126 FERC ¶ 61,317
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Portland Natural Gas Transmission System — Docket Nos. RP09-2-000 and RP09-2-001

ORDER ON COMPLIANCE AND
CLARIFICATION OR, ALTERNATIVELY, REHEARING

(Issued March 31, 2009)

1. On November 18, 2008, as amended on November 20, 2008, Portland Natural Gas Transmission System (Portland) filed additional information and explanations in compliance with the Commission's October 29, 2008 Order[1] which accepted and suspended, subject to refund and conditions, Portland's October 1, 2008 tariff filing in this docket. In that filing, which was protested, Portland proposed to implement an in-kind fuel surcharge effective October 1, 2008, to recover fuel Portland claimed it would be required to provide once Maritimes & Northeast Pipeline, L.L.C.'s (Maritimes) Phase IV Expansion Project goes into service. On December 8, 2008, Maritimes, DTE Energy Trading, Inc. (DTE Energy), and the PNGTS Shippers' Group (Shippers Group) each filed Reply Comments in response to Portland's compliance filing, as amended. Portland and Maritimes also filed requests for clarification, or, alternatively, rehearing of the Commission's October 29, 2008 Order. On December 3, 2008, the Shippers Group filed an answer to Portland's clarification request.

2. As discussed below, the Commission denies clarification and rehearing and, upon review of the information provided in Portland's compliance filing and in the comments in reply, the Commission finds that Maritimes is not permitted to charge Portland or its shippers for fuel attributable to Maritimes' Phase IV Expansion Project. Accordingly, the

[1] *Portland Natural Gas Transmission System*, 125 FERC ¶ 61,110 (2008) (October 29, 2008 Order).

Commission rejects Portland's October 1, 2008 filing and directs Maritimes to refund, with interest, any such fuel charges collected from Portland or its customers.

I. Background

3. Maritimes and Portland are two separate interstate pipeline systems in New England that join together at Westbrook, Maine. From that point, they each own undivided interests in jointly-owned facilities (Joint Mainline Facilities), which consists of about 101 miles of 30-inch diameter pipeline to an interconnection with Tennessee Gas Pipeline Company (Tennessee) at Dracut, Massachusetts. The Joint Mainline Facilities are operated by a third-party pursuant to an Operating Agreement and, along with a Joint Ownership Agreement and an Engineering and Construction Management Agreement (together, the Definitive Agreements),[2] and various settlements, make up the contractual arrangements between Maritimes and Portland. Maritimes' Phase IV Expansion Project consists of the addition of compression, metering, and pipeline looping facilities that increased the mainline capacity of the Maritimes' system and the Joint Mainline Facilities. Maritimes received a certificate of public convenience and necessity for the Phase IV Expansion Project by Commission Order issued February 21, 2007,[3] and the Project facilities recently went into service on January 15, 2009.

4. In its October 1, 2008 Filing, Portland stated that, although it was not participating in the Phase IV Expansion Project, the Project adds compressor stations to the Joint Facilities owned by both Portland and Maritimes and, pursuant to section 2.14(a) and (c) of the Operating Agreement, Portland is obligated to furnish gas in-kind for compressor fuel usage in proportion to its share of the total gas transported through the Joint Facilities.[4] Portland stated that it previously had no need for a fuel charge in its tariff

[2] The Definitive Agreements were approved by the Commission on November 4, 1997 in *Maritimes & Northeast Pipeline, L.L.C., et al.*, 81 FERC ¶ 61,166, at pp. 61,724-25 (1997). Further amendments were made in 2002 and 2006, as more fully described in the body of this order.

[3] *Maritimes & Northeast Pipeline, L.L.C., et al.*, 118 FERC ¶ 61,137 (2007) (Phase IV Certificate Order), *order denying reh'g*, 120 FERC ¶ 61,055 (2007).

[4] Section 2.14(a) of the Operating Agreement provides that each owner is obligated to furnish gas for losses in proportion to its share of the total gas transported through the mainline and each other portion on that day and section 2.14 (c) provides that the provisions of section 2.14(a) also applies to gas used as fuel for the operation of the Joint Facilities.

because there had been no compressor stations located on the Joint Facilities. However, it asserted, once it is required to provide fuel as a result of the foregoing provisions, it is critical that it have in place provisions for the recovery of fuel.

5. Three parties filed protests[5] to the filing raising several issues, including whether Portland provided sufficient information regarding its proposed filing and whether allocation of fuel to Portland's shippers as a result of Maritimes' Phase IV Expansion is consistent with the Commission's no subsidization policy. Under the no subsidization policy regarding pricing and charges associated with pipeline expansion projects,[6] they contended that Portland is prohibited from assessing expansion fuel costs on existing shippers who receive no benefit from that expansion and, in this case, are negatively impacted by the expansion. They further argued that neither the Phase IV Certificate Orders nor the Operating Agreement acknowledge the potential for Portland's shippers to be assessed fuel charges for a capacity expansion that provides them no benefit.[7] The parties requested that the Commission reject the proposed fuel charge or, alternatively,

[5] These parties are: (1) National Grid Gas Delivery Companies (National Grid) which includes Brooklyn Union Gas Company, KeySpan Gas East Corporation, Boston Gas Company, Colonial Gas Company, Essex Gas Company, EnergyNorth Natural Gas, Inc., Niagara Mohawk Power Corporation, and the Narragansett Electric Company; (2) The Shippers Group which includes Bay State Gas Company, Northern Utilities, Inc., DTE Energy Trading Inc., H.Q. Energy Services (U.S.) Inc., New Page Corporation and Wausau Papers of New Hampshire, Inc.; and (3) DTE Energy Trading, Inc. (DTE Energy).

[6] They asserted that the Phase IV Certificate Order did not authorize the allocation by Maritimes of the Phase IV Expansion fuel requirements to a third-party pipeline, Portland, or the recovery of that fuel subsidy from Portland's shippers. *Citing* Certificate Order at P 27 (2007). They also noted that Maritimes'existing shippers' net benefits from the project were estimated to be approximately $37 million per year, stating that, even with the additional fuel costs, the Phase IV Expansion project remains financially viable without adverse rate impacts or subsidies from Maritimes' existing shippers. They argued that the Commission could not have meant that Portland's shippers should subsidize Maritimes' Phase IV Expansion shippers.

[7] The parties stated that, contrary to Portland's statement, shippers were not aware of the potential for a fuel reimbursement charge to be placed into effect on October 1, 2008, or that Portland intended to impose such a charge as a result of Maritimes' Phase IV Expansion project at any time. They contended that Portland shippers relied on Commission precedent and the Phase IV Certificate Order and concluded that there would be no such fuel charge.

suspend the filing for five months and set it for hearing. Finally, the parties raised questions as to whether usage charges will be assessed on the fuel charge and assessing charges on forward haul shippers.

6. In the October 29, 2008 Order, the Commission stated that the filing raised significant issues as to whether Portland's proposed fuel charge is just and reasonable. Because the Commission did not have enough information to resolve those issues, the Commission conditionally accepted Portland's filing and suspended its effectiveness until the earlier of five months or a date set by subsequent Commission order, subject to refund and further review. The Commission stated that Portland's filing raised issues including (a) whether the Operating Agreement requires Portland to compensate Maritimes' for fuel use on the Joint Facilities incurred as a result of an expansion project in which Portland did not participate and (b) if so, whether Portland should be allowed to flow those costs through to its shippers. Therefore, to ensure that Portland's proposed tariff changes comply with Commission regulations and precedent and do not violate shippers' rights, the Commission required Portland to file additional information and explanations that address these issues and all other issues raised by the protests. The Commission also directed Portland to file a copy of the up-to-date revised Definitive Agreements and permitted the parties to file reply comments.

