

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

In the Matter of)
)
Gas Technology Institute) **Docket No. RP04-378-000**

**MOTION TO INTERVENE AND PROTEST
OF THE
NATURAL GAS SUPPLY ASSOCIATION**

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.214 (2003), the Natural Gas Supply Association (“NGSA”) hereby submits its Motion to Intervene and Protest in response to the Gas Technology Institute’s July 1, 2004 filing (“July 1 Filing”) in the above-captioned proceeding. In support, NGSA respectfully states the following:

I. INTERVENTION

A. Communications concerning this motion should be addressed as follows, and the following should be included on the official service list in this proceeding:

Patricia Jagtiani
Vice President for Regulatory Affairs
NATURAL GAS SUPPLY ASSOCIATION
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B. NGSA represents integrated and independent companies that produce and market natural gas in the United States. Established in 1965, NGSA encourages the expanded use of natural gas and supports regulatory and legislative actions that foster competitive markets.

C. This proceeding involves review of GTI's July 1 Filing which GTI states is to request approval from the Commission for advance rate approval of its proposed Collaborative Research, Development and Demonstration ("RD&D") Program, pursuant to Section 154.401 of the Commission's Regulations under the Natural Gas Act ("NGA").

D. Since NGSA represents companies that produce and market natural gas, NGSA has substantial and vital interests herein and desires to intervene in order to protect those interests. Therefore, NGSA is an interested party within the meaning of Section 15(a) of the Natural Gas Act, and its intervention and participation will be in the public interest. NGSA is not now, and will not be, adequately represented by any other party in this proceeding, and may be bound or adversely affected by the Commission's action herein.

II. PROTEST

In its July 1 Filing, GTI states that its mandatory RD&D surcharge proposal has garnered "comprehensive industry-wide support." This simply is not true. NGSA and an array of other pipeline customer groups do not support the proposal. For the following policy and legal reasons, the Commission must reject GTI's filing. Although the legal arguments against continuing the surcharge alone certainly should lead the Commission to reject this filing, NGSA also believes there are critical policy implications arising from GTI's proposal, which the Commission should consider.

A. Public policy supports the elimination of government-mandated surcharges.

In the last twenty years, while hewing to its mandate under the Natural Gas Act to protect consumers from pipeline monopoly power, the Commission has made enormous efforts to foster competition in the natural gas industry and, where appropriate, to move toward market-based solutions to industry problems, as opposed to providing an unsupported entitlement to one selected research group, for example. In addition to being completely contrary to the specific policies embodied in the FERC-approved, 1998 settlement, GTI's proposal is also completely contrary to FERC's overall policy direction and represents an attempt at an enormous step backward, harkening back to the days of command-and-control regulatory regimes and potentially eviscerating market-based ideals.

Not only is this proposal contrary to free-market goals, it is affirmatively anti-competitive in that approval of this surcharge acts as a deterrent to competition, as GTI is given a significant leg-up on any potential competition with its guaranteed \$48 million endowment. The proposal amounts to an economically inefficient and unfair subsidy across industry segments. Within a competitive free market, the investment risks should appropriately be borne by those companies and segments that stand to gain most from the enhanced delivery technologies envisioned.

For its part, NGSAs strongly supports RD&D, and its members back this up with substantial financial contributions. As the trade association for many of the largest natural gas producers and marketers, NGSAs members already make significant RD&D investments in focused areas where the industry and our customers will receive the most benefit.¹

¹ One member alone, ExxonMobil, "maintains the industry's largest proprietary upstream technology research and development effort, investing more than \$200 million annually," according to the corporation's 2003 annual report. Through this investment, the company supports "the full spectrum of upstream activities, from earliest exploration to enhanced recovery and field depletion," with specific priorities covering basin analysis; seismic acquisition, processing and interpretation; reservoir modeling and simulation; drilling, and facilities design, and gas commercialization technologies. Overall,

Research organizations, like other companies, respond to market forces. A competitive R&D market, such as that envisioned in the Settlement, will dictate which projects are funded and will also ensure that the benefits of any project are commensurate with the costs to those who pay for them. We support the Settlement as a means to encourage competition and to allow market forces, rather than government mandates, to determine the targets of and the funding for RD&D. NGSAs therefore urge the Commission to honor the 1998 Settlement Agreement and to complete the transition to voluntary funding by those with the greatest interest in the proposed RD&D.

B. GTI is legally bound by the 1998 Settlement Agreement, and the terms of the Settlement Agreement are clear.

Despite its claims to the contrary, GTI is bound by the terms of the January 21, 1998 Stipulation and Agreement Concerning GRI Funding (“Settlement Agreement”). This settlement was signed by a broad cross-section of natural gas industry participants, including GRI, after many rounds of contentious negotiations and was duly approved by the Commission. GTI, however, argues that because the Gas Research Institute (“GRI”) signed the Settlement Agreement, not GTI, it is not bound to the agreement. According to GTI, this is because GRI did not *technically* merge with the Institute of Gas Technology (“IGT”), rather the two entities “combined” to form GTI. However, principles of contract law mandate that the Commission look beyond the strict form of the relationship between GRI and IGT and consider the facts “on the ground.” Whatever the ultimate corporate form of the transaction between GRI and IGT, the reality of the result is that GTI assumed the rights and duties of GRI, most importantly receiving

according to a U.S. Energy Information Administration report published in 2004, entitled “Performance Profiles of Major Energy Producers 2002,” the 28 energy companies surveyed, of which eleven were NGSAs members, spent a total of \$464 million that year in “Oil & Gas Recovery R&D.”

the surcharge amounts collected by the interstate natural gas pipelines, and using the funds to administer the Commission-approved RD&D programs.

