TESTIMONY OF THE AMERICAN PUBLIC GAS ASSOCIATION
BEFORE THE ENERGY SUBCOMMITTEE
OF THE HOUSE ENERGY AND COMMERCE COMMITTEE
FOR THE HEARING "MODERNIZING THE NATURAL GAS ACT
TO ENSURE IT WORKS FOR EVERYONE"

FEBRUARY 5, 2020

Chairman Pallone, Ranking Member Upton and members of the Subcommittee, I appreciate this opportunity to testify before you today and we thank the Subcommittee for calling this important hearing on the Natural Gas Act.

I am Rich Worsinger, Director of Wilson Energy for the City of Wilson, NC, and I appear on behalf of the American Public Gas Association (APGA). Wilson Energy is a municipally-owned electric and gas system that provides service to approximately 35,000 electric customers and 15,000 gas customers. As a non-profit utility, Wilson Energy is primarily focused on providing safe and affordable services to their customers. Wilson Energy, like approximately 95% of the public gas systems in the country, is captive to one interstate pipeline to bring natural gas into our community.

The cost of transporting energy is built into every consumer's monthly energy bill. Federal regulators are tasked to ensure that the price of transporting energy in interstate commerce is "just and reasonable," under the Natural Gas Act (NGA) in the case of natural gas interstate pipelines and under the Federal Power Act (FPA) in the case of electric transmission lines. The existing law does not provide Federal Energy Regulatory Commission (FERC) with the authority to protect natural gas consumers the same way it can protect electric consumers that have overpaid for the cost of transporting energy. FERC lacks sufficient tools to adequately ensure our ratepayers are charged fair prices. Congress must modernize Section 5 of the NGA to allow FERC to order refunds when customers, including APGA members, are being overcharged by their natural gas transmission pipeline. We therefore commend the Subcommittee for its focus on modernizing this aspect of the law.

Interests of the American Public Gas Association

APGA is the national association for publicly owned natural gas distribution systems. There are approximately 1,000 public gas systems in 37 states and over 730 of these systems are APGA members. Publicly owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that own and operate natural gas distribution facilities in their communities.

As non-profit utilities, public gas systems focus is on providing reliable and affordable service to their customers. As a trade association that represents them, APGA ultimately represents the interests of natural gas consumers.

Importantly, approximately 95% of APGA's members are captive to a single interstate natural gas pipeline. These means that they are served by a monopoly and rely on NGA regulation by FERC to ensure "just and reasonable rates." Therefore, the ability of FERC to have the necessary tools to do its job of reigning in monopoly power is critical to APGA. This is what NGA Section 5 modernization is about.

NGA Section 5 Modernization Has Been A Long Time Coming

APGA has been advocating reform of NGA Section 5 for nearly 30 years. As explained below, an unnecessary and unjust statutory disparity arose between the federal regulation of gas transportation and electric transmission rates in 1988. Then in 1992, FERC eliminated the requirement that interstate natural gas pipelines restate their rates to update for changes in costs every three years. The elimination of that long-standing triennial rate filing requirement meant that pipelines avoided routine detailed rate scrutiny. As discussed below, many pipelines indeed have done so—to the detriment of the pocketbooks of millions of natural gas consumers.

Under the FPA, after determining that an electric utility's rates are excessive in response to a complaint filed under section 206 of the FPA, FERC can order refunds of the overcharges back to a refund-effective date of when the complaint was filed. FERC has no such authority under the parallel complaint provision under the NGA. Under NGA Section 5, FERC can only order a rate reduction *prospectively after* FERC's order is issued, which more often than not occurs *years* after a complaint is filed. Thus, natural gas customers do not receive full refund protection from overcharging transmission pipelines; the natural gas shippers are disadvantaged as compared to electric customers. This means complaints are seldom initiated under the NGA despite the known fact that many interstate pipelines are each year over-recovering their just and reasonable cost of service by many millions of dollars.

