

130 FERC ¶ 61,035  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Maritimes & Northeast Pipeline, L.L.C.

Docket Nos. RP09-809-001  
RP09-809-000

ORDER ON REHEARING AND TECHNICAL CONFERENCE ADDING ISSUES TO  
HEARING

(Issued January 21, 2010)

1. On July 1, 2009, in Docket No. RP09-809-000, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) filed a general section 4 rate case to reduce Maritimes transportation rates (July 1 filing). The July 1 filing also included an out-of-cycle change in Maritimes' Fuel Retainage Quantity whereby Maritimes proposed to change from using a bifurcated fuel rate methodology to a single, system-wide fuel rate methodology, as well as increase its Fuel Retainage Percentages in order to recover increased fuel costs. On July 30, 2009, the Commission accepted and suspended Maritimes' proposed decreased system transportation rates, to be effective August 1, 2009, subject to the outcome of a hearing. The Commission accepted and suspended Maritimes proposed fuel rates and fuel rate methodology, to be effective January 1, 2010, subject to the outcome of a technical conference.<sup>1</sup> On August 31, 2009, in Docket No. RP09-809-001, Maritimes filed a request for clarification and rehearing of the July 30 Order.

2. On September 11, 2009, Commission staff held a technical conference to gather additional information and to provide parties with a forum to discuss relevant issues and concerns raised by Maritimes' fuel proposal. Several parties filed initial and reply comments.

3. As discussed below, the Commission grants in part and denies in part Maritimes' request for clarification and rehearing. Additionally, after further review, we conclude that the fuel rate and fuel rate methodology proposed by Maritimes in its July 1 filing should be included in the hearing established by the July 30 Order.

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<sup>1</sup> *Maritimes & Northeast Pipeline, L.L.C.*, 128 FERC ¶ 61,109 (2009) (July 30 Order).

## I. Background

4. Maritimes recovers its system's fuel requirements and lost and unaccounted for gas (LAUF) by retaining in-kind a percentage of gas tendered by customers (Fuel Retainage Quantity). The Fuel Retainage Quantity is determined by multiplying a customer's receipts at the Point of Receipt by the effective Fuel Retainage Percentage. Section 20 of the General Terms and Conditions (GT&C) of Maritimes' tariff governs how Maritimes' Fuel Retainage Percentages are established and annually updated and how Maritimes will true-up under- or over-collections of fuel. Maritimes adjusts its Fuel Retainage Percentages annually by filing with the Commission at least 30 days prior to November 1 of each year. Maritimes' Fuel Retainage Percentages are calculated by dividing the projected annual quantities of fuel gas and LAUF for each specified calendar period by the projected annual throughput for each specified calendar period. Section 20.5 of the GT&C of Maritimes' tariff also provides for interim (out-of-cycle) fuel proposals between annual filings subject to approval by the Commission.

5. On June 30, 2004, Maritimes filed a general rate increase under section 4 of the Natural Gas Act (NGA). Among other things, Maritimes proposed changes to its fuel tracker mechanism. On July 29, 2004, the Commission accepted the filing, suspended it for five months, and permitted the proposed rates to become effective on January 1, 2005, subject to refund and the outcome of a hearing on the proposed rates.<sup>2</sup> Subsequently, Maritimes negotiated a settlement (Settlement) with several key shippers, which was accepted by the Commission on May 15, 2006.<sup>3</sup>

6. Before the Settlement, Maritimes charged a single, system-wide Fuel Retainage Percentage.<sup>4</sup> In the Settlement, the parties agreed to bifurcated Fuel Retainage Percentages, one for deliveries upstream of the Richmond, Maine compressor station and one for deliveries downstream of the Richmond, Maine compressor station. Section 1(C) of the Settlement provided that this methodology for calculating Fuel Retainage Percentages would remain in effect until the earlier of November 30, 2019, or the date Maritimes first places into effect rates in a rate case in which Maritimes proposes a single system-wide maximum recourse reservation charge that is equal to or less than \$0.7700 per Dth/d on a 100 percent load factor basis for Rate Schedule MN365 service.

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<sup>2</sup> *Maritimes & Northeast Pipeline, L.L.C.*, 108 FERC ¶ 61,087 (2004).

<sup>3</sup> *Maritimes & Northeast Pipeline, L.L.C.*, 115 FERC ¶ 61,176 (2006).

<sup>4</sup> Section 20 provides for Maritimes Fuel Retainage Percentage to be established for two calendar periods, the winter period (November through March) and the non-winter period (April through October).

