

144 FERC ¶ 61,034  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 284

[Docket No. RM12-17-000; Order No. 781)

Revisions to Procedural Regulations Governing Transportation by Intrastate Pipelines

(Issued July 18, 2013)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission revises its regulations to provide optional notice procedures for processing rate filings by those natural gas pipelines that fall under the Commission's jurisdiction pursuant to the Natural Gas Policy Act of 1978 or the Natural Gas Act. The Final Rule generally adopts the regulations proposed in the October 18, 2012 Notice of Proposed Rulemaking, but revises that proposal in two respects. First, the Final Rule revises the Commission's periodic rate review requirement policy to allow intrastate pipelines with unchanged state-based rates to meet the requirement by certifying that the state-approved rates continue to satisfy the requirements of the Commission's regulations for using a state-based rate. Second, the Final Rule extends the deadline for interventions and initial comments to 21 days after the date of the filing or such other date established by the Secretary of the Commission. The Final Rule also makes technical corrections to the proposed rules.

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EFFECTIVE DATE: This rule will become effective [**INSERT DATE 60 days after publication in the FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

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Revisions to Procedural Regulations Governing  
 Transportation by Intrastate Pipelines

Docket No. RM12-17-000

ORDER NO. 781

FINAL RULE

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Revisions to Procedural Regulations Governing  
Transportation by Intrastate Pipelines

Docket No. RM12-17-000

ORDER NO. 781

FINAL RULE

(Issued July 18, 2013)

1. In this Final Rule, the Commission revises its Part 284 regulations governing open access transportation service to include optional notice procedures which intrastate pipelines may elect to use when filing proposed rates or operating conditions pursuant to § 284.123 of the Commission's regulations.<sup>1</sup> The revised procedures are intended to result in regulatory certainty and a reduction of regulatory burdens on intrastate pipelines. The Final Rule generally adopts the regulations proposed in the Notice of Proposed Rulemaking.<sup>2</sup> However, the Final Rule revises the Commission's periodic rate review requirement policy to allow intrastate pipelines with unchanged state-approved rates to meet the periodic rate review requirement by certifying that their state-based rates

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<sup>1</sup> 18 CFR 284.123 (2012).

<sup>2</sup> *Revisions to Procedural Regulations Governing Transportation by Intrastate Pipelines*, 77 FR 66568 (Nov. 6, 2012), FERC Stats. and Regs. ¶ 32,695 (2012) (NOPR).

continue to satisfy the requirements of § 284.123(b)(1) of the Commission's regulations for using state-based rates. The Final Rule also extends the deadline for interventions and initial comments to 21 days after the date of a filing under the optional notice procedures or such other date established by the Secretary of the Commission. The Commission clarifies that the optional notice procedures are not available for market-based rate filings by intrastate pipelines, i.e., seeking approval for market-based rates pursuant to § 284.503, or Hinshaw pipelines seeking approval of a blanket certificate and initial rates pursuant to § 284.224. The Final Rule also makes technical corrections to the proposed rules.

## **I. Background**

2. Section 284.123 applies to filings by: (1) intrastate pipelines providing interstate services pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA)<sup>3</sup> and (2) Hinshaw<sup>4</sup> pipelines providing interstate services subject to the Commission's Natural Gas Act (NGA) jurisdiction pursuant to blanket certificates issued under § 284.224 of the

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<sup>3</sup> 15 U.S.C. 3372.

<sup>4</sup> Section 1(c) of the NGA exempts from the Commission's NGA jurisdiction pipelines which transport gas in interstate commerce if (1) they receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state, and (3) the pipeline is regulated by a state Commission. This exemption is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include section 1(c). See *ANR Pipeline Co. v. Federal Energy Regulatory Comm'n*, 71 F.3d 897, 898 (1995) (*ANR v. FERC*) (briefly summarizing the history of the Hinshaw exemption).

Commission's regulations.<sup>5</sup> NGPA section 311 authorizes the Commission to allow intrastate pipelines to transport gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines "under such terms and conditions as the Commission may prescribe."<sup>6</sup> NGPA section 601(a)(2) exempts transportation service authorized under NGPA section 311 from the Commission's NGA jurisdiction. Shortly after the adoption of the NGPA, the Commission authorized Hinshaw pipelines to apply for NGA section 7 certificates authorizing them to transport gas in interstate commerce in the same manner as section 311 pipelines may do under NGPA section 311.<sup>7</sup>

3. Subpart C of the Commission's Part 284 open access regulations (18 CFR 284.121-126 (2012)) implements the provisions of NGPA section 311 concerning transportation by intrastate pipelines. NGPA section 311 provides that the rates of intrastate pipelines performing transportation service under the NGPA shall be fair and equitable. Section 284.123 of the regulations provides procedures for section 311 and Hinshaw pipelines to establish fair and equitable rates for interstate services.

4. Section 284.123(b) allows intrastate pipelines an election of the methodology upon which to base their rates for interstate services. Section 284.123(b)(1) permits an

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<sup>5</sup> 18 CFR 284.224 (2012).

<sup>6</sup> 15 U.S.C. 3371(c).

<sup>7</sup> *Certain Transportation, Sales and Assignments by Pipeline Companies not Subject to Commission Jurisdiction Under Section 1(c) of the Natural Gas Act*, Order No. 63, FERC Stats. & Regs. ¶ 30,118, at 30,824-825 (1980).

intrastate pipeline to elect to base its rates on the methodology used by the appropriate state regulatory agency (1) to design rates to recover transportation or other relevant costs included in a then effective firm sales rate for city-gate service on file with the state agency; or (2) to determine the allowance permitted by the state agency to be included in a natural gas distributor's rates for city-gate natural gas service. Section 284.123(b)(1) also permits an intrastate pipeline to use the rates contained in one of its then effective transportation rate schedules for intrastate service on file with the appropriate state regulatory agency which the intrastate pipeline determines covers service comparable to service under Subpart C of Part 284.

5. If the intrastate pipeline does not make an election under paragraph (b)(1) of § 284.123, § 284.123(b)(2) requires that it “apply for Commission approval, by order, of the proposed rates and charges” pursuant to the procedures in that paragraph. Section 284.123(b)(2)(i) provides for the pipeline to file a petition for approval of the proposed rates and charges, as well as information showing the proposed rates and charges are fair and equitable. Upon filing the petition for approval, the intrastate pipeline is permitted to commence the transportation service and charge and collect the proposed rate, subject to refund. Section 284.123(b)(2)(ii) provides that the rate proposed in the application will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for providing similar transportation service, unless within the 150-day period after the date on which the Commission received a filed application, the Commission either extends the time for action, or institutes a proceeding

in which all interested parties will be afforded an opportunity for written comments and for the oral presentation of views, data, and arguments. The Commission has extended this 150-day period when necessary, for example to allow settlement in contested proceedings or initiate proceedings in complex cases.

6. Section 284.123(e) requires that, within thirty days of commencement of a new service, any intrastate pipeline that engages in transportation arrangements under Subpart C of Part 284 must file with the Commission a statement that includes the pipeline's interstate rates, the rate election made pursuant to § 284.123(b) of that section, and a description of how the pipeline will engage in these transportation arrangements, including operating conditions, such as gas quality standards and the creditworthiness of the shipper. This statement is generally referred to as the pipeline's "Statement of Operating Conditions" (SOC). Section 284.123(e) also requires that, if the pipeline changes its operations, rates, or rate election, it must amend the SOC and file such amendments no later than thirty days after commencement of the change in operations or the change in rate election.

7. As part of its regulation of section 311 and Hinshaw pipelines, the Commission has a policy of requiring a review of the rates of both section 311 and Hinshaw pipelines every five years. While this periodic rate review requirement is not part of the Commission's regulations, the Commission has consistently imposed that requirement in its orders approving each rate filing by an intrastate pipeline. In Order No. 735, the Commission modified its previous triennial rate review policy in order to decrease the

frequency of review from three to five years from the date the approved rates took effect.<sup>8</sup>

The Commission imposes this requirement, both when the intrastate pipeline has chosen to elect a state-based rate pursuant to § 284.123(b)(1) or has proposed a rate for a Commission-approved rate pursuant to § 284.123(b)(2).<sup>9</sup>

8. Finally, currently, a request to withdraw a filing must be filed under the Commission's general Rules of Practice and Procedure.

**A. The NOPR**

9. On October 18, 2012, the Commission issued the NOPR, in which it proposed to add a new section 284.123(g) to its regulations to provide optional notice procedures for processing rate filings by section 311 and Hinshaw pipelines. The Commission proposed that an intrastate pipeline may elect to use these procedures for approval of a filing pursuant to § 284.123 of the Commission's regulations. The Commission proposed that, under this procedure, the intrastate pipeline's filing would be approved without any order of the Commission, if the filing is not protested within a specified period after notice of the filing or if any protests are resolved during a reconciliation period.