II. Clarification and Rehearing

A. Portland's Clarification/Rehearing Request

7. In its request for clarification, Portland claims that it is not clear as to whether the Commission will make the revised tariff sheets effective earlier than March 31, 2009, if it concludes that such pass-through is permissible and if Portland begins to incur fuel charges prior to March 31, 2009. Therefore, Portland asks the Commission to clarify that the tariff sheets it filed in this proceeding will be made effective on or before the date that Portland begins to incur fuel charges pursuant to the Definitive Agreements. Portland alternatively seeks rehearing of the October 29, 2008 Order on the basis that the Commission's reasons for imposing a five-month suspension were impermissibly generic,[8] that the Commission did not provide adequate explanation to meet the standard of reasoned decision making,[9] and that the Commission's justification for the five-month

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[8] *See* October 29, 2008 Order, 125 FERC ¶ 61,110 at P 22 (the Commission found the five-month suspension to be appropriate because "preliminary study led the Commission to believe that the filing may be unjust, unreasonable or that it may be inconsistent with other statutory standards").

[9] Portland Request at 6 (*citing Northeast Energy Assoc. v. FERC*, 158 F.3d. 150, 154 (1998) (Commission must always give reasons for suspending proposed rate

(continued…)

suspension, in the circumstances of this case, will lead to harsh and inequitable results because it will effectively deprive Portland of the opportunity to recover direct costs incurred pursuant to the Definitive Agreements.

8. Shippers Group argues that Portland's request should be denied because the October 29, 2008 Order simply provided notice that the Commission might adjust the suspension period after consideration of the supplemental information and reply comments and depending upon the Commission's resolution of whether the Definitive Agreements require Portland to compensate Maritimes for fuel use and, if so, whether Portland should be allowed to flow those costs through to its shippers.

9. The Commission declines to grant the requested clarification and denies the alternate request for rehearing. Because we reject the October 1, 2008 filing and find that Maritimes may not charge Portland or its customers for fuel, and Maritimes must refund any such fuel charges with interest, Portland's clarification and rehearing requests are moot.

B. Maritimes' Clarification/Rehearing Request

10. Maritimes requests that the Commission clarify that the interpretation or meaning of the Operating Agreement with regard to the allocation of compressor fuel is not at issue in this case and that the Commission does not intend to interpret the Joint Owners' respective rights and obligations under the Operating Agreement in this proceeding. We decline to grant the requested clarification.

11. The Commission declines to grant the requested clarification because in issuing the October 29, 2008 Order, the Commission clearly intended that issues raised in the protests, including the interpretation of the Operating Agreement, should be addressed in Portland's compliance filing.[10]

12. In its alternative rehearing request, Maritimes asserts that the matter of the interpretation of the Operating Agreement is not properly before the Commission in this proceeding. Maritimes argues that the Commission's decision to inquire into the meaning of a contractual provision when no party to the contract disputes the provision is unreasonable and, therefore, arbitrary and capricious. Further, Maritimes argues that the

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changes); *Connecticut Light & Power*, 627 F.2d 467, 471 (D.C. Cir. 1980)) (if the Commission has standards or a rationale by which it chooses a period of suspension ranging from one day to five months, then they must be articulated, so that their reasonableness and application to the individual case can be known).

[10] *See* 125 FERC ¶ 61,110 at P 16 and 20.

Commission's decision to inquire into the respective rights and obligations of the joint owners under the Operating Agreement, notwithstanding the fact that the Commission has already approved the Operating Agreement, and the joint owners have relied on such approval, is also unreasonable and, therefore, arbitrary and capricious. Maritimes states that the Commission has not historically involved itself in interpreting contract provisions when no party to the contract disputes its terms and the Commission has not explained why it would do so in this case. Maritime states that, in any event, the parties have no disagreement concerning the provisions governing the allocation of fuel costs.

13. Maritimes argues that the Commission does not need to inquire beyond the joint owners' mutual agreement on the interpretation of the Operating Agreement regarding fuel cost responsibility. Specifically, Maritimes points to Portland's statement in the October 1, 2008 filing that, even though it did not participate in the Phase IV Expansion, the Operating Agreement obligates Portland to furnish in-kind gas for actual compressor fuel usage in proportion to its share of total gas transported through the Joint Facilities.[11] Maritimes contends that the fact that Portland made the filing demonstrates its belief that the Operating Agreement allocates responsibility to Portland for a portion of the compressor fuel use on the Joint Facilities following the Phase IV in-service date. Otherwise, Maritimes argues, the tariff filing would serve no purpose and would not have been filed. Thus, Maritimes contends the intent of the parties to the Operating Agreement with respect to the language at issue has been reaffirmed on the record in this proceeding, and any inquiry regarding the intent of the language can and should stop there.[12]

14. Maritimes argues that any interpretation of the Operating Agreement in the instant proceeding that would contradict the joint owners' mutual understanding and/or that would result in allocating additional costs for compressor fuel use on the Joint Facilities to Maritimes and its shippers would be tantamount to changing Maritimes' rates in another pipeline's proceeding. This, Maritimes argues, would violate section 5 of the NGA.[13] Therefore, Maritimes argues that, because an adverse interpretation of these

[11] Maritimes Request at 9 (*citing* Tariff Filing at 2).

[12] Maritimes Request at 9 (*citing Southern California Edison Co. v. FERC,* 502 F.3d 176, 181 (2007) (Commission may not ignore the plain language of a contract but instead must "give effect to the unambiguously expressed intent of the parties."); *see also New York Independent System Operator, Inc.*, 118 FERC ¶ 61,216 (2007) (stating Commission precedent is to look at the contract itself first and to admit extrinsic evidence to determine the intent of the parties only if the intent is not clear from the contract language)).

[13] Maritimes Request at 2 and 3 (*citing Consolidated Edison Co. of New York Inc., v. FERC,* 165 F.3d 992, 998 (D.C. Cir. 1999)*; Paiute Pipeline Co., 65 FERC* ¶ 61,009,

(continued…)

agreements would potentially shift costs to, and affect the rates of, Maritimes' shippers, the Commission would have to conduct any inquiry into the meaning of the agreements, if at all, in a proceeding directly involving Maritimes and directly involving a proposal under section 5 of the NGA to modify Maritimes' rates.[14] According to Maritimes, the only issue in the instant proceeding is whether Portland has adequately supported its filing and whether the costs that Portland seeks to recover have been prudently incurred.[15] This proceeding, it argues, does not involve the costs associated with operating the Joint Facilities that are allocated to Maritimes and its shippers. Therefore, Maritimes reasons that, as a matter of law, the Commission cannot interpret the Operating Agreement in this proceeding in a manner that will shift costs to Maritimes and its shippers. Maritimes argues that, if the Commission intends to interpret the agreements in some manner that may increase the rates charged to shippers on Maritimes, the Commission must proceed in interpreting the agreements in a procedurally appropriate manner by providing notice in the docket where the agreements were originally authorized and apply the proper legal standard under section 5 of the NGA.

15. Moreover, Maritimes states that the joint owners' mutual understanding that compressor fuel costs were to be shared following the in-service date of Phase IV was the basis for a key portion of the 2006 Settlement Agreement. According to Maritimes, pursuant to the 2006 Settlement Agreement, upon the in-service date of Phase IV, the downstream unit at the new Westbrook, Maine compressor station will become part of the Joint Facilities and will be owned in joint undivided interests by the joint owners. Maritimes states that sections 9 and 10 of the 2006 Settlement Agreement, like section 2.14 of the Operating Agreement, discuss the allocation of costs associated with compressor fuel use on the Joint Facilities and make it clear that Portland will be allocated a portion of compressor fuel costs related to all Phase IV compression on the Joint Facilities.

16. Further, Maritimes contends that the answer to whether the Operating Agreement requires Portland to compensate Maritimes for fuel use on the Joint Facilities was settled over a decade ago when the joint owners negotiated and agreed to the Definitive Agreements and resolved the manner in which they would allocate the costs associated with the construction and operation of expansion facilities, including costs associated

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at 61,191 (1993); *Williams Field Services Group Inc. v. El Paso Natural Gas Co.*, 95 FERC ¶ 61,076, at 61,298 (2001); and *Natural Gas Pipeline Company of America*, 90 FERC ¶ 61,033, at 61,167 (2000)).

[14] Maritimes Request at 8.

