

138 FERC ¶ 61,019
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bear Creek Storage Company L.L.C.

Docket No. RP12-121-001

ORDER DENYING REHEARING

(Issued January 11, 2012)

1. On November 17, 2011, the Commission found that Bear Creek Storage Company L.L.C. (Bear Creek) may be substantially over-recovering its cost of service. Therefore, the Commission initiated an investigation, pursuant to section 5 of the Natural Gas Act (NGA), to determine whether the rates currently charged by Bear Creek are just and reasonable and set the matter for hearing.¹ The Commission also directed Bear Creek to file a full cost and revenue study within 75 days of the issuance of the order.²

2. On December 19, 2011, Bear Creek filed a request for rehearing of the November 2011 Order. As discussed below, the Commission denies the request for rehearing.

I. Background

3. Bear Creek provides individually certificated storage service under Part 157 of the Commission's Regulations. Southern Natural Gas Company (Southern) and Tennessee Gas Pipeline Company (Tennessee), both of which are currently subsidiaries of El Paso Corporation (El Paso), each own 50 percent of Bear Creek. Southern operates Bear Creek, which provides storage service in Louisiana to Southern and Tennessee, who in turn each utilize the storage service to provide contract storage service to certain of their customers. The costs of operating the facility are included in the derivation of Tennessee's and Southern's rates.

¹ *Bear Creek Storage Co.*, 137 FERC ¶ 61,134 (2011) (November 2011 Order).

² *Id.* P 9-10; *see also*, ordering para. (D).

4. Bear Creek's current rates were established as part of a settlement approved by Commission on August 1, 1989.³ The settlement was the result of a NGA section 5 proceeding initiated by the Commission approximately 22 years ago.⁴

5. In the November 2011 Order, the Commission stated that it had reviewed the cost and revenue information provided by Bear Creek in its Form 2 for the years 2009 and 2010. Upon review of this cost and revenue information, the Commission estimated Bear Creek's return on equity for those calendar years to be 22.43 percent, and 29.16 percent, respectively. Based upon these figures, the Commission determined that Bear Creek's currently effective tariff rates may allow Bear Creek to recover revenue substantially in excess of its estimated cost of service.⁵

6. The Commission, therefore, directed Bear Creek to file a cost and revenue study within 75 days based on cost and revenue information for the latest 12-month period available. The Commission also directed that the study include all the schedules required for submission of an NGA section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations. Because the Commission is seeking actual cost and revenue information, the Commission stated that the information submitted by Bear Creek must exclude any adjustments or projections that may be attributable to a test period referenced in the schedules and statements set forth in section 154.312. Additionally, the Commission stated that, because Bear Creek does not have an NGA section 4 burden in this section 5 proceeding and will be filing testimony in response to other parties, Bear Creek does not need to file the Statement P required by section 154.312(v) of the Commission's regulations at this juncture.⁶

³ *Bear Creek Storage Co.*, 48 FERC ¶ 61,216 (1989).

⁴ *Bear Creek Storage Co.*, 46 FERC ¶ 61,215 (1989).

⁵ The Commission specifically made no finding as to what would constitute a just and reasonable capital structure or return on equity for Bear Creek but rather set those issues for hearing to be decided consistent with Commission policy. (*See, e.g., Transcontinental Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084, at 61,413-15 (1998), *reh'g denied*, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998), *petition for review denied, North Carolina Utilities Commission v. FERC*, D.C. Cir. Case No. 99-1037 (February 7, 2000) (per curiam) and *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048 (2008)).

⁶ *See Pub. Serv. Comm'n of New York*, 115 FERC ¶ 61,368, at P 6 (2006).

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

II. Rehearing Request

8. On rehearing, Bear Creek focuses solely on the Commission's directives requiring Bear Creek to file a file a cost and revenue study. First, Bear Creek contends that the Commission erred in requiring it to file a cost and revenue study in the form required for major rate changes by section 154.312 of the Commission regulations, rather than in accordance with the less onerous requirements of section 154.313 applicable to minor rate changes.⁸ Bear Creek asserts that this requirement is inconsistent with Commission precedent in *Indicated Shippers v. Sea Robin Pipeline Co.*⁹ and *Natural Gas Pipeline Company of America*.¹⁰ It states that, in those cases, the Commission established a policy of requiring relatively small pipelines offering few services to file a section 145.313 cost and revenue study in a NGA section 5 rate investigation, and only requiring that large pipelines file the more onerous section 154.312 cost and revenue study.

