pursuant to section 5 of the Natural Gas Act (NGA)<sup>1</sup> to determine whether the rates currently charged by Tuscarora Gas Transmission Company (Tuscarora) are just and reasonable.<sup>2</sup> As here relevant, that order set the matter for hearing and directed Tuscarora to file a cost and revenue study within 75 days, based on actual data for the latest 12-month period, including adjustments for known and measurable changes during that period.<sup>3</sup> The order also permitted Tuscarora to submit a separate cost and revenue study reflecting adjustments for changes that Tuscarora projects will undergo during an abbreviated six-month adjustment period following the 12-month period used in the cost and revenue study.

2. On February 22, 2016, Tuscarora sought rehearing of the Commission's directive to file a cost and revenue study. Tuscarora claims the Commission exceeded its authority when it ordered Tuscarora to file a cost and revenue study and derive rates therein, which Tuscarora characterizes as the functional equivalent of an NGA section 4 rate filing. Tuscarora also claims that the Commission improperly shifted the burdens of production

---

<sup>1</sup> 15 U.S.C. § 717(d).

<sup>2</sup> *Tuscarora Gas Transmission Company*, 154 FERC ¶ 61,030 (2016) (January 2016 Order).

<sup>3</sup> *Id.*

and proof by directing the cost and revenue study, and acted arbitrarily and capriciously by departing from a policy of permitting adjustments or projections that may be attributable to a test period. For the reasons discussed below, we deny Tuscarora's request for rehearing.

## II. Commission Determination

### A. Legal Authority to Require Cost and Revenue Study

3. Tuscarora's request for rehearing primarily focuses on the January 2016 Order's directive that the pipeline file a cost and revenue study, including all schedules required for a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with the exception of Statement P. Tuscarora contends that this requirement exceeds the Commission's authority under the NGA. Tuscarora's arguments in support of this contention are similar to those that have been addressed and rejected by the Commission in prior orders.<sup>4</sup>

4. Requiring Tuscarora to submit the information requested in the January 2016 Order does not improperly transform this section 5 proceeding into a section 4 proceeding, as Tuscarora contends. The January 2016 Order did not require Tuscarora to file any change in its existing rate schedules as is contemplated by section 4. Nor did the January 2016 Order place any section 4 burden on Tuscarora to support its existing rates in the required cost and revenue study.<sup>5</sup>

5. Rather, the January 2016 Order directed the submission of a cost and revenue study to enable the Commission to carry out its responsibilities under NGA section 5 to ensure that rates are just and reasonable. As the Commission has explained, the schedules and information required by section 154.312 are necessary to perform an

---

<sup>4</sup> See, e.g., *Bear Creek Storage Co. L.L.C.*, 138 FERC ¶ 61,019 (2012) (*Bear Creek*); *MIGC LLC*, 138 FERC ¶ 61,011 (2012) (*MIGC*); *Ozark Gas Transmission, LLC*, 134 FERC ¶ 61,062 (2011) (*Ozark*), *reh'g granted in part*, 134 FERC ¶ 61,193 (*Ozark II*); *Kinder Morgan Interstate Gas Transmission LLC*, 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*); *Natural Gas Pipeline Co. of America LLC*, 130 FERC ¶ 61,133 (2010) (*Natural*).

<sup>5</sup> January 2016 Order, 154 FERC ¶ 61,030 at P 9 ("Tuscarora does not have an NGA section 4 burden in this section 5 proceeding"). See also *Natural*, 130 FERC ¶ 61,133 at PP 14-15; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 22; *Bear Creek*, 138 FERC ¶ 61,019 at PP 28-29.

appropriately thorough evaluation of Tuscarora's rates.<sup>6</sup> With respect to the requirement that Tuscarora file Statements J-1 and J-2 summarizing its billing determinants and showing the derivation of each rate component of each rate, the Commission has explained that, in a section 5 proceeding, the value of such information "is not the actual per-units rates" themselves, but the "formulas used to develop" the rates.<sup>7</sup> "[B]y illustrating how [Tuscarora's] rates are currently designed, the Statements J-1 and J-2 will enable all participants to determine whether to challenge [Tuscarora's] existing rate design, or seek lower rates solely by challenging the justness and reasonableness of the cost of service or billing determinants underlying [Tuscarora's] existing rates."<sup>8</sup>

