

150 FERC ¶ 61,106  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Portland Natural Gas Transmission System

Docket No. RP08-306-003

OPINION NO. 510-B

ORDER ON REQUEST FOR REHEARING AND REFUND REPORT

(Issued February 19, 2015)

1. This order addresses a request for rehearing of Opinion No. 510-A,<sup>1</sup> as well as the refund report filed by Portland Natural Gas Transmission System (Portland) in accordance with Opinion No. 510-A. Opinion No. 510-A addressed requests for rehearing and clarification of Opinion No. 510,<sup>2</sup> which addressed briefs on and opposing exceptions to an Initial Decision issued on December 24, 2009 concerning a general Natural Gas Act (NGA) rate case filed by Portland in April of 2008.<sup>3</sup> Portland's refund report reflects refunds that were sent to customers in accordance with Opinion No. 510-A. As discussed below, the Commission accepts the refund report and dismisses as moot the request for rehearing of Opinion No. 510-A.

**I. Background**

2. Portland's interstate pipeline system was authorized by a series of Commission orders, which approved Portland's initial and amended applications and issued certificates of public convenience and necessity pursuant to NGA section 7(c), 15 U.S.C.

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<sup>1</sup> *Portland Natural Gas Transmission System*, Opinion No. 510-A, 142 FERC ¶ 61,198 (2013) (Opinion No. 510-A).

<sup>2</sup> *Portland Natural Gas Transmission System*, Opinion No. 510, 134 FERC ¶ 61,129 (2011) (Opinion No. 510).

<sup>3</sup> *Portland Natural Gas Transmission System*, Initial Decision, 129 FERC ¶ 63,027 (2009) (ID).

§ 717f (c).<sup>4</sup> Portland filed its initial application to construct and operate import facilities at the United States-Canada border near North Troy, Vermont and construct and operate approximately 242 miles of pipeline from the border facilities to an interconnection with Tennessee Gas Pipeline Company, L.L.C. (Tennessee) near Haverhill, Massachusetts.<sup>5</sup> Portland's proposed pipeline was designed for a firm, winter-day design capacity of 178,000 Mcf per day<sup>6</sup> and Portland based its proposed rates upon its firm, winter-day design capacity of 178,000 Mcf per day.<sup>7</sup> On July 31, 1996, the Commission issued a Preliminary Determination on Portland's application, subject to the outcome of its review of environmental matters (the 1996 Certificate Order). Recognizing that Portland would have unsubscribed capacity for both the winter and summer months, the Commission expressly placed Portland at risk for the recovery of costs based on 178,000 Mcf per day.<sup>8</sup>

3. Portland subsequently amended its certificate application in Docket Nos. CP96-248 and CP96-249 and, in addition, filed another construction application jointly with Maritimes and Northeast Pipeline, LLC (Maritimes) in Docket No. CP97-238-000. Under the amended application, Portland proposed to construct and operate: (a) import facilities at the United States/Canada border at Pittsburg, New Hampshire; (b) 142 miles of mainline from the border crossing facilities to Westbrook, Maine; and (3) two laterals off the mainline (collectively, Northern Facilities).<sup>9</sup> The mainline of the Northern Facilities interconnected downstream with mainline facilities that Portland proposed jointly with Maritimes in Docket No. CP97-238-000. The proposed joint facilities (collectively, Joint Facilities) consisted of 101 miles of pipeline, including 35 miles of mainline from Westbrook, Maine, to Wells, Maine and one lateral (Phase II Joint

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<sup>4</sup> See *Portland Natural Gas Transmission System*, 76 FERC ¶ 61,123, at 61,655 (1996) (issuing preliminary determination) (1996 Certificate Order), *order on reh'g*, 80 FERC ¶ 61,134 (issuing preliminary determination on amended application and denying rehearing) (July 1997 Certificate Order), *order on reh'g*, 80 FERC ¶ 61,345, at 62,145 (1997) (granting certificate authority and addressing rehearing requests) (September 1997 Certificate and Rehearing Order).