9. Bear Creek points out that in *Natural Gas*, the Commission explained that it was requiring Natural Gas Pipeline Company of America to file a section 154.312 cost and revenue study because it was an extremely large pipeline offering a wide array of transportation and storage services under 10 rate schedules, whereas in *Sea Robin* the Commission only required the pipeline to file a section 154.313 cost and revenue study because that pipeline was a relatively small pipeline with some 450 miles of pipeline offering three services. Bear Creek states that it is even smaller than Sea Robin, providing an individually certificated storage service to two customers under only one rate schedule. Bear Creek also notes that its capacity is fully subscribed and it has not discounted its rates, and therefore its throughput should not be a material issue.

⁷ See, e.g., *Ozark Gas Transmission, L.L.C.*, 134 FERC ¶ 61,062 (2011) (*Ozark 1*), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 (2011) (*Ozark 2*).

⁸ 18 C.F.R. § 154.313 (2011).

⁹ 76 FERC ¶ 61,151 (1996) (*Sea Robin*).

¹⁰ 130 FERC ¶ 61,133, at P 27-28 (2010) (*Natural Gas*).

Therefore, Bear Creek contends, the Commission's requirement that it file a section 154.312 cost and revenue study is an unexplained departure from prior Commission precedent.

10. Bear Creek states that, if the Commission permits it to file only a section 154.313 cost and revenue study, the Commission need not consider the remainder of its request for rehearing. However, Bear Creek asserts that any continued requirement for it to file the section 154.312 cost and revenue study would exceed the Commission's authority under NGA section 5 and unlawfully blur the distinctions between sections 4 and 5 of the NGA.

11. Specifically, Bear Creek argues that in order for the Commission to require it to change its rates pursuant to NGA section 5, the Commission must first find, after a hearing, that the existing rates are unjust and unreasonable or otherwise unlawful. Bear Creek asserts that after making such a determination, the Commission must then "fix" the just and reasonable rate to be thereafter observed. Bear Creek argues that the Commission has the burden of proof in making each of these findings.¹¹

12. Bear Creek asserts that the November 2011 Order requires it to file a cost and revenue study that is the functional equivalent of a section 4 rate case. Bear Creek states that section 154.312 sets forth all the statements and schedules that a pipeline must file with a section 4 proposal to change rates, including a Schedule J-2 (Derivation of Rates) showing "the derivation of each rate component of each rate."¹² Bear Creek argues that this requires it to do more than simply compile data and figures to develop a cost of service. It states that preparing a Schedule J-2 requires it to show the derivation of each rate component of each rate and make other subjective determinations regarding the various rate components such as its return on equity.¹³ Bear Creek argues that there is no difference in substance between what the Commission has directed Bear Creek to submit

¹¹ Bear Creek Rehearing Request at 9 (*citing Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 183-184 (D.C. Cir. 1986) and *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (*Western Resources*)).

¹² *Id.* 10 (citing 18 C.F.R. § 154.312(p)(2)).

¹³ Bear Creek asserts that preparing a Schedule J-2 is complicated by the fact that its current rates are based on a black box settlement in which the cost allocation and rate design was not specified, and therefore in order to derive rates Bear Creek would have to propose new methods of cost allocation and rate design.

and the type of filing requirements the court rejected in *Public Service Commission and Consumers Energy*.¹⁴

13. Further, Bear Creek states that sections 10(a) and 14(a) of the NGA do not authorize the Commission to require a pipeline to file a cost and revenue study with a derivation of rates. It argues that such a cost and revenue study is not strictly an informational filing of the type contemplated by sections 10(a) and 14(a), but would require it to make the kind of decisions that it is only required to make and support when it files for a rate change pursuant to NGA section 4. Bear Creek therefore argues that the Commission has improperly shifted the burden of proof and production to Bear Creek in violation of the NGA.

III. Discussion

14. Bear Creek's contentions on rehearing center on the Commission's requirements concerning the cost and revenue study to be filed by Bear Creek. For the reasons discussed below, the Commission denies Bear Creek's request for rehearing.

A. Nature of Cost and Revenue Study

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

16. Bear Creek relies on the 1996 order in *Sea Robin* to contend that the Commission has a policy of requiring relatively small pipelines with few services to file only a section 154.313 cost and revenue study in an NGA section 5 investigation, while imposing the more onerous section 154.312 cost and revenue study only on larger pipelines. However, since the Commission's June 2006 order in *Public Service v. National Fuel*,¹⁵ establishing a section 5 hearing concerning the rates of National Fuel

¹⁴ Bear Creek Rehearing Request at 13, (citing *Pub. Serv. Comm'n of New York v. FERC*, 866 F.2d 487, 492 (D.C. Cir. 1989) (*Public Service*); *Consumers Energy Co. v. FERC*, 226 F.3d 777 (6th Cir. 2000) (*Consumers Energy*)).

¹⁵ *Public Service Commission of New York, Pennsylvania Public Utility Commission, Pennsylvania Office of Consumer Advocate v. National Fuel Gas Supply Corporation*, 115 FERC ¶ 61,299, at P 38, order on reh'g, 115 FERC ¶ 61,368 (2006) (*Public Service v. National Fuel*).

