

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Petition for Initiation of Show Cause Proceedings) Docket No. _____

**INDUSTRY PETITION FOR INITIATION OF SHOW CAUSE PROCEEDINGS
DIRECTED TO
INTERSTATE NATURAL GAS PIPELINES AND STORAGE COMPANIES**

Pursuant to Rules 207(a)(4) and (a)(5) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. §§ 385.207(a)(4) and (a)(5) (2017), the undersigned Petitioners,¹ representing a broad-based coalition of the natural gas industry that are dependent upon services provided by interstate natural gas pipeline and storage companies, hereby petition the Commission to take immediate action under Sections 5(a), 10(a), and 14(a) and (c) of the Natural Gas Act (“NGA”)² to initiate show cause proceedings against all interstate natural gas pipeline and storage companies, excluding (1) Section 311 pipelines (which are otherwise required to file updated rate justifications on an

¹ Petitioners include the following trade associations: American Forest and Paper Association, American Public Gas Association, Independent Petroleum Association of America, Natural Gas Supply Association, and Process Gas Consumers Group. Petitioners also include the following companies: Aera Energy LLC, Anadarko Energy Services Company, Chevron U.S.A. Inc., ConocoPhillips Company, Hess Corporation, Petrohawk Energy Corporation, WPX Energy Marketing, LLC, and XTO Energy Inc. We estimate that these above-listed entities account for a majority of shippers on nearly every interstate natural gas pipeline, as well as a majority of contracted firm capacity.

² 15 U.S.C. §§ 717d(a), 717i(a), and 717m(a) and (c) (2016).

ongoing basis);³ and (2) natural gas pipeline and storage companies that are obligated to file a Section 4 rate case in 2018. Petitioners request the Commission to require all other regulated interstate natural gas pipeline and storage entities (unless barred by a settlement moratorium) to demonstrate that their existing jurisdictional rates continue to be just and reasonable following the passage of the Tax Cuts and Jobs Act of 2017 (“Tax Act”).⁴

The Tax Act became effective on January 1, 2018, and, as pertinent here, revised the income tax rates applicable to interstate natural gas pipeline and storage corporate and pass-through entities that are regulated by the Commission. Section 13001 of the Tax Act reduced the tax imposed on corporations from as high as 35% to a flat rate of 21%.⁵ Section 11011 of the Tax Act provided for owners of partnerships and other pass-through entities that as much as 20% of a taxpayer’s qualified business income may be deducted from the taxpayer’s otherwise taxable income.⁶ The Tax Act also eliminated the alternative minimum tax for corporations.⁷

Several state commissions, trade associations and other entities have already sent letters to the Commission requesting immediate rate relief associated with the

³ 18 C.F.R. § 284.123 (2017).

⁴ PL No. 115-97.

⁵ *Id.* at Section 13001, which amended, in part, Section 11(b) of the Internal Revenue Code, 26 U.S.C. § 11(b) (2016).

⁶ *Id.* at Section 11011, which created Section 199A of the Internal Revenue Code.

⁷ *Id.* at Section 12001(b), which amended Section 38(c)(6) and 53(d)(2) of the Internal Revenue Code, 26 U.S.C. §§ 38(c)(6) and 53(d)(2) (2016).

Tax Act.⁸ Further, a motion has been filed seeking partial summary relief in the Commission's pending Docket No. PL17-1 proceeding, related to whether an income tax allowance in rates for pass-through entities permits unlawful cost over-recovery.⁹ The purpose of this Petition is to propose an expedited "show cause" procedure to accommodate those requests and provide legal analysis in support.

I. REQUESTED RELIEF

Given the significant changes in the Tax Act, which, *inter alia*, will impact interstate natural gas transportation and storage rates, Petitioners request the Commission to provide the following relief:

1. Initiate show cause proceedings directed to each interstate natural gas pipeline and storage company (except for Section 311 pipelines and companies that will be filing a Section 4 rate case in 2018, as explained above), and require each to submit a cost and revenue study demonstrating that its existing rates continue to be just and reasonable, in spite of the changes to taxation implemented under the Tax Act.¹⁰

⁸ The Commission has received letters requesting FERC action following the effective date of the Tax Act from the following entities: American Public Gas Association (submitted Jan. 3, 2018), Process Gas Consumers Group (submitted Jan. 8, 2018), the State Advocates (submitted Jan. 9, 2018), the Michigan Public Service Commission (submitted Jan. 11, 2018), and Natural Gas Supply Association (submitted Jan. 17, 2018).