[15] Maritimes Request at 7-8.

with compressor fuel use following any expansion involving new compression. Specifically, Maritimes points out that the primary reason the Joint Facilities were constructed is because their individual proposed routes for their separate projects closely paralleled each other. In their respective preliminary determination proceedings, the Commission urged them to study the feasibility of constructing a single pipeline or constructing two separate pipelines sharing the same right-of-way.[16] Following these preliminary determinations, Maritimes explains that it engaged in lengthy discussions and negotiations regarding the construction, operation and potential future expansion of joint pipeline facilities that would accommodate both projects which resulted in the Definitive Agreements.

17. Maritimes asserts that section 2.14 of the Operating Agreement governs the allocation of responsibilities for compressor fuel use on the Joint Facilities and has been part of the Definitive Agreements since the original date of execution. It maintains that the joint owners have relied on the Definitive Agreements and the Commission's order approving the agreements in making the commitments necessary to construct the Joint Facilities and the Phase IV Expansion Project. Maritimes insists that, because neither owner has requested the Commission to interpret the provisions of these agreements with respect to the allocation of costs following an expansion, there is no basis on the record of this proceeding to question the joint owners' mutual understanding and interpretation of contractual provisions that they negotiated themselves and that have governed their long-standing relationship, which the Commission had previously approved.[17]

18. Maritimes submits that a negative interpretation of the joint owners' rights under the Operating Agreement would undermine their long-standing reliance on the Definitive Agreements and would re-open these agreements when both owners have a clear understanding of their respective rights and obligations with respect to the issues in this proceeding. Maritimes explains that since the date the Definitive Agreements were executed the joint owners have spent hundreds of millions of dollars in constructing the original Joint Facilities in reliance on the validity of the agreements.[18] Therefore,

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[16] Maritimes Request at 10 (*citing Maritimes & Northeast Pipeline, L.L.C.*, 76 FERC ¶ 61,124, at 61,674 (1996) and *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,124 (1996)).

[17] Maritimes Request at 10.

[18] Maritimes Request at 12 and note 13 where Maritimes incorporates herein by reference an October 23, 2008 Answer in which it explained in great detail the history of the Joint Facilities and the events leading up to the execution and Commission approval of the Definitive Agreements.

Maritimes objects to the Commission stepping in and interpreting a fundamental aspect of the original Definitive Agreements where neither of the joint owners have requested the interpretation or indicated a disagreement on the meaning of the relevant provisions. Maritimes maintains that an adverse interpretation will undermine each owner's ability to rely on the Definitive Agreements going forward, both for the operation of the Joint Facilities and for future expansions of the facilities and to make the capital investments necessary to operate and expand the Joint Facilities in the future.

19. The Commission denies Maritimes' request for rehearing. Despite the fact that neither Maritimes nor Portland have requested the Commission to inquire into the meaning of the contractual provisions at issue, due to the circumstances surrounding this case, we find that we must do so. Relying on the joint owners' interpretation of the Operating Agreement regarding fuel cost responsibility could lead to an unjust and unreasonable result and contrary to the parties' respective certificate authorizations as discussed below in addressing Portland's compliance filing. Portland bears the burden of showing that its proposal to flow through to its customers' Phase IV fuel charges from Maritimes is just and reasonable. If, as we find later on in this order in addressing the merits of the issues, Maritimes is not authorized to charge Portland or its customers for Phase IV fuel, then there is no basis for Portland's filing. For that reason, the alleged mutual agreement of the contracting parties is not a bar to further inquiry. Indeed, as we note below, in its Compliance Filing, at 9, Portland has taken a non-committal position on the questions raised regarding its contractual obligations and has left that issue up to the Commission to resolve. Hence, Maritimes stands alone with its claim of a contractual right to charge Portland and its customers for Phase IV fuel. Further, by making arguments on rehearing on the merits of the issue of the interpretation of the Operating Agreement or the 2006 Settlement, Maritimes contradicts its claim that we should not address those very arguments.

20. Further, the question of contract requirements and authorizations raised by Portland's filing are appropriate for review by the Commission irrespective of whether or not the signatory parties agree. The relevant contracts affect not only Portland and Maritimes, the two signatory parties, but also their respective customers insofar as Maritimes and Portland (at least initially) claim that the Operating Agreement affects rates for transportation service, which must be just and reasonable. The Operating Agreement also forms the basis for section 7 certificate rights and obligations issued upon a finding of public convenience and necessity. Moreover, even though the Commission approved both the Definitive Agreements and the 2006 Settlement Agreement, which modified the Definitive Agreements, and despite Maritimes' and Portland's reliance on these agreements, our acceptance of the agreements cannot serve as authorization for Portland to charge its shippers for fuel costs, absent a specific request

for such fuel charges.[19] We find that neither the Definitive Agreements nor their approval ever addressed rate recovery issues for fuel costs. Therefore, this is an issue which requires resolution in this proceeding.

21. Finally, consistent with the foregoing discussion, we reject Maritimes' argument that we are effectively modifying its rates, and that such action must only occur under section 5 of the NGA in a separate proceeding involving Maritimes' rates. Our ruling here does not change Maritimes' tariff or rates. Instead, we simply find that Maritimes' must comply with its existing tariff, section 20 of the GT&C of its tariff to be precise, and charge only its customers for fuel it consumes in transporting its customers' gas. It does not provide transportation service for Portland or Portland's customers and, therefore, may not charge them for fuel. We also need not establish a different proceeding to make that determination as Maritimes is a party to the instant proceeding and was apprised by the October 29, 2008 Order that the issues regarding fuel would be addressed in this proceeding.

22. Therefore, we find that it was not error for the Commission to proceed with an inquiry into the issues raised by the protests, including contract interpretation issues.

III. Portland's Compliance Filing

23. In its November 18, 2008 Compliance Filing, Portland states that, if the Commission interprets the Definitive Agreements to allow Maritimes to allocate a *pro rata* share of fuel for the Joint Facilities, then Portland *must* be permitted to recover the fuel costs from its shippers as a direct pass through and, therefore, it is critical that it have a tariff mechanism to recover such costs. Citing section 2.14 of the Operating Agreement and Attachment B (which is Appendix D to the Compliance Filing),[20] Portland explains that, among other things, the Definitive Agreements specify how lost and unaccounted-for gas should be allocated between Portland and Maritimes and further specify that fuel should be treated in the same manner.[21] Portland states that, although it initially protested the Phase IV Expansion, it ultimately entered into the 2006 Settlement Agreement with Maritimes in order to, among other things, more clearly outline how

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[19] *See Austral Oil Company v. FPC*, 560 F.2d 1262, 1267 (5th Cir. 1977).

[20] Portland's November 18, 2008 Compliance Filing contains Appendices A-D. Appendix A describes Portland's Fuel Charge Derivation, Appendix B is the Ownership Agreement, Appendix C is the Engineering and Construction Management Agreement, and Appendix D is the Operating Agreement between Portland and Maritimes.

[21] Portland November 18, 2008 Compliance Filing at 5, note 10.

future expansions would be conducted. Portland states that section 10 of the 2006 Settlement Agreement provides, in relevant part, that:

> [t]he Parties agree that, notwithstanding any provisions of this Settlement Agreement, each Owner's responsibility for operating costs associated with the Joint Facilities, including, without limitation, natural gas as fuel for the operation of the Joint Facilities, shall continue to be governed by Section 8.2.2 of the Ownership Agreement, the Operating Agreement and any other agreement(s) among the Owners and MNOC in existence as of the date of this Settlement Agreement.