(continued...)

Gas Supply Corp., the Commission has consistently required pipelines subject to section 5 investigations to file a section 154.312 cost and revenue study, regardless of their size or the complexity of their services. Thus, in *Panhandle Complainants v. Southwest Gas Storage Co.*,¹⁶ the Commission required Southwest Gas Storage Company (Southwest Gas), which provides only firm and interruptible storage service, to file a section 154.312 cost and revenue study. Similar to Bear Creek which provides storage service to two major pipelines, Southwest Gas's only storage customer was a major pipeline, Panhandle Eastern Pipe Line Co. More recently, in *Public Utilities Commission of Nevada v. Tuscarora Gas Transmission Co.*,¹⁷ the Commission required a 240-mile pipeline offering four transportation services and no storage services to file a section 154.312 cost and revenue study.

17. The Commission recognizes that in *Natural Gas*, it suggested that it might be sufficient in a section 5 investigation to only require a relatively small pipeline to file a cost and revenue study pursuant to section 154.313 applicable to minor rate changes. However, upon further consideration of this issue, the Commission has concluded the more detailed cost and revenue study provided for by section 154.312 is necessary for the efficient conduct of an NGA section 5 investigation, regardless of the size of the pipeline or the complexity of its services. Because of the potential for continued over recovery of revenues by the pipeline, it is necessary that section 5 investigations be conducted as efficiently and expeditiously as possible. In *Public Service v. National Fuel*, where we first required a pipeline to file a section 154.312 cost and revenue study in a NGA section 5 proceeding, we pointed out that in *Sea Robin* significant discovery had occurred before issuance of the Commission order and therefore, much information had already been provided by the pipeline so there was no need to require a filing under section 154.312. Accordingly, based on the experience in *Sea Robin*, we held that "the parties here should have the benefit of being provided the additional schedules and information required by section 154.312 at the outset of the proceeding, rather than having to obtain much, if not all, of the same information later through the discovery process."¹⁸

18. Permitting Bear Creek to file only a section 154.313 cost and revenue study would require the parties to rely on a more extended discovery process to obtain the information

¹⁶ 117 FERC ¶ 61,318, at P 18 (2006).

¹⁷ *Public Utilities Commission of Nevada, Sierra Pacific Power Co. d/b/a NV Energy v. Tuscarora Gas Transmission Co.*, 135 FERC ¶ 61,174, at P 30 (2011).

¹⁸ *Public Service v. National Fuel*, 115 FERC ¶ 61,368 at P 5.

necessary to evaluate Bear Creek's rates. As discussed below, while Bear Creek asserts that it only provides storage service to two customers and does not discount its rates, a section 154.313 cost and revenue study would not provide sufficient information to evaluate the justness and reasonableness of Bear Creek's rates. For example, in Bear Creek's 2010 Form 2, it reported that it is owned 50 percent each by two major pipelines, Southern and Tennessee, both of which are subsidiaries of El Paso. Bear Creek's status as a wholly owned subsidiary of other entities raises various ratemaking issues whose resolution requires information required by section 154.312, but not section 154.313.

19. This ownership of Bear Creek raises the issue of whether its rate of return should be determined based on the capital structure of a parent, rather than its own capital structure. Section 154.312(f) concerning the rate of return claimed by the pipeline requires it to submit information relevant to this issue, whereas the corresponding provision of section 154.313 does not. Specifically, section 154.312(f) requires that, where any component of the capital of a pipeline is not primarily obtained through its own financing, but is primarily obtained from a company which controls the pipeline, the pipeline must provide data in Statements F-1 through F-4 with respect to debt capital, preferred stock capital, and common stock capital of such controlling company or any intermediate company through which such funds have been secured. Section 154.313(f) simply requires the pipeline to show the rate of return claimed with a "brief explanation of the basis."¹⁹

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

21. In addition, section 154.312(c) requires the pipeline to submit detailed schedules concerning the cost of plant included in its rate base, while section 154.313(e)(5) only requires the pipeline to submit limited information concerning its balances at the end of the 12-month base period. For example, section 154.312(c) requires the pipeline to submit a Statement C showing the pipeline's gas utility plant as of the beginning of the 12-month base period, book additions and reductions during the 12 months, and the balance at the end of the 12-month period. That section also requires that the Statement C show any claimed adjustments to the book balances and the total cost of plant to be included in rate base. By contrast, section 154.313(e)(5) only requires the pipeline to submit a Statement C showing its cost of plant by function at the end of the base period,

¹⁹ 18 C.F.R. § 154.313(f) (2011).

with no information concerning changes during the base period or any claimed adjustments. However, verifying whether the plant balances included in Bear Creek's rate base as of the end of the base period are accurate will inevitably require an analysis of any book additions and reductions during the base period, as well as any claimed adjustments to the balances and cost of plant to be included in rate base.