<sup>5</sup> 1996 Certificate Order, 76 FERC at 61,649 (application filed in Docket Nos. CP96-248-000 and CP96-249-000).

<sup>6</sup> *Id.* at 61,649, 61,664.

<sup>7</sup> *Id.* at 61,651.

<sup>8</sup> *Id.* at 61,660-61.

<sup>9</sup> July 1997 Certificate Order, 80 FERC at 61,444-45.

Facilities) and 66 miles of mainline from Wells, Maine to Dracut, Massachusetts and two laterals (Phase I Joint Facilities).<sup>10</sup>

4. On July 31, 1997, the Commission issued a Preliminary Determination, on the basis of all pertinent non-environmental issues, and granted Portland a certificate to provide service using its capacity on the Phase I Joint Facilities,<sup>11</sup> to construct facilities and provide service using its capacity on the Phase II Joint Facilities, and to construct and operate the Northern Facilities. Among other things, the Commission found, that during the first year of operation, Portland would be capable of providing 178,000 Mcf per day of firm transportation service on the Northern Facilities and 169,400 Mcf per day of firm transportation service on the Joint Facilities.<sup>12</sup> During the second and subsequent years, the Commission found that both the Northern Facilities and Portland's share of the Joint Facilities would be capable of providing 210,000 Mcf per day of firm transportation service.<sup>13</sup> The Commission required Portland to revise its rates to reflect billing determinants based on 178,000 Mcf per day for the first year and an estimated increased capacity of 210,000 during subsequent years.<sup>14</sup> Recognizing that Portland would have unsubscribed capacity for both the winter and summer months based on these figures, the Commission once again expressly placed Portland at risk for the recovery of costs based on 178,000 Mcf per day for the first year of operation and 210,000 Mcf per day in subsequent years.<sup>15</sup>

5. Portland sought rehearing of the Commission's decision to require Portland to revise its rates to reflect 210,000 Mcf per day of capacity after the first year of operation and be placed at risk for the increased unsubscribed capacity.<sup>16</sup> Portland argued that it

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<sup>10</sup> September 1997 Rehearing and Certificate Order, 80 FERC at 62,145.

<sup>11</sup> In an order issued simultaneously in Docket Nos. CP97-238-000 *et al.*, the Commission issued to Portland a certificate to construct, and to Maritimes a certificate to operate, the Phase I Joint Facilities, subject to at-risk and other conditions. The certificate issued to Portland in that order, however, did not grant authority for Portland to use its capacity on the Phase I Joint Facilities. *See Maritimes and Northeast Pipeline, L.L.C., et al.*, 80 FERC ¶ 61,136 (1997).

<sup>12</sup> July 1997 Certificate Order, 80 FERC at 61,447.

<sup>13</sup> *Id.* at 61,447-48.

<sup>14</sup> *Id.* at 61,448.

<sup>15</sup> *Id.*

<sup>16</sup> September 1997 Certificate and Rehearing Order, 80 FERC at 62,146.

was uncertain when additional compression would go into service or the actual amount of increased compression and its effect on the capacity of the Portland system. Portland did not seek rehearing of the Commission decision to require Portland to revise its rates to reflect 178,000 Mcf per day of capacity during the first year of operation.

6. In the September 1997 Certificate and Rehearing Order, the Commission granted the requested certificate authorizations for the Northern and Joint Facilities, subject to conditions, and addressed Portland's rehearing request.<sup>17</sup> The Commission conditioned the certificates issued in the order to put both Portland and Maritimes at risk for their portion of the cost of the Phase II Joint Facilities.<sup>18</sup> With respect to Portland's rehearing request, the Commission found that it was premature, based on the current facts, to require Portland to revise its rates and to be placed at risk for 210,000 Mcf per day of capacity after its first year of operation, stating it would review that matter when Portland made its first NGA section 4 rate filing.<sup>19</sup> The Commission thus required Portland to make a section 4 rate filing within three years of the in-service date of its system "so that rates may be effective no later than the third anniversary of its in-service date."<sup>20</sup>