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<sup>8</sup> *Contract Reporting Requirements of Intrastate Natural Gas Companies*, Order No. 735, 75 Fed. Reg. 29,404 (May 26, 2010), FERC Stats. & Regs. ¶ 31,310, at P 96 (2010) (Order No. 735), *order on reh'g*, Order No. 735-A, 75 Fed. Reg. 80,685 (Dec. 23, 2010), FERC Stats. & Regs. ¶ 31,318 (2010).

<sup>9</sup> Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 92 and cases cited.

10. Specifically, the optional notice procedure as proposed in the NOPR would operate as follows: Proposed § 284.123(g)(3) provided that, within ten days after a filing by an intrastate pipeline pursuant to the optional notice procedure, the Secretary of the Commission would issue a notice of the filing, which would be published in the Federal Register. That notice would provide a deadline for interventions and initial comments fourteen days after the date of the filing, or such other date established by the Secretary. It would also provide a separate deadline for final comments and protests sixty days after the date of the filing or such other date established by the Secretary. As proposed, any person or the Commission's staff is permitted to file a protest prior to the 60-day protest deadline. If no protest is filed within the time allowed, the filing would be deemed approved without a Commission order, upon expiration of the time for filing protests, unless the intrastate pipeline has withdrawn, amended, or modified its filing or the filing is rejected prior to that date.

11. If a protest is filed, proposed § 284.123(g)(5) allows a reconciliation period for negotiations in a structured process to promote settlement of contested cases. Specifically, this section would permit the intrastate pipeline, the person who filed the protest in accordance with proposed § 284.123(g)(4), any intervenors, and staff thirty days from the deadline for protests to the pipeline's filing to resolve the protest and to convene informal settlement conferences to assist in resolving the protest. If all protests to the filing are withdrawn pursuant to proposed paragraph (g)(6) by the end of the reconciliation period, the filing would be deemed approved. Alternatively, proposed

paragraph (g)(7) permits the pipeline to amend or modify a tariff record in order to resolve concerns raised in an initial comment or a protest. Proposed paragraph (g)(7) provides that such a filing will toll the notice periods established under paragraph (g)(3) of this section for the original filing, and the Secretary of the Commission will issue a notice establishing new deadlines for comments and protests for the entire filing pursuant to paragraph (g)(3). The intrastate pipeline may request a deadline for protests less than 60 days after the date of the filing. If there are no protests to the amendment or modification and any protests to the entire filing which have been filed are withdrawn, the amended filing would be deemed approved as of the day after the new deadline for protests established by the Secretary.

12. If a filing is still contested after the above procedures are completed, the filing would not be deemed approved and, within sixty days from the deadline for filing protests, the Commission would establish procedures to resolve the proceeding. The 150-day period in existing § 284.123(b)(2)(ii) under which filings are deemed approved unless the Commission acts within that period does not apply to filings pursuant to the new notice procedures.

13. The Commission also proposed in § 284.123(g)(9) to apply the Commission's existing periodic rate review policy to rates approved under the optional notice procedures. Therefore, proposed § 284.123(g)(9) requires that a NGPA section 311 intrastate pipeline whose rates are approved under the optional notice procedures file an application for rate approval under § 284.123 on or before the date five years following

the date it filed the application for approval of the rates pursuant to § 284.123(g).

Similarly, a Hinshaw pipeline whose rates are deemed approved under § 284.123(g) would be required to file either (1) cost and throughput data sufficient to allow the Commission to determine whether any change to the pipeline's rates should be ordered pursuant to section 5 of the Natural Gas Act or (2) a petition for rate approval pursuant to § 284.123, on or before the date five years following the date it filed the application for approval of rates pursuant to § 284.123(g).<sup>10</sup>

14. Finally, the Commission proposed in § 284.123(h) to codify the procedures for section 311 and Hinshaw pipelines to withdraw any filing under § 284.123 in its entirety prior to its approval, including filings made under the existing procedures in § 284.123. Section 284.123(h)(2) would make the pipeline's withdrawal of its filing effective at the end of 15 days from the date of filing the withdrawal motion, if no opposition to the motion is filed within that period and the Commission does not issue an order disallowing the motion. Proposed § 284.123(h)(1) would require the pipeline to acknowledge that any amounts collected subject to refund in excess of the rates authorized by the

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<sup>10</sup> The courts have held that the Commission cannot require interstate pipelines subject to its NGA jurisdiction to make new rate filings under NGA section 4. *Public Service Commission of New York v. FERC*, 866 F.2d 487 (D.C. Cir. 1989). *Consumers Energy Co. v. FERC*, 226 F.3d 777 (6<sup>th</sup> Cir. 2000). Because the Commission regulates interstate services performed by Hinshaw pipelines under the NGA, the Commission gives them the option of filing a cost and revenue study every five years, instead of a new petition for rate approval. *Consumers Energy Co.*, 94 FERC ¶ 61,287 (2001).

Commission will be refunded with interest and a refund report will be filed. The refunds must be made within sixty days of the date the withdrawal motion becomes effective. A shipper would have 15 days to respond to the pipeline's filing.

## **B. Comments**

15. Comments on the NOPR were due on December 6, 2012. Thirteen parties filed comments.<sup>11</sup> In general, most commenters support the Commission's efforts to increase regulatory certainty and reduce regulatory burdens. However, some commenters either oppose the rule or request that the Commission modify or clarify the proposal. The comments are discussed below in the context of the relevant aspect of this Final Rule.

## **II. Whether to Adopt Optional Notice Procedures**

### **A. The NOPR**

16. In the NOPR, the Commission explained that it had proposed the new optional notice procedures in an effort to reduce burdens on regulated entities and provide regulatory certainty. The Commission stated that this proposal permitting a filing to be deemed approved without a Commission order under the conditions described above was

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<sup>11</sup> Comments were filed by Independent Petroleum Association of America (IPAA); American Gas Association (AGA); Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (Duke); The East Ohio Gas Company d/b/a Dominion East Ohio and Hope Gas Inc. d/b/a Dominion Hope (Dominion); Texas Pipeline Association (TPA); MGTC Inc. (MGTC); Enstor Operating Company, LLC (Enstor); Cranberry Pipeline Corporation (Cranberry); Calpine Corporation (Calpine); Apache Corporation, BP America Production Company, BP Energy Company, Noble Energy, Inc., and Occidental Energy Marketing, Inc. (Indicated Shippers); BG Energy Merchants, LLC and Marathon Oil Company (Indicated Marketers); Oklahoma Independent Petroleum Association (OIPA); and Dawn Hearty.

part of its commitment to continually review its regulations and streamline or eliminate requirements that impose an unnecessary burden on regulated entities. The Commission further stated that it believes that these notice procedures would provide an expedited and less burdensome method of processing filings by section 311 and Hinshaw pipelines which present few, if any, contested issues. The Commission noted that many of the intrastate pipeline companies filing rates and/or statements of operating conditions pursuant to § 284.123 are small and have few interstate shippers. The Commission further noted that discount rate agreements are common, with the result that the pipeline often performs most of its interstate services at rates which are discounted substantially below its maximum rates for such services. The Commission stated that most § 284.123 filings are not protested by any shipper and, if protested, those protests often raise issues which are relatively amenable to settlement.

**B. Comments**

17. The commenters generally support adoption of the optional notice procedures, although several request clarifications or modifications to the regulations proposed in the NOPR. Generally, the commenters supporting the proposal, including AGA, MGTC, TPA, Dominion, Duke, Calpine, and Cranberry, support the proposal due to the expedited and less burdensome procedure which they believe will benefit intrastate pipelines. TPA states that it is a more rapid process than the existing procedures and will achieve certainty earlier at a reduced cost to the pipeline, shippers and the Commission. Dominion asserts that the proposal will expedite the regulatory filing and approval

process in uncontested cases while at the same time ensuring that any contested matter receives full consideration and review by the Commission before a final determination is made.

18. However, Indicated Shippers, Indicated Marketers, and OIPA oppose the adoption of the proposed optional notice procedures. Indicated Shippers, Indicated Marketers, and OIPA argue that the proposed optional notice procedures improperly reduce or eliminate the Commission's statutory responsibilities and the independent staff review that is required for filings pursuant to § 284.123 of the Commission's regulations. Indicated Shippers argues that the proposed rule would, in fact, impermissibly permit automatic implementation of rates.

19. Indicated Marketers contends that, while the volume of protests may be small, this likely results from the section 311 market structure and the shippers' difficulty accessing capacity on large section 311 intrastate pipelines. Indicated Marketers argues<sup>12</sup> that the increase of large section 311 intrastate pipelines requires more oversight, especially with the increasing supply of shale gas.<sup>13</sup>

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<sup>12</sup> Indicated Marketers at 9-13.