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

23. Finally, while both section 154.312(o) and 154.313(b) require pipelines to submit the same Statements I-1 through I-3 showing how the pipeline functionalizes, classifies and allocates its cost of service,²⁰ only section 154.312(p) requires the pipeline to file Statements J-1 and J-2 summarizing its billing determinants and showing the derivation of each rate component of each rate. The value of those statements for purposes of this section 5 proceeding is not the actual per-unit rates calculated in those statements, but information contained in those statements concerning the rate derivation methods underlying the pipeline's existing rates, particularly the formulas used to develop Bear Creek's per-unit deliverability, capacity, and injection/withdrawal storage rates. For example, Statement J-1 requires that, if the pipeline imputes billing determinants for

²⁰ Section 154.312(o) requires the pipeline to file Schedule I-1 showing the functionalization of its cost of service, Schedule I-2 showing the classification of costs between fixed costs and variable costs, and Schedule I-3 showing the allocation of its cost of service among the pipeline's services and rate schedules. Section 154.312(o)(3)(iii) requires that Schedule I-3 show, among other things, the "formulae used in the allocation," and "the factors underlying the allocation of costs." 18 C.F.R. §154.312(o)(3)(iii) (2011). Section 154.313(b) requires that the pipeline file the same schedules I-1 through I-3 required by section 154.312.

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

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

25. Finally, the Commission notes that Bear Creek's burden of preparing the necessary data required under section 154.312 is lessened by the fact that it provides only storage service, and otherwise appears to have a relatively simple cost of service. For example, section 154.312(o)(1) (ii) – (iii) require the pipeline to submit Schedules I-1(b) and I-1(c) allocating costs among incremental and non-incremental facilities and among rate zones. However, in its 2009 and 2010 Form 2s, Bear Creek stated it had no incremental facilities and Bear Creek has no rate zones. Therefore, Bear Creek may state that Schedules I-1(b) and I-1(c) are not applicable to it. Similarly, a number of other schedules may be inapplicable to Bear Creek, such as the various schedules related to transmission assets and service.

26. The Commission concludes that, regardless of Bear Creek's relatively small size, the information to be furnished under section 154.312 is necessary to enable the Commission to determine the issues in this proceeding.

B. Legal Authority to Require Cost and Revenue Study

27. Bear Creek contends that the Commission lacks the authority in an NGA section 5 proceeding to require it to submit a cost and revenue study including all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with the exception of a Statement P. Bear Creek further argues that this requirement disregards the boundaries between sections 4 and 5 of the NGA as set forth by the courts,²¹ and effectively requires it to submit an NGA section 4

²¹ Bear Creek Rehearing Request at 8-9 (citing, *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 343 (1956); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d

rate filing, which the Commission cannot order a pipeline to do. The Commission disagrees.

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

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

30. The November 2011 Order directed Bear Creek to file information that the Commission needs to carry out its responsibilities under NGA section 5 to ensure that rates are just and reasonable. The Commission recognizes that, consistent with *Western Resources*,²² in order to require Bear Creek to reduce its rates, the Commission will have the burden under NGA section 5 to show that Bear Creek's current rates are unjust and unreasonable and that any new rates imposed by the Commission are just and reasonable. The November 2011 Order clearly stated a number of times that the Commission was acting under NGA section 5,²³ and expressly recognized that "Bear Creek does not have an NGA section 4 burden in this section 5 proceeding."²⁴

182, 187 (D.C. Cir. 1986); *Western Resources, Inc. v. FERC et. al.*, 9 F.3d 1578 (D.C. Cir. 1993) (*Western Resources*)).

²² 9 F.3d at 1578.

²³ See, e.g., November 2011 Order, 137 FERC ¶ 61,134 at P 1 ("Therefore, the Commission will initiate an investigation, pursuant to section 5 of the Natural Gas Act (NGA), to determine whether the rates currently charged by Bear Creek are just and reasonable and set the matter for hearing."); *Id.* P 8 ("Accordingly, the Commission will

31. Sections 10(a) and 14(a) of the NGA authorize the Commission to require Bear Creek to submit the information required by the November 2011 Order in order to carry out its responsibilities under NGA section 5.²⁵ Section 10(a) permits the Commission to require any and all reports that are “necessary or appropriate to assist the Commission in the proper administration of [the NGA].” Section 10(a) also permits the Commission to “prescribe the manner and form in which such reports shall be made, and require from such natural gas companies specific answers to all questions upon which the Commission may need information.” Similarly, section 14 permits the Commission “to investigate any facts, conditions, practices, or matters which it may find necessary or proper . . . to aid in the enforcement of the provisions of this chapter.”