24. Portland argues that the threshold question in this proceeding is whether the Definitive Agreements require Portland and its shippers to pay a *pro rata* share of the in-kind fuel charge that accrues as a result of the Phase IV Expansion or whether the fuel charge accrued on the Joint Facilities can be attributed to one owner.[22] Portland contends that the protesting parties assert that it does not, while Maritimes asserts that it does. Portland asserts that the Commission needs to resolve this dispute between its shippers and Maritimes. Portland states that the relevant agreement to be used in resolving this matter is the Operating Agreement and the relevant language from the Operating Agreement is the Line Losses and Fuel provisions in section 2.14 which provides:

> (a) Operator shall estimate line losses that occur in the normal daily operation of the Joint Facilities for the Mainline and each other Portion on a daily basis, utilizing the methodology described in Attachment B. Each Owner shall be obligated to furnish Gas for such losses in proportion to its share of the total Gas transported through the Mainline and each other Portion on that Day. Operator shall use its best efforts to adjust its daily estimates to account for overages and underages. By 10 days after the beginning of each Month, Operator shall determine the total quantity of such Gas losses actually incurred during the preceding Month in the Mainline and all other Portions. If Operator's determination indicates that the quantity of Gas received during the preceding Month for normal line losses was less than the quantity of Gas actually lost, each Owner shall be obligated to furnish its proportionate share, determined by utilizing the methodology described in Attachment B, and based on the total throughput of the Mainline and all other Portions during the month, of additional quantities of Gas needed. If Operator's determination indicates an excess of receipts for normal line losses during the preceding Month, then such

[22] Portland November 18, 2008 Compliance Filing at 7 and 9.

> excess shall be returned to the Owners by adjusting operator’s subsequent daily estimate of normal line losses.
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> * * * * *
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> (c) The provisions of Section 2.14(a) shall also apply to Gas used as fuel for the operation of the Joint Facilities.[23]

25. Portland states that the line loss allocation procedure in Attachment B of the Operating Agreement provides, in relevant part:

> In order to equitably allocate differences in inlet and delivery quantities that are attributable to normal pressure variances and line losses or that the Operator is not able to attribute to a particular Owner’s respective shippers, and after taking into account any procedures or methods specifically prescribed in the Operating Agreement such differences shall be allocated based on the following formula . . . [].

26. Portland points to the protesting parties’ arguments that: (a) the *pro rata* sharing of costs does not apply to the fuel at issue here because the fuel is clearly attributable to Maritimes’ shippers who are the only users of the additional capacity created by the Phase IV Expansion; (b) the Operating Agreement does not require cost sharing because the language provides that “[e]ach owner shall be obligated to furnish Gas for such losses in proportion to its share of the total Gas transported through the Mainline and each other Portion on that Day;” (c) Portland’s share of the gas transported on the Phase IV Expansion facilities is zero because none of its shippers are utilizing the Phase IV Expansion; and (d) the Commission’s no subsidy rule requires that no fuel costs be attributed to them.[24]

27. Portland next points to Maritimes’ argument that: (a) Portland’s shippers benefit from the Phase IV Expansion; (b) the owners own the Joint Facilities jointly with undivided interest; (c) it believed and relied on the fact that the Operating Agreement requires Portland and its shippers to absorb a portion of the fuel charge for the Phase IV Expansion; (d) Portland’s shippers realized significant cost savings because Portland and Maritimes constructed the Joint Facilities; (e) Portland’s shippers will receive all of the reliability benefits associated with a shipper on a much larger pipeline; and (f) the

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[23] Portland November 18, 2008 Compliance Filing at 7-8.

[24] Portland November 18, 2008 Compliance Filing at 8 (*citing* Shippers Group Protest at 17 and DTE Energy Protest at 7 and 12).

configuration of the Westbrook station also ensures that Portland will have the ability to deliver into the Joint Facilities without having to construct or add additional compression.

28. Portland maintains that, based upon these arguments, the Commission must determine whether the fuel charges accrued on the Joint Facilities as a result of the Phase IV Expansion can be "attributed" to one owner, or whether the joint nature of the facilities requires both parties to contribute.[25]

29. To the extent the Commission determines that Portland is subject to an allocation of fuel pursuant to the Definitive Agreements, Portland maintains that it must be entitled to recover such fuel from its shippers. Portland argues that, under *Hope Natural Gas*,[26] it must be provided the opportunity to earn an adequate return and to recover from its shippers all prudently-incurred costs of operating its facilities. Portland argues that a cost that a company incurs under a Commission-approved contract that it seeks to directly pass through to its customers – with no profit component and no opportunity to over-recover – must be recoverable in rates. Portland asserts that the fact that the shippers are not parties to the Operating Agreement is not relevant to the question of whether Portland should be permitted to pass through the costs it incurs to provide service to its shippers.[27]

30. Contrary to the protesting parties' argument that the Commission's "no subsidy" policy prohibits Portland from passing through the fuel charges, even if Portland is obligated to pay them, Portland argues that there are several reasons why the no subsidy policy would not bar Portland from passing through all fuel charges that are allocated to it under the Definitive Agreements, namely because: (a) of the history of this pipeline, Portland asserts that it is unclear whether the no subsidy policy is applicable;[28] (b) none of Portland's shippers protested the fuel provision in the Definitive Agreements or the 2006 Settlement Agreement in which the parties reaffirmed that responsibility for operating costs, including fuel, would continue to be governed by the Definitive

[25] Portland November 18, 2008 Compliance Filing at 9.

[26] Portland November 18, 2008 Compliance Filing at 10 (*citing FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603; 64 S. Ct. 281; 98 L. Ed. 333 (1944) and *El Paso Natural Gas Company*, 90 FERC ¶ 61,050, at 61,216 (2000)).

[27] *See* Portland November 18, 2008 Compliance Filing at 10-11.

[28] *See* Portland November 18, 2008 Compliance Filing at 11-12 wherein Portland argues that the no subsidy policy was issued after the Commission approved the Definitive Agreements and therefore the policy cannot operate to abrogate terms agreed to and relied upon the parties in entering into the agreements.

Agreements and that the parties were aware that the fuel charge could be passed through to them; (c) several of Portland's shippers now filing protests in this proceeding had an ownership interest in Portland at the time the Definitive Agreements were negotiated; and (d) the shippers' no subsidy arguments ignore the fact that if the Commission determines that the Definitive Agreements allocate a *pro rata* share of fuel to Portland, then Portland must have a way to supply that fuel.

A. <u>Reply Comments</u>

31. On December 8, 2008, Maritimes, DTE Energy and the Shippers Group each filed reply comments in response to Portland's November 18, 2008 Compliance Filing. Shippers Group argues that Portland's filing attempts to trivialize the requirements of the Commission's fuel reimbursement regulations and policies. Shippers Group and DTE Energy believe it is notable to point out that Portland avoids advancing a firm position on whether the Operating Agreement requires Portland to reimburse Maritimes for fuel consumed by the Phase IV Expansion.[29] The parties contend that, contrary to Portland's assertions, this proceeding is not a dispute between Portland's shippers and Maritimes concerning the interpretation of contracts to which the shippers are not parties; nor does the outcome of this proceeding require the Commission to interpret such contracts.[30] Rather, Shippers Group and DTE Energy argue that this is a section 4 rate proceeding involving one ultimate issue, i.e., whether Portland's proposed fuel charge is just and reasonable thereby putting the burden of proof on Portland which they argue was not satisfied by either the October 1, 2008 Filing or the November 18, 2008 Compliance Filing. Both parties maintain that Portland failed to include in either filing the most basic information and materials required for fuel reimbursement filings or evidence establishing that it is just and reasonable to require its shippers to bear the cost of fuel required by a pipeline expansion in which neither Portland nor any of its shippers is participating.[31]

32. DTE Energy argues that the Definitive Agreements do not require Portland to compensate Maritimes for fuel use on the Phase IV Expansion. Shippers Group argues that neither the Definitive Agreements, the Commission's approval of them, nor the 2006

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[29] Shippers Group Reply at 3 and DTE Energy at 4.

[30] The parties argue that the Definitive Agreements do not contemplate interpretation by the Commission and the Commission should not reverse its longstanding policy of refusing to interpret them. *See* Shippers Group Reply at 21-25 and DTE Energy Reply at 5.

[31] *See* Shippers Group Reply at 4-5 and DTE Energy Reply at 3-4.