7. On July 1, 2009, Maritimes filed a general section 4 rate case to reduce Maritimes transportation rates (July 1 filing). The July 1 filing included an out-of-cycle change in Maritimes' Fuel Retainage Quantity whereby Maritimes proposed to change from using a bifurcated fuel rate methodology to a single, system-wide fuel rate methodology, as well as increase its Fuel Retainage Percentages in order to recover increased fuel costs. On July 30, 2009, the Commission: (a) accepted and suspended Maritimes' proposed tariff sheets establishing decreased system transportation rates, to be effective August 1, 2009, subject to refund and the outcome of a hearing; and (b) accepted and suspended Maritimes' proposed tariff sheet<sup>5</sup> revising Maritimes' fuel rate methodology and increasing its fuel charges, to be effective January 1, 2010, subject to refund and the outcome of a technical conference.<sup>6</sup> The July 30 Order found that, because Maritimes was proposing a change to its then-current bifurcated fuel rates, it bore the burden under section 4 of the NGA to show that the proposed single, system-wide rate was just and reasonable and that the parties to the proceeding raised significant issues as to whether Maritimes satisfied such section 4 burden.<sup>7</sup>

8. On September 11, 2009, Commission staff held a technical conference to gather additional information and to provide parties with a forum to discuss relevant issues and concerns raised by Maritimes' fuel proposal. The parties filed initial and reply comments, which were due October 5, 2009 and October 16, 2009, respectively.<sup>8</sup>

## II. Request for Clarification and Rehearing

### A. Refund Obligation

9. In its request for rehearing, Maritimes seeks clarification that its tariff sheets reflecting a decrease in system transportation rates are not subject to refund. If the

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<sup>5</sup> Thirteenth Revised Sheet No. 11 to FERC Gas Tariff, First Revised Volume No. 1.

<sup>6</sup> July 30 Order, 128 FERC ¶ 61,109.

<sup>7</sup> *Id.* P 36.

<sup>8</sup> On December 2, 2009, Maritimes filed a motion to put into effect at the end of the suspension period, January 1, 2010, Substitute First Revised Twelfth Revised Sheet No. 11, in lieu of Thirteenth Revised Sheet No. 11, which was suspended in the July 30 Order. On December 22, 2009, Maritimes' December 2 filing was accepted. *Maritimes & Northeast Pipeline, L.L.C.*, Docket No. RP09-809-002, (Dec. 22, 2009) (unpublished letter order). Maritimes' Substitute First Revised Twelfth Revised Sheet No. 11 reflects a single, system-wide Fuel Retention Percentage of 0.86 percent for both winter and non-winter periods.

Commission denies Maritimes' request for clarification, Maritimes requests rehearing of the July 30 Order on this issue. Maritimes states that the Commission's authority to order refunds has been interpreted by federal courts, including the Supreme Court, as applying only to rate increases and not to rate decreases.<sup>9</sup> Maritimes states that, consistent with this precedent, where a pipeline proposes a rate decrease, the Commission has found that the pipeline does not have a refund obligation.

10. Maritimes states that the rates established in the Settlement constitute the base from which refunds are calculated. Specifically, Maritimes states that its mainline transportation rate for Rate Schedule MN365 under the Settlement was \$0.78 per Dth per day (Dth/d) on a 100 percent load factor basis, with an additional \$0.14 Dth/d surcharge for deliveries on its Phase III facilities. In the instant proceeding, Maritimes states that it proposed to decrease its Rate Schedule MN365 rate to \$0.6049 per Dth/d for deliveries to all mainline delivery points, which the Commission accepted and allowed to become effective August 1, 2009.<sup>10</sup> Accordingly, Maritimes argues, because it has proposed rates that are lower than the pre-existing lawful rates established in the Settlement, it is contrary to court and Commission precedent to find that Maritimes' decreased rates are effective subject to refund.

### **Commission Determination**

11. In accepting and suspending Maritimes' claimed rate decrease subject to a refund condition, the Commission acted out of an abundance of caution. Pursuant to the authority granted by the NGA and case precedent, the Commission may not order refunds below the pre-existing lawful rate.<sup>11</sup> To the extent that the instant proceeding ultimately reveals that Maritimes' proposed rates are below the pre-existing lawful rates set forth in the Settlement, refunds will not be required. To this extent, the Commission grants Maritimes request for clarification and rehearing of the July 30 Order on this issue.

### **B. Burden of Proof**

12. In its rehearing request, Maritimes argues that the Commission erred in the July 30 Order when it found that the single, system-wide fuel methodology underlying Maritimes' proposed fuel rate constitutes "a change to [Maritimes'] current methodology

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<sup>9</sup> Maritimes Rehearing Request at 3, (citing *Fed. Power Comm'n v. Sunray Dx Oil Co.*, 391 U.S. 9, 23 (1968); *Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1224 (D.C. Cir. 1984).

<sup>10</sup> Maritimes states that proposed rates for all other mainline rate schedules and incremental laterals were also lower than the rates established in the Settlement.