⁹ A Motion for Partial Summary Disposition related to the tax effects of the Tax Act on pass-through entities requesting similar relief is currently pending before the Commission. *See* "First Motion for Partial Summary Disposition," Docket No. PL17-1 (submitted Jan. 2, 2018). The instant Petition is broader in scope, in that it would apply to all interstate natural gas pipeline and storage companies, regardless of the business structure of the owner.

¹⁰ The cost and revenue study is a well-established approach in Commission initiated Section 5 proceedings. *See* note 31 *infra*.

- a. Direct the pipelines and storage companies in preparing the cost and revenue study, to use the most recently available, 12-month, cost and revenue data, adjust the income tax allowance to take into account the changes implemented under the Tax Act, including the impact of the lower rate on the income tax allowance, as well as reducing and refunding the Accumulated Deferred Income Tax account (“ADIT”), indicate the rate of return/capital structure assumptions, indicate the cost allocation and rate design methodologies that underlie the existing rates, and include a derivation of the per unit rates.
 - b. Require a pipeline or storage company, if such company believes that it has a Commission-approved settlement that would exempt it from such a rate analysis (*e.g.*, a Section 5 rate moratorium), to provide evidence to that effect, subject to Commission review. If the Commission agreed that a settlement prohibited a rate change during the term of the settlement, then the show cause process would be applicable to such company at the termination of any applicable Section 5 rate moratorium provisions of the settlement.
 - c. Require a pipeline or storage company, if such company believes that any of its contracts (for example, discounted or negotiated rate contracts) are exempt from Commission-ordered rate adjustments, to identify those contracts, and provide evidence to that effect, and permit shipper counterparties the opportunity to contest such a claim. The applicability of a rate reduction to specific contracts would be determined on a case-by-case basis, based upon the specific provisions of the contract at issue.
2. Require an immediate rate reduction, based upon the Commission’s calculations,¹¹ if a filed cost and revenue study demonstrates that the revenues from services offered on the interstate natural gas pipeline or storage company’s system exceed the costs, following the adjustments to account for changes to the tax laws implemented under the Tax Act.

¹¹ *See, e.g., Transcontinental Gas Pipe Line Co. LLC*, 162 FERC ¶ 61,050 at P 17 (2018) (the Commission, on its own motion, recalculated the proposed initial incremental rate to reflect the new 21 percent corporate tax rate, and rejected Transco’s incremental recourse rate).

Petitioners urge the Commission to adopt this industry-wide “show cause” approach and affirmatively order rate reductions immediately, where appropriate, in lieu of other administrative procedures. For example, if the Commission were to adopt a rulemaking proceeding such as, Order No. 475 issued in 1986,¹² when corporate income tax rates were last decreased substantially, it would unreasonably delay relief to consumers, due to the need for a Notice of Proposed Rulemaking, followed by comments, and then followed by an Order actually issuing a rule.

There can be no factual dispute that tax rates for regulated pipeline and storage companies have been reduced significantly, and there should be no reasonable legal dispute that their income tax allowances should be reduced accordingly. Long, drawn-out administrative proceedings are not required and serve only to allow pipelines or storage companies to retain cost over-recoveries that are not allowed under the NGA in the interim. Moreover, Section 5 relief is prospective only; thus, an expedited ruling on the merits is required to afford consumers the rate relief to which they are due as soon as possible. In no event should the Commission require individuals to file complaints seeking rate relief, before lower rates are ordered. Such individual complaint actions would result in extremely costly and redundant litigation of the same issue in multiple proceedings,

¹² “Order No. 475,” *Electric Utilities; Rate Changes Relating to Federal Corporate Income Tax Rates for Public Utilities, FERC Statutes and Regulations* ¶ 30,752 (1987); Order No. 475-A, *reh’g denied*, 41 FERC ¶ 61,029 (1987).

wasting administrative and industry resources, and again, would unreasonably delay effective rate relief.