Settlement Agreement addressed the flow-through of costs to Portland's customers, much less established that it is just and reasonable for Portland's customers to bear all costs incurred by Portland as a result of them.[32] Shippers Group argues that, as articulated by the Commission, the purpose of the Definitive Agreements was to "set forth the terms under which the pipelines would construct, own and operate the joint facilities." Shippers Group maintains that the authorization for constructing the Joint Facilities was conditioned on the submission of the Definitive Agreements, not to determine rate consequences for Portland's shippers but, because the Commission believed "that the terms and conditions of the relationship between Maritimes and Portland with regard to the construction and operation of the joint facilities needs to be in place before construction is commenced in order to assure that the parties are willing and able to construct the authorized facilities."[33]

33. Moreover, Shippers Group argues that the Definitive Agreements belie any assertion of intent to establish rate consequences for Portland's shippers. Shippers Group states that the only one of the Definitive Agreements to which Portland cites is the Operating Agreement which succinctly recites that the purpose of that agreement is "to set forth the respective rights and responsibilities of M&N Operating [Company] as Operator."[34] Shippers Group states that, likewise, the 2006 Settlement Agreement, which amended the Definitive Agreements, did not determine rate consequences for Portland's shippers. Rather, according to the Shippers Group, it had only two important implications – removing Portland's opposition to Maritimes' Phase IV Expansion and providing for "a more certain procedure for future expansions of the Joint Facilities.[35] If

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[32] Shippers Group Reply at 6 and DTE Energy at 4-5.

[33] Shippers Group maintains that the Commission's approval of the Definitive Agreements in the section 7 certificate proceeding found them "sufficiently detailed" for that particular expressed purpose. *See* Shippers Group Reply at 6-7 (*citing Maritimes and Northeast Pipelines, L.L.C.*, 80 FERC ¶ 61,136 (1997) (mimeo at 8-9 and 19); and *Maritimes and Northeast Pipelines, L.L.C.*, 81 FERC ¶ 61,166, at 61,724 (1997)).

[34] Shippers Group Reply at 7-8 (*citing* November 18 Supplement Filing, Appendix D, Operating Agreement at 2). Shippers Group point out that non-signatory third parties are given no rights or remedies under the agreement to enforce or challenge the actions of the contracting parties. Citing to Section 2.14 of the Operating Agreement and Attachment B, DTE Energy argues that it is clear from the black letter of the Operating Agreement that it does not require Portland to compensate Maritimes for fuel use on the Joint Facilities incurred as a result of an expansion project in which Portland did not participate. DTE Energy Reply at 5.

[35] Shippers Group Reply at 8 and notes 13-15.

the Definitive Agreements were dispositive of any issues concerning the flow-through of the Joint Facility costs on both Portland's and Maritimes' systems, Shippers Group contends, the Commission would have had no reason to allow the investigation of the Joint Facility construction cost overruns in Portland's last rate case and the question of whether the Phase IV costs should be incrementally priced by Maritimes should never have arisen since under that interpretation Maritimes' existing customers (as opposed to its new expansion customers) would have had a predetermined obligation to bear all of the Joint Facility expansion costs and charges allocated to Maritimes under the Definitive Agreements. Moreover, Shippers Group points out that the Commission would have had no reason, as it did in the instant proceeding, to question whether Portland should be allowed to flow allocated fuel costs through to its shippers. Shippers Group argues that, even if the Definitive Agreements reflect Portland's and Maritimes' agreement as to how costs allocated between them would be treated for their respective ratemaking purposes, the Commission's approval of an agreement between contracting parties cannot act to deny non-signatories their statutory rights to challenge the justness and reasonableness of rates based on costs assigned under such contracts.[36]

34. DTE Energy argues that Portland's proposed fuel charge is inconsistent with the authorizations granted by the Commission regarding the Phase IV Expansion project. DTE Energy points to the Commission's finding when certifying the project that it "will not adversely affect Maritimes' existing customers, or other pipelines and their customers" which was dictated by the Commission's application of the "no subsidy" test as a "threshold" prerequisite for new pipeline construction. DTE Energy asserts that, if the Commission had been aware that Maritimes intended to allocate Phase IV project fuel to Portland and that Portland intended to pass these costs through to its captive shippers, the Phase IV Expansion project would never have passed the threshold test.[37] Similarly, Shippers Group argues that Portland's October 1, 2008 Filing is in direct contravention of the Commission's no-subsidy policy and that, in its Compliance Filing, Portland rejects any need to address on the merits the no subsidy policy by suggesting that the policy's application to Portland's alleged responsibilities for fuel associated with Maritimes' Phase IV Expansion of the Joint Facilities was preempted by the Commission's approval of the Definitive Agreements two years prior to the Commission's most recent policy on pricing of pipeline expansions.[38] DTE Energy asserts that the relevant consideration is not the date the Definitive Agreements were executed, but the date that Maritimes filed for certification of the Phase IV Project to which the fuel costs at issue in this proceeding

[36] Shippers Group Reply at 9-10 and notes 19 and 23.

[37] DTE Energy Reply at 6-8.

[38] Shippers Group Reply at 3.

related, namely May 16, 2006, which is well after the 1999 Pricing Policy went into effect.[39]

35. Referring to its October 14, 2008 Protest, Shippers Group explains that the Commission's no subsidy policy requires that all costs associated with newly certificated pipeline expansions be able to stand on their own financially, based on the logic that "[e]xisting customers … should not have to subsidize a project that does not serve them."[40] Shippers Group asserts that both the Commission and Courts have repeatedly interpreted the no subsidy policy as applying not just to the capital costs associated with new pipeline expansions, but to operating costs, as well as fuel charges, resulting from the new expansions. Shippers Group states that both have thus required that, absent offsetting cost reductions, expansion fuel must be borne exclusively by expansion shippers, rejecting proposals to allocate expansion fuel charges to existing customers on integrated pipeline systems who did not participate in the expansion.[41] Shippers Group points out that the U.S. Court of Appeals affirmed the Commission's rejection of a pipeline proposal to allocate expansion fuel to existing customers rather than exclusively to expansion shippers, relying on "[t]he Commission's general goal of eliminating the

[39] DTE Energy Reply at 11. DTE Energy points out that, even in cases where the applicant filed its original certificate application before the Pricing Policy Statement was issued and only filed to amend the certificate after the Policy Statement went into effect, the Commission has applied its Pricing Policy to its review of the application to amend the certificate. *Id.* and notes 37 and 38.

[40] Shippers Group Reply at 11 and note 24.

[41] Shippers Group Reply at 11-12 (*citing*, e.g., *Iroquois Gas Transmission System, LP*, 97 FERC ¶ 61,379, at 62,732 (2001) (rejecting pipeline proposal to require all shippers on an expanded pipeline system to bear costs of additional fuel necessitated by expansion and, instead, requiring all expansion fuel be borne solely by shippers receiving service enabled by expansion); *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,258, at P 15 and Ordering Paragraph (I) (2007) (requiring fuel attributable to expansion compression be borne exclusively by customers benefiting from the service provided by the expansion); *Kern River Gas Transmission Company*, 96 FERC ¶ 61,137, at 61,581-82 (2001) (ensuring that existing customers not cross-subsidize fuel required by expansion through revenue crediting condition that will assure such existing customers that "they will not bear increased transportation or fuel rates as a result of the . . . Expansion Project"); *see also Dominion Transmission, Inc.,* 118 FERC ¶ 61,036, at P. 2, 5 and 6 (2007) (requiring pipeline to provide further information concerning fuel costs in annual fuel report, to ensure no fuel subsidization by customers not receiving negotiated or discounted service)).

subsidization of new customers by existing customers" because "existing shippers should not have the rates under their current contracts changed because the pipeline has built an expansion to provide service to new customers."[42] Shippers Group states that, in rejecting the pipeline's claim that expansion fuel charges should be allocated to existing customers because the new expansion compression improved system flexibility, reliability, and backup service during maintenance of older compressors, the Court affirmed the Commission's rationale that under the no subsidy policy applied under its 1999 Pricing Policy Statement "there must be a specific benefit from the project for existing shippers rather than generalized benefits resulting from the project being integrated into the system."[43]

36. Thus, Shippers Group argues that, consistent with the 1999 Pricing Policy, the Commission should reject Portland's and Maritimes claim that Portland's shippers receive any benefit from Maritimes' Phase IV Expansion that could justify assessing Phase IV fuel charges on them. Shippers Group argues the Commission should reject their claim because: (a) neither Portland nor its shippers are participating in the Phase IV Expansion, therefore, they receive no benefit from it; and (b) not only will Portland's shippers not benefit from the Phase IV Expansion, but the Phase IV Expansion will actually reduce Portland's capacity from current levels of at least 210,000 Mcf/d by at lease 20 percent, thereby producing a detriment for Portland's system and its system users. Shippers Group maintains that if fuel costs are allocated to Portland and its shippers this would, contrary to the 1999 Policy Statement, require them to subsidize a project that does not serve them.[44]

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[42] Shippers Group Reply at 12 (*citing Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 919 (D.C. Cir. 2008) and *citing Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128, at 61,392 (2000).