<sup>13</sup> Indicated Marketers cites the Notice of Inquiry (NOI) proceeding in Docket No. RM11-1-000, *Capacity Transfers on Intrastate Natural Gas Pipelines*, FERC Stats. & Regs. ¶ 35,567 (2010) (cross-referenced at 133 FERC ¶ 61,065 (2010)), which requested comments on whether and how holders of firm capacity on intrastate pipelines should be permitted to allow others to make use of their firm interstate capacity.

20. Indicated Marketers and OIPA argue that the proposed regulation shifts the burden of proof to shippers. Indicated Marketers contends that this proposal: (1) lacks any provision for parties to conduct discovery; (2) fails to consider the fact that a shipper's commercial concerns may prevent it from filing a protest; and (3) fails to protect prospective shippers. Finally, Indicated Marketers argues that the Commission's expectation that all matters can be resolved through negotiations is unreasonable. Indicated Marketers contends that the changes to terms and conditions of service of intrastate pipelines (1) may be less likely to be resolved and involve policy issues or operational changes that require the Commission resolution and (2) may be implemented immediately and are not required to be filed until thirty days after the commencement of service.<sup>14</sup>

21. OIPA argues that the optional notice procedures together with lengthening of the periodic rate review to 5 years seem to be tilting the playing field in favor of intrastate pipelines.

22. While AGA supports adoption of the optional notice procedures, it requests that the Commission clarify that those procedures will not apply to rate filings seeking authorization to charge market-based rates.

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<sup>14</sup> (Citing 18 CFR 284.123(e) (2012)).

**C. Commission Determination**

23. The Commission finds that the optional notice procedures, as modified herein, will provide an expedited and less burdensome method of processing the significant percentage of filings by section 311 and Hinshaw pipelines which present few, if any, contested issues. This will reduce burdens on section 311 and Hinshaw pipelines, particularly those performing relatively little interstate service, and their customers. It will also allow the Commission to devote more resources to cases where significant issues are raised.

24. The Commission rejects commenters' assertions that these procedural revisions would reduce or eliminate staff review of the subject filings or violate the Commission's statutory and regulatory obligations to ensure fair and equitable rates, terms and conditions of service. Contrary to the arguments of the commenters regarding the proposed opportunity to review and protest filings and asserted changes in the characteristics of intrastate pipelines and the natural gas markets, the Commission finds that nothing in the proposed rule, as modified herein, reduces the necessary review by the Commission or the opportunity for participation by shippers.<sup>15</sup> Staff will continue to

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<sup>15</sup> OIPA argues that while, as the NOPR recognizes (citing NOPR, FERC Stats. & Regs. ¶ 32,695 at P 9) that discount rates from the maximum rate are common for the intrastate pipelines, those discounts are charged to the cost-of-service in many instances and, therefore, maximum rate customers pay a higher maximum rate. However, the Commission's statement was made in the context of its discussion of the lack of contested issues in and protests to filings pursuant to section 284.123. Further, in any

thoroughly review intrastate pipeline filings under the revised procedures in the same manner as it reviews such filings under the existing procedures. Section 284.123(g)(4)(i) permits the Commission's staff to file a protest to an optional notice filing, even if no party files a protest.<sup>16</sup> In addition, there will be a full opportunity for interested parties to participate in filings pursuant to § 284.123(g). In fact, in some respects, shippers will have a greater ability to participate and contest the intrastate pipeline's filing. Section 284.123(g)(3), as revised below, gives shippers 21 days to submit initial comments and a 60-day period for final protests. The optional notice procedures approved in the Final Rule, including the 30-day reconciliation period after final protests are filed, provides a framework to resolve contested issues by agreement between the parties in an expeditious manner. If, however, a shipper continues to contest a filing after the reconciliation period, § 284.123(g)(8) provides that the filing will not be deemed approved, and instead the Commission will establish additional procedures to consider the contested issues.

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case, the approval without a Commission order under the optional notice procedure is limited to uncontested filings and, therefore, customers paying the maximum rate may protest a filing and prevent such approval.

<sup>16</sup> Indicated Marketers argues that there is little precedent for the ability of Commission staff to protest set forth in section 284.123(g)(4)(i). However, the Commission staff's use of protests in blanket certificate proceedings pursuant to a similar provision in section 157.205(e) of the prior notice procedures provides a precedent. The Commission believes that the ability of Commission staff to protest filings will be used to effectively assist the Commission in implementing its responsibilities under section 311.

25. Indicated Shippers argues that the proposed rule would impermissibly permit “automatic” implementation of rates<sup>17</sup> through light-handed regulation,<sup>18</sup> including permitting market-based rates without the required finding of a lack of market power. Similarly, Indicated Marketers<sup>19</sup> and OIPA argue that the burden of proof has been shifted to shippers. They assert that the proposed rules lack discovery procedures and

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<sup>17</sup> Indicated Shippers contends that the Commission must “provide a reasonable justification for excluding” an intrastate pipeline from a requirement that binds interstate pipelines and that the proposed rules would set a bad regulatory precedent. Indicated Shippers at 3, quoting *ANR v. FERC*, 71 F.3d 897, 902. The quoted language is directed to the Commission’s failure provide a reasonable justification for rejection of objections by an intervenor in that case. However, the proposed optional notice procedure provides a full opportunity to present any objections by the intervenors or Commission staff and for appropriate resolution of any contested issues by the Commission.

<sup>18</sup> Indicated Shippers asserts that the proposed rules unnecessarily minimize regulatory oversight in conflict with the Commission’s goal of fostering a national pipeline grid and the appropriate implementation of section 311 (citing *EPGT Texas Pipeline, L.P.*, 99 FERC ¶ 61,295, at 62,252 (2002)). However, as explained in this order, the proposed rules do not minimize the Commission’s regulatory oversight and this assertion is rejected as unsupported.

<sup>19</sup> Indicated Marketers objects to the Commission’s statement the proposed optional notice procedures would reduce regulatory burden similar to the prior notice procedures for interstate pipelines set forth in section 157.205 since it implies those procedures are applicable to the section 284.123 filings covered by these rules. However, the Commission’s statement did not concern the applicability of the prior notice procedures to these section 284.123 filings. The Commission was referring to its belief regarding the similar result of these procedures in reducing regulatory burdens. NOPR, FERC Stats. & Regs. ¶ 32,695 at P 10.

ignore the fact a shipper's commercial concerns may prevent it from filing a protest.

They further assert that the proposed rules also ignore prospective shippers.

26. The Commission disagrees. The proposed rules only eliminate the need for a Commission order in the limited circumstance where filings are unopposed. This does not lessen, in any manner, the requirements for approval of filings pursuant to § 284.123, and the pipeline will continue to have the burden of proof to support its proposed rates, terms and conditions. As described above, parties will continue to have a full opportunity to protest a § 284.123 filing. With regard to discovery procedures, the existing rules do not permit parties to conduct discovery, unless a case is set for hearing before an Administrative Law Judge. However, the Commission staff does issue data requests to obtain needed information,<sup>20</sup> and nothing in the proposed procedures would prevent the staff from continuing to issue such data requests, as needed.

27. Further, as provided in § 284.123(g)(1), the optional notice procedures are applicable only to filings seeking approval of rates, a statement of operating conditions, and any amendments thereto, pursuant to § 284.123. The Commission's regulations require that intrastate pipelines seeking approval for market-based rates must do so pursuant to § 284.503, and Hinshaw pipelines seeking approval of a blanket certificate and initial rates must do so pursuant to § 284.224. Therefore, the Commission clarifies

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<sup>20</sup> See, e.g., *Peoples Gas Light and Coke Co.*, 118 FERC ¶ 61,203 (2007); *Crosstex LIG, LLC*, 129 FERC ¶ 61,284 (2009).

the optional notice procedures are not available for market-based rate filings by intrastate pipelines or for blanket certificate applications by Hinshaw pipelines.

28. Finally, Indicated Marketers argue that Commission's expectation that all matters may be resolved through negotiation is unreasonable.<sup>21</sup> Indicated Marketers assert that terms and conditions of service may be less likely to be resolved than rates and may include policy issues which require resolution by the Commission. Indicated Marketers further asserts that there is lack of protection for shippers because § 284.123(e) of the Commission's regulations does not require intrastate pipelines to file changes to an SOC until 30 days after commencement of the change.

29. The Commission does not believe that all contested issues under the proposed rules will be resolved through negotiations. While § 284.123(g)(5) designates a new structured 30-day reconciliation period after the deadline for filing protests to improve the opportunity to resolve any remaining contested issues, the Commission is required after the end of that period to establish procedures to resolve the proceeding when a contested filing has not been resolved within 60 days of the deadline for filing protests. The new procedures do not put the shipper at a greater disadvantage than the current procedures or reduce staff or Commission involvement and, in fact, they increase the opportunity for participation by both shippers and staff and to resolve contested issues in

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<sup>21</sup> Indicated Marketers at 16-17.

a new procedural framework. The Commission believes that specifying a thirty-day period reconciliation period will promote settlement of contested issues and increase the opportunity for the parties and the Commission staff to participate in the settlement process.