Finally, the “show cause” approach proposed herein cannot reasonably be criticized as promoting allegedly inappropriate “piecemeal” ratemaking. Given that the pipeline or storage company would be permitted to demonstrate the rate impact of all current costs and revenues in its cost and revenue compliance filing, it would have the opportunity (1) for example, to demonstrate that there are offsets to decreased tax costs; and/or (2) to separately file a Section 4 case to the extent the pipeline or storage company believes it is under-recovering its costs.

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III. ARGUMENTS IN SUPPORT OF PETITION

A. The Commission's Top Priority Should Be To Protect Consumers From Pipeline and Storage Company Over-Recoveries As Soon As Possible.

"The rate-making process under the [NGA], *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and consumer interests."¹³ "As a general proposition, a regulated utility is allowed to recover from ratepayers all expenses incurred, including income taxes, plus a reasonable return on capital invested in the enterprise and allocated to public use."¹⁴ With regard to the question of income taxes, "[t]he general rule followed by the Commission, and indeed most if not all regulatory commissions, is that the 'consumers should be charged for only the actual liability for Federal income taxes.'"¹⁵ Moreover, the Commission allows pipelines and storage companies to recover through rates the actual or potential income tax liability attributable to regulated utility income.¹⁶

The Commission has an obligation under the NGA to "protect consumers against exploitation at the hands of natural gas companies,"¹⁷ and "to underwrite

¹³ *Federal Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*").

¹⁴ *Public Service Co. of New Mexico v. FERC*, 653 F.2d 681, 683 (D.C. Cir. 1981).

¹⁵ *City of Chicago, Ill. V. FPC*, 385 F.2d 629, 633, *citing United Fuel Gas Co.*, 12 F.P.C. 251, 265 (1953).

¹⁶ *See Inquiry Regarding Income Tax Allowances*, "Policy Statement on Income Tax Allowances," 111 FERC ¶ 61,139 (2005) ("*Income Tax Policy Statement*").

¹⁷ *Hope*, 320 U.S. at 610.

just and reasonable rates to the consumers of natural gas.”¹⁸ Given this statutory obligation, paired with the general rule that consumers should only be charged for the interstate natural gas pipeline’s or storage company’s actual tax liability, the Commission must act to ensure that consumers are paying the lowest reasonable rate for service.

If the Commission is concerned that simultaneous cost and revenue compliance filings would strain its resources, then it could stagger the filing dates, as it did when Order No. 636 was issued,¹⁹ or order filings in order of highest rates of return as reported on Form No. 2s, or some other method, in order to allow the Commission and interested parties the time necessary to review each cost and revenue study. But any such staggering should retain an expedited schedule. Moreover, there are also several interstate natural gas pipeline companies with Section 4 rate case filing requirements that are due in 2018, which would obviate the need for the Commission to initiate an investigation under Section 5 for those pipelines. Thus, any administrative burdens can be managed.

¹⁸ *Atlantic Refining Co. v. Public Service Comm’n of New York*, 360 U.S. 378, 388 (1959).

¹⁹ “Order No. 636,” *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, FERC Stats. and Regs. ¶ 30,939 at 30,463 (1992).

B. The Commission’s Legal Authority To Grant The Requested Relief Is Well Grounded In Applicable Precedent.

Given that the Tax Act has already reduced income tax liability, the Commission must take action immediately to eliminate the over-recovery of costs attributable to lower income tax liability for interstate natural gas pipelines and storage companies.

1. The Commission’s statutory authority to accomplish this goal is well defined.

Section 5(a) of the NGA permits the Commission, upon a finding that an existing rate, charge, or classification, or any rule, regulation practice, or contract affecting such rate, charge or classification is unjust and unreasonable, “shall determine the just and reasonable rate, charge, classification, rule, regulations, practice, or contract to be thereafter observed and in force, and shall fix the same by order.”²⁰ Section 5(a) grants the Commission the authority to “order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.”²¹

Section 10(a) of the NGA grants the Commission the authority to require interstate natural gas pipelines and storage companies to submit cost and revenue

²⁰ 15 U.S.C. § 717d(a).