<sup>11</sup> See *Distrigas*, 737 F.2d at 1224.

for calculating the fuel rates on its mainline system,” conferring the burden of proof on Maritimes to show that the change is just and reasonable. Maritimes states that, in September of 1997, in Maritimes’ original certificate proceeding, the Commission approved a single, system-wide rate design for mainline service on the Maritimes’ system.<sup>12</sup> Maritimes states that in the course of approving that rate design, the Commission rejected arguments from various protestors that the Commission should require Maritimes to implement a zone-based rate design. Further, Maritimes states that each November 1 thereafter until the date on which the Commission approved the Settlement, June 1, 2006, Maritimes proposed, and the Commission accepted as just and reasonable, a single system fuel rate for service Maritimes’ system. Maritimes states that its last rate case settlement included an interim bifurcated fuel rate methodology that expired by its express terms on August 1, 2009.<sup>13</sup>

13. Maritimes contends that, as of the August 1, 2009 effective date of the reservation charge proposed by Maritimes in its July 1 filing, the bifurcated fuel rate methodology established by the Settlement terminated according to Section 1.3(C) of the Settlement. Maritimes states that when the bifurcated fuel rate methodology terminated, the single, system-wide fuel methodology in effect at the time of the Settlement became the status quo. Accordingly, Maritimes contends, its filing to continue utilizing that methodology for its fuel rate does not constitute a change in methodology. Further, Maritimes argues that the single, system-wide fuel rate utilized by Maritimes in its July 1 filing constituted “settled practice” on Maritimes within the meaning of *Pub. Serv. Comm’n of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 880 (1981) (*NYPSC*), and therefore, any party challenging the single, system-wide fuel rate methodology bears the burden under section 5 of the NGA to show that such methodology is unjust and unreasonable and that its proposed methodology is just and reasonable.

14. Maritimes also contends that the burden placed by the Commission on Maritimes to show that the single system fuel rate methodology is just and reasonable could lead to the illogical and untenable result that no fuel rate design methodology would exist upon which to design a fuel rate. Maritimes contends that the bifurcated fuel methodology cannot be reinstated because that would be contrary to specific language of the Settlement, which expressly states that the bifurcated methodology terminated when the new transportation rates proposed herein became effective. Therefore, Maritimes argues, the only result consistent with logic and the language of the Settlement, would be for the single, system-wide fuel rate methodology that was in effect prior to the Settlement to continue in effect.

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<sup>12</sup> Maritimes Rehearing Request at 6 (citing *Maritimes & Northeast Pipeline, L.L.C.*, 80 FERC ¶ 61,346, at 62,186 (1997), *order on reh’g*, 84 FERC ¶ 61,130, at 61,685-61,686 (1998)).

<sup>13</sup> Maritimes Rehearing Request at 7.

15. Maritimes claims that the parties to the Settlement were careful to provide that the bifurcated fuel rate design would not be considered “settled practice” and thereby confer a section 4 burden on Maritimes to justify a return to its historical practice. To that end, Maritimes states that section 2.2 of the Settlement was added.<sup>14</sup> Maritimes states that, in *NYPSC*, the court concluded that a particular rate design methodology on the Transcontinental Gas Pipe Line Company, LLC (Transco) system, although established at one point by a rate case settlement, constituted “settled practice” for rate purposes and based on this conclusion, the court ruled that any party proposing a change to Transco’s rate design methodology had the burden of proof to justify the change. Maritimes states that section 2.2 was added to negate this result. Because the parties were clear that the bifurcated fuel methodology, established under section 1.3(C) of the Settlement, was not “settled practice” as defined in *NYPSC*, Maritimes contends the single system fuel rate is “settled practice” on Maritimes. Maritimes argues that the parties made it clear that nothing in the Settlement was intended to set precedent for future proceedings and, with the exception of sections 1.5 and 1.6 of the Settlement, which govern specific mainline transportation rate design matters and the requirement to file the instant rate case, nothing in the Settlement was intended to be deemed “settled practice” as defined in *NYPSC*. Accordingly, Maritimes requests that the Commission grant its request for rehearing and immediately lift the suspension of Maritimes’ proposed single, system-wide fuel rate.

#### **Commission Determination**

16. For the reasons discussed below, we find that Maritimes bears the burden under section 4 of the NGA to show that its proposed single, system-wide (or postage stamp) fuel rate is just and reasonable. In general, where a pipeline has not proposed a change in its rates or tariff, NGA section 5 places on the Commission the burden of showing the existing rate or tariff provisions are unjust and unreasonable and justifying the replacement rate. However, NGA section 4 provides for different procedures where a pipeline proposes a rate increase or other changes to its tariff. As pertinent here, NGA section 4 provides:

Where increased rates or charges are...made effective [at the expiration of the suspension period], the Commission may...upon completion of the hearing and decision...order such natural gas company to refund, with interest, the portion

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<sup>14</sup> Section 2.2 of the Settlement provides: “In consideration of all elements of this negotiated Settlement, no party intends that any provision of this Settlement constitutes precedent or, with the exception of Sections 1.5 and 1.6 of this Settlement, should be deemed ‘settled practice,’ as the term ‘settled practice’ was interpreted in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980), cert. denied, 454 U.S. 880 (1981).”

of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that an increased rate or charge is just and reasonable shall be upon the natural gas company.<sup>15</sup>

17. In its request for rehearing, Maritimes relies on two provisions of the Settlement to contend that, notwithstanding the express language of section 4, it does not have a section 4 burden to show that its proposed postage stamp rate is just and reasonable. Rather, it contends that parties seeking to change such rate design bear the burden of proof under section 5 to show that such rate design is unjust and unreasonable and that their proposed methodology is just and reasonable. For the reasons discussed below, we hold that neither provision of the Settlement relieves Maritimes of its statutory section 4 burden.