### **III. Time Periods Allowed to Intervene and Protest in a § 284.123(g) Proceeding**

#### **A. The NOPR**

30. The proposed procedures provide deadlines of fourteen days for interventions and initial comments, and sixty days for final comments and protests from the date of the filing of a pipeline's proposed rate or operating conditions or such other date established by the Secretary of the Commission.

#### **B. Comments**

31. OIPA contends that the fourteen-day deadline for filing interventions and initial comments is too short in light of the ten-day period allowed for the Secretary to issue notice of a filing using the optional notice procedures. OIPA contends that it is extraordinarily difficult to discover and appropriately respond to an applicable rate filing within the four-day period between the ten-day period allowed to issue notices and the fourteen-day deadline for interventions and initial comments. As a result, OIPA contends, there will likely be more protests than the Commission anticipates.

32. TPA, on the other hand, argues that the sixty-day deadline for final comments and protests is too long. It contends that the NOPR's sixty-day deadline for protests results in a protest period substantially longer than the fourteen-day period the Commission

currently allows for protests to filings by intrastate pipelines. TPA states that the Commission provides no explanation why such an extended protest period is warranted under the new optional notice procedures. Although an extended period may be intended to allow additional time for resolution before the filing of a final protest, TPA is concerned that the process will result in a short protest within the proposed fourteen-day deadline for initial comments and a lengthy final protest at the sixty-day deadline. TPA asserts this aspect of the proposed procedures conflicts with the Commission's efforts to expedite regulatory certainty.

33. TPA contends that a shorter protest period than the proposed sixty-day protest period will help the Commission achieve its goals of increasing regulatory certainty and reducing the regulatory burden. TPA further contends that protests in substantially more complex interstate rate and tariff cases are due within twelve days of the filing and that there is no reason why simpler filings cannot be analyzed in the same time period. TPA prefers a single fourteen-day protest period, consistent with the existing practice of allowing fourteen days for any interventions or protests, and it asserts this would allow for a longer reconciliation period that can be used to achieve resolution. However, if the existing time period is lengthened, TPA believes that a single intervention or a protest period of thirty days to be a reasonable balance under the circumstances.

34. TPA argues that the proposed protest period with its two opportunities to protest will cause unnecessary delay and, therefore, should be consolidated into a single shorter period. TPA asserts that the Commission should consolidate these protest periods into a

single period. TPA further asserts that a bifurcated protest period is unnecessary and has the potential to needlessly complicate the process. TPA further asserts that it is not aware of any other Commission regulation that allows a party two opportunities to protest, including the prior notice process under the existing blanket certificate regulations. TPA contends that a single shorter period would allow the reconciliation period to be increased, thus creating more time for the parties to resolve their differences which is more productive and ultimately will foster a more efficient administrative process.

35. TPA also argues that to expedite the rate approval process, the Commission should revise the NOPR to allow pipelines the opportunity to request a shorter notice period if a protest has been resolved within the reconciliation period as a result of the pipeline's agreement to modify or amend the proposed rate filing.

36. TPA contends that § 284.123(g)(7) requires the Secretary of the Commission to establish new deadlines for comments and protests pursuant to paragraph (g)(3) when a filing has been amended or modified, but without making any distinction as to the basis for the proposed amendment or modification. TPA, therefore, suggests that if the rate filing has been amended or modified to resolve a protest, pipelines should be allowed to petition the Secretary for a shorter notice period under paragraph (g)(3) and additional language should be included in paragraph (g)(7) to afford the pipelines the flexibility to request a new shortened comment period.

**C. Commission Determination**

37. The Commission rejects TPA's request to shorten the proposed 60-day deadline for final protests, and therefore § 284.123(g)(3) adopts the NOPR proposal to provide a 60-day deadline for final comments and protests to a filing under the optional notice procedures or such other date established by the Secretary of the Commission. However, in response to OIPA's comments regarding the time period allowed for interventions and initial comments, the Commission will revise the deadline for interventions and initial comments in § 284.123(g)(3) to allow a longer time period of 21 days for interventions and initial comments, or such other date established by the Secretary.

38. Consistent with the NOPR, § 284.123(g)(3), as adopted in this Final Rule, permits the Secretary a period of up to ten days in order to issue a notice of a filing under the optional notice procedures in the Federal Register. The Commission is permitting a period of up to ten days for noticing the filing, because § 284.123(g)(2) requires the Director of the Office of Energy Market Regulation to reject, within seven days of the date of filing, a filing which patently fails to comply with the requirements of § 284.123(e) or (f) without prejudice to the pipeline refiling a complete filing. Those two paragraphs describe the information intrastate pipelines must include in their filings and the electronic filing requirements. As explained in the NOPR, immediate rejection of filings for failure to comply with these requirements should help streamline the processing of rate and other filings by intrastate pipelines by ensuring that filings must be complete before they are processed. The ten-day period for noticing a filing allows staff

time to make an initial review of a filing to ensure that it complies with the §§ 284.123(e) and (f) filing requirements before it is noticed. However, the Commission recognizes that the ten-day period for the Secretary to notice the filing in conjunction with a 14-day deadline for filing interventions and initial comments could leave insufficient time for an interested party to determine whether it has concerns with a filing. Extending the deadline for interventions and initial comments to 21 days should address this concern.

39. The Commission finds that TPA's concerns about the 60-day period for filing final comments and protests are misplaced. TPA's assertions characterizing the proposed procedures as providing two deadlines for filing protests are mistaken. While a protest may be filed at any time during the period allowed for protests to the filing, there is only one sixty-day deadline for filing protests. The initial period allows intervenors to file initial comments to express their concerns about a filing without filing a formal protest. As TPA recognizes, the Commission proposed the sixty-day period before final protests are due in order to provide an opportunity for the applicant and potential protestors to resolve concerns raised in initial comments and any other questions prior to the protest deadline and thereby avoid the filing of any protest.<sup>22</sup> That would avoid the need for a reconciliation period after the deadline for filing protests and thus help expedite approval of the pipeline's filing. As explained in the NOPR, the Commission continues to believe

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<sup>22</sup> TPA at 6.

that § 284.123(g), including the 60-day period before final protests are due, will create an improved framework in which to achieve settlement of contested cases.<sup>23</sup> Further, a longer time period allowed to protest a filing is appropriate in view of the approval of filings which are not protested in the proposed rules.

40. If an intrastate pipeline amends its filing in order to resolve concerns raised either in an initial comment or a final protest, paragraph (g)(7) requires the Secretary of the Commission to establish new deadlines for comments and protests pursuant to paragraph (g)(3), and paragraph (g)(3) allows the Secretary to provide for different deadlines than the deadlines ordinarily provided for in that section. Therefore, the intrastate pipeline or intervenors may petition the Secretary of the Commission pursuant to paragraph (g)(3) to allow a shorter time period for the filing of comments and protest on amendments to tariff records agreed to by the parties in order to resolve concerns raised in initial comments or a final protest. Accordingly, TPA's request for revision of paragraph (g)(7) to expressly permit such shorter deadlines is unnecessary.

#### **IV. Procedures for Resolving Contested Cases**

##### **A. The NOPR**

41. If a protest is not resolved within the thirty-day reconciliation period after the deadline for filing final protests, the pipeline's filing is not deemed approved under the optional notice procedures, and the Commission must issue an order resolving the

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<sup>23</sup> NOPR, FERC Stats. & Regs. ¶ 32,695 at P 10.

contested issues with respect to the pipeline's filing. Section 284.123(g)(5) accordingly provides that, if a protest is not withdrawn or dismissed by the end of the reconciliation period, the Commission will "establish procedures to resolve the proceeding" within sixty days from the deadline to file protests.

**B. Comments**

42. TPA argues that proposed § 284.123(g)(5) may unnecessarily delay the rate application process and that to streamline the resolution of protests, the Commission should include a specific procedural method to resolve the protests and encourages the Commission to use the staff panel procedures allowed by § 284.123(b)(2)(ii) of the Commission's regulations.<sup>24</sup> Under that procedure, the Director of the Office of Energy Market Regulation designates a three-member staff panel to conduct an informal advisory proceeding in which all interested parties are afforded an opportunity to submit written comments and to make an oral presentation of views, data and arguments. The Commission then issues an order on the pipeline's filing based on the record developed in the staff panel proceeding.

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<sup>24</sup> Section 284.123(b)(2)(ii) allows the Commission to institute "a proceeding in which all interested parties will be afforded an opportunity for written comments and for oral presentation of views, data and arguments." The Commission has generally done this through the staff panel procedures described above. However, section 284.123(b)(2)(ii) does not expressly refer to, or require, those procedures.