7. Thereafter, on October 1, 2001, Portland made the section 4 rate filing required by the certificate orders in Docket No. RP02-13-000 (2001 Rate Filing). The Commission, in an order issued October 31, 2001, accepted and suspended the 2001 Rate Filing for five months — until April 1, 2002 — and made it subject to refund.<sup>21</sup> Subsequently, on October 25, 2002, Portland filed an uncontested Stipulation and Settlement Agreement to resolve all issues in Docket No. RP02-13-000 (2002 Settlement), which the Commission accepted on January 14, 2003.<sup>22</sup> The 2002 Settlement established a firm transportation (FT) maximum recourse rate of \$0.8500 per Dekatherm (Dth) effective April 1, 2002.<sup>23</sup>

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<sup>17</sup> September 1997 Certificate and Rehearing Order, 80 FERC ¶ 61,345.

<sup>18</sup> See *id.* at 62,146. In a separate order, the Commission issued to Portland a certificate to construct, and to Maritimes a certificate to operate, the Phase I Joint Facilities, subject to Portland and Maritimes being at risk for their portion of the cost of the Phase I Joint Facilities. *Maritimes*, 80 FERC at 61,477.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 62,147.

<sup>21</sup> *Portland Natural Gas Transmission System*, 97 FERC ¶ 61,131 (2001), *settlement accepted in*, 102 FERC ¶ 61,026 (2003) (letter order) (2002 Settlement Order).

<sup>22</sup> See 2002 Settlement Order, 102 FERC ¶ 61,026.

<sup>23</sup> See *id.* P 3.

The 2002 Settlement required Portland to file a general NGA section 4 rate case no sooner than, and no later than, April 1, 2008.<sup>24</sup>

8. On April 1, 2008, Portland made the NGA section 4 rate filing as required by the 2002 Settlement, which is the subject of the instant proceeding.<sup>25</sup> Portland proposed increased rates based on cost and revenue data during a 12-month base period ending December 31, 2007, as adjusted for changes during the nine-month period ending September 30, 2008.<sup>26</sup> The Commission accepted and suspended Portland's tariff sheets until September 1, 2008, subject to refund, and established procedures for an evidentiary hearing.<sup>27</sup>

9. On January 15, 2009, Maritimes placed into service its Phase IV Expansion of both the Joint Facilities and its own separate facilities upstream of the Joint Facilities.<sup>28</sup> Portland did not participate in that expansion and accordingly that expansion did not increase its 210,000 Mcf per day capacity on the Joint Facilities. However, in June 2008, the Commission granted Portland's request for a declaratory order finding that, once the Phase IV facilities were placed in service, Portland's system-wide or "end-to-end" capacity (i.e. its ability to transport gas all the way from Pittsburg, New Hampshire to Dracut, Massachusetts) would be reduced to 168,000 Mcf per day on a year round basis.<sup>29</sup> The Commission found that a compressor unit added to the Joint Facilities at Westbrook as part of the Maritimes Phase IV Expansion would increase the minimum delivery pressure from Portland to the Joint Facilities, thereby reducing Portland's ability to transport gas all the way from Pittsburg to Dracut to 168,000 Mcf per day. However, the Commission stated that this finding did not affect Portland's capacity rights of 210,000 Mcf per day on the Joint Facilities between Westbrook and Dracut.

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<sup>24</sup> *Id.* P 7.

<sup>25</sup> Portland filed its direct case with its proposed rate application.

<sup>26</sup> Portland 2008 Rate Filing at 3.

<sup>27</sup> *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,108 (2008) (Hearing Order on 2008 Rate Filing).

<sup>28</sup> The Commission approved Maritimes' application for a certificate for its Phase IV Expansion in February 2007, *Maritimes & Northwest Pipeline, L.L.C.*, 118 FERC ¶ 61,137 (2007).

