

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

Transcontinental Gas Pipe Line Company, LLC)	Docket No. CP15-117
Transcontinental Gas Pipe Line Company, LLC)	Docket No. CP15-118
Transcontinental Gas Pipe Line Company, LLC)	Docket No. CP15-138

(Not Consolidated)

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF
THE NORTH CAROLINA UTILITIES COMMISSION AND THE NEW YORK
STATE PUBLIC SERVICE COMMISSION**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, the North Carolina Utilities Commission (“NCUC”) and the New York State Public Service Commission (“NYPSC”) (collectively, “State Commissions”) hereby move to respond to the May 12, 2015 Answer of Transcontinental Gas Pipe Line Company, LLC (“Transco”) in the above-referenced proceeding. In light of the good cause demonstrated herein to consider this answer, the State Commissions also submit an answer to Transco’s Answer. In support thereof, the State Commissions state:

I. MOTION FOR LEAVE TO ANSWER

Although the Commission’s procedural rules generally do not provide for answers to protests, answers, or similar filings unless otherwise ordered,¹ the Commission may, for good cause shown, waive this prohibition and permit such answers.² The Commission has

¹ 18 C.F.R. § 385.213(a)(2) (2014).

² *Id.* § 385.101(e).

discretion to permit answers when the answer would provide information helpful to the disposition of an issue,³ permit the issues to be narrowed or clarified,⁴ or aid the Commission in understanding and resolving issues.⁵ State Commissions' Answer meets this standard because it helps clarify the issues and thereby provides the Commission with a more complete and accurate record upon which to base its decision in this matter.

II. ANSWER

A. Recourse Rates Will Only Provide the Required Check on Pipelines' Market Power At the Time They Enter into Negotiated Rates if the Recourse Rates Properly Reflect the Costs of the Project

The three projects addressed in the certificate applications represent over \$3 billion in new investment, and the newly proposed services will be provided under negotiated rates. As the State Commissions explained in their initial protest, when determining whether to approve negotiated rates, the Commission relies on the availability of recourse rates to prevent pipelines from exercising market power by assuring that the customer can revert to the just and reasonable tariff rate if the pipeline unilaterally demands excessive prices or withholds service.⁶ Recourse rates are also important because FERC's general

³ See, e.g., *CNG Transmission Corp.*, 89 FERC ¶ 61,100, at n.11 (1999).

⁴ See, e.g., *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224, at 62,078 (1998); *New Energy Ventures, Inc. v. S. Cal. Edison Co.*, 82 FERC ¶ 61,335, at n.1 (1998).

⁵ See, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,188, at P 7 (2004) (accepting the NYISO's answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *Morgan Stanley Capital Group, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000) (accepting an answer that was "helpful in the development of the record . . ."); *Tenn. Gas Pipeline Co.*, 92 FERC ¶ 61,009, at 61,016 (2000).

⁶ See State Commissions Protest at 9 (citing *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 at P 4 (1996), *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998); *Natural Gas Pipelines Negotiated Rate Policies*

policy is that interruptible and firm transportation (“FT”) authorized overrun rates are designed to be equivalent to a 100 percent load factor derivative of the maximum FT cost-based rate and are to be charged based on usage. Therefore, even if all service is being provided under negotiated rates, recourse rates need to be properly designed so that they provide a check on the pipeline’s market power during the establishment of negotiated rates, and so that the rates for any interruptible or overrun service conforms with the NGA’s just and reasonable requirement.

Transco’s Answer fails to address the need for recourse rates that actually reflect the costs of the projects to check the pipeline’s market power when entering into negotiated rates. Transco is correct that the Commission reviews recourse rates once the pipeline has an operating history.⁷ That process is, however, irrelevant to whether Transco has supported its proposed negotiated rates because that process will not occur until long after the parties have entered into the negotiated rates. Unless the recourse rates are based on a reasonable estimate of the actual costs to construct the projects, they will not provide the necessary check on the pipeline’s market power during the time frame that actually matters—the period during which the parties agreed to the negotiated rates.⁸

and Practices; Modification of Negotiated Rate Policy, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006), *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006)).

