UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate	**Docket No. RM18-11-000**

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION IN SUPPORT OF THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING

Pursuant to the Commission's Notice of Proposed Rulemaking ("NOPR") in the referenced proceeding,[1] the Natural Gas Supply Association ("NGSA") respectfully submits the following comments in support of the Commission's proposal to 1) assess whether rate reductions are warranted for jurisdictional interstate natural gas pipelines in light of the reduced income tax rate under the Tax Cuts and Jobs Act of 2017 ("2017 Tax Act") and elimination of Master Limited Partnership ("MLP") income tax allowance under the Commission's Revised Policy Statement on Treatment of Income Taxes ("Revised Policy Statement"); and 2) ensure that appropriate rate reductions are implemented.

I. Executive Summary

As discussed in further detail below, NGSA supports Commission action to address any over-recovery by interstate pipelines through the proposed approach outlined in the NOPR. It is the Commission's obligation to ensure that the economic benefits of the 2017 Tax Act and Revised Policy Statement flow through to consumers. We also strongly support reasonable returns for interstate pipelines, so they are properly incentivized to build needed infrastructure.

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[1] *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 162 FERC ¶ 61,226 (2018) ("NOPR").

However, NGSA, like other pipeline shipper and customer groups, has a strong interest in ensuring that FERC review pipeline rates when there are new laws or new market conditions that may result in a pipeline substantially exceeding the FERC-approved just and reasonable rate of returns, such as the 2017 Tax Act and Revised Policy Statement. Therefore, we urge the Commission to act quickly to adopt its proposed process in the NOPR and include the modifications discussed below in the final rulemaking. Specifically, we request that the Commission remove the 'take no action' option under the four voluntary options and, in addition, consider allowing negotiated rate contract holders to be eligible for a negative surcharge mechanism, when not otherwise expressly prohibited by contractual terms.

II. Interest of NGSA

Founded in 1965, NGSA represents integrated and independent energy companies that produce and market domestic natural gas and is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA's members trade, transact and invest in the U.S. natural gas market in a range of different manners. NGSA members ship and/or supply billions of cubic feet of natural gas on interstate pipelines on a daily basis and are greatly impacted by the outcome of this proceeding.

NGSA encourages the use of natural gas within a balanced national energy policy and supports the benefits of competitive markets. NGSA has consistently advocated for well-functioning natural gas markets, policies that support market transparency, efficient nomination and scheduling protocols, just and reasonable transportation rates, non-preferential terms and conditions of transportation services and the removal of barriers to developing needed natural gas infrastructure. NGSA has a long-established commitment to ensuring a public policy environment that fosters a growing, competitive market for natural gas. NGSA also supports a balanced energy future; one which ensures a level playing field for all market participants and eliminates inappropriate regulatory barriers to supply.

III. Comments

A. NGSA supports Commission action to ensure pipeline rates are just and reasonable following the significant changes to federal income tax rates.

In response to the 2017 Tax Act and the Revised Policy Statement following the *United Airlines* decision,[2] as well as the numerous requests for immediate Commission action from natural gas shippers and state advocates,[3] the Commission proposed a process that will allow it to determine which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates. The Commission's objective in this proceeding is well defined:

> Interstate natural gas pipelines and intrastate natural gas pipelines providing interstate service should flow through the benefits of the corporate income tax reduction and elimination of MLP income tax allowance to consumers to the extent that their rates would otherwise over-recover their costs of service. Therefore, the Commission is initiating this rulemaking proceeding to consider the most efficient and expeditious method of accomplishing this goal consistent with the requirements of the NGA and NGPA.[4]

We agree with the Commission that is important to flow through these economic benefits to customers and to do so in a timely manner. Given how significant these changes are, in both U.S. law and FERC policy, we support FERC's NOPR with minimal modifications to ensure pipeline rates are just and reasonable.

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[2] *See United Airlines v. FERC,* 827 F.3d 122 (D.C. Cir. 2016).

[3] NGSA, along with several other entities, filed letters and a petition requesting immediate Commission action in light of the 2017 Tax Act. *See supra* n. 10.

[4] *See* NOPR at P 24.

B. The Commission's approach is both reasonable and flexible.

The Commission's proposed approach is a fair and appropriate process, as it avoids the pitfalls of a one-size fits-all policy or mandatory rate reductions. Instead, the Commission's approach is very reasonable. Specifically, the Commission is requiring interstate natural gas pipelines to A) make a one-time informational filing to evaluate the impact of the tax change and Revised Policy Statement on pipeline rates ("Form 501-G") and B) choose one of four voluntary options that address the effect of the 2017 Tax Act and Revised Policy Statement, including: 1) reduce rates by the percentage reduction in cost of service resulting from the 2017 Tax Act and the Revised Policy Statement; 2) commit to filing either a prepackaged uncontested settlement or general Natural Gas Act (NGA) section 4 rate case by December 31, 2018; 3) file a statement explaining why an adjustment to rates is not needed; or 4) take no action at all.[5]

This two-pronged approach ensures that the Commission is not imposing 'piecemeal' ratemaking, because voluntary option number three allows pipelines to justify their existing rates in a written statement, using the abbreviated cost and revenue study from Form 501-G and any additional supporting information it chooses as support. Additionally, under option two, pipelines are given more time to comply if they commit to filing an uncontested prepackaged rate settlement or general NGA section 4 rate case by December 31, 2018, without the risk of a section 5 investigation prior to that date. At the same time, the Commission is taking a flexible approach by allowing pipelines the option to bypass this proposed process and work directly with customers instead. For example, interstate pipelines that file a prepackaged uncontested rate settlement before the deadline for their Form 501-G report would be exempt from filing the report.