It is not just public gas systems that have recognized this disparity in treatment of energy consumers under the NGA and FPA. As shown below, many FERC Commissioners have endorsed modernization of NGA Section 5. More and more groups in the energy industry have come on record as supporting NGA Section 5 modernization, including: the Natural Gas Supply Association, American Public Power Association, National Rural Electric Cooperative Association, and Industrial Energy Consumers of America.

Overview of Rate Regulation of Interstate Natural Gas Pipelines

In 1938 Congress gave the Federal Power Commission, now FERC, the authority under the NGA to regulate rates that interstate pipelines charge for interstate delivery of natural gas. It required that interstate pipelines charge consumers a "just and reasonable" rate for the transportation of natural gas. The NGA was intended to be a parallel statute to the pre-existing FPA, which also had, at its core, the mandate that rates (for electric utilities) be "just and reasonable."

Section 4 of the NGA permits pipelines to request rate increases at any time. Section 5 of the NGA allows FERC and consumers to ability to initiate a FERC rate inquiry to lower rates so that they remain "just and reasonable." This two-sided coin was meant to function just like Sections 205 and 206 of the FPA.

In this statutory scheme, Congress wanted to ensure that electric utilities and interstate pipelines would be able to recover their legitimate costs of service through FPA Section 205 and NGA Section 4. Congress also wanted consumers to be protected from over-collections by electric utilities and interstate pipelines through the complaint sections of the FPA Section 206 and the NGA Section 5.

This process ceased to be effective when ratemaking became more complex and time consuming. The rate increase side of the coin does continue to provide higher rates to regulated companies, albeit subject to a refund period so that refunds are due if the requested increase is demonstrated to have been excessive. Without a parallel provision on the refund side of the coin, consumers do not get parallel rate reductions. With only prospective application of the outcome of such rate reduction inquiries, electric utilities and interstate pipelines dragged complaint proceedings out interminably. Transmission entities were incentivized to make Section 206 and Section 5 cases last as long as possible so that they could keep overcharges. That changed in part when Congress acted in 1988.

The Federal Power Act Was Fixed in 1988; the Natural Gas Act Was Not

Congress worked to fix the flaws in the FPA. In the Regulatory Fairness Act of 1988 (RFA), Section 206 of the Federal Power Act was amended to provide FERC the authority to order refunds back to the affected consumers if FERC determined the consumer was overcharged. The refund-effective date was set by FERC at the outset of the proceeding. This was further enhanced in the Energy Policy Act of 2005, which allowed the refund-effective date to be set as early as the date the complaint was filed. Efforts to make the NGA consistent were repelled by the pipeline lobby.

These changes to the FPA have worked. Customers with legitimate grievances against electric transmission entities file complaints knowing that refunds can be ordered back to when the complaint was filed. As a consequence, electric utilities—faced with the prospect of potential refunds—are much less inclined to delay since the longer the proceeding, the greater the refunds (due, in part, to the compounding of interest on those refunds). The result has been just and reasonable rates, as Congress had envisioned when the FPA was enacted.

Unfortunately, the NGA, though virtually identical to the FPA in all material respects, was not amended in the RFA. At that time, the need appeared to be less compelling because interstate pipelines were required to have their rates reviewed by FERC every three years in return for the right to automatically pass on gas costs under FERC's purchased gas adjustment regulations. This meant that pipeline overcharges could be identified routinely and would not go on indefinitely.

Soon thereafter, however, in 1992, when pipelines "unbundled" and ceased selling gas, FERC terminated the triennial rate filing regulation in FERC Order 636. Since 1992, gas shippers and consumers have been without sufficient recourse to properly ensure they are being treated fairly by interstate gas transmission pipelines. APGA has been fighting since for fairness and equity to remedy the ineffectiveness of NGA Section 5.

Pipelines Have a Proven Record of Over-Collecting: A Rigged System?

The need for legislation to amend Section 5 of the NGA is more than academic: interstate pipelines have a demonstrated track record of over-collecting since the requirement that each restate their rates to FERC no more than every three years expired in 1992. Pipelines are adept at using the regulatory process to their financial advantage.