43. TPA asserts that a staff panel procedure is familiar and affords parties an adequate opportunity to present oral views, data and arguments before Commission staff. TPA further contends that the staff panel procedures will increase regulatory certainty and allow elimination of the sixty-day period referred to in proposed § 284.123(g)(5).

**C. Commission Determination**

44. The Commission denies TPA's request to revise the proposed procedures to require the use of a staff panel process in cases where the pipeline's filing is not deemed approved under the prior notice procedures. The Commission believes that the proposed ability to determine the method of resolution of the contested issues based on the unique circumstances of each case will allow resolution of the cases in the most appropriate and expeditious manner. With respect to TPA's request to require that staff panel procedures be used in every case where the pipeline's filing is not deemed approved without an order, the Commission believes that use of these procedures may not be the most appropriate procedure to resolve every case. In some cases, it may be possible to resolve contested issues based solely on written pleadings without the need for any oral presentation of views, data, and argument as permitted under staff panel proceedings. In addition, while the Commission does not ordinarily establish formal evidentiary hearings before an Administration Law Judge in intrastate pipeline cases, the Commission has in rare cases determined that such a hearing, including the opportunity for the parties to

conduct discovery, is necessary.<sup>25</sup> Therefore, requiring initiation of a staff panel in any given case may not necessarily be the best method to expeditiously resolve the contested issues and the Commission will not by rule restrict its ability to determine the most appropriate procedures for resolution of contested cases in each case based on the particular circumstances of that case.

## V. Ex Parte Rules

### A. The NOPR

45. In the NOPR, the Commission stated that once a proceeding filed pursuant to section 284.123(g) is contested, the Commission's *ex parte* rules governing off-the-record communications<sup>26</sup> will be applicable.

### B. Comments

46. TPA contends that the Commission must modify the application of its *ex parte* rules in the Reconciliation Period to ensure that the ability to settle cases is not impaired. TPA requests that, in the Reconciliation Period, the *ex parte* rules would not be applicable to any communication made as part of a *bona fide* effort to resolve the protest, subject to two limitations. First, notice of the fact of the communication, but not its contents, would be required to be provided to other parties within two business days. TPA asserts that this limitation would allow the staff to continue to serve its role in

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<sup>25</sup> *Consumers Power Co.*, 120 FERC ¶ 61,252 (2007).

<sup>26</sup> 18 CFR 385.2201 (2012).

facilitating settlements and discuss issues raised only by staff without running afoul of the spirit of the *ex parte* rules. Second, if a staff panel is established, the Commission would make clear in the order designating the staff panel members that hence forth they are decisional employees and the *ex parte* rules apply from that date to those individuals. TPA asserts that such modifications will not undermine the appropriate purpose of the *ex parte* rules. TPA states that it is open to other methods of facilitating the settlement process, and its goal is to avoid having the *ex parte* rules serve as an impediment to settlement.

**C. Commission Determination**

47. The Commission believes that TPA's request to modify the Commission's *ex parte* rules to limit their application during the processing of cases under the optional notice procedures conflicts both with the appropriate application and the purpose of those rules and, therefore the request is denied. The *ex parte* rules are designed to ensure "the integrity and fairness of the Commission's decisional process"<sup>27</sup> and apply whenever a case is contested. The *ex parte* rules have two primary purposes: (1) a hearing is not fair when one party has private access to the decision maker and can present evidence or argument that other parties have no opportunity to rebut; and (2) reliance on "secret"

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<sup>27</sup> 18 CFR 385.2201(a) (2012).

evidence may foreclose meaningful judicial review.<sup>28</sup> TPA's requested modification would conflict with these purposes. While TPA asserts that application of the *ex parte* rules could impede settlement, as the Commission pointed out in Order No. 607, the *ex parte* rules as clarified were not intended to reduce communications and, in fact, should improve the meaningful dialogue that is necessary for fair and informed decision making.<sup>29</sup> In fact, the *ex parte* rules are currently being applied in section 311 proceedings utilizing methods such as Commission staff data requests and conferences to provide communication to promote settlement resulting in resolution of the vast majority of contested issues. Therefore, TPA's request to modify the Commission's *ex parte* rules for the proposed proceedings where the proposed Reconciliation Period is applicable is denied as unsupported.<sup>30</sup>

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<sup>28</sup> *Regulations Governing Off-the-Record Communications*, 63 FR 51312 (Sept. 25, 1998), FERC Stats. and Regs. ¶ 32,534, at 33,501 (1998).

<sup>29</sup> *Regulations Governing Off-the-Record Communications*, Order No. 607, 64 FR 51222 (Sept. 22, 1999) FERC Stats. & Regs. ¶ 31,079, at 30,880 (1999) (Order No. 607), *order on reh'g*, Order No. 607-A, 65 FR 71247 (Nov. 30, 2000), FERC Stats. & Regs. ¶ 31,112 (2000).

<sup>30</sup> As TPA notes, under the *ex parte* rules, the Commission may modify the rules for a proceeding to the extent permitted by law. However, TPA's request to modify the *ex parte* rules at this time for every optional notice proceeding is denied as speculative and unsupported.

## **VI. Market-Based Rates Which Must Be Revised to Cost-Based Rates**

### **A. Comments**

48. TPA argues that intrastate pipelines subject to market-based rates should be allowed to file under the optional notice procedures if the Commission subsequently determines the market-based rates for a service are no longer applicable after notice is given by the pipeline to the Commission of a significant change in market power status pursuant to § 284.504(b) of the Commission's regulations. TPA contends that, if the Commission determines that the change in market power requires a cost-based rate to be set, the Commission should allow the company to utilize any of the options available under the Commission's regulations, including the optional notice procedures. TPA asserts that, given the existing reporting requirements applicable to entities with market-based rates, there is no need for any additional filing requirements.

### **B. Commission Determination**

49. When an intrastate pipeline must file for approval of cost-based rates for a service for which market-based rates were authorized, under the circumstances described by TPA, the intrastate pipeline may file pursuant to paragraph (g) if it solely files for that approval pursuant to § 284.123. However, the intrastate pipeline may be required to make such filing in conjunction with other provisions of the Commission's regulations, i.e., pursuant to the requirements of §§ 284.503 and 284.504 related to its other services which are market-based. Under such circumstances, as explained above, optional notice

procedures are limited to filings seeking approval pursuant to § 284.123 and would not be available for such filings.

## **VII. Periodic Rate Review**

### **A. The NOPR**

50. The NOPR proposed to include a five-year periodic rate review requirement in the optional notice procedures consistent with the Commission's policy of including such a requirement in each order approving a rate filing by a section 311 or Hinshaw pipeline. Accordingly, the proposed regulations included a requirement that a NGPA section 311 intrastate pipeline whose rates are deemed approved under the optional notice procedures file an application for rate approval under § 284.123 on or before the date five years following the date it filed the application for approval pursuant to the optional notice procedures. Similarly, a Hinshaw pipeline would be required to file either (1) cost and throughput data sufficient to allow the Commission to determine whether any change to the pipeline's rates should be ordered pursuant to section 5 of the Natural Gas Act; or (2) a petition for rate approval pursuant to § 284.123, on or before the date five years following the date it made the optional notice procedures filing.

51. As described above, under § 284.123(b), intrastate pipelines are afforded two basic methods to establish fair and equitable rates for section 311 service: (1) using a rate based on, or on file with, the pipeline's state commission, as provided for under § 284.123(b)(1); or (2) by applying to the Commission to set the rates by order, as provided for under § 284.123(b)(2). The Commission's regulations define an appropriate

state regulatory agency as one that sets “rates and charges on a cost-of-service basis.”

The Commission has applied its five-year periodic rate review requirement on all section 311 and Hinshaw pipeline rates, regardless of which of the two basic rate approval methods were used.

## **B. Comments**

52. TPA argues that if a pipeline is using state-approved rates pursuant to § 284.123(b)(1) and those rates have not changed during the five-year period, the Commission should only require confirmation that the pipeline’s underlying state-approved rates remain valid and allow these state-approved rates to qualify under the proposed optional notice procedures. TPA also requests that the Commission utilize this certification process even if an applicant does not use the proposed optional notice procedures. TPA requests that, in the case of a pipeline that wishes to continue to use its established, unchanged section 311 rates based on its state-approved rates, the Commission should only require confirmation that the pipeline’s underlying state approved rates have not changed by adding the phrase “or a certification that a rate set under (b)(1) remains valid,” to new paragraph (g)(9). TPA further requests that the Commission revise its periodic rate review policy for all such unchanged section 311 state-approved rates even if an applicant does not use the proposed optional notice procedures.

53. TPA also contends that the five-year period should be measured from the time the rate is approved, either by final Commission order or operation of law. TPA asserts that,

in a contested case, the finally approved rate may be in effect for a significantly shorter period than five years and shippers are protected by the refund requirement of § 284.123(b)(2)(ii), but that any settlement that requires a refiling requirement five years from the date of the original filing does not provide the pipeline with five years of rate certainty.