[5] *See* NOPR at PP 26-29.

C. The Commission must move quickly to finalize this rulemaking and ignore any attempts to delay action on pipeline rates.

The impact of the 2017 Tax Act and Revised Policy Statement on pipeline rates cannot be understated. Even NGSA's cursory analysis indicates that it is likely many pipelines are significantly over-recovering revenue because of the change in law and policy.[6] FERC should act quickly with a final rulemaking to achieve its stated goal of flowing through the economic benefits to consumers and should resist attempts to delay the process. The 2017 Tax act, which went into effect on January 1, 2018, reduced the maximum corporate income tax rate from 35% to a historic low of 21%.[7] In the Revised Policy Statement, which went into effect on March 21, 2018, FERC is no longer permitting an MLP to recover an income tax allowance in its cost of service. Therefore, it is indisputable that certain costs that were once eligible for recovery by pipelines organized as either a corporation or MLP have been reduced or removed, respectively, due to these changes in the tax law and policies regarding the income taxes.

The Commission has the statutory obligation to protect consumers and "to underwrite just and reasonable rates to the consumers of natural gas."[8] By initiating this proposed process, the Commission is taking the right step to fulfill its obligation. Any arguments that FERC action is unreasonable or legally unfounded should be viewed merely as attempts to delay the inevitable. As more fully detailed in the joint petition and answer filed by NGSA and other gas shippers, the

[6] NGSA's early analysis of pipeline ROEs using both a 21% income tax rate for pipelines organized as corporations and eliminating the income tax allowance for MLPs was compared to the ROEs in our Annual Study. The informal results revealed that many pipelines have been pushed over the threshold of a reasonable rate of return due to these changes in the tax law and policy statement.

[7] *See* NOPR at P 1.

[8] *See, e.g., Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388.

Commission's statutory authority to initiate this process is well defined under section 5(a), section 10(a) and section 14(a) of the NGA, and is supported by court precedent.[9]

D. The Commission should consider removing the option to 'take no action' to maintain its timeline.

Under the Commission's current proposal, pipelines would have the option to 'take no action' with respect to a rate change or filing after submitting Form 501-G (option four). We are concerned that if the Commission provides pipelines with an immediate 'out,' pipelines may use this as an opportunity to delay or needlessly draw out the process. If a pipeline truly believes that a rate change is not justified or that the tax reduction is offset by other increased costs, it can take advantage of option three under the proposed process, allowing it to justify its existing rates and avoid a potential Section 5 proceeding by providing evidentiary support. However, taking no action is not a reasonable or realistic option and furthermore, it brings risk and unnecessary uncertainty to the process. Evaluating every jurisdictional interstate pipeline's forms to determine whether a Section 5 investigation is necessary is not the best use of Commission resources and time. Moreover, the Commission does not have the ability to order refunds under Section 5 of the Natural Gas Act, which denies shippers and customers the rate relief that they are owed under the 2017 Tax Act and Revised Policy Statement. Thus, with each passing day nearly all pipelines receive the full and unencumbered benefit of favorable tax treatment. For these reasons, we encourage the Commission to reconsider and offer only the first three options under any final rule.

[9] *See Industry Petition for Initiation of Show Cause Proceedings Directed to Interstate Natural Gas Pipelines and Storage Companies*, Docket No. RP18-415-000 (Jan. 31, 2018); Motion for Leave to Answer and Answer of the Undersigned Petitioners to Pipeline Answers, Docket No. RP18-415-000 (Feb. 20, 2018). The arguments provided therein are relevant to this proceeding, even though they were prepared in the context of the show cause proceedings.

E. The final rulemaking should allow negotiated rate contract holders to share in the economic benefits provided by the 2017 Tax Act and Revised Policy Statement.

While NGSA supports the Commission's actions to address the impact of the 2017 Tax Act and Revised Policy Statement on pipeline rates and any potential over-recovery by pipelines, foreclosing the opportunity for negotiated rate contract holders should not automatically occur. To ensure this process achieves the Commission's goal of flowing through the economic benefits to *all* consumers, we request that FERC consider allowing negotiated rate contract holders to be eligible, on a case by case basis, for a negative surcharge mechanism when not otherwise expressly prohibited by contractual terms. With a blanket decision that excludes negotiated rate agreements upfront, the Commission is essentially creating a loophole that would allow certain pipelines to avoid making the necessary rate reductions. A considerable number of shippers will be disadvantaged, because many large interstate pipelines have negotiated rate agreements with shippers, who signed long-term contracts under vastly different tax circumstances. In fact, several pipelines have already suggested that this proceeding should have a minimal impact on their revenue.[10] This does not comport with the objective of the 2017 Tax Act and its significant reduction in the corporate income tax rate, which is to incentivize businesses to put more money into the economy by passing down the benefits of the tax savings.