²¹ *Id.*

studies, which are necessary to assist the Commission in the proper administration of the NGA.²²

Section 14(a) of the NGA states: “The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder . . .”²³ Section 14(c) grants the Commission the authority to “require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry.”²⁴

Thus, the Commission clearly has the statutory authority to initiate show cause proceedings against interstate natural gas transportation pipeline and storage companies and to request cost and revenue studies to determine whether existing rates continue to be just and reasonable, given the changes to income tax liability that have resulted from the Tax Act.

2. The courts have supported the Commission’s exercise of its statutory to ensure the lowest reasonable rate.

The courts have agreed that the Commission has the statutory authority to investigate interstate natural gas pipeline and storage company rates to determine whether a pipeline or storage company is in compliance with FERC policies and

²² *Id.* at § 717i(a).

²³ *Id.* at § 717m(a).

²⁴ *Id.* at § 717(m)(c).

rules,²⁵ and to order a decrease for “any rate which is not the ‘lowest reasonable rate.’”²⁶ Furthermore, the courts have determined that the FERC has the discretion to initiate proceedings and to terminate them,²⁷ and that such discretion is presumptively not subject to judicial review.²⁸

Additionally, the Commission has the authority to find that one component of pipeline or storage company rates (*e.g.*, the tax cost level) is unjust and unreasonable, while deferring a ruling on the other components of the rates. In *FPC v. Tennessee*, the Supreme Court reversed the court of appeals and upheld the Commission’s interim ruling during an ongoing rate case, which found in that case that the pipeline’s rate of return was excessive and ordered immediate rate reductions.²⁹ The Court found that the Commission need not consider every element of a pipeline’s costs to find that one component is excessive, and to order refunds accordingly.³⁰

²⁵ See *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18, 39 (D.C. Cir. 2002) (“The Commission has authority under § 5 to order hearings to determine whether a given pipeline is in compliance with FERC’s rules, 15 U.S.C. § 717d(a), and under § 10 and § 14 to require pipelines to submit needed information for making its § 5 decisions, 15 U.S.C. §§ 717i & 717m(c).”)

²⁶ *Federal Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1946) (“the Commission is also free under §5(a) to decrease any rate which is not the ‘lowest reasonable rate.’”).

²⁷ See *General Motors Corp. v. FERC*, 613 F.2d 939, 944-45 (D.C. Cir. 1979).

²⁸ See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

²⁹ *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) (“*FPC v. Tennessee*”).

³⁰ *Id.* at 149-156.

3. The Commission has relied upon this statutory authority to eliminate pipeline and storage company over-recoveries.

The Commission has relied upon the statutory authority, granted to it under Sections 5(a), 10(a), and 14(a) and (c), to require interstate natural gas pipelines and storage companies to submit cost and revenue studies to examine whether an interstate natural gas pipeline and/or storage company's rates continue to be just and reasonable.³¹ In the section 5 investigations, which the Commission has initiated over the last several years, the Commission examined publicly available information and determined that the pipelines and storage companies may have been over-recovering their costs.³² The Commission initiated a Section 5 action against the pipeline and/or storage company and directed the pipeline and/or