⁷ Transco Answer at 2-3 (*citing Northeast Pipeline, L.L.C.*, 81 FERC ¶ 61,166 at 61,726 (1997)).

⁸ *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 at P 4 (1996).

B. The Return Components of Certificate Applications Should Reflect Current Market Conditions

In its Answer, Transco dismisses the State Commissions' protest of the three certificate applications on the grounds that the "'just and reasonable' determination does not apply to rates proposed in certificate proceedings." Transco Answer at 2-3, 4, 10. It claims that, "[i]nstead, the Commission need only determine that the proposed rates are in the public convenience and necessity -- that they are appropriately designed, are based on the incremental cost of service (including the estimated costs and revenues) of the Project facilities, and comply with the threshold requirement under the Commission's certificate policy statement that the Project will not be subsidized by existing shippers." *Id.* at 3 (citing *e.g. Transcontinental Gas Pipe Line Company, LLC*, 150 FERC ¶ 61,205 (2015)). Transco claims it has met that standard because it "proposes an incremental recourse rate for each Project designed to recover the incremental cost of service attributable to the Project facilities. The design of the recourse rates ensures that the Projects will not be subsidized by Transco's existing customers." *Id.* According to Transco, nothing more needs to be shown to make a finding that the recourse rates are thus in the public convenience and necessity and should be approved by the Commission. *Id.*

In essence, Transco's Answer rests on the assumption that all it needs to do is propose rates based on an incremental cost of service and ensure that the Projects will not be subsidized by Transco's existing customers. Under Transco's interpretation of that analysis, as long as Commission policies are followed, it matters not a whit whether the incremental cost of service reflects current costs or is adequately supported. The State Commissions submit that the Natural Gas Act requires more.

As demonstrated in the State Commissions' Protest, over half of the cost of service underlying the proposed recourse rates in two of the certificate applications is "Pre-tax return at 15.34%."⁹ In the other application, "Pre-tax return at 15.34%" is approximately 48% of the overall cost of service.¹⁰ The entirety of Transco's support for use of a Commission pre-tax return of 15.34% is that it complies with Commission policy. Transco Answer at 3-5. Transco admits that in order to approve the Applications the Commission must determine that "the proposed rates are appropriately designed, **are based on the incremental cost of service** (including the estimated costs and revenues) of the Project facilities." Answer at 3, emphasis supplied. Despite that acknowledgement, it is telling that Transco did not state, and thus seemingly could not demonstrate, that its proposed 15.34% pre-tax return reflects current market conditions.¹¹ Instead, Transco's applications and its Answer are devoid of anything that would support a finding that the major cost element of its incremental cost of service, return, is reflective of the costs it will actually incur to construct the Projects.

C. Single Year Analyses Are Inadequate to Support 20 and 25 Years of Lease Payments

⁹ Docket No. CP15-118 Exhibit P at page 4 (compare line 8 with line 12); Docket No. CP15-138, Exhibit P (compare line 8 with line 12).

¹⁰ Docket No. CP15-117 Exhibit P (compare line 8 with line 12).

¹¹ It is well established that a utility's ROE should reflect current market conditions. *See Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923) ("*Bluefield*"); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"). As demonstrated in the State Commissions' protest, a preliminary DCF analysis for natural gas pipelines reflecting current market conditions results in a median ROE of 10.95%. State Commissions Protest at 12.

Another major cost element of two of the Projects (Dalton and Atlantic Sunrise) are the lease payments Transco will make to unaffiliated third parties for jointly owned lateral facilities. The Dalton Project Lease payment is over 30% of the total estimated cost of service of that project.¹² The Atlantic Sunrise Lease payment is approximately 20% of the total estimated cost of service of the project.¹³ In each instance, the third party will be a passive owner that will lease its ownership interest in the lateral to Transco under long-term fixed lease agreements. In their Protest, the State Commissions argued that Transco's lease analyses are deficient because, while the Dalton Project Lease has a 25-year primary term¹⁴ and the Atlantic Sunrise Lease has a primary term of 20 years,¹⁵ Exhibit N to each of those applications only analyzes one year of each of the leases. This is important because Transco's single year analyses do not take into account, *inter alia*, the impact of depreciation of the leased facilities on the cost of service. As the leased facilities are depreciated over time, the cost of service should decrease due to the decrease in rate base. The State Commissions therefore concluded that, by limiting its analyses of multi-year leases to one year, Transco failed to show that the lease payments over the life of the lease will be less than the equivalent cost of service that would apply if Transco directly owned the facilities. Therefore, Transco has failed to demonstrate its proposed lease arrangements provide benefits. See State Commissions Protest at 13-17.