[43] *See* Shippers Group Reply at 12-13 (*citing Transcontinental Gas Pipe Line Corp*., 106 FERC ¶ 61,299, at P 75 (2004); *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d at 920). DTE Energy also cites to numerous precedent and states that Portland failed to acknowledge, let alone address, them in its November 18, 2008 Compliance Filing. *See* DTE Energy Reply at 12-13.

[44] Shippers Group Reply at 13-14 and notes 29-31. Shippers Group point out that even if the 1995 Pricing Policy Statement (which permits some subsidization of new expansion facilities but only if the expansion costs do not cause more than a 5 percent increase in rates and there are tangible quantifiable benefits produced by the expansion for non-expansion shippers) were applied to this case, Portland has provided no information concerning the potential cost impact of the Phase IV fuel assessments on its shippers. Shippers Group argue this precludes any determination as to the extent to which Portland's shippers will be adversely affected by fuel attributable to the Phase IV

(continued…)

37. Responding to Portland's claim that Portland must be entitled to recover fuel from its shippers,[45] DTE Energy contends that this is a meritless claim as the precedent cited by Portland merely stands for the proposition that the Commission must afford a pipeline a "reasonable" opportunity to earn a fair return.[46] DTE Energy states that the U.S. Supreme Court recently re-emphasized with respect to the analogous principle under the Federal Power Act that it does not follow from this principle that "the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . ."[47] DTE Energy argues that the Operating Agreement is between Portland and Maritimes and, further, the agreement does not obligate or authorize Portland to allocate fuel to any of its customers. Because neither DTE Energy nor any of Portland's shipper entered into a contract regarding the fuel allocation provisions of the Operating Agreement but Portland did,[48] DTE Energy argues that Portland cannot be relieved of what may be its "improvident bargain" by passing through the fuel costs to its shippers, particularly when its shippers receive no benefit from the incurrence of such costs.

38. In its Reply, Maritimes contends that the Definitive Agreements are unambiguous and require Portland to pay for its proportionate share of compression on the Joint Facilities. According to Maritimes, any arguments to the contrary are collateral attacks on the Commission's orders approving the Definitive Agreements. Maritimes points out that it and Portland have relied on the Definitive Agreements in planning and conducting their business activities. Maritimes argues that the protesting parties have been customers on the Joint Facilities who have enjoyed the benefits of the Definitive Agreements and that all customers of the Joint Facilities, including Portland's shippers,

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Expansion, which should have been determined before the Phase IV Expansion was authorized. *See* Shippers Group Reply at 17-18 and notes 39-40.

[45] DTE Energy at 14 (*citing* November 18, 2008 Filing at 10).

[46] DTE Energy at 14 (*citing El Paso Natural Gas Co.,* 90 FERC ¶ 61,050, at 61,216 (2000)).

[47] DTE Energy at 15 (*citing Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County,* 128 S. Ct. 2733, 2739 (2008)) (*quoting FPC v. Sierra Pacific Power Co.,* 350 U.S. 348, 352-53 (1956)).

[48] DTE Energy points out that Portland's argument, about shippers not being parties to contract by the pipeline to purchase trucks or computers, is belied by its own example because in its example such items actually provide some benefit to shippers and thus their costs are properly reflected in the derivation of rates. DTE Energy at 15 and notes 54-56.

will benefit from the higher pressures through increased flexibility and reliability and the ability to serve end use customers with higher compression, including access to increased supply.

39. Maritimes states that it and Portland agree that section 2.14 of the Operating Agreement and Attachment B govern the issues in this proceeding. Maritimes maintains that the Operating Agreement obligates Portland to furnish in-kind gas for actual compressor fuel usage in proportion to its share of total gas transported through the Joint Facilities. Maritimes asserts that section 2.14 contains the line loss provision and provides that each owner is responsible for its proportionate share of line losses (and therefore fuel) on the Joint Facilities. Maritimes further asserts that the Attachment B (which contains the allocation methodology), applies to quantities that the Operator is not able to attribute to a particular owner's respective shippers and allocates fuel between the owners by day *pro rata* based on each owner's actual throughput during the day.[49] Under certain circumstances, Maritimes points out that the Operator of the Joint Facilities will not be able to attribute the fuel use at the these facilities to a particular Owner's shippers. Moreover, Maritimes argues that the Ownership Agreement is clear that the downstream unit at Westbrook and Eliot station are part of the undivided interests in the Joint Facilities as a whole and not separate and discrete facilities owned entirely by Maritimes.[50]

40. Therefore, Maritimes argues that, because the joint owners agree on the interpretation of section 2.14 of the Operating Agreement, the Commission does not need to interpret their respective rights and obligations under the Operating Agreement regarding fuel cost responsibility. Despite Portland's position that the Commission must determine as a threshold matter whether the Definitive Agreements require Portland and its shippers to pay a *pro rata* share of the in-kind fuel charge, Maritimes maintains that the Operating Agreement clearly establishes that Portland must provide in-kind fuel reimbursement once the compressor stations on the Joint Facilities are in-service.

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[49] Maritimes states that gas from Maritimes' wholly-owned facilities will commingle with gas from Portland's wholly-owned facilities upstream of, and at, the downstream unit at the Westbrook compressor station. Similarly, according to Maritimes, a commingled Maritimes-Portland gas stream will flow through the compressor station at Eliot. Maritimes Reply at 8.

[50] Maritimes Reply at 8 and note 21 (*citing* Section 3.1 of the Ownership Agreement which provides that "the Owners shall own the Joint Facilities as tenants-in-common, with no rights of partition by sale, with undivided Ownership Interests for each Portion of the Joint Facilities' and Section 1.32 of the Ownership Agreement which provides that "Joint Facilities" shall mean the Initial Joint Facilities and any Expansions thereto").

Maritimes argues that the October 1, 2008 Filing by Portland only serves to reinforce Portland's belief that the Operating Agreement allocates responsibility to Portland for a portion of the compressor fuel use. Maritimes argues there is no "threshold" issue concerning Portland's responsibility for its allocated share of fuel costs pursuant to the Operating Agreement. The only critical issue in this proceeding, according to Maritimes, is whether Portland has adequately supported its proposed fuel tracker.[51]

41. Maritimes maintains that the Definitive Agreements established over 10 years ago that Portland is responsible for its share of allocated costs following an expansion. More recently, according to Maritimes, the 2006 Settlement Agreement directly addressed the owners' understanding of their responsibility for compressor fuel use on the Joint Facilities following the in-service date of the Phase IV and any other expansions. Specifically, Maritimes points to section 9 of the Settlement Agreement which pertains to the Westbrook Compressor Station and which provides:

> (A) Maritimes' Phase IV Application contemplates the construction of two compressor units which will be designated as the Westbrook Compressor Station. One compressor unit will be on the Joint Facilities and one compressor unit will be on Maritimes wholly-owned facilities. Maritimes' wholly-owned compressor unit at the Westbrook Compressor Station shall become part of the Joint Facilities such that the entire Westbrook Compressor Station shall be part of the Joint Facilities mainline with each Party owning an undivided interest equal to its respective undivided interest in the [illegible word] of the Joint Facilities Mainline upon the in-service date of the first of any facilities built at PNGTS' request using Initial Expansibility, provided that PNGTS shall pay Maritimes on or before such in-service date for PNGTS' portion of the Westbrook Compressor Station in accordance with Section 9(B) of this Settlement Agreement. In connection with any expansion of the Joint Facilities mainline following any expansion contemplated in the Phase IV Application, either Party may direct MNOC to reconfigure the piping at the Westbrook Compressor Station such that PNGTS will inject gas into the Joint Facilities mainline on the suction side of both compressor units at the Westbrook Compressor Station. However, unless PNGTS has exercised the Pre-Emptive Option Right contemplated under Section 3 of this Settlement Agreement or has constructed its own expansion of the Joint Facilities mainline, PNGTS shall not be allocated or otherwise

[51] Maritimes Reply at 8-9.