Many regulated pipelines have simply avoided rate reviews. For example, in 2018, Texas Eastern Transmission filed its first general Section 4 rate case since 1992. Panhandle Eastern stayed away from FERC after its rates were reset in 1996 until FERC commenced an NGA Section 5 proceeding against it in 2019.[1]

As this reality set in, the Natural Gas Supply Association developed an annual Pipeline Cost Recovery report based on Form 2 data filed with FERC each year by major interstate pipelines. Year after year the trade press reported how the study demonstrated that billions more in rates were collected by those pipelines than if they had earned an average 12% allowed return on equity (ROE). In 2018, the one-time FERC Form 501-G filings showed many pipelines earning 15-60% ROEs. It defies the NGA mandate of "just and reasonable" rates that regulated monopolies are permitted to levy with impunity rates that produce exorbitant shareholder returns.

Billions of dollars have been and continue to be taken from consumers that could have gone into local businesses in a community or into paying food bills and mortgages or into investing in a child's education. Instead, they have flowed upstream to the pipelines' coffers.

Not having refund potential in an NGA Section 5 complaint has real world impacts in the FERC processes. Most rate matters are settled and not litigated at FERC. Without potential refunds after a complaint is filed, a pipeline has little incentive to resolve the complaint promptly. More significant, Section 4 of the NGA gives complete discretion to a natural gas company to seek a rate increase at any time. Accordingly, if FERC renders an adverse NGA Section 5 rate ruling requiring a prospective rate decrease, the pipeline immediately could try to nullify that by filing its discretionary NGA Section 4 increase if the pipeline's costs had increased or were increasing. Such a filing also would nullify an ongoing and incomplete NGA Section 5 investigation as well. Pipeline rates requested under NGA Section 4 routinely take effect six months after the request, subject to refund. That date trumps any rate ordered to take effect following an NGA Section 5 rate finding. This reality discourages shippers and FERC staff from dedicating resources to pursuing an NGA Section 5 complaint.

The history of one large interstate pipeline system serving the Midwest, Northern Natural Gas Company, shows how this happens. On November 19, 2009, the Commission established a hearing under Section 5 of the NGA to determine whether the rates currently charged by Northern were just and reasonable, observing that its 2008 return on equity (ROE), net of income taxes, appeared to be approximately 24 percent—more than twice the allowable ROE. But less than eight months later, FERC terminated the proceeding at the request of customers because settlement discussions had reached an impasse, and Northern indicated its intent to file a

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[1] *See Panhandle Eastern Pipe Line Co., LP,* 166 FERC ¶ 61,032 (2019); *Panhandle Eastern Pipe Line Co., LP,* 77 FERC ¶ 61,284 (1996).

substantial increase in rates under NGA Section 4, unless the Commission terminated this NGA Section 5 proceeding, in which case it would delay such a rate increase for at least a year.[2]

The same script played out a decade later. In January 2019 FERC commenced an NGA Section 5 inquiry after it estimated that Northern's ROE in 2018 was 17.3 percent, and therefore Northern may be over-recovering its cost of service. Before that could be resolved, on July 1, 2019, Northern filed revised tariff records pursuant to NGA Section 4, which were accepted and suspended until January 1, 2020, subject to refund.[3]

In another recent example, FERC commenced an NGA Section 5 inquiry into the rates of Panhandle Eastern Pipe Line Co., LP in January 2019.[4] FERC's trial staff then filed testimony supporting a $54 million reduction in the pipeline's cost of service. On August 30, 2019, the pipeline filed to change its rates under NGA Section 4, then moving to terminate its NGA Section 5 proceeding. The procedural outcome was that FERC accepted and suspended the rate increase, subject to refund under NGA Section 4, to be effective March 1, 2020.[5] FERC declined to terminate the NGA Section 5 proceeding, but the upshot is that FERC must act there prior to March 1, 2020 for there to be any consequence to the NGA Section 5 inquiry, as limited as that would be.