32. Bear Creek contends that NGA sections 10 and 14 do not authorize the Commission to require a cost and revenue study with a derivation of rates. It argues that the required study would necessitate that Bear Creek not merely produce existing data or make mechanical calculations, but make numerous subjective determinations of the type it would only be required to make in a section 4 filing. Bear Creek points out that section 154.312 ultimately requires the pipeline to submit a Statement J-2 requiring it to show the derivation of each rate component of each rate. Bear Creek contends that this would improperly require it to make the kind of decisions that it is only required to make and support when it files for a rate change under NGA section 4.

33. Citing the Commission’s January 2011 order in *Kinder Morgan Interstate Gas Transmission LLC*,²⁶ Bear Creek further contends that the Commission is improperly requiring the pipeline to first “propose” a new rate that the Commission will then use as the basis for fixing the new just and reasonable rate. Bear Creek points out that, in the section 5 investigation of Kinder Morgan’s rates, the Commission stated that “in

initiate an investigation to examine the justness and reasonableness of Bear Creek’s rates pursuant to section 5 of the NGA and set the matter for hearing.”).

²⁴ *Id.* P 9.

²⁵ NGA section 10 states “Every natural-gas company shall file with the Commission such... special reports as the Commission may by...order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act.”

²⁶ Bear Creek Rehearing Request at 11(citing *Kinder Morgan Interstate Gas Transmission LLC*, 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*)).

determining just and reasonable rates in a section 5 proceeding, the Commission takes into account the fact that the NGA delegates to the pipeline the primary initiative to *propose* rates.”²⁷ Bear Creek contends that this indicates the Commission believes that in section 5 investigations, the pipeline should first propose a new rate that the Commission will then use as the basis for fixing the new just and reasonable rate, as further shown by the following statement in *Kinder Morgan*: “In these circumstances, requiring Kinder Morgan to state how it believes its costs should be allocated among services and rate zones to derive per-unit rates will allow the other participants and the Commission to use Kinder Morgan’s preferred method or shoulder the burden of showing Kinder Morgan’s method is not among the possible just and reasonable methods and a different method is just and reasonable.”²⁸ Bear Creek states that in a section 5 proceeding, it should only be obligated to defend its existing rates, not propose new rates with a rate design it would not necessarily support in a section 4 rate filing.

34. Bear Creek’s reliance on *Kinder Morgan* to contend that the Commission is requiring it to set forth its preferred method of cost allocation and rate design is misplaced. Bear Creek fails to recognize that, while the pipeline in *Kinder Morgan* did not seek rehearing of that order, Ozark Gas Transmission L.L.C. (Ozark) did seek rehearing of the Commission’s similar holding in its section 5 case, in an order issued simultaneously with *Kinder Morgan*.²⁹ In its rehearing request, Ozark stated that the rates in the cost and revenue study it had submitted in response to *Ozark 1* reflected its historical rate design and were not evidence of Ozark’s preferred method for designing rates and allocating costs as Ozark would typically submit if it were proposing a change in rates under NGA section 4. The Commission granted rehearing in part. The Commission held, “[i]n light of Ozark’s statement that the rate design used in its cost and revenue study does not necessarily reflect its preferred rate design, that rate design will not serve as evidence of Ozark’s preferred rate design or cost allocation.”³⁰

²⁷ *Id.* (citing *id.* P 30) (emphasis added by Bear Creek).

²⁸ *Id.*

²⁹ *See Ozark*, 134 FERC ¶ 61,062 at P 35. In that order, the Commission stated, “The requirement that Ozark calculate rates based on those costs and revenues will provide useful information for the section 5 proceeding by showing, among other things, how Ozark believes costs should be allocated among services to derive per-unit rates and how the necessary calculations are performed.”

³⁰ *Ozark 2*, 134 FERC ¶ 61,193 at P 31-32.

35. Therefore, consistent with *Ozark 2*, Bear Creek may submit Statements I-1 through I-3 and Statements J-1 and J-2, using the cost allocation and rate design methods underlying its existing rates, without indicating whether those methods constitute its currently preferred cost allocation and rate design methodology.³¹ Accordingly, the rate design used in Bear Creek's cost and revenue study will not be treated as a rate design proposal by Bear Creek, nor will it serve as evidence of Bear Creek's preferred rate design or cost allocation methods. Requiring Bear Creek to show in its cost and revenue study how its costs are currently allocated among its services and how its per-unit rates are currently designed does not transform that study into an NGA section 4 filing. To the contrary, as discussed below, such information is important factual information necessary for this NGA section 5 proceeding, both for purposes of properly allocating the burden of proof under section 5 and for purposes of enabling the Commission, on its own, to calculate just and reasonable rates for Bear Creek.