54. TPA further argues that the satisfaction of the periodic review requirement by a cost and revenue study should not be limited to Hinshaw pipelines but also be applicable to all section 311 pipelines if no rate change is proposed. TPA asserts that section 311 rates are often deeply discounted and, in order to avoid needless rate change applications, pipelines with a rates established by the Commission that do not propose a rate change should be allowed the option to file a cost and revenue study. TPA further asserts that if the pipeline demonstrates that the costs of providing section 311 service exceed the revenues from that service that should end the matter. TPA contends that there is no reason not to allow the same cost and revenue study in lieu of a rate case for all the other section 311 entities. TPA further contends that the Commission has approved of interstate pipeline rate case settlements that require a cost and revenue study and that, after a cost and revenue study is noticed, if protested, the same procedures in the NOPR can be followed.

55. Several other parties request clarification of the periodic rate review requirement. MGTC requests that the Commission clarify that the optional notice procedures under paragraph (g) may be used to meet the periodic rate review requirement. AGA requests

that the Commission clarify that the approval of operating conditions or terms and conditions of service without changing rates will not be subject to the periodic rate review requirement. Finally, Enstor seeks clarification that the periodic rate review requirement in paragraph (g)(9) will not be applicable to market-based rates.

**C. Commission Determination**

56. The Commission is modifying its periodic rate review policy with respect to rates based on those approved by the appropriate state regulatory agency for a comparable service consistent with § 284.123(b)(1) to permit section 311 and Hinshaw pipelines using state-based rates to certify that those rates continue to meet the requirements of § 284.123(b)(1), rather than filing a new rate petition or cost and revenue study. Paragraph (g)(9) of § 284.123, as adopted by the Final Rule, reflects this revised policy. This change further reduces the regulatory burden on intrastate pipelines.

57. The Commission finds that this change in its periodic rate review policy is consistent with our overall policy of permitting intrastate pipelines to base their rates on cost-based rates approved by their state regulatory agency. When an intrastate pipeline elects to use a state-approved rate, the Commission's examination of these § 284.123(b)(1) rate elections is limited to whether the rate meets the requirements of that section. Section 284.123(b)(1) permits an intrastate pipeline to elect to base its rates on the methodology used by the appropriate state regulatory agency (1) to design rates to recover transportation or other relevant costs included in a then effective firm sales rate for city-gate service on file with the state agency; or (2) to determine the allowance

permitted by the state agency to be included in a natural gas distributor's rates for city-gate natural gas service. Section 284.123(b)(1) also permits an intrastate pipeline to use the rates contained in one of its then effective transportation rate schedules for intrastate service on file with the appropriate state regulatory agency which the intrastate pipeline determines covers service comparable to service under Subpart C of Part 284.

58. The Commission's analysis of whether the intrastate pipeline's state rate election under § 284.123(b)(1) satisfies these requirements focuses on whether the state rate or rate methodology elected by the pipeline is for the appropriate city-gate service or a transportation service comparable to the interstate service to be provided by the intrastate pipeline. The Commission does not look behind the state regulatory agency's cost and revenue findings to determine whether they are reasonably supported. Rather, as part of the Commission's regulation of intrastate pipelines performing interstate service, the Commission defers to the cost and revenue factual findings of the state regulatory agency. By contrast, when the intrastate pipeline files a petition for rate approval under § 284.123(b)(2), the Commission makes its own cost and revenue findings, based on data filed by the pipeline.

59. Nevertheless, under the Commission's current five-year periodic rate review policy, section 311 and Hinshaw pipelines are required to make the same application for rate approval or cost and revenue study after five years, regardless of what rate election

they have chosen.<sup>31</sup> Currently, section 311 and Hinshaw pipelines using state-based rates typically meet the periodic review requirement by making a new filing with the state commission, and then filing the new rate approved by that commission with this Commission. Thus, our current periodic rate review policy has the effect of requiring the state regulatory agencies whose rates are used for interstate service to conduct new rate cases for the pipeline's intrastate services every five years. The Commission finds that it will be more consistent with our overall policy, in the context of § 284.123(b)(1) rate elections, of deferring to the cost and revenue determinations of state regulatory agencies to allow the state regulatory agencies to determine when rates need to be updated to reflect changes in costs and revenues.

60. Therefore, the Commission will revise its current policy for all section 311 and Hinshaw pipelines with state-approved rates which have not changed since the previous five-year filing to allow these intrastate pipelines to make a filing pursuant to the optional notice procedures in paragraph (g) certifying that those rates continue to meet the requirements of § 284.123(b)(1) on the same basis on which they were approved. However, the Commission will require that, if the state-approved rate used for the election is changed at any time, the section 311 or Hinshaw pipeline must file a new rate election pursuant to § 284.123(b) for its interstate rates not later than 30 days after the

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<sup>31</sup> Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 92.

changed rate becomes effective. This will ensure that the state-based rates used for interstate services reflect the state regulatory agency's most current cost and revenue findings. Accordingly, this Final Rule includes this revised policy as part of the optional notice procedures in the added paragraphs (g)(9)(ii) and (g)(9)(iii). Certification filings will receive the same notice procedures as any other paragraph (g) filing.

61. The Commission denies TPA's request that the ability to meet the periodic rate review requirement through a cost and revenue study should be applicable to all section 311 pipelines if no rate change is proposed. As the Commission explained above,<sup>32</sup> the Commission gives Hinshaw pipelines the option of filing a cost and revenue study every five years, instead of a new petition for rate approval, because the courts have held that the Commission cannot require interstate pipelines subject to its NGA jurisdiction to make new rate filings under NGA section 4. However, the Commission has held that its conditioning authority under NGPA section 311(c) permits it to condition approval of rates under section 311 on a periodic rate refilling requirement.<sup>33</sup> Therefore, TPA's request that this option required by a statutory limitation be available to all section 311 pipelines is denied as unsupported.

62. TPA's request that the five-year periodic rate review requirement be revised to commence on the date that the rate is approved is also denied. Requiring periodic review

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<sup>32</sup> See n.10 of this order.

<sup>33</sup> See *GulfTerra Texas Pipeline, L.P.*, 109 FERC ¶ 61,350, at P 10 (2004).

rate filings with the Commission is the means by which the Commission can be assured that intrastate and Hinshaw pipeline rates approved by the Commission remain fair and equitable for interstate transportation. The Commission believes that the five-year period established in Order No. 735 measured from the date of the pipeline's request is an appropriate period to allow before requiring a review of the rates in order to determine if the information and data upon which the Commission based its approval of the pipeline's rate has become stale. Regardless of how soon after the intrastate pipeline's rate filing the Commission issues its order approving the rate, the Commission's rate determination will be based on data from the period before the pipeline made its rate filing. Therefore, granting TPA's request to measure the five-year period from the date the rates are ultimately approved could result in rates remaining in effect for a period significantly longer than the five-year period without an updating of cost and revenue data. Use of the date of the request results in regulatory certainty for intrastate pipelines that the requested rates may be proposed to be effective on the filing date and, if approved, the full five-year period will be available.

63. The Commission clarifies, as requested by MGTC, that intrastate pipelines may file for approval of rates or to certify state rates under § 284.123(g) pursuant to the optional notice procedures under paragraph (g) to meet the periodic rate review requirements in paragraph (g)(9). The proposed rules are revised to include the clarifying language "under this section" after the words "either file" in the second sentence of § 284.123(g)(9)(i). As requested by AGA, the Commission also clarifies that filings

pursuant to this paragraph (g) for approval of operating conditions or terms and conditions of service without changing rates are not subject to the periodic rate review requirement in paragraph (g)(9).

64. Finally, as discussed above, the optional notice procedures do not apply to requests for approval of market-based rates. Therefore, as Enstor requests, the Commission clarifies that the periodic rate review requirement in paragraph (g)(9) is not applicable to market-based rates. This is consistent with the Commission's existing policy of not extending its periodic rate review requirement to intrastate pipelines with market-based rates.<sup>34</sup>

## **VIII. Miscellaneous**

### **A. Section 284.123(g)(8)**

#### **1. The NOPR**

65. Proposed § 284.123(g)(8)(i) states that a filing is approved “effective on the day after time expires” for filing a protest unless, among other things, the filing is rejected. Similarly, proposed § 284.123(g)(8)(ii) states that if a protest is withdrawn, the filing is approved “effective upon” the day after the withdrawal unless, among other things, the filing is rejected.

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<sup>34</sup> See, e.g., *Louisville Gas and Electric Co.*, 99 FERC ¶ 62,040 (2002).

## 2. Comments

66. TPA argues that the word “effective” in those sections creates an ambiguity since transportation under 18 CFR 284.121 may commence without prior Commission approval. TPA asserts that, if no protest is filed, or one is withdrawn, the filing should be deemed effective on the date proposed by the pipeline. TPA contends that the Commission can correct this problem by deleting the word “effective” from proposed paragraphs (g)(8)(i) and (g)(8)(ii) and adding the following at the end of each paragraph: “rates approved under this subparagraph are effective as of the date specified in the filing for approval.”