> charged for the additional capital, operating and maintenance expenses and fuel expenses associated with the compressor unit at the Westbrook Compressor Station that is contemplated under the Phase IV Application to be constructed on Maritimes' wholly-owned facilities (to be clear, once PNGTS has acquired Excess Initial Expansibility following the exercise of the Pre-Emptive Option Right in accordance with Section 3 of the Settlement Agreement or an expansion of the Joint Facilities mainline has been constructed for PNGTS' account, PNGTS shall be responsible for costs associated with such compressor unit in accordance with this Section 9(A)).
>
> (B) Upon the transfer to PNGTS of an ownership interest in the Westbrook compressor unit previously owned entirely by Maritimes, as contemplated in Section 9(A) of the Settlement Agreement, PNGTS shall reimburse Maritimes for PNGTS' proportionate share of such compressor unit (based upon PNGTS' proportionate Capacity Entitlement (as defined in the Ownership Agreement in the Joint Facilities mainline at the time of the transfer) and the remainder of the Westbrook Compressor Station facilities previously owned exclusively by Maritimes at the net book value reflected on Maritimes' books and records at the time the unit and the remainder of the station are transferred from Maritimes' wholly-owned facilities to the Joint Facilities mainline. PNGTS shall have audit rights with respect to such payment as set forth in Section 3(K) of this Settlement Agreement.

42. According to Maritimes, pursuant to this provision, the owners agreed that Portland would deliver into the Joint Facilities between the two compressor units at the Westbrook station, such that the upstream unit at the station would be on Maritimes' wholly-owned facilities and the downstream unit at the station would be on the Joint Facilities. Maritimes asserts that this configuration ensures that Portland will have the ability to deliver into the Joint Facilities at a pressure adequate to enter the facilities without having to construct compression on its wholly-owned facilities or obtaining additional pressure from another source. Maritimes also claims that section 9 of the Settlement Agreement makes clear that Portland will be responsible only for its share of the operating, maintenance and fuel expenses associated with the unit at the Westbrook station on the Joint Facilities, but not the unit at Westbrook located on Maritimes' wholly-owned facilities.[52]

[52] Maritimes Reply at 15.

43. Maritimes states that it relied on the terms of the Settlement Agreement to commence construction of the Phase IV Expansion shortly after the Commission's order approving the agreement. Maritimes argues that it would be fundamentally unfair and inappropriate for the Commission to now issue a ruling in the instant proceeding that would be contrary to the terms of the Settlement Agreement and the agreement between the owners, especially since the shippers failed to raise any concerns about the Settlement Agreement at the time it was noticed for public comment.[53]

44. Maritimes next argues that the protesting parties are collaterally attacking the Commission's orders approving the Definitive Agreements and the 2006 Settlement Agreement and, therefore, their arguments should be rejected.[54] Maritimes further argues that the protesting parties fail to acknowledge the benefits associated with the Joint Facilities. Maritimes points out that Portland and its shippers realized significant cost savings when the owners agreed to construct the Joint Facilities as a single pipeline, rather than as two discrete pipelines in two separate right-of-ways. Maritimes claims the shippers benefit from: (a) lower capital investment; (b) lower operating and ad valorem costs; (c) an increase in reliability of service associated with being a shipper on a larger pipeline; and (d) having direct access to additional sources of supply. Maritimes also mentions the benefit of a single pipeline because of the decreased environmental impact and the decreased impact on landowners and communities.[55]

45. Finally, Maritimes argues that the configuration of the Westbrook compressor station, as established in the 2006 Settlement Agreement, ensures that Portland will have the ability to deliver into the Joint Facilities without constructing a compression station on its wholly-owned facilities. Maritimes states that section 10.2 of the Ownership Agreement provides that each owner will maintain, at its sole cost and expense, sufficient pressure on its wholly-owned facilities to permit its gas to enter the mainline at the Westbrook, Maine interconnection, up to a maximum inlet pressure of 1110 psig. Maritimes explains that, as part of a later agreement to exchange certain minor interests in laterals and interconnections on the Joint Facilities, Portland proposed and Maritimes

[53] The order approving the Settlement Agreement was issued on March 12, 2007 (118 FERC ¶ 61,193 (2007)), which was a few weeks after the Commission issued its order authorizing the Phase IV Expansion on February 21, 2007 (118 FERC ¶ 61,137 (2007)).

[54] *See* Maritimes Reply at 16.

[55] Maritimes Reply at 17-18.

agreed to increase the maximum inlet pressure as provided in section 10.2.[56] Maritimes states that the original design for the Phase IV project integrated the new maximum inlet pressure; however, Portland concluded that it preferred a lower maximum inlet pressure and that the higher pressure requirement would cause it to have to construct a new compressor station in order to deliver into the Joint Facilities mainline following the in-service date of the Phase IV Expansion. Thus, according to Maritimes, Portland proposed to reduce the maximum inlet pressure, which Maritimes agreed to and to reconfigure the Phase IV-related Westbrook compressor station to allow Portland to deliver into the Joint Facilities mainline, provided Portland flowed at the new lower pressure.[57]

B. Commission Discussion

46. The Commission finds that section 2.14 does not permit Portland to be allocated any fuel requirements as a result of the Phase IV expansion project. As described more fully above, section 2.14(a) provides in pertinent part: "Operator shall estimate line losses that occur in the normal daily operation of the Joint Facilities for the Mainline and each other Portion on a daily basis, utilizing the methodology described in Attachment B. Each Owner shall be obligated to furnish Gas for such losses in proportion to its share of the total Gas transported through the Mainline and each other Portion on that Day." Attachment B provides for a *pro rata* allocation of line losses "that the Operator is not able to attribute to a particular Owner's respective shippers." Section 2.14(c) of the Operating Agreement provides that the foregoing applies to allocation of fuel as well.

47. We find that these provisions require the Operator to allocate 100 percent of the fuel used by the Phase IV Expansion compressors to Maritimes and its shippers because their share of the total gas transported through the Phase IV Expansion is 100 percent. Since Portland is not allocated any Phase IV Expansion capacity and is not utilizing these facilities or the Phase IV Expansion capacity to transport its shippers' gas, Portland's share of the total gas transported through the Phase IV Expansion portion of the Joint Facilities, under section 2.14(a), is zero. In addition, Attachment B limits the *pro rata*

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[56] Maritimes Reply at 19 and note 36 (*citing* to the executed Term Sheet for Capacity Reallocations included as part of Maritimes' February 22, 2005 certificate application in Docket No. CP05-74).

[57] Maritimes Reply at 20 and note 37 (*citing* to Amendment to Ownership Agreement included as part of Appendix C of Portland's November 18, 2008 Compliance Filing. Maritimes states that, absent the agreement to lower the maximum inlet pressure and to reconfigure the Westbrook compressor station, Portland and its shippers would have had to bear the full cost of a new compressor station and the fuel associated with running the station.

allocation of fuel volumes to volumes which cannot be attributed to a particular owner's respective shippers. Because the Phase IV Expansion facilities were constructed solely to provide service to Maritimes' shippers, all fuel used by the Phase IV Expansion compressor facilities can, and should, be attributed to Maritimes' shippers. Accordingly, section 2.14(a) and Attachment B provide for zero fuel volumes to be allocated to Portland and its shippers. Thus, the fact that Portland has an ownership interest in the Phase IV Expansion facilities is not relevant and does not command a different result. We also note that Portland has taken a non-committal stance on the issue of Maritimes' contractual authority to exact fuel charges from Portland and its customers, thereby negating Maritimes' argument that the parties to the agreement, namely, Maritimes and Portland, have a mutual agreement as to its meaning.[58]

48. Further, we find that section 10 of the 2006 Settlement only provides for the continuation of whatever fuel reimbursement provisions were previously agreed to, including the fuel provisions of the Operating Agreement, the sole agreement among the Definitive Agreements upon which Maritimes relies. Having found above that section 2.14 of the Operating Agreement does not permit recovery of Phase IV Expansion fuel from Portland or its shippers, the 2006 Settlement would not affect any ruling we make here regarding that earlier agreement.[59] Further, the 2006 Settlement does not provide for rate recovery by Portland from its customers for the $600,000 payment to Maritimes pursuant to section 6 of the Settlement and that payment appears as part of the consideration paid in a black-box settlement between the two pipelines regarding a number of long-standing disputes between them regarding future expansions. Once again, we note Portland's noncommittal observation that we will need to resolve the issue of contractual authorization in this case. As a result, despite Maritimes' unilateral claims of a mutual intent, the Commission will not attempt to define the reasons behind the various concessions and agreements underlying the provisions of that Settlement Agreement.