36. With regard to the burden of proof, the Commission must know what cost allocation and rate design methodologies underlie the pipeline's existing rates to determine who has the burden of justifying a change in those methodologies. As the Commission explained in *Ozark 2*, when a pipeline proposes in a section 4 rate case to increase its rates because of an increased cost of service or reduced throughput but proposes to continue using its existing rate design, the pipeline has no section 4 burden to support a continuation of its presumptively just and reasonable existing rate design.³² It follows that in a section 5 proceeding, parties seeking a rate reduction based only on assertions that the pipeline's cost of service has decreased or its throughput has increased, have no burden to support a continuation of the pipeline's "presumptively just and reasonable"³³ existing rate design. As the D.C. Circuit has held, the NGA "allocates the burden of proving that a rate change is just and reasonable according to the source of the

³¹ If Bear Creek desires to use a revised cost allocation and rate design methodology in its cost and revenue study, it may do so. But, in that event, it must explain the changes from the exiting methodology, as required by section 154.312(o)(3)(iv).

³² See, e.g., *Public Service Comm'n of New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980); *Western Resources*, 9 F.3d at 1579-80; *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 456 (D.C. Cir. 1988) (*Tennessee*); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 514 (D.C. Cir 1985).

³³ *Tennessee*, 860 F.2d at 456 (D.C. Cir. 1988).

proposed change.”³⁴ Consistent with that principle, if Trial Staff and other intervenors do not propose any change in Bear Creek’s existing rate design, they have no burden to show that a continuation of the existing rate design is just and reasonable. If, however, Trial Staff or an intervenor proposes a change in Bear Creek’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 Bear Creek 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, and it would not need to show that its existing rate design is unjust and unreasonable.

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

38. The Commission recognizes that developing a cost and revenue study using its existing cost allocation and rate design methods may require Bear Creek to exercise some degree of judgment concerning how those methods should be applied to Bear Creek’s current costs and billing determinants. Also, the fact Bear Creek’s current rates are the result of a black box settlement may require Bear Creek to make certain assumptions concerning whether and how that settlement may have affected the cost allocation and rate design methods underlying Bear Creek’s rates in effect before that settlement.³⁵

³⁴ *East Tennessee Natural Gas Co.*, 863 F.2d 932, 937 (D.C. Cir. 1988) (*East Tennessee*). See also, *Western Resources*, 9 F.3d at 1578; *Complex Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999) (*ConEd*).

³⁵ Article IV of the 1989 settlement of Bear Creek’s last NGA section 5 proceeding provides that the design of its rates includes rates for deliverability, capacity, and injection/withdrawal, but provides no other details of how those charges were derived.

However, the fact Bear Creek 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 Bear Creek or otherwise violate NGA section 5.

39. In *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*), the United States Court of Appeals for the District of Columbia Circuit rejected a contention similar to the one made here by Bear Creek. In *INGAA*, the Commission in Order No. 637 had directed each pipeline to file *pro forma* tariff sheets showing how it intended to comply with a regulation requiring pipelines to permit segmentation³⁶ or to explain why its system's configuration justified curtailing segmentation rights. As in the instant proceeding, the pipelines contended that requiring them to submit these filings impermissibly shifted the burden of proof, and the Commission had in essence required pipelines to make section 4 filings to defend their current rates. The court rejected this argument, finding that the Commission had stated that it "will indeed shoulder the burden under § 5 of the NGA." *INGAA*, 285 F.3d at 38. As pertinent here, the court expressly stated that:

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

40. The November 2011 Order's requirement that Bear Creek submit a cost and revenue study is similar to Order No. 637's directive, affirmed in *INGAA*, that pipelines file *pro forma* tariff sheets showing how they intended to comply with the new segmentation regulation or explain why they should be exempted from that requirement.³⁷ The requirement to file such *pro forma* tariff sheets went beyond a

³⁶ 18 C.F.R. § 284.7(d) (2011). *Regulation of Short-term Natural Gas Transportation Services*, Order 637, FERC Stats. and Regs. ¶ 31,091, *reh'g*, Order 637-A, FERC Stats. and Regs. ¶ 31,099 (2000).

³⁷ Bear Creek seeks to distinguish *INGAA*, by claiming that Order No. 637-A stated that no pipeline would be required to propose segmentation tariff provisions until the Commission found that the pipeline's tariff was unjust and unreasonable, citing Order No. 637-A, *id.* 31,590-91. Bear Creek Rehearing Request at 18. However, Order

(continued...)

requirement simply to provide factual information. It required each pipeline to state in its compliance proceeding its opinion as to whether and how shippers on its system should be permitted to segment their capacity in light of the operational requirements of their systems and to propose specific tariff language implementing the pipeline's proposed segmentation plan.³⁸ Moreover, here as in *INGAA*, the Commission has clearly recognized that it has the burden of proof in this NGA section 5 proceeding.

