UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Ruby Pipeline LLC) **Docket No. CP09-54-000**

ANSWER OF WYOMING PIPELINE AUTHORITY TO REQUEST FOR CLARIFICATION OF RUBY PIPELINE

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.213 (2009), the Wyoming Pipeline Authority ("WPA") hereby submits the WPA's Answer to the Request For Clarification of Ruby Pipeline LLC ("Ruby") filed in the captioned proceeding on October 5, 2009. In support thereof, the WPA states as follows:

I. BACKGROUND

WPA is an Intervenor in, and party to, this proceeding.

On January 27, 2009, Ruby filed an application for a certificate of public convenience and necessity to construct and operate a new, green field pipeline project comprised of: (1) a 42-inch-diameter mainline commencing at the Opal Hub in Lincoln County, Wyoming, and extending generally westward for approximately 675.2 miles through Lincoln and Uinta Counties in Wyoming, Rich, Cache, and Box Elder Counties in Utah, Elko, Humboldt, and Washoe Counties in Nevada, and Lake and Klamath Counties in Oregon, terminating at the Malin Hub in Klamath County, Oregon (Line No. 300A); and (2) a 2.6-mile-long, 42-inch-diameter lateral pipeline extending from the Malin Hub to an interconnection with PG&E's system at the Oregon/California border. On September 4, 2009, the Commission issued a "Preliminary Determination on Non-Environmental Issues" preliminarily approving Ruby's proposal subject to certain conditions. *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 (2009) ("September 4 Order").

In the September 4 Order, the Commission accepted Ruby's electric power charge ("EPC") subject to certain conditions. The Commission rejected Ruby's proposal to recover voluntary costs, capped at $12.5 million per year, associated with the mitigation of greenhouse gas emissions. 128 FERC ¶ 61,224 at P65. The Commission rejected Ruby's proposal to calculate its firm recourse rate based on 95% of the pipeline capacity and ordered Ruby to recalculate its recourse rates based on 100% of capacity. 128 FERC ¶ 61,224 at P 44. The Commission found that the accrual of AFUDC should begin on January 27, 2009 (the date of the filing of Ruby's Application) rather than June 2007 when Ruby commenced spending on environmental impact studies ultimately utilized in the certificate process, pipeline supplies, rights-of-way, and engineering. 128 FERC ¶ 61,224 at P 92. As a result, Ruby was directed to remove from its cost-of-service accrual of approximately $4 million of AFUDC between June 2007 and January 2009. 128 FERC ¶ 61,224 at P 86.

On October 5, 2009, Ruby filed a "Request For Clarification Or In The Alternative Petition For Rehearing" on these and other issues arising under the Commission's September 4 Order. This Answer is filed in support of Ruby's Request for Clarification on the identified issues.

II. ANSWER

Pursuant to Rule 213, 18 C.F.R. § 385.213 (2009), the WPA files its Answer to Ruby's Request for Clarification of the Commission's September 4 Order. In *Transcontinental Gas Pipe Line Corp.*, 113 FERC ¶ 61,129 (2005), as here, the applicant filed a "request for clarification," asking that it be considered a request for rehearing "in the alternative." 113 FERC ¶ 61,129 at P 11. An Intervenor filed an "answer" to the request for clarification. The Commission noted that although "answers" are not permitted to a request for rehearing, an answer lies to the request for clarification, *id.*, *citing* 18 C.F.R. §385.213(a)(3) (2005), and accepted the pleading as proper.

Accordingly, WPA's Answer to Ruby's Request for Clarification in this proceeding is proper.

Preliminarily, WPA reminds the Commission that the WPA is charged by the State of Wyoming with facilitating the development of pipeline infrastructure inside and outside the State of Wyoming to enhance natural gas development within Wyoming and to develop and maintain access to markets for the abundant natural gas resources of the state. Promoting increased interstate pipeline take-away capacity for Wyoming gas is a core element of the WPA's mandate. In this regard, the mandate of the WPA is in many respects consistent with the recent goal of the Commission to facilitate development of the nation's natural gas pipeline infrastructure in order to bring the nation's abundant domestically produced supplies of competitively priced, clean burning natural gas from developing producing regions, such as the Rocky Mountain region and the nation's shale gas producing regions, to residential, commercial, industrial and electric generation markets. Thus, the WPA's Comments will address the policy considerations that the WPA believes warrant reconsideration by the Commission of ratemaking policies that, while adequate for a different time and different conditions, should be modified to reflect the current economic and environmental climate facing developers of grass roots natural gas pipelines.