¹² See Transco Application, Docket No. CP15-117 Exhibit P at line 11 (showing a Lease Payment of \$25,691,000 out of a Total Cost of Service of \$82,708,551 shown on line 12).

¹³ See Transco Application, Docket No. CP15-138 Exhibit P at line 11 (showing a Lease Payment of \$95,578,896 out of a Total Cost of Service of \$480,719,972 shown on line 12).

¹⁴ Docket No. CP15-117 Application at 9.

¹⁵ Docket No. CP15-138 Application at 8.

Transco's Answer argues that it used the first year of each lease arrangement in order to be consistent with Section 157.14(a)(18) of the Commission's regulations, which requires Transco to calculate its initial recourse rates for the Projects using a cost of service for the first calendar year of operation after the proposed facilities are placed in service. Transco Answer at 6. It then criticizes the State Commissions for failing to provide "support or alternative analyses to refute the demonstration made by Transco regarding the benefits of the lease arrangements." *Id.* at 7. Finally, in a footnote, Transco states that:

Transco believes that any reasonable analysis of the annual lease payments over the primary terms of the leases compared to the estimated cost of service over that same period assuming Transco constructed and owned all of the corresponding Project facilities also would demonstrate that the proposed leases comply with the Commission's requirements. As a practical matter, there is no way to know what the future Project rates will be over the lease term assuming Transco constructed and owned all of the corresponding Project facilities.

Id. at n.10.

Transco's Answer on the Lease issue contains at least three major flaws. One, the burden of proof is on Transco, not the State Commissions, to support its lease proposal via substantial evidence.¹⁶ Therefore, if as Transco asserts "the primary terms of the leases compared to the estimated cost of service over that same period . . . would demonstrate that the proposed leases comply with the Commission's requirements" the obligation is on Transco, not the State Commissions, to provide that analysis. Two, the State Commissions did provide an alternative analysis, *i.e.*, the argument that the impact of depreciation on the

¹⁶ Section 7(c) of the Natural Gas Act ("NGA") and the Commission's implementing regulations, 18 C.F.R. § 157.5 *et seq.* (2014), require that a pipeline seeking a certificate of public convenience and necessity demonstrate that the application is required by the present or future public convenience and necessity.

fixed costs recovered via the leases calls into question the validity of Transco's single year analyses of long-term leases. It is telling that Transco failed to counter this criticism in its Answer. Three, Transco's reliance on Section 157.14(a)(18) of the Commission's regulations is misplaced. That regulation sets out the requirements for the calculation of initial recourse rates. Here, Transco is not only proposing initial recourse rates; it is also attempting to demonstrate that long-term leases meet the Commission's benefits test. See Transco Answer at 6. It would not be reasoned decision making to find that Transco's one-year analysis supports a finding concerning the economics of its proposed 20 and 25 year leases.

III. CONCLUSION

WHEREFORE, the North Carolina Utilities Commission and the New York State Public Service Commission respectfully request that the Federal Energy Regulatory Commission:

- (1) Grant their motion for leave to respond to Transco's Answer and consider the foregoing arguments in ruling on each of Transco's certificate applications addressed herein;
- (2) Set each of the certificate applications addressed herein for evidentiary hearing;
- (3) Grant the State Commissions' request for partial consolidation of the three applications on the issue of whether use of a pre-tax return of 15.34% to calculate recourse rates is appropriate; and

(4) Grant such other relief, as the Commission may deem necessary and appropriate.

Date: May 27, 2015

Respectfully Submitted,

North Carolina Utilities Commission

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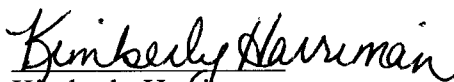
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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2014), I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this ___ day of May 2015.

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