<sup>29</sup> *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,275 (2008 Declaratory Order), *order on reh'g*, 125 FERC ¶ 61,198 (2008), *petition for review dismissed*, *PNGTS Shippers' Group v. FERC*, 592 F.3d 132 (D.C. Cir. 2010).

10. On May 12, 2010, Portland filed a separate, general NGA section 4 rate case in Docket No. RP10-729-000 (2010 Rate Case). The test period for the 2010 Rate case, unlike the test period for this rate case, reflected the effects of Maritimes' Phase IV Expansion, including the reduced capacity on Portland's Northern Facilities. The Commission accepted and suspended Portland's 2010 Rate Case tariff records to be effective December 1, 2010.<sup>30</sup> Thus, the resulting rates determined in this rate case (Docket No. RP08-306-000) were effective only for a locked-in period from September 1, 2008 through November 30, 2010.

11. Among the issues raised in both this rate case and Portland's subsequent 2010 Rate Case was the appropriate level of Portland's at-risk condition. In this rate case, Portland proposed to design its rates based on billing determinants of 210,840 Dth per day (approximately 210,000 Mcf per day), but it asserted that its at-risk condition should remain at the initial 178,712 Dth per day (178,000 Mcf per day) level established in its certificate proceeding for the period until its next section 4 rate case.<sup>31</sup> Portland argued that the "Commission's 178,000 Mcf/day at-risk condition was the final determination of this matter in the certificate proceedings."<sup>32</sup> Trial Staff recommended that the at-risk condition be set at 210,840 Dth per day (210,000 Mcf per day). PNGTS Shippers Group (PSG), on the other hand, argued that the capacity of Portland's Northern Facilities during the test period in this rate case was 217,405 Dth per day, somewhat greater than its capacity on the Joint Facilities and therefore, the at-risk condition in this rate case should be established at a level of 217,405 Dth per day.

12. In the 2010 Rate Case, Portland contended that its at-risk condition should be reduced to 168,000 Mcf per day (168,672 Dth per day), consistent with the Commission finding in the 2008 Declaratory Order that its end-to-end capacity had been reduced to that level by Maritimes' Phase IV Expansion. Trial Staff and PSG contended that Portland's at-risk condition should be maintained at a level of at least 210,000 Mcf per day, because Portland continued to have that level of capacity on the Joint Facilities and Portland's actions during Maritimes' Phase IV Expansion had facilitated the reduction of its capacity on the Northern Facilities.

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<sup>30</sup> See *Portland Natural Gas Transmission System*, 131 FERC ¶ 61,230 (2010) (Hearing Order on 2010 Rate Filing); see also Portland's Motion to Place Suspended Rates and Tariff Sheets into Effect, Docket No. RP11-1541-000 (Nov. 22, 2010).

<sup>31</sup> In a certificate proceeding, pipeline capacity generally is stated in volumetric units. However, pipelines are required to state their rates in thermal units. See *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, Order No.582, FERC Stats & Regs. ¶ 31,025, at 31,392 (1995).

<sup>32</sup> ID, 129 FERC ¶ 63,207 at P 304 (citing Ex. PNG-1 at 6).

13. On December 24, 2009, the Presiding Administrative Law Judge (ALJ) issued the Initial Decision in this rate case.<sup>33</sup> Opinion No. 510 affirmed the ALJ's decision to establish Portland's at-risk condition at a level of 210,840 Dth per day.<sup>34</sup> The Commission agreed with the ALJ that, in both the July 1997 Preliminary Determination Order and September 1997 Certificate and Rehearing Order, the Commission intended to base Portland's at-risk condition on the actual capacity of the pipeline once all construction authorized by the 1997 certificate orders was completed and to place Portland at-risk for any unsubscribed capacity.<sup>35</sup> The Commission found that the capacity of Portland's system was 210,840 Dth per day.<sup>36</sup> PSG sought rehearing of the Commission's determination in Opinion No. 510 that Portland's at-risk condition be based on a capacity level of 210,840 Dth per day. PSG contended that the Commission erred in ignoring certain record evidence establishing that Portland's firm capacity on the Northern Facilities during the Test Period year exceeded 210,840 Dth per day and was at least 217,405 Dth per day. Portland did not seek rehearing of Opinion No. 510's finding concerning the at-risk condition for purposes of this rate case, but it requested clarification that any rate issues associated with its reduction in capacity as a result of the Phase IV Expansion would be addressed in the 2010 Rate Case.