A. GREENHOUSE GAS MITIGATION COST RECOVERY

Ruby has proposed a novel mechanism to recover costs voluntarily incurred by Ruby (subject to an annual cap of $12.5 million) to reduce or eliminate Ruby's carbon emission footprint. The issue as WPA sees it is far broader than fealty to the traditional ratemaking principles which the Commission relied in reaching its determination on this issue in the September 4 Order. The WPA will not repeat here the technical legal arguments made by Ruby in support of its request for clarification. Rather, the WPA calls upon the Commission to take a broader view of the issues presented by a changing economic and environmental climate within which pipelines propose new, green field pipeline facilities.

The WPA believes the Commission has not adequately considered several factors that support Ruby's proposed cost recovery mechanism:

(1) First, and perhaps most important, there are no "captive customers" whose interests the Commission is charged with protecting.

(2) Second, all of the initial shippers, accounting for approximately 73% of Ruby's firm capacity, are negotiated rate shippers, none of whom has protested the proposed charge. Because none of these shippers are captive customers, that should be enough to satisfy the Commission that the proposed charge is just and reasonable. The proposed charge is, in effect, a *de facto* element of these shippers' negotiated rates[1] and should be treated as such.

The WPA believes that climate change concerns raise issues that will demand a rethinking by the Commission of traditional policies in both the gas and electric regulatory arenas. The need for expanded electricity transmission infrastructure to transmit wind energy, from areas where current transmission capacity is inadequate to handle expanded generation, to consuming regions where demand for renewable energy supplies is growing, will require a rethinking of traditional regulatory policies. So too, siting and construction of green field natural gas pipelines requires a careful rebalancing of traditional regulatory interests that the Commission has to date achieved with admirable success. *E.g.*, *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069 (2007) and 123 FERC ¶ 61,234 (2008) (accepting differing negotiated rates for classes of shipper based upon capacity reserved; accepting differences in rollover and ROFR rights for classes of negotiated rate shippers; providing approval of recourse rates in the initial certificate approval orders, *etc*.).

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[1] Even if the shippers' base tariff rates are set at the recourse rate, this would be true if the shipper had contractually agreed to Ruby's proposal to recover these costs through a tariff mechanism.

The question of recovery of carbon mitigation costs *per se* is not the issue here. The issue is whether the Commission will join the leadership role demonstrated by Ruby and its shippers in approving a novel tariff mechanism responsive to concerns not even conceived of decades ago when the utility rate making principles commonly applied by the Commission today were developed. The WPA urges the Commission to revisit the question of recovery of voluntarily incurred carbon emission costs and provide guidance to the industry on when, and how, such costs may be recovered from shippers who have not opposed such charges.

B. PROJECTED UTILIZATION RATE FOR FIRM RESERVATION CHARGE BILLING DETERMINANTS

In a similar vein, but with a distinctly different focus, the WPA believes that the heightened environmental scrutiny facing developers of green field pipelines, especially in environmentally sensitive areas, like so much of the western United States in general and the Rocky Mountain region in particular, calls for a modification in the application of traditional utility ratemaking principles. As discussed below, such a change is especially appropriate where (a) there are no "captive shippers," and (b) the majority (73+ %) of the pipeline's firm capacity is subscribed by negotiated rate shippers (which themselves comprise 100% of the firm shippers).

The issue here is whether the Commission should modify its traditional utility rate making requirements to reflect the realities of expanding the pipeline infrastructure in growing supply areas to meet likely future demand. The issue is not confined to the natural gas industry; the Commission's decision has implications for development of interstate electricity transmission facilities as well.

From a utility regulatory perspective it makes some sense to require that reservation charge billing determinants be based upon 100% of the pipeline's capacity. This traditional ratemaking principle protects captive ratepayers from paying rolled-in rates for excessive

capacity additions by incumbent utilities. The policy has less validity, however, where –

(a) the pipeline is a green field project rather than an expansion of an existing system;

(b) no captive customers exist;

(c) the majority of the firm capacity (73+ %) is subscribed by negotiated rate shippers; and

(d) there are currently no "recourse rate" shippers.