Contrary to its assertions,² GTI cannot pick and choose which of GRI's Settlement Agreement responsibilities it assumes.³ If GTI is going to reap the benefits of the Settlement Agreement, it also must abide by the agreement's limitations and obligations.⁴

Having determined that GTI must abide by GRI's rights and obligations under the Settlement Agreement, we now turn to the analysis of those rights and obligations. Article VI of the Settlement Agreement states:

By agreeing to this Offer of Settlement, no party is required to continue membership in GRI beyond December 31, 2004 . . . Subject to Article V, all parties agree that (i) the Commission-approved uniform research and development surcharges shall terminate . . . December 31, 2004; (ii) funding of GRI will be voluntary thereafter as described herein; and (iii) none of the parties will propose or support any modification of the Offer of Settlement or any continuation of Commission-approved uniform research and development surcharges to fund GRI beyond December 31, 2004.⁵

This language could not be any clearer: the mandatory surcharge expires no later than December 31, 2004, and no party to the Settlement Agreement may propose a continuation of a mandatory, Commission-approved surcharge to fund GRI's RD&D. As demonstrated above, GTI, having accepted the benefits of the bargain struck by its predecessor GRI, now is obligated to fulfill the terms of the Settlement Agreement, which includes completing the transition to a voluntary funding mechanism.

² July 1 Filing, at 10.

³ See Restatement (Second) of Contracts § 69 (1981).

⁴ See *Cashman v. Shinn*, 441 N.E.2d 940, 943 (Ill. App. Ct. 1982)(holding that if one accepts the benefits of an agreement, that party is estopped from denying the applicability of the agreement to it); see also, *Grot v. First Bank of Schaumburg*, 684 N.E.2d 1016, 1020 (Ill. App. Ct. 1997)(holding that if one accepts the benefits of an agreement, that party is estopped from denying the validity of the agreement).

⁵ Stipulation and Agreement Concerning GRI Funding, Art. VI ("Settlement Agreement").

C. GTI misconstrues the Commission’s June 26, 1998 Order on Rehearing.⁶

GTI exerts substantial effort in its July 1 Filing arguing that the Commission stripped Article VI of any legal effect in its June 26, 1998 Order on Rehearing approving the Settlement Agreement.⁷ In fact, this is not the case at all. GTI presents this argument extracting statements in a piecemeal fashion from the American Public Gas Association’s (“APGA”) Request for Clarification, and attempts to shoehorn APGA’s position into the Commission’s holding. A plain reading of the Commission’s order, however, demonstrates that the Commission supported APGA’s position under limited circumstances.

APGA raises an issue regarding Article VI of the settlement, seeking clarification that it will not be bound in perpetuity to not taking a particular position regarding Commission-approved funding for GRI. It claims it did not agree to be bound not to propose or support any modification of the settlement beyond the end of the settlement term, or December 31, 2004. It points out that there may be events which transpire which would effectively end the settlement before the end of its stated term, and that it should not be foreclosed from arguing for or supporting something other than what is in the existing settlement if such an event should occur. The Commission agrees with APGA *on this point*. The settlement agreement, *in such an event*, would no longer be effective and the proscription against advocating or supporting modifications to the settlement would end. Thus, the April 29 order is clarified to this extent.⁸

It is abundantly clear when the language is read *in toto* as it was written by the Commission that the Commission’s agreement was tied to the specific situation where events occur that “effectively end the settlement before the end of its stated term.” The Commission’s phrase “in such an event,” refers to such situations.⁹ In fact, linguistically it must refer to this specific

⁶ *Gas Research Institute*, 83 FERC ¶ 61,331 (1998).

⁷ July 1 Filing, at 4-6.

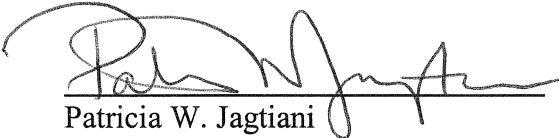
⁸ 83 FERC ¶ 61,331, at p. 62,338 (emphasis added).

⁹ Neither APGA nor the Commission provide examples of such events. However, one such possibility of an event that would “effectively end the settlement before the end of its stated term” would be if, on judicial review of the Settlement Agreement, a court overturned the settlement. In fact, while not specifically referencing such a situation in the quoted paragraph above, in its Order on Rehearing the Commission did address the impact on the Settlement Agreement of judicial review in response to a different party’s request for clarification.

situation because there is no other “event” identified in the above-quoted language. It is therefore evident that the Commission did not hold that Article VI “does not have the force and effect of law,” as GTI argues.¹⁰ Rather, the Commission held that in limited circumstances the Settlement Agreement would no longer be effective and parties could support measures that were not originally in the Settlement Agreement. The provisions of Article VI remain intact and therefore, no party, including GTI, may propose a “continuation of Commission-approved uniform research and development surcharges to fund GRI [GTI] beyond December 31, 2004.”

WHEREFORE, for the foregoing reasons, the Natural Gas Supply Association respectfully requests that it be allowed to intervene in this proceeding with full rights as a party hereto and that the Commission order action consistent with this protest and reject the GTI pleading.

Respectfully submitted,



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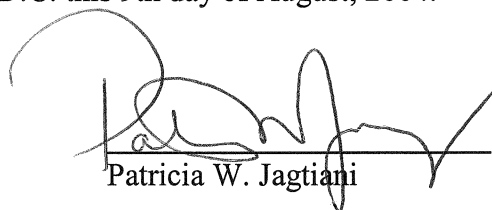
Date: August 9, 2004

¹⁰ July 1 Filing, at 6.

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2003), I hereby certify that I have this day served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 9th day of August, 2004.



Patricia W. Jagtiani