6. In order to require Tuscarora to reduce its rates, the Commission will have the burden under NGA section 5 to show that its current rates are unjust and unreasonable and that any new rates imposed by the Commission are just and reasonable. For this reason, the cases relied upon by Tuscarora – *Public Service Comm'n of New York v. FERC*, and *Consumers Energy Co. v. FERC*, 226 F.3d 777 (6th Cir. 2000) – are inapposite.<sup>9</sup> The Commission is simply requiring an informational filing of the type the *Consumers Energy* court found permissible under NGA section 10(a).<sup>10</sup> Consequently, it is inaccurate to conclude the Commission required Tuscarora to make a section 4 filing.

7. Tuscarora takes issue with the Commission's statement that sections 10(a) and 14(a) of the NGA authorize the Commission to require Tuscarora to submit the information required by the January 2016 Order to carry out its responsibility under NGA

---

<sup>6</sup> See, e.g., *MIGC*, 138 FERC ¶ 61,011 at PP 29-40.

<sup>7</sup> *Id.* P 37.

<sup>8</sup> *Id.* P 38.

<sup>9</sup> Request for Rehearing at 7-8. See *Public Serv. Comm'n*, 866 F.3d at 490 ("FERC's attempted relocation of the expected dispute from § 5 to § 4 would shift the burden of proof from the Commission to the company"); *Consumers Energy*, 226 F.3d at 781 (finding that the Commission exceeded its section 4 authority by requiring "Consumers ... [to] file a petition for rate approval to justify its current rate or to establish a new maximum rate").

<sup>10</sup> *Consumers Energy*, 226 at 777 ("Should FERC wish [the pipeline] to make periodic informational filings, it may of course so require pursuant to § 10a of the NGA.") See also *Natural*, 130 FERC ¶ 61,133 at PP 22-24; *Bear Creek*, 138 FERC ¶ 61,019 at PP 44-46; *Kinder Morgan*, 134 FERC ¶ 61,061 at PP 33-35; *MIGC*, 138 FERC ¶ 61,011 at PP 56-58.

section 5 to ensure that the pipeline's rates are just and reasonable.<sup>11</sup> Tuscarora argues that the required study goes beyond a compilation of factual data, such as a requirement to file a full section 154.312 cost and revenue study which includes a derivation of rates.<sup>12</sup> Tuscarora argues these requirements necessitate Tuscarora to “make multiple subjective decisions regarding composition of rate base, cost allocation, rate design, and claimed return on equity ... and then to derive rates based upon those decisions”<sup>13</sup> which are the types of determinations typically only made pursuant to an NGA section 4 proceeding.

8. The Commission finds this argument to be meritless.<sup>14</sup> By requiring Tuscarora to submit a full section 154.312 cost and revenue study, including deriving per unit rates, the Commission is not requiring Tuscarora to present its position as to the just and reasonable rates that the Commission should establish in this proceeding. Rather, the Commission is requiring Tuscarora to provide factual information within its possession necessary for an evaluation whether Tuscarora’s existing rates are just and reasonable, and, if not, how those rates should be modified. For example, the information required by § 154.312(b)(1) and (2) concerning accumulated deferred income taxes and regulatory assets and liabilities is accounting information which Tuscarora is required to reflect in its books pursuant to the Uniform System of Accounts in Part 201 of the Commission’s regulations. Without that information, it would not be possible to calculate Tuscarora’s rate base. While section 154.312(f) requires the pipeline to show in Statement F-1 “the percentage rate of return claimed and the general reasons therefore,” we will permit Tuscarora simply to use an illustrative return on equity in that statement, without taking any position as to whether that return is just and reasonable.

9. In addition, as the Commission clarified in *Ozark Gas Transmission, L.L.C. (Ozark II)*,<sup>15</sup> the Commission is not requiring Tuscarora to set forth its preferred cost allocation and rate design methodology in Statements I and J required by §§ 154.312(o)

---

<sup>11</sup> January 2016 Order, 154 FERC ¶ 61,030 at n.7. See *Natural*, 130 FERC ¶ 61,133 at PP 16-24; *Bear Creek*, 138 FERC ¶ 61,019 at PP 32-33, 41-46; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 24.