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[58] As noted earlier in the background section of this order, after summarizing the arguments of Maritimes and the other parties, Portland merely states: "Based upon these arguments, the Commission must determine whether the fuel charges accrued on the Joint Facilities as a result of the Phase IV Expansion can be 'attributed' to one owner, or whether the joint nature of the facilities requires both parties to contribute." Portland November 18, 2008 Compliance filing at 9.

[59] As noted earlier, section 10 of the 2006 Settlement provides, in pertinent part: "[t]he Parties agree that, notwithstanding any provisions of this Settlement Agreement, each Owner's responsibility for operating costs associated with the Joint Facilities, including, without limitation, natural gas as fuel for the operation of the Joint Facilities, shall continue to be governed by . . . the Operating Agreement . . .".

49. Finally, to find that Portland and its shippers are responsible to pay for fuel for transportation of Maritimes' shippers' gas on Maritimes' Phase IV Expansion would violate the Commission's policy, adopted in its Certificate Policy Statement on certification of new construction,[60] that pipelines proposing new projects must be prepared to financially support the project without relying on subsidization from existing customers. The Commission applied that policy in the February 21, 2007 Certificate Order authorizing the construction of Maritimes' Phase IV Expansion Project. The Commission stated that "pipelines proposing new projects … must be prepared to financially support the project without relying on subsidization from existing customer," and the Commission found that Maritimes had shown that its revenues from the expansion would not exceed the projected costs. The Commission thus concluded that the Phase IV Expansion Project would not "adversely affect Maritimes' existing customers, or other pipelines and their customers."[61] Requiring Portland and its shippers to pay for Maritimes' Phase IV Expansion Project compressor fuel when they do not utilize that capacity (and do not have a right to) would subsidize Maritimes' Phase IV Expansion Project and its shippers. Accordingly, under that ruling, Portland should not be subject to any fuel costs related to the Phase IV Expansion since all of the capacity on this expansion was built for the benefit and use of Maritimes and its shippers and Portland has no right to such capacity. We find that any fuel volumes attributable to the Phase IV Expansion Project compression station operations must be attributed exclusively to Maritimes and its shippers. Accordingly, the cost of such fuel volumes must be allocated to Maritimes and its shippers.

50. In its application for a certificate of public convenience and necessity for its Phase IV Expansion Project and subsequent pleadings in that proceeding, Maritimes never informed the Commission that the project would result in additional fuel costs being imposed on Portland or its shippers, and the absence of this information contributed to the Commission's finding in the certificate proceeding that the project would not adversely affect Maritimes' existing customers or other pipelines and their customers, including Portland and its customers. In evaluating the potential for subsidies, the Commission was well-aware of the additional fuel consumption created by the Phase IV Expansion Project and directed Maritimes to file an analysis to determine "what impact the new compression will have on system fuel, and whether the changes in fuel use combined with the decrease in its base transportation rates will adversely impact

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[60] *Certification of New Interstate Natural Gas Pipeline Facilities* (Policy Statement), 88 FERC ¶ 61,277 (1999), *order clarifying statement of policy*, 90 FERC ¶ 61,128 (2000); *order further clarifying statement of policy*, 92 FERC ¶ 61,094 (2000).

[61] *Maritimes & Northeast Pipeline, L.L.C.*, 118 FERC ¶ 61,137, at P 25 and 27 (2007).

Maritimes' existing shippers."[62] Had the Commission been informed that Portland and its shippers would also bear a portion of the cost of fuel attributable to the Phase IV Expansion Project compressors, the Commission most certainly would have required Maritimes' analysis to include a study of the impact on Portland and its customers as well. Maritimes' March 23, 2007 compliance response in Docket No. CP06-335-003 was limited entirely to a study of the impact on its own existing customers.[63] In this regard, we reject the argument that Calpine Corporation's (Calpine) December 23, 2005 comments filed in response to a request for declaratory order by Maritimes in Docket No. CP06-32-000 regarding one of Maritimes' various proposals on the design of the Phase IV Expansion Project facilities somehow informed the Commission of the instant claim that Portland can be allocated Phase IV Expansion Project fuel.

51. The Commission's April 20, 2006 Order on Maritimes' petition only declared what total increase in capacity that particular facilities' design proposal would have had and clarified that it would not make any decision on whether the project would be required by the public convenience and necessity until it had a complete certificate application before it.[64] Further, the Commission pointed out that "[Portland] notes that it and Maritimes agree that the Commission should not attempt to resolve the contractual issues between them in the context of Maritimes' request in this proceeding."[65] One of the disputes between Maritimes and Portland was over the allocation of costs for what Portland, at that time, proposed as an allocation to it of Phase IV Expansion transportation capacity. As Calpine observed in its comment, at 2, "the preliminary proposal includes a potential expansion of the Joint Facilities on behalf of [Portland] of 150,000 Dth/d." Had Portland acquired Phase IV Expansion capacity to provide transportation service to its own customers, an allocation of fuel to Portland and its customers would then certainly have been an appropriate. However, Portland ultimately acquired no Phase IV Expansion capacity (in fact, its capacity was reduced by 20 percent) and it transports its customers' gas using this reduced existing capacity. Thus, Calpine's comment regarding the potential allocation of fuel to Portland and its customers under an earlier Phase IV Expansion Project proposal is irrelevant.

52. If the Commission had knowledge of what we are now informed of by Maritimes as to its position on fuel, the Commission would have conditioned the authorization of Maritimes' Phase IV Expansion Project on Maritimes allocating all Phase IV Expansion

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[62] *Id*. 118 FERC ¶ 61,137 at P 32 (emphasis added).

[63] Accepted by unpublished delegation order issued on July 23, 2007.

[64] *Maritimes & Northeast Pipeline, L.L.C.*, 115 FERC ¶ 61,069 (2006).

[65] *Id*. P 21.

Project fuel costs to its own customers; otherwise, the project would not have passed the Commission's threshold requirement under the no-subsidization requirement of the Certificate Policy Statement. We also reject the claim that the Certificate Policy Statement is not directly applicable here. The Certificate Policy Statement was issued before the execution of the 2006 Settlement and before Maritimes filed its application for a certificate for its Phase IV Expansion Project and was applied in its February 21, 2007 Certificate Order and, therefore, clearly is applicable.

53. Accordingly, we find that, even if we were to find that the Operating Agreement requires Portland to compensate Maritimes for fuel use incurred as a result of the Phase IV Expansion Project, such an agreement would violate Commission policy and precedent, and would be unjust and unreasonable and against the public interest in violation of the certificate authorization granted Maritimes to construct and operate its Phase IV Expansion Project facilities.

54. We therefore reject Portland's October 1, 2008 filing. Because Maritimes' Phase IV Expansion Project went into service on January 15, 2009, Maritimes must refund any fuel volumes collected from Portland with interest in accordance with the Commission's regulations.

The Commission orders:

(A) Maritimes may not pass any fuel costs of the Phase IV Expansion Project on to Portland and must refund, with interest, any fuel collected from Portland.

(B) Portland's October 1, 2008 filing is rejected.

(C) The requests for clarification or, alternatively, rehearing are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.