18. First, Maritimes argues that section 1(C) of the Settlement expressly provides that the bifurcated fuel rate methodology expired on August 1, 2009, the effective date of its new transportation rate, and its postage stamp fuel rate methodology in existence prior to the settlement was automatically restored. Section 1(C) of the Settlement provides that:

Separate Fuel Retainage Percentages (FRP)... will become effective on the Effective Date and will apply prospectively to service on its mainline system, one for deliveries on the mainline system upstream of the Richmond, Maine compressor station and one for deliveries on the mainline system downstream of the Richmond, Maine compressor station.... Notwithstanding any other provision of this Settlement, the methodology set forth in this Section 1(C) for calculating the FRPs for the mainline system shall remain in effect until the earlier of (i) November 30, 2019, or (ii) the date on which Maritimes first places into effect rates (whether or not subject to refund) in a rate case filed after an Expansion In-Service Date (defined in Section 1.9(B) of this Settlement) in which Maritimes proposes a single system-wide maximum recourse Reservation Charge that is equal to or less than \$0.7700 per Dth/d on a 100 percent load factor basis for Rate Schedule MN365 service.

19. We do not interpret this provision of the Settlement as automatically restoring the postage stamp fuel rate methodology on August 1, 2009, the effective date of Maritimes' July 1 proposed transportation rates. We believe that this section simply mandates that

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<sup>15</sup> See 15 U.S.C. §717c(e) (2006). See generally 5 U.S.C. § 556(d) (2006) (providing that a proponent of a rule or order has the burden of proof).

the bifurcated rates must remain in effect at least until either of the two conditions set forth in the provision are met, but we do not think it dictates when or how the rate may change once the conditions permitting a change are met. It does not provide, as Maritimes contends, that the old postage stamp rate must be reinstated when the conditions are met. It simply allows parties to seek changes, whether under sections 4 (Maritimes) or 5 (other parties) of the NGA, once the conditions for removing the mandate for bifurcated rates are satisfied.

20. We believe that, if the parties intended for the postage stamp rate design that was in effect prior to Settlement to take effect when Maritimes' new transportation rates were made effective, they would have included language so stating.<sup>16</sup> However, they did not. Rather, the Settlement is silent as to the fuel rate methodology that would replace the bifurcated rate methodology after the new transportation rates were made effective. Under section 1(C) of the Settlement, we believe Maritimes was free to propose a new fuel rate methodology when it filed for new transportation rates, provided it could show that such methodology was just and reasonable.

21. Second, Maritimes relies on section 2.2 of the Settlement to argue that it should not have a section 4 burden with respect to its proposed postage stamp rate. Section 2.2 of the Settlement provides:

In consideration of all elements of this negotiated Settlement, no party intends that any provision of this Settlement constitutes precedent or, with the exception of Sections 1.5 and 1.6 of this Settlement, should be deemed 'settled practice,' as the term 'settled practice' was interpreted in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980), cert. denied, 454 U.S. 880 (1981).

Maritimes claims that, because the parties to the Settlement agreed that the bifurcated fuel rate would not be considered a "settled practice," the old postage stamp fuel rate that was in effect prior to the Settlement should be treated as the settled practice for fuel recovery. Accordingly, Maritimes argues, anyone opposing its return to the old postage stamp fuel rate should have a section 5 burden to show that that rate is unjust and unreasonable.

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<sup>16</sup> See *Florida Power & Light Company*, 67 FERC ¶ 61,141, at 61,396 & n.11 (1994) (collecting court cases indicating that the Commission can expect contracting parties to express their intentions clearly and not require the Commission to read into their agreements what is not spelled out, including *Consolidated Gas Supply Corporation v. FERC*, 745 F.2d 281, 291(4<sup>th</sup> Cir. 1984), wherein the court stated, "It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant").

22. Maritimes' reliance on section 2.2 of the Settlement and *NYPSC* to assert it need not proceed under NGA section 4 is misplaced. That section of the Settlement contains nothing to alter the ordinary allocation of section 4 and 5 burdens. "When choosing between section 4 and section 5, the Act makes the source of the proposed rate change decisive."<sup>17</sup> Here, Maritimes is proposing a change from the existing bifurcated rate to a postage stamp rate, and thus must proceed under section 4.