67. Dominion requests clarification of the proviso in paragraphs (g)(8)(i) and (g)(8)(ii) that the filing is approved after the listed conditions are met, “unless the intrastate pipeline withdraws, amends, or modifies its filing *or the filing is rejected.*” (Emphasis supplied.) Specifically, Dominion requests clarification that the reference to rejection of the filing is limited to the initial 7-day rejection period only. Dominion requests that the Commission so clarify, by revising the last clause in paragraphs (g)(8)(i) and (g)(8)(ii) to read “or the filing is rejected pursuant to paragraph (g)(2).”

## 3. Commission Determination

68. The Commission agrees that revisions to paragraphs (g)(8)(i) and (g)(8)(ii) regarding approval of the filing are appropriate to recognize that the rates may be collected subject to refund prior to Commission approval and to resolve any ambiguity

with respect to the effectiveness of the approved rates. The Commission also clarifies the reference in these paragraphs to rejection of the filing.

69. Accordingly, the Commission removes the language following the word “effective” and substitutes the following language at the end of each paragraph: “on the date proposed in the filing requesting approval unless the intrastate pipeline withdraws, amends, or modifies its filing or the filing is rejected pursuant to paragraph (g)(2) of this section.”

**B. Section 284.123(g)(4)**

**1. The NOPR**

70. Proposed paragraph (g)(4) states that, in addition to the Commission’s staff, “any person” may file a protest prior to the 60-day protest deadline.

**2. Comments**

71. Dominion believes that it would be problematic and conflict with the goals of certainty and streamlined processing, if an entity could fail to intervene timely but have the rights of a protester. Therefore, the Dominion suggests that the phrase “any person” in proposed paragraph (g)(4) be revised to read “Any intervenor or the Commission’s staff.”

**3. Commission Determination**

72. The Commission rejects Dominion’s request to revise paragraph (g)(4) of the proposed rule. Section 385.211(a)(1) of the Commission’s Rules of Practice and Procedure, in part, allows “any person” to file a protest to any application or tariff or rate

filing.<sup>35</sup> Further, consistent with that provision, § 157.205(e)(1) allows “any person” or the Commission staff to file a protest in the existing certificate prior notice procedures.<sup>36</sup> Therefore, Dominion has not presented a sufficient basis to grant its request to limit the ability to file a protest under these proposed procedures.

### C. Clarifications

73. Paragraph (g)(1) is revised to remove the language after the word “procedures” in the second sentence which states “on the first page of ” and replace it with the words “in the.” This revision is necessary to reflect the electronic filing requirements in § 284.123(f) which are applicable to all filings pursuant to § 284.123. The phrase “of this chapter” is added to paragraph (g)(6) after the reference to § 385.216 and paragraph (g)(9)(i) after the reference to § 154.313. Paragraph (g)(5) is revised to add the word “Commission” before the word “staff.” Finally, § 385.211(b)(1) of the Commission’s regulations currently requires any protests which are filed to be served on the person against whom they are directed. Therefore, paragraph (g)(4)(i) is revised to remove as unnecessary the second sentence which required protests to filings pursuant to the optional notice procedures to be served on the Secretary of the Commission and the intrastate pipeline.

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<sup>35</sup> 18 CFR 385.211(a)(1) (2012).

<sup>36</sup> 18 CFR 205(e)(1) (2012).

**IX. Information Collection Statement****A. The NOPR**

74. In the NOPR, in accordance with the requirements of the Office of Management and Budget (OMB), the Commission estimated that the average annual public reporting burden imposed on the section 311 and Hinshaw intrastate pipelines of making filings for rate approval under § 284.123 would not change. The preparation effort or the substance of a filing made pursuant to § 284.123(g) would be the same as for a filing made pursuant to existing §§ 284.123(b) and/or 284.123(e). A requirement of a pipeline using the new optional filing procedures is that the pipeline make a new rate approval filing under § 284.123 within five years of the date of the initial filing. Since the Commission has, as a matter of policy, routinely imposed that requirement on the section 311 industry in the context of individual rate cases, the Commission does not consider this a change in the burden being imposed.

75. The Commission as a part of this Final Rule is changing its policy with respect to five-year periodic rate review requirement for pipelines whose rates are based upon a state rate election under § 284.123(b)(1). The Commission will only require a pipeline with state-approved rates which have not changed since the previous five-year filing to certify that those rates continue to meet the requirements of § 284.123(b)(1) on the same basis on which they were approved. Concomitant with this policy change, the Commission will now require a pipeline with rates that are based upon a state rate election under § 284.123(b)(1) to file within thirty days of a change in its underlying state

rates for approval of new rates under § 284.123. The pipeline may not wait to do this in conjunction with a filing under its five-year periodic rate review requirement. The Commission has observed that generally most pipelines file to revise rates based upon a state rate election whenever there is a change. The Commission estimates that this change in policy may result in three additional filings on an annual basis.

76. As noted in the NOPR, the Commission estimates that a single pipeline may, on an annual basis, use the new withdrawal filing requirements under § 284.123(h). This may result in an increase in burden of 12 hours per year for the new withdrawal filing requirements.

**B. Comments**

77. None of the parties commented on the burden estimates.

**C. Commission Determination**

78. The Commission has reviewed the burdens imposed by this rulemaking. The Commission's review finds that the proposed changes will not affect the burden on section 311 intrastate and Hinshaw pipelines of making an initial filing seeking approval of proposed rates or operating conditions pursuant to § 284.123. The preparation effort or the substance of a filing made pursuant to § 284.123(g) would be the same as for a filing made pursuant to existing §§ 284.123(b) and/or 284.123(e).

79. The Commission believes the change in policy to require a pipeline with rates that are based upon a state rate election to file for new rates within thirty days of a change in its underlying state rates would add only minimal burden to any intrastate pipeline.

80. The Commission believes the change in policy requiring pipelines new withdrawal procedure for filings made prior to their approval would add only minimal burden to any intrastate pipeline making a withdrawal filing.

81. The proposed changes will primarily affect the post-filing process and cost. The changes will reduce overall cost and delay for stakeholders; however that post-filing burden is beyond the scope of requirements of the Paperwork Reduction Act. The new optional procedures will provide both intrastate pipelines and their shippers greater regulatory certainty and a simpler process without any change in the upfront burden of preparing and making a filing.

82. The Commission's revised burden estimate is shown below. The revision to the table included in the NOPR includes three additional rate filings that would result from the policy change requiring pipelines to update rates using a state rate election whenever there is a change.

<b>FERC-549 (OMB Control No. 1902-0086)</b>	<b>Number of Respondents</b>	<b>Burden Hours Per Respondent Per Year (1 filing/year)</b>	<b>Total Annual Burden Hours</b>
	<b>(a)</b>	<b>(b)</b>	<b>(a X b)</b>
<b><i>Existing Inventory:</i></b>			
Rates and Charges for Intrastate Pipelines (18 CFR 284.123(b) and (e))	67	12	804
<b><i>Final Rule in RM12-17-000:</i></b>			
Rates and Charges for Intrastate Pipelines (18 CFR 284.123(b), (e) and (g))	70	12	840
Withdrawal of Filing prior to Approval (18 CFR 284.123(h))	1	12	12
<b>FERC-549 Total</b>	<b>71</b>	<b>12</b>	<b>854</b>

## **X. Environmental Analysis**

83. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.<sup>37</sup> The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.<sup>38</sup>

The actions proposed to be taken here fall within categorical exclusions in the Commission's regulations for rules that are corrective, clarifying or procedural, for

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<sup>37</sup> *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

<sup>38</sup> 18 CFR 380.4 (2012).

information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.<sup>39</sup> Therefore an environmental review is unnecessary and has not been prepared in this rulemaking.

## **XI. Regulatory Flexibility Act**

84. The Regulatory Flexibility Act of 1980 (RFA)<sup>40</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such an analysis if proposed regulations would not have such an effect.<sup>41</sup> Most companies regulated by the Commission do not fall within the RFA's definition of a small entity.<sup>42</sup>

85. This Final Rule should have no significant negative impact on those entities, be they large or small, subject to the Commission's regulatory jurisdiction under the NGA. Most companies to which the Final Rule applies do not fall within the RFA's definition of small entities. In addition, the Commission has identified two small entities as

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<sup>39</sup> See 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), and 380.4(a)(27) (2012).

<sup>40</sup> 5 U.S.C. 601-612 (2006).

<sup>41</sup> 5 U.S.C. 605(b) (2006).