14. In Opinion No. 510-A, the Commission granted PSG's rehearing request, as well as Portland's clarification request.<sup>37</sup> Upon further review, the Commission found that the level of Portland's at-risk condition should be 217,405 Dth per day, instead of 210,840 Dth per day. The Commission interpreted the July 1997 Certificate Order as requiring that the at-risk condition be based on the capacity of the Northern Facilities, if that capacity was greater than Portland's capacity entitlements on the Joint Facilities. Based on its analysis of the record in the proceeding, the Commission found that during the relevant test period the capacity of Portland's Northern Facilities was at least 217,405 Dth per day. In light of this evidence, the Commission concluded that Portland's at-risk condition should be based on 217,405 Dth per day, as opposed to its lower capacity entitlement on the Joint Facilities.

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<sup>33</sup> ID, 129 FERC ¶ 63,027.

<sup>34</sup> Opinion No. 510, 134 FERC ¶ 61,129 at P 290.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* P 291.

<sup>37</sup> Opinion No. 510-A, 142 FERC ¶ 61,198.

15. On the same day the Commission issued Opinion No. 510-A in this rate case, the Commission issued Opinion No. 524<sup>38</sup> in Portland's 2010 rate case. Opinion No. 524 addressed the issue of whether and how Portland's at-risk condition should be adjusted to reflect the reduction in the capacity of its Northern Facilities as a result of Maritimes' Phase IV Expansion. The Commission found that, in contrast to the situation addressed in Opinion No. 510-A where Portland had somewhat greater capacity on the Northern Facilities than on the Joint Facilities, Portland now has 210,00 Mcf per day capacity on the Joint Facilities but only 168,000 Mcf capacity on the Northern Facilities. Similar to Opinion No. 510-A's holding that Portland's at-risk condition should be set at the then higher capacity of the Northern Facilities, Opinion No. 524 found that, in this new situation, Portland's at-risk condition should be set at the now higher capacity of the Joint Facilities. The Commission accordingly rejected Portland's contention that its at-risk condition should be limited to its end-to-end capacity during the test period for the 2010 Rate Case of 168,000 Mcf. On April 19, 2013, Portland filed a request for rehearing of the Opinion No. 510-A, asserting that the Commission had erred in its holding concerning the at-risk condition. Portland also filed a request for rehearing of Opinion No. 524's holding concerning its at-risk condition in that case.

16. On April 22, 2013, in Docket Nos. RP13-806-000 and RP13-806-001, Portland submitted a filing to comply with Order No. 510-A. Portland's compliance filing used a cost-of-service of \$63,859,829 and reflected a recourse rate of \$0.8048 per Dth, using billing determinants of 217,405 Dth. No protests or adverse comments were filed. On May 30, 2013, Portland's compliance filing was accepted in a delegated letter order.<sup>39</sup>

17. On May 20, 2013, Portland submitted its refund report reflecting refunds that were sent to customers in accordance with Opinion No. 510-A. Portland noted in its report that the refund floor for the locked-in rate period is the last just and reasonable rate of \$0.8500 per Dth as established in Docket No. RP02-13-000. Portland stated that, because the rate filed in Portland's April 22 compliance filing is lower than the applicable refund floor, refunds are calculated using the refund floor, not the April 22 compliance filing rate of \$0.8048 per Dth. No protests or adverse comments were filed.