41. The Commission readily admits that the information that it has requested from Bear Creek is the type of information necessary to craft rates. Whether rates are changed pursuant to the procedures and burdens in a NGA section 4 or NGA section 5 proceeding, the same information and calculations are required to determine the rates. The pipeline's cost of service must be determined, including an appropriate return on equity, and that cost of service must be allocated among the pipeline's various services, and per unit rates must be determined for each service. Therefore, the Commission has requested that Bear Creek provide most of the same information it would require had Bear Creek filed to change its rates under NGA section 4, particularly since the required information is in the hands of Bear Creek.

42. Bear Creek contends that our requirement that it submit a cost and revenue study is contrary to Order No. 710, in which the Commission exercised its authority under

No. 637-A contains no such statement. Rather, the passage cited by Bear Creek simply states that the Commission "required pipelines to make *pro forma* filings to establish whether their current tariffs are just and reasonable. The requirement for pipelines to make *pro forma* compliance filings is not . . . a requirement that pipelines make a section 4 filing. Rather, the *pro forma* filings require the pipeline to show why their existing tariffs should not be considered unjust and unreasonable. If the Commission finds changes are warranted, it will be acting under section 5 to implement such changes." Earlier on page 31,590 of Order 637-A, the Commission stated that Order No. 637 provided that "Each pipeline is required to make a *pro forma* tariff filing demonstrating how it intends to comply with the regulation by revising its tariff, explaining why its existing tariff meets the requirement, or explaining why the operational configuration of its system does not permit segmentation." The subsequent passage in Order No. 637-A did not purport to modify that requirement, and the pipelines' filings to comply with Order No. 637 generally included *pro forma* tariff language setting forth each pipeline's proposal as to how to implement segmentation.

³⁸ See, e.g., *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,084, at P 12-14 (2002), describing the pipeline's Order No. 637 compliance filing virtual pool proposal in light of its assertion that physical pathing was not operationally feasible on its system.

NGA section 10(a) to require pipelines to file the Form 2. Bear Creek points out that Order No. 710 rejected a proposal to require pipelines to file cost and revenue studies as part of these forms, and stated that a party filing a section 5 complaint would still have the burden to show why the information in the Form 2 support an allegation that the pipeline's existing rates are unjust and unreasonable.³⁹ Bear Creek asserts that Order No. 710 thus recognized that in a section 5 proceeding, the party bearing the burden of proof will have to carry its burden based on the data in the pipeline's Form 2.

43. Bear Creek has misinterpreted Order No. 710. In that order, the Commission stated that the data requested in the Form 2 "is designed to provide the Commission and pipeline customers with information that will aid their ability to make a reasonable assessment of a pipeline's cost of service."⁴⁰ Consistent with that intent, the Commission has analyzed Bear Creek's Form 2s for 2009 and 2010, and estimated that Bear Creek's return on equity for those calendar years was 22.43 percent, and 29.16 percent, respectively. The Appendix to the November 2011 Order sets forth how the Commission calculated those returns, and Bear Creek has not contested any aspect of the Commission's analysis. Thus, the Commission's assessment of the information in Bear Creek's Form 2 makes out a *prima facie* case that Bear Creek's current rates are unjust and unreasonable, thus justifying a further examination of its rates, as contemplated by Order No. 710. In order to carry out such a further examination of a pipeline's rates, the Commission requires the additional information not included in the Form 2. For example, the Form 2 does not require pipelines to provide the information necessary to allocate costs among customers or to derive per-unit rates, such as the contract demands of the shippers in each customer class, annual billing requirements, how much throughput flowed at a discount and what those discounts were. Thus, contrary to Bear Creek's assertion, the Commission never intended that the party bearing the burden of proof in a section 5 proceeding must carry that burden based solely on the data in the pipeline's Form 2. If that had been the case, the Commission would have had to require the pipelines to include considerably more detailed information in their Form 2s, than Order No. 710 required.

44. The court decisions set forth by Bear Creek do not prohibit the Commission's actions here as suggested by Bear Creek. In *Public Service v. FERC*, the Commission expressly required that a pipeline file new rate schedules under NGA section 4 every

³⁹ Bear Creek Rehearing Request at 15-17 (citing *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. and Regs. ¶ 61,278, at P 12, *reh'g*, Order No. 710-A, 123 FERC ¶ 61,278 (2008)).

⁴⁰ *Id.*

three years. The Commission determined that this action was necessary because of the inadequate protection provided by NGA section 5, and concluded that good cause existed to require periodic section 4 refilings. The court found that the Commission had improperly shifted the burden of proof from the Commission to the pipeline.⁴¹ However, the court found that in that proceeding “the Commission has made clear that its purpose in requiring a § 4 filing was precisely to avoid the ‘insufficient protection’ afforded by [NGA] § 5, *see Ozark Gas Transmission System*, 39 FERC ¶ 61,142 at 61,512, i.e., to avoid its procedural constraints.” *Id.* 491. In this case, unlike *Public Service v. FERC*, the Commission has not required Bear Creek to file new rate schedules under NGA section 4, and the Commission fully recognizes that it is proceeding under NGA section 5, and bears the burden to make the findings required by section 5 in order to modify Bear Creek’s rates.

