

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

Natural Gas Supply Association,	)	
American Forest and Paper Association,	)	Docket Nos. RP11-1538-000
American Public Gas Association,	)	RP11-1538-001
Independent Petroleum Association of America, and	)	
Process Gas Consumers Group	)	

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF  
THE NATURAL GAS SUPPLY ASSOCIATION,  
THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,  
THE PROCESS GAS CONSUMERS GROUP,  
THE AMERICAN PUBLIC GAS ASSOCIATION AND  
THE AMERICAN FOREST AND PAPER ASSOCIATION  
TO  
REQUEST OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA  
FOR CLARIFICATION, REHEARING AND RECONSIDERATION**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. §§ 385.212, 385.213 (2011), the Natural Gas Supply Association (“NGSA”), the American Forest and Paper Association, Inc. (“AF&PA”), the American Public Gas Association (“APGA”), the Independent Petroleum Association of America (“IPAA”), and the Process Gas Consumers Group (“PGC”) (collectively, the “Associations”) hereby move for leave to file an answer to and answer the May 23, 2011 request of the Interstate Natural Gas Association of America (“INGAA”) for clarification, rehearing and reconsideration (“Request for Rehearing”) in the above-captioned proceeding and ask the Commission to re-affirm its initial order in this proceeding.

**I. BACKGROUND AND EXECUTIVE SUMMARY**

On November 17, 2010, the Associations filed a petition in the above-captioned docket asking that the Commission enforce its policy regarding pipeline crediting during outages and

order pipelines to amend their tariffs in accordance with Commission policy (“Petition”). Specifically, pursuant to existing Commission policy, the Associations requested that the Commission ensure that pipelines incorporate into their tariffs an acceptable sharing mechanism that allows for partial reservation charge credits during outages that are due to unexpected and uncontrollable *force majeure* events, and that pipeline tariffs explicitly require full reservation charge credits to shippers during outages that are not due to unexpected and uncontrollable *force majeure* events.

On April 21, 2011, the Commission issued an order on the Petition<sup>1</sup> urging pipelines to determine whether their individual tariff is in compliance, and if not, to make an appropriate filing to come into compliance.<sup>2</sup> The Commission also, *inter alia*, directed the Division of Audits in its Office of Enforcement to include a review of whether a tariff complies with the Commission’s reservation charge crediting policy in future audits of interstate pipelines.<sup>3</sup> On May 23, 2011, INGAA filed a request for clarification, rehearing and reconsideration of the Order on Petition.

The Associations urge the Commission to reject INGAA’s argument and instead reaffirm its properly, well-reasoned prior Order in this proceeding. As set forth more fully below, there is no substantive legal or procedural error in the Order as the Order essentially restated and affirmed previously established Commission policy and urged pipelines to comply with that policy.

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<sup>1</sup> *Natural Gas Supply Association, et al.*, Order on Petition, 135 FERC ¶ 61,055 (2011) (“Order on Petition” or “Order”).

<sup>2</sup> *Id.* at P 12.

<sup>3</sup> *Id.* at P 13.

## II. MOTION FOR LEAVE TO ANSWER

The Associations hereby move, pursuant to Rule 212, for leave to file an answer to the Request for Rehearing. While the Commission's Rules of Practice and Procedure prohibit responses to requests for rehearing,<sup>4</sup> the Commission has the authority to waive that prohibition for good cause.<sup>5</sup> The Commission has found good cause to permit answers where they are otherwise prohibited in various circumstances, including where the answer would assure a complete record in the proceeding,<sup>6</sup> provide information helpful to the disposition of an issue,<sup>7</sup> permit the issues to be narrowed or clarified,<sup>8</sup> or aid the Commission in understanding and resolving issues.<sup>9</sup>

The Associations wish to submit additional information and comments in order to assist the Commission in resolving the issues raised by the Request for Rehearing and therefore respectfully request that the Commission accept this answer as part of the record in this proceeding.