³¹ See, e.g., *Natural Gas Pipeline Co. of America, L.L.C.*, 158 FERC ¶ 61,044 (2017); *Wyoming Interstate Co., L.L.C.*, 158 FERC ¶ 61,040 (2017); *Empire Pipeline, Inc.*, 154 FERC ¶ 61,029, *reh'g denied*, 154 FERC ¶ 61,274 (2016); *Iroquois Gas Transmission System, L.P.*, 154 FERC ¶ 61,028 (2016) *Columbia Gulf Transmission, LLC*, 154 FERC ¶ 61,027, *reh'g denied*, 154 FERC ¶ 61,275 (2016); *Viking Gas Transmission Co.*, 141 FERC ¶ 61,118 (2012); *Wyoming Interstate Co., L.L.C.*, 141 FERC ¶ 61,117 (2012); *Bear Creek Energy Storage Co., L.L.C.*, 138 FERC ¶ 61,019 (2012); *MIGC LLC*, 138 FERC ¶ 61,011 (2012); *ANR Storage Co.*, 137 FERC ¶ 61,136 (2012) *Public Utilities Commission of Nevada, Sierra Pacific Power Company d/b/a NV Energy v. Tuscarora Gas Transmission Co.*, 135 FERC ¶ 61,174 (2011); *Ozark Gas Transmission, L.L.C.*, 133 FERC ¶ 61,158 (2010), *reh'g denied*, 134 FERC ¶ 61,062 (2011); *Kinder Morgan Interstate Gas Transmission, L.L.C.*, 133 FERC ¶ 61,157, *reh'g denied*, 134 FERC ¶ 61,061 (2011); *Great Lakes Gas Transmission Limited Partnership*, 129 FERC ¶ 61,160 (2009), *reconsideration denied*, 130 FERC ¶ 61,132 (2010); *Northern Natural Gas Co.*, 129 FERC ¶ 61,159 (2009), *reh'g denied*, 130 FERC ¶ 61,132 (2010); *Natural Gas Pipeline Co. of America, LLC*, 129 FERC ¶ 61,258 (2009), *reh'g denied*, 130 FERC ¶ 61,133 (2010).

³² See, e.g., *Natural Gas Pipeline Co. of America, LLC*, 130 FERC ¶ 61,133 at P 2.

storage company to submit a cost and revenue study using data from the latest 12-month period available.³³

Moreover, the Commission regularly grants summary disposition on the question of whether a tax change should be reflected in rates. This is because tax changes are “known and measurable,” and not subject to dispute.³⁴ In *Trunkline*, the Commission found that a tax change “made it certain that [the pipeline’s] taxes would decrease in a very predictable manner in future periods.”³⁵ And in granting summary disposition on a tax change in *VEPCO*, the Commission elaborated: “[t]he...tax rate is established by statute. It is a figure that is certain in amount. It is not subject to estimation. Failure to reflect the Congressionally-determined tax rate would yield an unreasonable result.”³⁶

Under these standards, the requested relief in this Petition is more than reasonable, if not overly conservative, in that Petitioners are proposing to allow pipelines and storage companies the opportunity to attempt to justify existing rates by examining all costs and revenues.

³³ See, e.g., *Wyoming Interstate Co., L.L.C.*, 158 FERC ¶ 61,040 at P 9.

³⁴ See, e.g., *Trunkline*, 58 FERC ¶ 61,240 at 61,788 (1992); see also, *Ozark Gas Transmission Corp.*, 41 FERC ¶ 61,207 at 61,567 (1987); *National Fuel Gas Supply Corp.*, 51 FERC ¶ 61,122 at 61,334 (1990).

³⁵ *Trunkline*, 58 FERC at 61,788.

³⁶ *VEPCO*, 10 FERC ¶ 61,083 at 61,180 (1980). See also, e.g., *Wisconsin Power & Light Co.*, 40 FERC ¶ 61,316, at 61,975 (1987) (granting a motion for summary disposition on a movant’s proposal to revise the utility’s rates to reflect a tax-rate change).

In reliance upon the above-cited precedent and authority, Petitioners are requesting the Commission to issue an expedited show cause order, followed by Commission-ordered rate reductions, where appropriate. The changes to the tax code implemented by the Tax Act are known and their impact on rates can be easily identified using data from the latest 12-month period available. A simple adjustment to the income tax allowance in the cost and revenue study, for example, to reflect the new corporate tax rate of 21 percent, will provide the Commission with sufficient information to determine whether the pipeline's or storage company's rates would result in an over-recovery, and, therefore be no longer just and reasonable, thereby providing the rationale for ordering a reduced rate. Petitioners respectfully urge the Commission to act as soon as reasonably possible, without delay. In the interim, interstate natural gas pipelines and storage companies will continue to enjoy an authorized windfall due to the changes in the Tax Act.

For the foregoing reasons, Petitioners request the Commission to initiate "show cause" proceedings under Section 5 of the NGA, requiring interstate natural gas pipeline and storage companies (except for Section 311 pipelines, and pipelines and storage companies that file a Section 4 rate case in 2018, as explained above), to submit cost and revenue studies as described herein, and take further action ordering rate reductions, where appropriate.

Respectfully submitted,

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