<sup>12</sup> Request for Rehearing at 9-11.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> See *Natural*, 130 FERC ¶ 61,133 at PP 16-24; *Bear Creek*, 138 FERC ¶ 61,019 at PP 32-33, 41-46; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 24.

<sup>15</sup> 134 FERC ¶ 61,193 at P 32.

and (p). Rather, Tuscarora may complete those statements using the cost allocation and rate design methods underlying its existing rates, without taking any position as to its currently preferred cost allocation and rate design methodology.<sup>16</sup> Requiring Tuscarora 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 provides important factual information necessary to the conduct of this NGA section 5 proceeding. Such information is required both for purposes of properly allocating the burden of proof under NGA section 5 and for purposes of enabling the Commission, on its own, to calculate just and reasonable rates for Tuscarora.

10. 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. For example, as explained in prior cases, in a section 5 proceeding, parties seeking a rate reduction because the pipeline's cost of service has decreased or its throughput has increased, have no burden to support a continuation of the pipeline's existing rate design.<sup>17</sup> The NGA "allocates the burden of proving that a rate change is just and reasonable according to the source of the proposed change."<sup>18</sup> Thus, if Trial Staff and other intervenors do not propose any change in Tuscarora's existing rate design, they have no burden to show that a continuation of the existing rate design is just and reasonable. But if Trial Staff or an intervenor proposes a change in Tuscarora'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 Tuscarora seeks to modify its existing rate design in any subsequent evidence filed in this case, it would only have the burden to show that its proposed new rate design is just and reasonable.

11. Similarly, if a party presents sufficient evidence that Tuscarora's cost of service has decreased and/or its throughput has increased in order to satisfy its section 5 burden to show that Tuscarora's existing rates are unreasonably high, but no party presents evidence to support a change in Tuscarora's rate design, the Commission will then have the burden of persuasion under NGA section 5 to justify and fix new just and reasonable

---

<sup>16</sup> If Tuscarora 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 existing methodology, as required by section 154.312(o)(3)(iv).

<sup>17</sup> See *Bear Creek*, 138 FERC ¶ 61,019 at P 36; *MIGC*, 138 FERC ¶ 61,011 at P 50; *Ozark II*, 134 FERC ¶ 61,193 at P 32.

<sup>18</sup> *East Tennessee Natural Gas Co.*, 863 F.2d 932, 937 (D.C. Cir. 1988).

rates using Tuscarora'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. Thus, Tuscarora'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 Tuscarora to submit a cost and revenue study showing its existing cost allocation and rate design methods.

12. The Commission recognizes that developing a cost and revenue study using its existing cost allocation and rate design methods may require Tuscarora to exercise some degree of judgment concerning how those methods should be applied to Tuscarora's current costs and billing determinants. However, the fact Tuscarora 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 Tuscarora or otherwise violate NGA section 5.

13. The United States Court of Appeals for the District of Columbia Circuit rejected a contention similar to one made here by Tuscarora in *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (2002)<sup>19</sup> and upheld a Commission order directing pipelines to file *pro forma* tariff sheets that went beyond the simple provisions of factual information. Rather, the order required each pipeline to state its opinion as to whether and how shippers on their system should be permitted to segment their capacity and to provide the specific tariff language implementing such plans. The pipelines asserted that requiring them to submit these filings impermissibly shifted the burden of proof and the Commission had effectively required them to make section 4 filings to defend their current rates. The court observed that the Commission would "shoulder the burden under § 5 of the NGA" with respect to any rate change and found "no violation of the NGA" with respect to "the Commission's determination to extract information from the pipelines relevant to the practical issues."<sup>20</sup>

14. The information sought here is similar to data used in an NGA section 4 proceeding because the same data and calculations are needed to change rates regardless of whether they are changed pursuant to NGA section 4 or section 5.<sup>21</sup> Consequently,

---

<sup>19</sup> *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*).

<sup>20</sup> *Id.* See also *MIGC*, 138 FERC ¶ 61,011 at PP 53-54 (discussing *INGAA*); *Bear Creek*, 138 FERC ¶ 61,011 at PP 39-40 (same); *Natural*, 130 FERC ¶ 61,133 at P 17; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 25 (same).