## III. ANSWER

In its Request for Rehearing, INGAA identified a number of alleged procedural and legal infirmities in the Commission's Order. Although we will not herein address each argument, the Associations believe that, contrary to INGAA's claims, there are absolutely no infirmities in this Order and therefore urge the Commission to re-affirm the Order in its entirety. In sum, as set

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<sup>4</sup> See 18 CFR § 385.213(a)(2) (2011).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *Pacific Interstate Transmission Co.*, 85 FERC ¶ 61,378 at 62,444 (1998), *reh'g denied*, 89 FERC ¶ 61,246 (1999).

<sup>7</sup> See, e.g., *CNG Transmission Corp.*, 89 FERC ¶ 61,100 at 61,287 n.11 (1999).

<sup>8</sup> See, e.g., *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224 at 62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335 at 62,323 n.1 (1998).

<sup>9</sup> See, e.g., *Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,009 at 61,016 (2000).

forth more fully below, in this Order, the Commission simply reiterated its current authority under the NGA, its existing policies, and its regulations.

The issue of outage credits is not a frivolous issue. Quite to the contrary, it is a very important issue with economic consequences to all shippers. Pipeline outages cause producer shippers to bear added costs associated with shutting in natural gas and/or securing alternate means to serve their downstream transactions and commitments. End-use customers also bear additional costs associated with securing alternative sources to bring natural gas supplies to their plants and industrial facilities. In addition to these losses, absent Commission action, shippers often must also forfeit their reservation charges in those instances where the pipeline tariff is not in compliance with clear Commission policy. Simply put, shippers that do not receive transportation service and are nevertheless forced to pay full reservation charges are unfairly paying for service they do not receive. Moreover, as members of the Associations have seen, uncertainty as to whether pipelines' tariffs provide shippers with appropriate credits during outages causes unnecessary conflicts between pipelines and shippers. We support the Commission's decision to reiterate its policies in this important area and look forward to the uniform implementation of these clear policies.

As to any suggestion that the Commission should have conducted a rulemaking, it is well settled law that the Commission has the option of proceeding by rule or on a case-by-case basis to set policy.<sup>10</sup> Contrary to the arguments in the Request for Rehearing, there is simply no

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<sup>10</sup> See, e.g., *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267, 294 (1974) (“[A]djudicative cases may and do serve as vehicles for the formulation of agency policies.”); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”); *Michigan-Wisconsin Pipeline Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975) (“[T]here is no question that the Commission may attach precedential and even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a *stare decisis* manner.”); *Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“[A]gency may establish binding policy through rulemaking procedures . . . or through adjudications which constitute binding precedents.”); *AEP*  
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procedural infirmity in the Commission’s approach reflected in the Order. In short, the Commission used this Order as a vehicle to reiterate its existing outage policies – policies that the Commission has extensively and meticulously documented in its findings<sup>11</sup> and policies that have been examined and affirmed by the D.C. Circuit.<sup>12</sup> In this Order, the Commission also stated that it will continue to monitor industry compliance with its policies and rules, including outage crediting policies, and will enforce compliance if necessary. Even without having issued the Order on Petition, the Commission could have undertaken any of the actions enumerated in the Order. The Order did not, as the Request for Rehearing implies, serve to enlarge the scope of the Commission’s available regulatory responsibilities or its regulatory remedies.

INGAA’s Request for Rehearing further takes issue with the Commission’s assertion that pipelines should ensure that their tariffs comply with Commission policy and that the Commission might “consider other appropriate actions to obtain compliance”<sup>13</sup> should pipelines fail to comply with its policies. The Commission was clearly *not* acting under Section 5 of the Natural Gas Act (“NGA”). In fact, the Commission denied the Associations’ request for

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*Power Marketing, Inc.*, 108 FERC P 61,026 at P 187 (2004) (“Our decision to establish new policy in the context of case-specific proceedings is clearly within our authority.”); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC P 61,349 at P 51 (2003) (“The Commission, moreover, is not limited to notice and comment rulemaking to develop policy. Agencies generally are permitted considerable discretion to choose whether to proceed by rulemaking or by adjudication.”).