In short, this phenomenon has been well understood for a long time, causing FERC commissioners to support reform of the NGA. As then FERC Commissioner Cheryl A. LaFleur wrote in a 2010 concurrence on one of the first of the modern complaint cases initiated by the Commission:

> I recognize the concerns raised by the Industrials on rehearing regarding the unfair advantage pipelines may have in a section 5 proceeding vis-à-vis their customers. The Commission can only act, however, within the existing statutory scheme. I believe that this proceeding clearly demonstrates the need for reform of section 5 of the NGA to prevent the asymmetry of leverage between applicants under section 4 and complainants or the Commission under section 5. As happened here, without Commission authority to set a refund effective date upon institution of a complaint or investigation under section 5, a pipeline can threaten to file a general section 4 rate case and move those rates into effect prior to the date by which a Commission order in the section 5 proceeding could lower those rates. This situation places the parties supporting the section 5 proceeding in a difficult situation in that they may be forced to pay even higher rates without refund relief for some period of time. It also hampers the Commission's efforts to ensure just and reasonable rates. **I therefore support legislative action to amend the**

[2] *Northern Natural Gas Co.*, 131 FERC ¶ 61,178 (2010).

[3] *Northern Natural Gas Co.*, 168 FERC ¶ 61,069 (2019).

[4] *Panhandle Eastern Pipe Line Co.*, LP, 166 FERC ¶ 61,032 (2019).

[5] *Panhandle Eastern Pipe Line Co.*, LP, 168 FERC ¶ 61,208 (2019).

NGA to provide the Commission with refund authority in section 5, similar to that provided under section 206 of the Federal Power Act.[6]

Support for Modernization From FERC Commissioners Through the Years

Pipeline regulators have endorsed the modernization of NGA Section 5 for a long time, but Congress has failed to respond.

At its November 20, 2008 Open Meeting, FERC Chairman Kelliher (and individual FERC Commissioners) expressed support for legislation to bring refund parity between NGA Section 5 and FPA Section 206. Chairman Kelliher stated: “And I agree that there are inadequacies in Section 5. The prospective relief offered by Section 5, I think there is a good argument that that is inadequate, but the Commission only has the tools that Congress has given us, and we have to apply Section 5 as it's written, not as we might prefer it to be written.” Commissioner Moeller followed Chairman Kelliher’s remarks and stated: “Mr. Chairman, I would agree with your comments that Section 206 and Section 5 should be consistent. It's Congress's responsibility where it's in their realm to change the law, to provide consistency.” Commissioner Wellinghoff expressed support, stating “I would support a statutory change to reforming Section 5 to make it consistent with Section 206 of the Federal Power Act. I think it's absolutely necessary. I don't think there is any public policy reason that I can think of, for it to be different.” Finally, Commissioner Spitzer stated: “the idea of a prospective refund mechanism, offends my sensibilities, and, therefore, I will associate myself with all my colleagues, that a change in the law really, in addition to accounting for the time value of money, which, it seems to me, would be a very intuitive concept. Symmetry with the Federal Power Act, is something that is appropriate….”

Later, then Chairman Wellinghoff penned a statement almost a decade ago as part of a dissent:

> As a general matter, the lack of refund authority under section 5 of the NGA allows the regulated community to defeat the purpose of section 5 at least in some circumstances. This is not the case under the Federal Power Act (FPA). The Commission must establish a refund effective date for a section 206 proceeding and has the authority to order refunds for the period ending 15 months after the refund effective date. Thus, the incentive for game-playing is removed and the Commission can determine on the merits that a public utility’s rates are just and reasonable. For this reason, I support legislative changes providing for NGA refund authority paralleling that provided to the Commission in the FPA.[7]

Commencing approximately nine years ago, FERC increasingly began scrutinizing

[6] *Northern Natural Gas Co.,* 133 FERC ¶ 61,111 (2010)(LaFleur, Commissioner, concurring)

[7] *Northern Natural Gas Co.,* 133 FERC ¶ 61,111 (2010)(Wellinghoff, Chairman., dissenting)

pipeline annual reports for evidence of overearning. This resulting in a few NGA Section 5 rate inquires every couple of years.[8] The Commission would order the designated pipeline to file a cost and revenue study based on cost and revenue information for the latest 12-month period available. Occasionally the pipeline would agree with the findings and settle the proceeding by lowering rates prospectively. More common, the pipeline fought the decrease and severely delayed any refunds. This pattern was disrupted by the passage of the Tax Cut and Jobs Act of 2017.