23. The settlement language cited by Maritimes in section 2.2 makes no reference to NGA sections 4 or 5, but only provides that relevant portions of the Settlement shall not be deemed a "settled practice" under *NYPSC*. However, in that case, the term "settled practice" was used, not in the context of its discussion of the section 4/section 5 distinction, but in a separate section of the court's opinion applying the rule developed in *Columbia Gas*,<sup>18</sup> that the Commission must explain the reasonableness of any departure from a long-standing, i.e., "settled" practice. In *NYPSC*, Transco made a filing for a rate increase under section 4 of the NGA. Transco did not propose to change the zones into which its system was divided. The zones served to allocate costs among three different regions along its system. However, the Commission determined that instead of using a zonal method of cost allocation, the pipeline should use a Mcf-mile method of cost allocation. The Commission contended that since Transco filed for higher rates under section 4(e) of the NGA, Transco bore the burden of proof with respect to its zonal method of cost allocation. The court disagreed.

24. In the first part of the court's opinion regarding the Commission's decision to replace zoned cost allocations with the Mcf-mile method, under the heading "The Commission's Authority Under Section 5(a) of the Natural Gas Act," the court found that the Commission had a section 5 burden because Transco was not proposing to change its allocation method from its then-existing filed rates (which were the result of a settlement).<sup>19</sup>

25. In a separate, second part of the court's opinion, under the heading "The Commission's Burden Under the Columbia Gas Rule," the court first pointed out that the previous year it had held in *Columbia Gas* that the Commission "bears the burden of explaining the reasonableness of any departure from a long standing practice and any facts underlying its explanation must be supported by substantial evidence." Applying *Columbia Gas*, the court found that the Commission's prior allocation of Transco's costs

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<sup>17</sup> *Consolidated Edison*, 165 F.3d at 1008.

<sup>18</sup> *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, at 586, n.31 (D.C. Cir. 1979) (*Columbia Gas*).

<sup>19</sup> *See NYPSC*, 642 F.2d at 1342-46.

based on the zone method was a settled practice and then found that the Commission had not provided substantial evidence to justify its departure from long-standing practice.

26. The court concluded by saying that the Commission's order directing use of the Mcf-mile method was invalid in the first instance because of the Commission's disregard of section 5 procedural requirements,<sup>20</sup> and in any event, the record supporting the directive to use the Mcf-mile method fell short of substantiality.<sup>21</sup>

27. The question of which party bears the burden of proof turns solely on whether the pipeline or the Commission is initiating the change from the pipeline's pre-filing rates, without regard to what is or isn't a "settled practice." The *Columbia Gas* rule is simply the standard requirement that the Commission justify any departure from existing policy or precedent, which applies whether the Commission is acting under sections 4 or 5 of the NGA. The court in *NYPSC* found that the Commission had erred because (a) it failed to meet its section 5 burden to show that Transco's existing allocation method (which Transco was not proposing to change) was unjust and unreasonable, and (2) even if the Commission had met that burden, the Commission failed to show that the Mcf-mile method was just and reasonable.

28. Because the Settlement provides that Maritimes' bifurcated fuel rates are not a settled practice, the Commission does not have to satisfy the *Columbia Gas* burden if it approves a modification of Maritimes' bifurcated fuel rates. Said differently, under section 2.2 of the Settlement and *NYPSC*, in the event the Commission finds that Maritimes' has met its section 4 burden with respect to its proposed postage stamp rate, the Commission can approve Maritimes' proposal without having to separately justify a departure from its prior approval of the bifurcated fuel rates.

29. For the foregoing reasons, we find that Maritimes has the burden of proof under section 4 of the NGA to show that its proposed postage stamp rate is just and reasonable.

### **III. Technical Conference**

30. The Maine Public Advocate (MPA), Casco Bay Energy Company, LLC (Casco), Verso Paper Corporation (Verso), Bangor Natural Gas Company (Bangor), Maine Public Utilities Commission (Maine PUC), H.Q. Energy Services (U.S.) Inc. (HQUS), Repsol

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<sup>20</sup> Specifically, the court stated that the Commission erred in (a) placing the burden of proof on the opponents of the Commission-adopted change in cost allocation rather than upon itself, and (b) failing to make the finding that the existing zone rates legally in effect were unlawful. *See NYPSC*, 642 F.2d at 1348.

<sup>21</sup> *See NYPSC*, 642 F.2d at 1348.

Energy North America Corporation (Repsol), Salmon Resources Ltd (Salmon), Mobil Natural Gas, Inc. (Mobil), and Maritimes filed initial and/or reply comments.<sup>22</sup>

**A. Fuel Rate Methodology**

**1. Initial Comments**

31. Maritimes states that the changes to its system since the original certificate proceedings do not support zoned fuel rates. Maritimes claims that its system is still too short at approximately 325 miles and all of Maritimes' firm mainline shippers continue to subscribe capacity from the U.S.-Canada border to the end of the system, as was the case in the original certificate proceeding. In addition, Maritimes states that there have been two significant facility modifications to the system since the original certificate order, both of which support continuation of a single, system-wide fuel rate design.

32. The first major modification, Maritimes explains, was the Phase III Project, which extended the mainline 25 miles from Methuen, Massachusetts to Beverly, Massachusetts, at which point there is an interconnection with Algonquin Gas Transmission (Algonquin). Maritimes states that this resulted in there being two termini of the system: the interconnect with Algonquin at Beverly and the interconnect with Tennessee Gas Pipeline Company at Dracut, Massachusetts, which was the original terminus of the system. Maritimes states that Phase III emphasized the importance of the single primary firm market Maritimes serves by adding an interconnection with another interstate pipeline serving that market, but kept the length of the system to approximately 325 miles.