<sup>11</sup> Order on Petition at PP 12-28. See also, e.g., *Kern River Gas Transmission Company*, 129 FERC ¶ 61,262 (2009), *order on reh’g*, 132 FERC ¶ 61,111 (2010); *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *reh’g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997); *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2008); *Texas Eastern Transmission Co.*, 62 FERC ¶ 61,015 (1993); *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, at P 20-24, *reh’g*, 108 FERC ¶ 61,170, at P 10-11 (2004); *Petal Gas Storage, L.L.C.*, 126 FERC ¶ 61,199, at P 25 (2009); *Entrega Gas Pipeline LLC*, 114 FERC ¶ 61,326, at P 13 (2006); *Alliance Pipeline L.P.*, 84 FERC ¶ 61,239 (1995); *Florida Gas Transmission Co.*, 105 FERC ¶ 61,171, at P 34 (2003); *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262 (2003) (*El Paso*).

<sup>12</sup> *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007).

<sup>13</sup> Order at P 13.

Section 5 action and instead reminded the pipelines of its *existing* outage crediting policies and urged the pipelines to bring their tariffs in line with these *existing* policies.<sup>14</sup>

In addition, certain arguments in the Request for Rehearing appear to be aimed at speculation about what the Commission might do “in the event of significant non-compliance with the Commission’s reservation charge crediting policy.”<sup>15</sup> In such event, the Commission merely stated that it “will consider other appropriate actions to obtain compliance.”<sup>16</sup> The Commission has not threatened or promised any particular course of action, rather the Commission is merely offering a statement of fact reflecting the options the Commission can use to address non-compliance with any Commission rule, regulation or policy, whether in the area of outage credits or any other substantive area under the Commission’s purview.

Similarly, the directive that the Division of Audits include this issue in its reviews of pipeline tariffs does not exceed FERC’s standing authority, nor does this statement, standing alone, constitute Section 5 action. As mentioned above, the Commission did not state that it will take any further action but only that it will “*consider*” appropriate action. This could mean the issuance of an audit report and proposed remedy, initiating a Section 5 proceeding, or any other action under the Commission’s existing authority.

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<sup>14</sup> See *id.* at Ordering Paragraph (A) and PP 2, 12, and 28. The Associations further note that audits are completely separate from Section 5 authority. In fact, the Commission has the authority under NGA Section 8 to audit the books and records of the pipelines over which it has jurisdiction. See NGA Section 8(b), 15 U.S.C. § 717g(b). This power is separate and apart from NGA Section 5 authority. The Commission has promulgated rules to implement its audit authority and these rules specifically provide that an audit will result in either a notice of deficiency or audit report which will contain findings and proposed remedies. 18 C.F.R. § 158.1 (2011). In 2006 the Commission issued Order Nos. 675 and 675A which increased the due process rights of the entity being audited. The rules allow the audited party to respond and note any disagreements with the finding of the audit, as well as provide procedures, including a full evidentiary hearing, to determine any challenge to findings or proposed remedies. 18 C.F.R. § 158.2 (2011).

<sup>15</sup> Order on Petition at P 13.

<sup>16</sup> *Id.*

In short, the Commission used this Order as a vehicle to reiterate its existing outage policies – policies that the Commission has extensively and meticulously documented in its findings and policies that have been examined and affirmed by the D.C. Circuit. The Order did not, as the Request for Rehearing implies, serve to enlarge the scope of the Commission’s available regulatory responsibilities or its regulatory remedies.

For all of these reasons, the Associations respectfully urge the Commission to deny INGAA’s Request for Rehearing and to continue to ensure compliance with the Commission’s rules and policies as set forth in the Order on Petition.

Respectfully submitted,

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July 29, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Commission Secretary in these proceedings.

Dated at Washington, DC this 29th day of July, 2011.

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