The Most Compelling Episode: The Tax Cuts and Jobs Act of 2017

All this Subcommittee needs to understand about this issue is present in the story of FERC's response to the watershed corporate tax reduction from 35% to 21%.[9] The Tax Cuts and Jobs Act affected nearly each regulated utility in the U.S.—retail and wholesale; state and federal—including each interstate natural gas pipeline. When the new corporate tax rate took effect on January 1, 2018, pipeline costs were reduced significantly. Public policy has long provided that tax costs of a regulated company are flowed through to customers in rates like other costs. The reduction in pipeline tax payments should have lowered consumer rates immediately. Did consumers of interstate pipelines get lower rates at that time as a result? No. Unlike the regulatory authority over retail utilities in most states,[10] FERC could not set a refund date with the date of the change in the tax law.

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[8] *See East Tennessee Natural Gas, LLC*, 165 FERC ¶ 61,198 (2018); *Midwestern Gas Transmission Co.*, 162 FERC ¶ 61,219 (2018); *Dominion Energy Overthrust Pipeline, LLC*, 162 FERC ¶ 61,218 (2018); *Natural Gas Pipeline Co. of America LLC*, 158 FERC ¶ 61,044 (2017); *Wyoming Interstate Co., L.L.C.*, 158 FERC ¶ 61,040 (2017); *Tuscarora Gas Transmission Co*., 154 FERC ¶ 61,030, *order denying reh'g and granting* clarification, 154 FERC ¶ 61,273 (2016); *Iroquois Gas Transmission System, L.P*., 154 FERC ¶ 61,028 (2016); *Empire Pipeline, Inc.*, 154 FERC ¶ 61,029 (2016), *order denying reh'g,* 154 FERC ¶ 61,274; *Columbia Gulf Transmission*, LLC, 154 FERC ¶ 61,027 (2016), *order denying reh'g,* 154 FERC ¶ 61,275; *Wyoming Interstate Co., L.L.C.*, 141 FERC ¶ 61,117 (2012); *Viking Gas Transmission Co*., 141 FERC ¶ 61,118 (2012); *Bear Creek Storage Co. L.L.C.*, 137 FERC ¶ 61,134 (2011), *order denying reh'g*, 138 FERC ¶ 61,019 (2012); *MIGC LLC*, 137 FERC ¶ 61,135 (2011), order denying reh'g, 138 FERC ¶ 61,011 (2012); *ANR Storage Co.*, 137 FERC ¶ 61,136 (2011); *Ozark Gas Transmission, LLC*, 133 FERC ¶ 61,158 (2010), *reh'g granted in part and denied in part*, 134 FERC ¶ 61,062, *reh'g granted in part and denied in part*, 134 FERC ¶ 61,193 (2011); *Kinder Morgan Interstate Gas Transmission LLC*, 133 FERC ¶ 61,157 (2010), reh'g granted in part and denied in part, 134 FERC ¶ 61,061 (2011); *Natural Gas Pipeline Co. of America LLC*, 129 FERC ¶ 61,158 (2009), reh'g denied, 130 FERC ¶ 61,133 (2010). As the Commission explained in the Natural rehearing order, "Sections 10(a) and 14(a) of the NGA authorize the Commission to require [the pipeline] to submit the information required by the [order instituting investigation] in order to carry out its responsibility under NGA section 5 to ensure that the pipeline's rates are just and reasonable." 130 FERC ¶ 61,133 at P 16.

[9] An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Public Law 115–97, 13, Stat. 2054 (2017) (Tax Cuts and Jobs Act).