33. The second significant facility modification, Maritimes explains, was the Phase IV Project, which more than doubled the mainline capacity through the addition of compression and minor looping and was built to accommodate additional supply coming from the Canaport™ LNG Terminal in New Brunswick, Canada. Maritimes states that the anchor customer for the Phase IV Project, Repsol, subscribed to all of the Phase IV capacity and all of the remaining unsubscribed capacity on the pipeline, including all turnback capacity, and selected the two termini of the system as its delivery points. Maritimes states that the Phase IV project made transportation on Maritimes less expensive, as reflected by the rate decrease instituted in this proceeding, even taking into account increased fuel costs as a result of the additional compression. Maritimes argues that any argument that the additional compression associated with the Phase IV project somehow should translate into zoned fuel rates ignores the substantial transportation rate

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<sup>22</sup> Several parties provided comments regarding Maritimes' request for clarification and rehearing. We have not included those comments in this section. Please see the preceding section of this order for a discussion of the issues related to Maritimes' request for clarification and rehearing.

reduction proposed by Maritimes in this proceeding and constitutes an attempt to cherry pick the July 1 filing.

34. Maritimes also argues that there is no evidence that a single, system-wide fuel rate will inhibit the development of market centers that would otherwise develop on Maritimes. Maritimes states that there are no points on Maritimes where there are many interstate pipeline interconnections and there is no storage on the system. Maritimes claims that the deliveries in Maine have remained essentially flat over the life of the Maritimes' project, including the three-year period during which the bifurcated fuel rates were in effect. However, Maritimes states that following the in-service date of Phase IV the quantity of deliveries upstream of the two termini represents a much smaller percentage of the overall delivery capacity of the system.<sup>23</sup>

35. Repsol and Salmon filed initial comments supporting Maritimes' proposed single, system-wide fuel rate methodology. On the other hand, MPA, Verso, Maine PUC, and Casco contend in their initial comments that Maritimes has failed to meet its burden of proof under section 4 of the NGA to demonstrate that a single system-wide fuel rate is just and reasonable. Alternatively, they support MPA's proposal for distance-based fuel rates, described in more detail below.

36. MPA states that Commission regulations require that the rates charged by interstate pipelines reasonably reflect any material variation in the cost of providing service due to the distance over which transportation is provided.<sup>24</sup> MPA states that, given the 640 percent increase in installed compression capacity since Maritimes began operations and the relatively large share of deliveries being made to markets located upstream of the Dracut and Beverly terminus points, a single system-wide fuel charge does not meet the Commission's requirement. Implementing a single, system-wide fuel charge, Maine argues, would cause fuel to be over-recovered for short-haul deliveries and under-recovered for long-haul deliveries.

37. MPA also argues that Maritimes' current bifurcated fuel rate methodology is also flawed. First, MPA argues that the bifurcated rate is no longer appropriate given that there are eight compressor stations downstream of the border crossing at Baileyville, Maine, as opposed to one, which was the case when the bifurcated rate was included in the Settlement, and that further gradation is required to reflect the pipeline's actual variable cost of providing transportation service. Second, MPA states that the existing bifurcated fuel rate only considers the points to which the gas is delivered and ignores the

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<sup>23</sup> Specifically, Maritimes states that deliveries upstream of the two termini decreased from 48 percent of the mainline system's total design day delivery capacity to 24 percent.

<sup>24</sup> Maine Advocate Initial Comments at 3 (citing 18 C.F.R. § 284.10(c)(3)).

point of receipt. As a result, MPA states, the 25-mile transportation service from Methuen to Beverly is assessed the same maximum fuel retainage percentage as the 320-mile transportation service from Baileyville to Beverly.

38. MPA suggests that Maritimes' fuel retainage methodology should track fuel use by compressor station. Maritimes states that under the existing fuel retainage methodology, Maritimes estimates monthly the amount of gas that will be transported through each compressor station and the amount of gas that will be consumed as fuel and those projections are used to calculate a seasonal fuel retainage percentage for each compressor station. MPA states that deliveries made upstream of the Richmond compressor station are assessed a Fuel Retainage Quantity that is equal to the Baileyville compressor fuel percentage, plus an additional percentage for LAUF and deliveries made downstream of the Richmond compressor station are assessed a Fuel Retainage Quantity that is the sum of the Baileyville compressor fuel percentage and the Richmond compressor fuel percentage, plus LAUF. MPA asserts that this same methodology could be expanded to account for the eight compressor stations now in operation.

39. MPA states that there are other methodologies currently in effect for other interstate pipelines that the Commission could also consider, including a per-mile fuel percentage or assessing a separate percentage for each block of miles that gas is transported. In Maritimes case, MPA states, it would make sense to assess an incremental fuel percentage for each 40 miles of transportation to reflect the approximate spacing of compressor stations on the pipeline.