<sup>42</sup> 5 U.S.C. 601(3) (citing section 3 of the Small Business Act, 15 U.S.C. 623 (2006)). Section 3 defines a "small-business concern" as a business which is independently owned and operated and which is not dominant in its field of operation.

respondents to the requirements in the NOPR.<sup>43</sup> As explained above, the Commission estimates that the proposed § 284.123(g) regulations will serve as a substitute for filings currently done pursuant to §§ 284.123(b) and (e), and § 284.123(h) provides regulatory certainty if a pipeline decides to withdraw its filing. The Commission estimates that intrastate pipelines will experience little if any change in regulatory burden associated with making their filings, and pipelines will be able to avoid certain costs and delays post-filing due to the new streamlined process. Accordingly, the Commission certifies that this rule will not have a significant impact on a substantial number of small entities and no regulatory flexibility analysis is required.

## **XII. Document Availability**

86. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

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<sup>43</sup> The U. S. Small Business Administration's (SBA) Table of Small Business Size Standards is found in 13 CFR 121.201. SBA's updated version of the size standards (effective March 26, 2012, and *available at* [http://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf)) defines a natural gas pipeline (contained in Subsector 486, Pipeline Transportation) as "small" when it has average annual receipts of \$25,500,000 or less.

87. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

88. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

### **XIII. Effective Date and Congressional Notification**

89. The Commission did not propose a specific implementation schedule in the NOPR. The Commission will implement the new optional filing procedures 30 days from the date of OMB's approval of this Final Rule. The Secretary of the Commission will issue a revised list of Type of Filing Codes<sup>44</sup> to pipelines for filings made pursuant to paragraph (g) and withdrawals made pursuant to paragraph (h).

90. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule"

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<sup>44</sup> See 18 CFR 375.302(z) (2012). The *Implementation Guide* describes the Type of Filing contents. The Type of Filing Code list is posted on the Commission's web site at [http://www.ferc.gov/docs-filing/etariff/filing\\_type.csv](http://www.ferc.gov/docs-filing/etariff/filing_type.csv).

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as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects in 18 CFR Part 284

Natural gas

Reporting and recordkeeping requirement

By the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

In consideration of the foregoing, the Commission amends part 284, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

**PART 284 – CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS  
UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED  
AUTHORITIES**

1. The authority citation for Part 284 continues to read as follows:

**Authority:** 15 U.S.C. 717-717z, 3301-3432; 42 U.S.C. 7101-7352; 43 U.S.C. 1331-1356.

2. Section 284.123 is amended by adding paragraphs (g) and (h) to read as follows:

§ 284.123 Rates and charges.

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(g) *Election of Notice Procedures.* (1) *Applicability.* An intrastate pipeline filing for approval of rates, a statement of operating conditions, and any amendments or modifications thereto pursuant to this section may use the notice procedures in this paragraph. Any intrastate pipeline electing to use these notice procedures for a filing must clearly state its election to use these procedures in the filing. Such filing is approved and the rates deemed fair and equitable and not in excess of the amount that an interstate pipeline would be permitted to charge for similar transportation service if the requirements in paragraph (g)(8) of this section have been fulfilled.

(2) *Rejection of filing.* The Director of the Office of Energy Market Regulation or his designee shall reject within 7 days of the date of filing a request which patently fails to

comply with the provisions of paragraphs (e) or (f) of this section, without prejudice to the intrastate pipeline refiling a complete application. If such filing was required by this section, that filing must be refiled within 14 days of the date of the rejection.

(3) *Publication of notice of filing.* The Secretary of the Commission shall issue a notice of the filing within 10 days of the date of the filing, which will then be published in the Federal Register. The notice shall designate a deadline for filing interventions, initial comments, final comments, and protests to the filing. The deadline for interventions and initial comments shall be 21 days after the date of the filing or such other date established by the Secretary of the Commission. The deadline for final comments and protests shall be 60 days after the date of the filing or such other date established by the Secretary of the Commission.

(4) *Protests.* (i) Any person or the Commission's staff may file a protest prior to the deadline for protests.

(ii) Protests shall be filed with the Commission in the form required by Part 385 of this chapter including a detailed statement of the protestor's interest in the filing and the specific reasons and rationale for the objection and whether the protestor seeks to be an intervenor.

(5) *Effect of protest.* If a protest is filed in accordance with paragraph (g)(4) of this section, then the intrastate pipeline, the person who filed the protest, any intervenors and Commission staff shall have 30 days from the deadline for filing protests established by the Secretary of the Commission in accordance with paragraph (g)(3) of this section, to

resolve the protest, and to file a withdrawal of the protest pursuant to paragraph (g)(6) of this section. Informal settlement conferences may be convened by the Director of the Office of Energy Market Regulation or his designee during this 30 day period. If a protest is not withdrawn or dismissed by end of that 30 day period, the filing shall not be deemed approved pursuant to this paragraph. Within 60 days from the deadline for filing protests established by the Secretary of the Commission in accordance with paragraph (g)(3) of this section the Commission will establish procedures to resolve the proceeding.

(6) *Withdrawal of protests.* The protestor may withdraw a protest by submitting written notice of withdrawal to the Secretary of the Commission pursuant to § 385.216 of this chapter and serving a copy on the intrastate pipeline, any intervenors, and any person who has filed a motion to intervene in the proceeding.

(7) *Amendments or modifications to tariff records prior to approval.* An intrastate pipeline may file to amend or modify a tariff record contained in the initial filing pursuant to the procedures under this paragraph (g) which has not yet been approved pursuant to paragraph (g)(8) of this section. Such filing will toll the notice period established in paragraph (g)(3) of this section and the Secretary of the Commission will issue a notice establishing new deadlines for comments and protests for the entire filing pursuant to paragraph (g)(3).

(8) *Final approval.* (i) If no protest is filed within the time allowed by the Secretary of the Commission under paragraph (g)(3) of this section, the filing by the intrastate pipeline is approved, effective on the date proposed in the filing requesting approval unless the

intrastate pipeline withdraws, amends, or modifies its filing or the filing is rejected pursuant to paragraph (g)(2) of this section.

(ii) If any protest is filed within the time allowed by the Secretary of the Commission under paragraph (g)(3) of this section and is subsequently withdrawn before the end of the 30-day reconciliation period provided by paragraph (g)(5) of this section, the filing by the intrastate pipeline is approved effective on the date proposed in the filing requesting approval unless the intrastate pipeline withdraws, amends, or modifies its filing or the filing is rejected pursuant to paragraph (g)(2) of this section.

(9) *Periodic rate review.* Rates of pipelines approved by the Commission pursuant to this paragraph are required to be periodically reviewed.

(i) Any intrastate pipeline with rates so approved must file an application for rate approval under this section on or before the date five years following the date it filed the application for authorization of rates pursuant to this paragraph. Any Hinshaw pipeline that has been granted a blanket certificate under § 284.224 of this chapter and with rates approved pursuant to this paragraph must on or before the date five years following the date it filed the application for authorization of the rates pursuant to this paragraph either file under this section cost, throughput, revenue and other data, in the form specified in § 154.313 of this chapter, to allow the Commission to determine whether any change in rates is required pursuant to section 5 of the Natural Gas Act or an application for rate authorization pursuant to this section.

(ii) An intrastate pipeline with rates approved pursuant to the rate election in paragraph (b)(1) of this section that remain unchanged during the five-year review period which were approved based on then effective state rates may file a certification with the Commission pursuant to this paragraph (g) that the rates continue to comply on the same basis with the requirements set forth in paragraph (b)(1) of this section. Such certification of rates will meet the periodic rate review requirement set forth in this paragraph (g)(9) unless the Commission determines that further proceedings concerning the rates are appropriate.

(iii) If the state rate used pursuant to paragraph (b)(1) of this section for approval of a rate pursuant to this paragraph (g) is changed, not later than 30 days after that changed rate becomes effective, the intrastate pipeline must file a new rate election pursuant to paragraph (b) of this section.

(10) *Withdrawal of filing prior to approval.* A pipeline may, pursuant to paragraph (h) of this section, withdraw in its entirety a filing made pursuant to paragraph (g) that has not been approved by filing a withdrawal motion with the Commission. A filing that is withdrawn will not fulfill the requirements under paragraph (g)(8) of this section.

(h) *Withdrawal of filing.* A pipeline may withdraw in its entirety a filing pursuant to this section that has not been approved by filing a withdrawal motion with the Commission.

(1) The withdrawal motion must state that any amounts collected subject to refund in excess of the rates authorized the Commission will be refunded with interest calculated and a refund report filed with the Commission in accordance with § 154.501 of this

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chapter. The refunds must be made within 60 days of the date the withdrawal motion becomes effective.

(2) The withdrawal motion will become effective, and the filing will be deemed withdrawn at the end of 15 days from the date of filing of the withdrawal motion, if no order disallowing the motion is issued within that period. If an answer in opposition is filed within the 15-day period, the withdrawal is not effective until an order accepting the withdrawal is issued.

Document Content(s)

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