More importantly, excluding negotiated rate contract holders from this process would run contrary to Commission policy that allows the application of surcharges for extraordinary circumstances. Negotiated contracts often contain language with surcharge provisions to capture

[10] *See* Platts.com, *US FERC will disallow tax allowance cost recovery for MLPs* (March 18, 2018) ("'Enterprise Products Partners said FERC's altered policy is 'not expected to have a material impact to the earnings and cash flow of Enterprise.' Tallgrass Energy similarly said FERC's tax policy revisions are likely to be immaterial to that company's revenues, since both Rockies Express and Pony Express have negotiated rate contracts.").

potential unforeseen items or special circumstances that are not part of the standard ratemaking process. Because of this, there have been several instances where the Commission permitted pipelines to impose a surcharge on negotiated rate contract agreements, particularly if the contract did not contain specific language prohibiting a surcharge for the unique circumstance.[11] Thus, if shippers with negotiated rate contracts are expected to share in costs incurred by pipelines for special situations, such as hurricanes or modernizations, then FERC should also use its authority to allow shippers to share in cost reductions received by pipelines for special situations, apportioning the impact of such extraordinary circumstances – whether they are positive or negative – to all parties. FERC should be consistent in the way it makes decisions regarding unique situations that have significant impacts on both pipelines and shippers. The major shift in U.S. tax law and recently-implemented policy that disallows an income tax allowance for MLPs are each significant changes that warrant further consideration on a case-by-case basis for negotiated rate agreement contract holders.

Further, it would be arbitrary and capricious for the Commission to have a policy for surcharges that works only in one direction – allowing for the addition of surcharges that increase transportation rates, but not allowing for negative surcharges that decrease transportation rates. NGSA recognizes that the Commission generally disfavors trackers and surcharges, however, the Commission has justified the use of a surcharge for special circumstances in the past on a case-by-case basis. For example, in its Policy Statement on the Cost Recovery Mechanisms for Modernization of Natural Gas Facilities, the Commission modified its policy to permit the use of a tracker mechanism due to costs pipelines would incur

[11] *See, e.g., Sea Robin Pipeline Company, LLC,* 130 FERC ¶ 61,261 (2010); *High Island Offshore Sys., LLC,* 138 FERC ¶ 61,114 (2012). In both of these proceedings, FERC relied on the contracts containing a *Memphis* clause to permit the pipelines to impose a surcharge on fixed, negotiated rate contracts.

under the Pipeline Safety Act and initiatives from the Department of Energy and Environmental Protection Agency.[12] Therefore, NGSA requests that FERC implement a negative surcharge mechanism, as warranted, for shippers with negotiated rate contracts. In light of FERC's previous actions taken in unique situations, such as a change in law or policy initiative, FERC should allow shippers the opportunity to make claims for a negative surcharge mechanism, and view favorably the rights of shippers to pursue such claims. This will ensure that all parties are afforded the opportunity to appropriately share in the benefits of the 2017 Tax Act and Revised Policy Statement and that pipeline rates are just and reasonable.

F. Commission review is essential to confirm that a settlement precludes rate changes under option three of the proposed approach in the NOPR.

With respect to Commission-approved settlements that may exempt a pipeline from a rate reduction, such as a moratorium on rate reductions, NGSA requests that the pipeline be required to provide evidence to that effect under proposed option three for Commission review. If the Commission agrees that the settlement prohibited a rate change during the term of the settlement, then the Commission's final rulemaking should include language that the pipeline will be subject to the Commission's process outlined above, as well as any appropriate rate reductions, as soon as the rate moratorium provisions of the settlement are terminated or expired. The repercussions of the 2017 Tax Act are in place indefinitely, and shippers in these types of settlements should still be afforded the benefits of a rate reduction, regardless of how long it takes for it to happen under settlement provisions.

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[12] *See Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, Docket no. PL15-1-000 (April 16, 2015). The Commission stated therein: "given the heightened sensitivity to pipeline safety [referencing the Pipeline Safety Act] and environmental related concerns [reference to recent DOE, PHMSA and EPA initiatives] … the Commission has determined to modify its policy to permit the use of a tracker mechanism in the limited circumstances provided for under the Policy Statement, which will inure to the public interest." *See id.*at P 39.

III. Conclusion

With the important modifications noted above, NGSA supports the Commission's proposal to assess whether pipeline rates are just and reasonable in light of the 2017 Tax Act and Revised Policy Statement. We request the Commission expeditiously adopt its proposed approach and include our requested modifications regarding negotiated rate agreements and eliminating the opt-out option listed as option four.

Respectfully submitted,

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Date: April 25, 2018