40. MPA states that in order to determine which fuel retainage methodology is appropriate for Maritimes requires an assessment of how compressor fuel use varies based on the distance gas is transported on Maritimes' system, as well as the impact of the retainage methodology on shippers and consumers. MPA also recommends that Maritimes provide, or in the alternative, the Commission direct Maritimes to provide, other detailed information related to Maritimes' compressors and fuel retainage information provided in other proceedings.<sup>25</sup>

## **2. Reply Comments**

41. In its reply comments, Maritimes raises generally the same arguments it raised in its initial comments. Maritimes contends that MPA's arguments against the single, system-wide fuel rate methodology constitute a collateral attack on the findings of the Commission in Maritimes' original certificate proceeding. Maritimes states that MPA does not address the Commission's substantive findings in Maritimes' original certificate proceeding, nor does it provide any explanation as to why it believes that the Commission's findings are no longer valid. Maritimes also contends that MPA's

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<sup>25</sup> MPA Initial Comments at 7-9.

proposal is a collateral attack on the Phase IV certificate order and is effectively an argument for a reduced fuel rate at the expense of the Phase IV anchor customer.

42. Regarding MPA's proposed compressor-based fuel rate methodology, Maritimes argues that the proposal does not work for several reasons. First, Maritimes claims that 7 of the 9 zones created by MPA proposal would be too short (approximately 40-50 miles in length) and the other two zones would be less than 2 miles long and less than 50 feet long. Second, Maritimes claims that shippers would only pay fuel for a particular compressor station if the transportation haul at issue traversed the station and crossed zone boundaries. Thus, Maritimes argues, a receipt and a delivery within the same zone would result in no fuel charge to the shipper. Third, Maritimes claims that three of the nine zones would have no delivery points at all and MPA does not explain how fuel rates would be designed for these three zones. Maritimes argues that, if there are no deliveries on a particular portion of the pipeline, there is no reason for creating a zone boundary because no one will benefit from the lower rate created by the zone. Lastly, Maritimes claims that administering nine fuel zones on a pipeline of its length will be unduly burdensome both for the pipeline and for shippers.

43. Maritimes argues that MPA also fails to demonstrate that its other two fuel proposals, a per-mile fuel percentage and an incremental fuel percentage for each 40 miles of transportation, are just and reasonable. Maritimes states that MPA has not provided any support for a per-mile fuel percentage and there is no basis for requiring a fuel charge for each 40 miles of transportation.<sup>26</sup>

44. In their reply comments, Repsol, Salmon, and Mobil agree with Maritimes' explanation for why a single, system-wide fuel rate is appropriate in light of the attributes of Maritimes' system. Further, Repsol and Salmon contend that the parties opposing the single, system-wide fuel rate have not demonstrated that a specific alternative fuel collection methodology is just and reasonable.

45. MPA also raises generally the same arguments it raised in its initial comments. MPA contends that neither Maritimes, nor the other intervenors, address MPA's argument that a single, system-wide fuel rate methodology does not reflect the material differences in compression fuel costs between short-haul transportation and long-haul transportation on Maritimes' system. MPA states that, in addition to the Phase III and IV expansions cited by Maritimes, there have been other changes that have raised the importance of compressor fuel charges and expanded the opportunities for short haul expansion, including the Compressor Station Expansion Project and the addition of two new delivery points.<sup>27</sup> MPA also argues that Maritimes' assertion that the Commission

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<sup>26</sup> Maritimes states that the compressors are not spaced 40 miles apart and two zones would be much shorter than 40 miles.

<sup>27</sup> MPA Reply Comments at 6-7.

previously rejected a distance-based fuel methodology on Maritimes is incorrect. MAP argues that in the orders cited by Maritimes the Commission addressed arguments that Maritimes should be required to implement a zoned rate design, but made no reference to the fuel charge methodology.<sup>28</sup> Further, MPA states that it is not arguing the Commission erred by allowing Maritimes to put into effect a single system-wide fuel percentage when it first commenced. Rather, MPA argues that then, as opposed to now, the configuration was much less dependent on compression than the facilities that Maritimes operates today and as a result, the difference in compressor fuel use for short-haul transportation and long-haul transportation was relatively small.

46. MPA states that all firm shippers currently hold contracts with primary delivery points at the two Massachusetts delivery points at the end of Maritimes' system only because Maritimes uses postage-stamp rates for mainline transportation services. With a postage-stamp rate, it argues, firm shippers pay the same amount for the firm right to transport gas to end of the system as they would to an upstream market.

47. HQUS states that it supports the efforts of MPA and others to ensure that some reflection of distance of haul continue to be observed in the design of Maritimes' fuel charges. HQUS states that Maritimes' system is not a grid-like system where it may be difficult to ascertain from where volumes to particular delivery points have been sourced and transported. Rather, HQUS contends that volumes on Maritimes move almost exclusively in a linear and southerly direction from the Canadian border, rendering the utility and use of pipeline and compression facilities to any given delivery point relatively easy to track.