[10] In this way, retail consumers are provided better protection from distribution monopolies in states in which regulators can establish refund effective dates immediately. *E.g., Ex Parte-Regulatory Accounting related to the federal Tax Cuts and Jobs Act of 2017*, Case. No. PUR-2018-00005 (Va. SCC Jan. 8, 2018)(ordering all 8 of Virginia's natural gas distributors, effective January 1, 2018, to accrue regulatory liabilities for the impacts of the reduced corporate income tax rate). Tax-related regulatory inquiries started in nearly half the Nation's state jurisdictions by mid-January 2018. *Six Implications of the New Tax Law for Regulated Utilities*, The Brattle Group (January 2018) https://www.brattle.com/news-and-knowledge/news/brattle-economists-outline-implications-of-new-tax-law-for-regulated-utilities .

It could only order prospective relief to consumers with rate changes taking effect at a future date under its NGA Section 5 authority.

In the summer of 2018, FERC issued a Final Rule that established procedures for the Commission to determine which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of the income tax reductions provided by the Tax Cuts and Jobs Act.[11] When the Commission first considered its obligations in January 2018, Commissioner Robert F. Powelson proclaimed the need for consumer rate relief that Congress had authorized:

> This historic tax reform measure could provide utility customers across the U.S. sizeable rate reductions on their transmission and distribution rates. In some cases, customers are looking at between $80 and $90 per year in potential rate reductions.
>
> From Montana to Maryland PUCs are urging regulated utilities to take immediate action to apportion dollars back to their ratepayers. As state leaders begin to tackle this important issue, I think my colleagues and I need to remain diligent in making sure our formula rates on natural gas pipelines and electric transmission provide immediate reductions….
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> And I applaud the American Public Gas Association, along with numerous state PUCs and consumer advocates for expressing concerns on the timeliness of these tax flowbacks to ratepayers. In my view, consumers should not be penalized by slow regulatory review processes that could put direct savings into their pockets and provide them with safe and affordable utility service. Mr. Chairman, I hope that we will do our part to make sure these tax benefits are accrued to the energy consumers here in America.[12]

Nevertheless, it took until September 13, 2018 for new regulations to take effect. FERC's response was to require each of 133 interstate natural gas pipeline to file a new form demonstrating the impact of the new tax law on its rates. To ease the administrative burden of reviewing this mountain of data, these Form 501-G filings were grouped into three monthly tranches, commencing in October 2018.[13]

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[11] Order No. 849, 164 FERC ¶ 61,031 (2018).

[12] Transcript of the Jan. 18, 2018 1039th Commission Meeting held in Washington D.C. (available at www.ferc.gov).

[13] Many pipelines objected to the mandatory filing. Specifically, Order No. 849 required interstate natural gas pipelines to file a one-time report, called FERC Form No. 501-G, on the rate effect of the new tax law and changes to the Commission's income tax allowance policies. In addition to filing the one-time report, each pipeline had four options: (1) make a limited NGA Section 4 filing to reduce its rates by the percentage reduction in its cost of service shown in its FERC Form No. 501-G; (2) commit to file either a prepackaged uncontested rate settlement or a general NGA Section 4 rate case; (3) file a statement explaining why it does not believes it has to change its rates; or (4) file the FERC Form No. 501-G without taking further action. In the latter option, the Commission would consider whether to initiate an NGA Section 5 investigation of any pipeline that has not submitted a limited NGA Section 4 rate reduction filing or committed to file a general Section 4 rate case. In addition, in order to provide an additional incentive for (footnote continued)

FERC did not have all the necessary data to act until a year after the corporate tax rate reduction, which then automatically inured solely to the regulated pipelines' balance sheets. Yet that data showed dozens of pipelines significantly overearning their regulated ROEs to the tune of aggregate annual overcharges of a billion dollars or more. Indeed, FERC commenced NGA Section 5 rate inquires against pipelines as soon as it could.[14] FERC never produced a summary of these data nor a report showing how it responded to such overcharges, although that information could be helpful to Congress.