<sup>21</sup> See *Natural*, 130 FERC ¶ 61,133 at P 20; *Bear Creek*, 138 FERC ¶ 61,011 at P 41.

this information solidly fits within the scope of this proceeding and Tuscarora, who possesses this data, has been requested to provide it accordingly.

15. With regard to Tuscarora's contention that the Commission has improperly shifted the burden of production and proof by requiring Tuscarora to file a cost and revenue study and derive rates, the January 2016 Order specifically stated that Tuscarora does not have an NGA section 4 burden in this section 5 proceeding.<sup>22</sup> In fact, in an attempt to avoid placing inappropriate burden on Tuscarora, the January 2016 Order exempted Tuscarora from submitting certain types of information.<sup>23</sup>

16. The D.C. Circuit has held that the statutory burden of proof requirement in a section 4 proceeding "relates to the burden of persuasion ... not to the burden of production, and thus the identity of the party submitting evidence is not dispositive."<sup>24</sup> Similarly, in this section 5 proceeding, the Commission has the burden of persuasion to show that Tuscarora's existing rates are unjust or unreasonable and may rely on any evidence in the record to satisfy that burden, regardless of the source of that evidence. The information required by the January 2016 Order - a cost and revenue study - includes information possessed by Tuscarora and encompasses cost allocation and rate design methods underlying Tuscarora's existing rates. Tuscarora is in the best position to demonstrate how it designed its rates.<sup>25</sup> This information will assist the Commission in carrying out its responsibilities under NGA section 5. Thus, we do not find the burden of proof and production has shifted.<sup>26</sup>

## **B. Clarification**

17. Lastly, Tuscarora requests clarification regarding the January 2016 Order's limitations on the cost and revenue data adjustments. The January 2016 Order permitted

---

<sup>22</sup> January 2016 Order, 154 FERC ¶ 61,030 at P 9.

<sup>23</sup> The January 2016 Order exempted Tuscarora from filing Schedule P and nine months of post-base period adjustment data required by section 154.303(a). *Id.* P 9.

<sup>24</sup> *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)).

<sup>25</sup> See *Natural*, 130 FERC ¶ 61,133 at P 15; *Bear Creek*, 138 FERC ¶ 61,019 at P 47.

<sup>26</sup> See *Bear Creek*, 138 FERC ¶ 61,019 at P 47; *MIGC*, 138 FERC ¶ 61,011 at PP 59-60; *Kinder Morgan*, 134 FERC ¶ 61,061 at PP 31-32.

Tuscarora to file a separate cost and revenue study that reflects adjustments for changes it projects will occur during an abbreviated six-month adjustment period following the 12-month base period used for required cost and revenue study. Tuscarora states that the abbreviated six month adjustment period will end on June 30, 2016, and it requests clarification that the January 2016 Order does not prohibit it providing cost and revenue data or adjustments for changes that occur after that date where it can be demonstrated that such data is necessary to correctly reflect its rates.

18. The Commission established the six-month cut-off date for updated cost and revenue data so that the participants would not be “faced with a constantly moving target and the section 5 proceeding would never end.”<sup>27</sup> However, as the Commission clarified in *Ozark II*, the interest in such a cut-off date can be overridden in unusual circumstances. The Commission permits use of post-test period data in establishing pipeline rates “where the post-test period data show that projections based on test period date will be seriously in error.”<sup>28</sup> Accordingly, the Commission clarifies that nothing in the January 2016 Order precludes Tuscarora from providing additional cost and revenue data or adjustments for changes that occur after June 30, 2016, where it can be demonstrated that projections based solely on data for the period before June 30, 2016 will be seriously in error and where the presiding administrative law judge modifies the procedural schedule in a manner that adequately accounts for use and consideration of such data.

19. We dismiss all other claims raised as having been sufficiently addressed by the January 2016 Order.

The Commission orders:

The Commission hereby denies Tuscarora’s request for rehearing and grants clarification, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>27</sup> *Ozark II*, 134 FERC ¶ 61,193 at P 26.

<sup>28</sup> *Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,265, at 62,022 (1999).