48. In its reply comments, Bangor states that rolling-in the fixed costs of the compression that was added South of the Richmond Compressor Station does not justify rolling-in, in the form of a system-wide fuel percentage, the variable costs of fuel. Also, Bangor contends that the fact that Maine's usage of the system has not grown relative to demand at the Dracut or Beverly delivery points actually justifies lowering the fuel costs allocated to Maine's customers relative to shippers at Dracut or Beverly.

## **B. LAUF**

49. In its initial and reply comments, Repsol argues that, based upon information contained in Maritimes' recent FERC Form 2 filings for 2007 and 2008, Maritimes' proposed LAUF rate may be too high. Repsol argues that FERC Form 2 data show that, rather than losing gas, Maritimes actually gained gas in its LAUF account in 2007 and 2008 and that there is no evidence suggesting that Maritimes' experience regarding

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<sup>28</sup> MPA Reply Comments at 3 (citing *Maritimes & Northeast Pipeline, L.L.C.*, 80 FERC ¶ 61,346 (1997) and *Maritimes & Northeast Pipeline, L.L.C.*, 84 FERC ¶ 61,130 (1998)).

LAUF in 2009 will be significantly different from 2007 and 2008. Repsol also argues that Maritimes' proposed LAUF rate appears too high given the operational characteristics and system efficiencies evidenced by the FERC Form 2 actual data. Therefore, Repsol argues that the collection of natural gas under Maritimes' fuel tracker mechanism, as proposed, would result in additional in-kind gas, in excess of the pipeline's requirements. Accordingly, Repsol requests that the Commission require Maritimes to re-file in this docket its tariff sheets to reflect Maritimes' actual LAUF levels using the most recent twelve months of available data ending July 31.

### C. Deemed Costs

50. In its reply comments, Repsol requests that the Commission require Maritimes to re-file its tariff sheets relating to the fuel collection to exclude "deemed costs" in accordance with the Commission's recently articulated policy pronouncement in *El Paso*,<sup>29</sup> issued after the technical conference in this proceeding. Repsol states that, in *El Paso*, the Commission rejected aspects of El Paso's fuel filing because it found that the pipeline's "cost and revenue true-up incorporate[d] costs unrelated to the actual purchase and sale of gas," by "assign[ing] a value to the gas at the time an underage or overage occurred using El Paso's Monthly System Cash Out Index Price," and because the "revenue true-up incorporate[d] monthly 'accrued costs' or 'accrued revenues' into the fuel tracker."<sup>30</sup> Repsol states that the Commission found that the inclusion of these values in the pipeline's fuel tracker mechanism violated the Commission's prohibition against recovering "deemed costs" and furthermore found that El Paso's fuel tracker mechanism was unjust and unreasonable.

51. Repsol states that Maritimes' most recent fuel filing indicates that the pipeline's fuel tracker appears to include deemed costs, in violation of the Commission's policies. Accordingly, Repsol requests that the Commission require Maritimes to re-file in this docket its tariff sheets addressing fuel to exclude "deemed costs," in compliance with the Commission's decision in *El Paso*. Repsol states that it believes that Maritimes' fuel filing and tariff are sufficiently clear to allow the Commission to make a determination on the issues of "deemed costs" and the validity of the fuel tracker mechanism. However, if the Commission finds that this is not the case because of material factual issues, Repsol requests that the issues be incorporated in Maritimes' current rate case, where extensive discovery can be conducted.

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<sup>29</sup> Repsol Reply Comments at 5 (citing *El Paso Natural Gas Co.*, 129 FERC ¶ 61,006 (2009) (*El Paso*) and *Colorado Interstate Gas Co.*, 128 FERC ¶ 61,117 (2009)).

<sup>30</sup> Repsol Reply Comments at 5 (citing *El Paso*, 129 FERC ¶ 61,006 at P 2).

### **Commission Determination**

52. We find that Maritimes proposed fuel rates and single, system-wide fuel rate methodology raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing already underway in this docket. Accordingly, the Commission directs that Maritimes' fuel rate filing be consolidated with the hearing established by the July 30 Order to explore the issues raised in the initial and reply comments, including, but not limited to, issues related to Maritimes' satisfaction of its section 4 burden, alternative fuel rate proposals, Maritimes' LAUF projection, and the inclusion of deemed costs. The Commission finds that it is appropriate to examine these issues in the context of a hearing where a factual record can be developed by the parties. We defer to the presiding judge in the ongoing hearing in this docket whether any modifications to the current procedural schedule in that case are necessitated by consolidating these issues with the other issues previously set for hearing.

#### **The Commission orders:**

(A) The Commission accepts in part and denies in part Maritimes' request for clarification and rehearing of the July 30 Order, as discussed in the body of this order,

(B) The fuel rates and fuel rate methodology proposed by Maritimes in its July 1 filing are set for hearing and are consolidated with the hearing established by the July 30 Order.

By the Commission. Commissioner Norris voting present.

( S E A L )

Kimberly D. Bose,  
Secretary.