Therefore it was evident that FERC could not even begin to take action on an individual pipeline's rates until a year after the effectiveness of the lower corporate tax rates.[15] Accordingly, in the Final Rule the Commission attempted to incent pipelines to lower rates voluntarily—with almost no success. And if the regulatory action was to commence an NGA Section 5 rate investigation, consumer rate relief would be delayed until the conclusion of that lengthy proceeding. Commissioners Cheryl A. LaFleur and Richard Glick issued a joint concurrence to state clearly the need for NGA Section 5 reform:

> [W]e believe that today's Final Rule sharply highlights the need for a legislative fix to the lack of refund authority in Section 5 of the Natural Gas Act (NGA). Under current law, the Commission's ability to protect natural gas customers against unjust and unreasonable rates is compromised by its inability to set a refund date. We believe that current law provides a perverse incentive for protracted litigation and creates an asymmetry of leverage between pipelines seeking a rate increase under Section 4 of the NGA and complainants or the Commission under Section 5. "With respect to the Final Rule, **we believe that our lack of refund authority affected the balance the Commission was able to strike in today's order**. It is a clear tenet of cost-of-service ratemaking that tax savings should flow through to ratepayers, and the Commission is rightly pursuing that goal in the Final Rule. However, because our Section 5 "stick" under the NGA cannot effectively deliver timely relief to

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pipelines to make a limited NGA Section 4 rate reduction filing, the final rule includes a guarantee that the Commission will not, for a three-year moratorium period, initiate a NGA Section 5 rate investigation of a pipeline that makes such a filing, if that filing reduces the pipeline's return on equity to 12 percent or less. Order No. 849 established a staggered schedule for the filings of the FERC Form No. 501-G with the first batch due October 11, 2018, the second batch due November 8, 2018, and the third batch due December 6, 2018.

[14] *E.g., Southwest Gas Storage Co.*, 166 FERC ¶ 61,117 (2019); *Panhandle Eastern Pipe Line Co., LP*, 166 FERC ¶ 61,032 (2019); *Northern Natural Gas Co.*, 166 FERC ¶ 61,033 (2019); *Bear Creek Storage Company, L.L.C.*, 166 FERC ¶ 61,034 (2019).

[15] Indeed, FERC's first action came on January 16, 2019, when it launched investigations and initiated hearings pursuant to Section 5 into three natural gas pipeline companies in response to their Form No. 501-G filings to explore whether they have been over-recovering their costs of service. Separately, FERC also found then that nine other gas companies sufficiently complied with FERC's directives in Order No. 849 and terminated their Form No. 501-G proceedings without taking any further action, usually over the objections of consumers.

> customers, the Final Rule proffers a series of "carrots" in the hope that pipelines will exercise their Section 4 filing rights to quickly flow those tax benefits back to their customers. While we think the balance struck in the Final Rule is reasonable in light of our limited refund authority, we believe that the Commission would be better equipped to protect customers if the law were amended.[16]

This statement makes clear that had FERC been given authority to order refunds under the Energy Policy Act of 2005, consumer rate relief would have come more swiftly and been commensurate with the lower costs experienced by the Nation's interstate natural gas pipelines. Instead, the pipelines profited excessively.

A few of these pipeline tax cases still remain unresolved, with no rate relief for lowered pipeline tax costs that commenced more than two years ago. Many pipelines did reduce rates—12-24 months after their costs declined. FERC has not published any summary of the results that may be cited here. Regardless, it is clear that if FERC had refund authority under Section 5, consumers would have been awarded many more millions in refunds and lower rates.

Section 5 Legislation Will Not Negatively Impact Investment in Infrastructure

The central argument that pipelines have made against NGA Section 5 modernization is that providing FERC with refund authority would adversely affect a pipeline company's ability to attract new capital, and this in turn would have an impact on infrastructure investment. Pipelines have built many billions of dollars of pipelines following the surge in new production in recent years. This argument is a red-herring and is misleading in several ways:

- New infrastructure projects are certificated to earn healthy equity returns, usually in the 12.5% range. NGA Section 5 modernization does not affect at all the ability of these projects to earn such returns; rather, NGA Section 5 reform is only applicable to those egregious over-earners that overcharge their customers.