## **II. Discussion**

18. The Commission accepts Portland's refund report, and the Commission dismisses Portland's request for rehearing of Opinion No. 510-A on the ground that the issue of

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<sup>38</sup> *Portland Natural Gas Transmission System*, Opinion No. 510, 142 FERC ¶ 61,198 (2013) (Opinion No. 524).

<sup>39</sup> *Portland Natural Gas Transmission System*, Docket Nos. RP13-806-000 and RP13-806-001, at 1(May 30, 2013) (delegated letter order).

whether the at-risk condition applicable in this proceeding should be 210,840 Dth per day as held in Opinion No. 510 or 217,405 Dth per day as held in Opinion No. 510-A is moot.

19. For the reasons discussed below, resolution of the at-risk condition in this proceeding would have no effect on the rates actually paid by Portland's customers either in this case or the 2010 Rate Case. Moreover, a merits decision of that issue in this case would have limited precedential value in the 2010 Rate Case, in light of the fact that the test period in this rate case does not reflect the substantial changes in Portland's capacity as a result of Maritimes' Phase IV Expansion. Accordingly, no purpose is served by a final resolution of the at-risk condition based on the record in this proceeding.

20. As explained above, the rates at issue in the instant proceeding were effective only for a locked-in period from September 1, 2008, when they took effect subject to refund, through November 30, 2010, when the rates proposed in the 2010 Rate Case took effect subject to refund. The Commission's authority to require refunds in a rate case is limited to the refund floor established by the rates last found just and reasonable by the Commission, including rates established by a settlement.<sup>40</sup> In its filing to comply with Opinion No. 510-A, Portland calculated a recourse rate of \$0.8048 per Dth using billing determinants of 217,405 Dth. However, the refund floor for the locked-in period at issue in this rate case is the last just and reasonable rate of \$0.8500 per Dth, as established in the 2002 Settlement. Accordingly, as reflected in Portland's refund report, Portland was only required to make refunds based on the \$0.8500 per Dth rate. If the Commission were to grant rehearing of Opinion No. 510-A and allow Portland to recalculate its rates using billing determinants of 210,840 Dth per day, the recalculated rates would only increase to approximately \$0.8298 per Dth. This would not reduce the refunds Portland has already provided customers because \$0.8298 per Dth is still below the applicable refund floor of \$0.8500 per Dth.

21. Moreover, in Opinion No. 524-A, which is being issued contemporaneously with this order, the Commission is approving a recourse rate of approximately \$0.85 per Dth based on Portland's compliance filing made in accordance with Opinion No. 524. That rate will be above any possible refund floor that might be established based on the final rates determined in the instant rate proceeding (\$0.8048 or \$0.8298).

22. In these circumstances, no purpose would be served by a final resolution of Portland's at-risk condition in this rate case based on a stale record that does not reflect Portland's current capacity levels as a result of Maritimes' Phase IV Expansion or

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<sup>40</sup> See *Tennessee Gas Pipeline Co.*, 52 FERC ¶ 61,085, at 61,315 (1990) and *Williams Natural Gas Co.*, 51 FERC ¶ 61,341, at 62,107 (1990). See also *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208, 1224 (1st Cir. 1984)).

Portland's reduced ability to transport gas across the Northern Facilities.<sup>41</sup> Because the Commission is not making a final resolution of the at-risk condition issue in this proceeding, the discussions of the at-risk issue in either Opinion No. 510 or Opinion No. 510-A are not being treated as precedential in Opinion No. 524-A. The Commission is, instead, resolving the at-risk issue in Opinion No. 524-A based on Portland's current capacity levels as reflected in the record of the Docket No. RP10-729 proceeding, without reference to Opinion Nos. 510 and 510-A.

The Commission orders:

The Commission accepts the refund report and dismisses as moot the request for rehearing of Opinion No. 510-A.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>41</sup> See also *Wyoming Interstate Co., Ltd.*, 89 FERC ¶ 61,303 (1999) (terminating hearing on the grounds that further litigation in the severed hearing could not establish a refund floor for the rates proposed in the new rate case).