45. In *Consumers Energy*, the Commission required a Hinshaw pipeline⁴² performing certain NGA jurisdictional services to file, at three-year intervals, petitions “for rate approval to justify its current rate or to establish a new maximum rate.”⁴³ The court held that it was unclear whether the Commission intended to require the pipeline to make periodic NGA section 4 filings modifying its rates, or simply require periodic informational filings. Finding that the Commission lacked authority to order pipelines to make NGA section 4 filings, the court remanded the case to the Commission. However, the court also stated:

Should FERC wish [the Pipeline] **to make periodic informational filings, it may of course so require pursuant to § 10(a) of the NGA.** This will allow FERC to do what it insists it has been trying to do all along, and will permit both sides to get what they have assured us they want. *Id.* at 781 (emphasis added).

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

⁴¹ *Public Service v. FERC*, 488 F.2d. at 490-92.

⁴² A Hinshaw pipeline is exempt from the Commission’s NGA jurisdiction by NGA section 1(c).

⁴³ 226 F.3d at 777.

47. With regard to Bear Creek's contention that the Commission has improperly shifted the burden of producing evidence that its rates are unjust and unreasonable to Bear Creek, the D.C. Circuit has held that the statutory burden of proof requirement in a section 4 proceeding "relates to the burden of persuasion (or, more accurately, the risk of non-persuasion), not to the burden of production, and thus the identity of the party submitting evidence is not dispositive."⁴⁴ Therefore, the court held that the Commission could find that the pipeline had satisfied its burden to support a section 4 proposal even though it presented no evidence in support of that proposal, if there is other evidence in the record to show that the proposal is just and reasonable. Similarly, in this section 5 proceeding, the Commission has the burden of persuasion to show both that Bear Creek's existing rates are unjust, unreasonable and that any new rates the Commission imposes are just and reasonable. However, the Commission may rely on any evidence in the record to satisfy that burden, regardless of the source of that evidence.⁴⁵ The information

⁴⁴*ConEd*, 165 F.3d at 1008 (citing *City of Winnfield, La. v. FERC*, 744 F.2d 871 (D.C. Cir. 1984)).

⁴⁵ In support of its argument that the initial burden of going forward in this section 5 proceeding is with Trial Staff and other participants, Bear Creek cites *Transwestern Pipeline Co.*, 36 FERC ¶ 61,174, at 61,433 (1986). In that case, complainants alleged that the pipeline's different minimum bills applicable to two customers were unduly discriminatory. The Commission held that the complainants always have the burden of persuasion under NGA section 5. The Commission also held that the complainants have an initial burden of producing evidence showing that the customers are similarly situated but are being treated differently. However, the Commission held that the production of such evidence would shift the burden of production to the pipeline to justify the disparity on the basis of factual differences. These holdings reasonably required the complainants alleging undue discrimination to make a *prima facie* showing of undue discrimination, while then requiring the pipeline to produce evidence in its possession as to the reasons why it was treating the two customers differently. See *East Tennessee*, 863 F.2d at 938 (finding that the Commission may, consistent with its burden of persuasion under section 5, impose on the pipeline the burden of producing evidence justifying a minimum bill, once a *prima facie* showing is made that the minimum bill is anticompetitive). In this case, the Commission is taking a similar approach. Our analysis of Bear Creek's 2009 and 2010 Form 2s, estimating that its return on equity for those years was 22.43 percent and 29.16 percent, makes a *prima facie* showing that its rates are unjust and unreasonable, and, as described above, our requirement that Bear Creek submit a cost and revenue study is intended solely to obtain evidence within its possession necessary to evaluate whether, in fact, its rates are unjust and unreasonable. The Commission will at all times have the burden of persuasion in this section 5 proceeding. The Administrative Law Judge's decision in *Vermont Yankee Nuclear Power Corp.*, 40 FERC ¶ 63,006, at

(continued...)

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

48. Therefore, as discussed above, Bear Creek's request for rehearing of the November 2011 Order is denied.

The Commission orders:

Bear Creek's request for rehearing of the Commission's November 2011 Order is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

65,043, *reversed on other grounds*, 40 FERC ¶ 61,372 (1987), relied on by Bear Creek, made only a passing reference to the burden of production in a discussion whose primary purpose was to find that the Commission had the "ultimate burden of persuasion" under section 206 of the Federal Power Act; the Commission's order on the initial decision found that the burden of persuasion had been satisfied without addressing the issue of the burden of production (40 FERC at 62,206).