- Almost all significant new infrastructure projects are undertaken on the basis of "negotiated" contracts between the transporter and the shippers. Negotiated contracts are not subject to rate changes by the transporter under NGA Section 4 or rate challenges by shippers under NGA Section 5; the negotiated rate is fixed at a mutually agreeable sum for the term through bilateral negotiations. These negotiated contracts form the basis for the project developer to go to the marketplace and provide the developer with known returns for the contract terms. Thus, because few shippers pay a regulated rate for service from new projects, the argument that NGA Section 5 reform would deter new infrastructure development is false and misleading.

- FERC is required by law when setting rates to provide for a rate of return that permits the affected pipeline to recover all debt costs plus raise capital in the marketplace at reasonable rates. FERC has done just that, and the financial markets understand this, so NGA Section 5 modernization will not affect at all the ability of interstate pipelines to

[16] Order No. 849, 83 Fed. Reg. 36672 at 36716 (2018)(emphasis supplied)(footnote omitted)

raise capital in the marketplace.

- FERC itself, which has been pro-infrastructure, does not appear to be persuaded the argument that Section 5 reform would be bad for infrastructure development when observing the commissioners of both political parties that have supported NGA Section 5 modernization.

Thus, this theoretical “infrastructure” argument is nothing but a strawman raised by the pipelines because they have no defense on the merits against Section 5 modernization—they are overcharging customers because the rates of many of them are no longer just and reasonable. Absent NGA Section 5 reform, FERC, which is supposed to ensure that pipelines charge and consumers pay just and reasonable rates, is basically helpless to prevent allowing pipelines to defeat the purpose of the NGA.

Also, interstate pipeline companies throw out the worrisome-sounding jargon “retroactive ratemaking.” The legalistic argument is that since the rates being charged by a pipeline at any given point in time were previously approved by the FERC, they must still be just and reasonable (and hence refunds should be denied). This contention is self-evidently inaccurate since a rate that is just and reasonable at any given point in time may become unjust and unreasonable at a subsequent point in time if costs materially increase or decrease. Pipelines are not bashful about filing to increase their rates when costs are rising, and such rate increases go into effect virtually immediately subject to refund after a nominal suspension period under NGA Section 4. The suggestion that pipelines should be allowed to supersede rates heretofore determined to be just and reasonable after a nominal suspension period but that consumers should have to wait potentially years before getting relief from unjust and unreasonable rates is absurd on its face. In short, unless FERC determines that interstate pipelines are violating the NGA, no refunds will be required. The identical provision under the FPA has been upheld against charges of retroactive ratemaking.

Finally, interstate pipelines in the past have argued that transportation rates for natural gas are a small part of the overall cost to consumers, so policymakers should ignore it. First, that contention ignores the congressional mandate in the NGA that rates be “just and reasonable.” Moreover, today and for several years the cost of natural gas commodity has been falling while the cost of transporting it has been increasing. With this winter’s unit price of natural gas dipping below $2/MMBtu, interstate transportation costs average the highest portion of the delivered cost in decades. What matters in this discussion is the FERC-regulated component—pipeline rates to move the gas from the field to local distribution companies and industrial loads—and there is no basis for a regulated entity under the NGA to over-recover its allowed return by many millions of dollars, as is the case today, simply because the production component of the ultimate charge paid by consumers is unregulated.

Conclusion

Millions of Americans rely on natural gas to heat their homes and businesses, as well as to supply energy to manufacturing and industrial enterprises. Natural gas has helped make America the worldwide leader in emissions reductions. Critical to this continued success story is fair prices for consumers. In the energy transmission business FERC has the authority to ensure price fairness for electric customers, but lacks the same statutory authority to protect gas consumers. There is no reason for this inequity to exist. It is unfair to allow pipelines to continue to keep their overcharges. APGA will work with the Subcommittee and others to establish this critical consumer safeguard.