Under such circumstances, other factors warrant consideration in striking the appropriate balance of competing policy issues.

In particular, one such consideration is the likelihood that, over time, any "excess" capacity will be subscribed as production in the region grows. Another relevant consideration is the relatively small incremental cost of oversizing facilities to accommodate potential future demand, particularly where environmental considerations render looping an undesirable or difficult to implement option. In the environmentally sensitive areas of the Rocky Mountain producing region, it is frequently desirable to size transportation facilities to meet both current ***and future*** demand in order to reduce the environmental impact of construction activities.

A consideration not taken into account by the Commission is the effect on future oil and gas development of the current policy which encourages pipelines to be designed only large enough to meet current capacity, with no provision for future demand. In Wyoming, where pipeline take-away capacity remains constrained, the lack of adequate take-away capacity is an impediment to exploration and development of the state's abundant natural gas resources because oil and gas producers must factor in the lag time until adequate additional transportation capacity is constructed.

The lack of adequate interstate natural gas pipeline take-away capacity in the west

presents a real challenge to producers, pipelines and ultimately the Commission. A policy developed in a different time to meet different conditions, that discourages construction of "excess" (unsubscribed) capacity can only worsen, rather than ameliorate those challenges. By contrast, a policy that does encourages[2] prudent sizing of transportation facilities to meet both current *and reasonably anticipated future demand* will –

(a) minimize the environmental impact of construction activities to meet growing demand for interstate transportation take-away capacity; and

(b) eliminate an impediment to investment in natural gas exploration and development activities caused by the lack of adequate take-away capacity.[3]

WPA suggests that these factors are relevant under the "public convenience and necessity" standard applicable to a certificate application, and support a determination that the resulting rates are "just and reasonable" under circumstances where –

(a) the pipeline is a green field project;

(b) no captive customers exist;

(c) the great majority of the firm capacity is subscribed by negotiated rate shippers; and

(d) there are no "recourse rate" shippers.

The WPA believes that the whispered refrain from the classic movie ""Field of Dreams" – "If you build it, they will come" – applies in these circumstances. Increased drilling and production activities will quickly fill the unsubscribed capacity, sharply reducing the Commission's rate-related concerns. To further alleviate those concerns, the WPA suggests the following potential solution: as a condition to the pipeline's use of 95% of its firm capacity as

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[2] Or at least does not affirmatively ***dis***courage.

[3] Such concerns are heightened by the reports of sharp reductions in drilling activities by oil and gas producers in the region due to lower natural gas prices.

the basis for the billing determinant for the firm reservation charge, the pipeline could be required to recalculate its reservation charge utilizing the resulting larger billing determinant when 100% of the capacity is subscribed by firm shippers.[4] This mechanism would afford the pipeline an opportunity to recover its costs during the interim period of under-subscription, while protecting shippers and the public from over-earning by the pipeline of its authorized return when the pipeline is fully subscribed.

C. AFUDC ACCRUAL START DATE

The WPA recognizes that the Commission's announced policy against including AFUDC incurred prior to the certificate filing date stems from the Commission's goal of protecting captive ratepayers from unjust and unreasonable expenses incurred by the pipeline. The WPA agrees that the Commission must continue to be vigilant in protecting captive ratepayers from excessive costs, particularly organizational costs that should properly be part of the risk of the shareholders. However, the WPA believes that in circumstances where there are not captive customers, the driving force behind the Commission's AFUDC policy is greatly diminished and a less restrictive approach should be adopted.

In circumstances which do not involve captive customers, the Commission need not use the certificate application filing date as a bright-line for determining when AFUDC costs may be accrued. Instead, the Commission should apply the "used and useful" test to determine whether AFUDC expenses incurred prior to the certificate filing date should be included in the cost-of-service. If the costs incurred are not organizational and financing costs, directly benefit the certificate process, and are costs that the pipeline would have been required to incur in any event, albeit later in the regulatory process (thereby incurring further regulatory delay), then such costs

[4] The resulting rate reduction would be put into place immediately. No other changes in the pipeline's costs or other rate factors would be permitted as part of the filing.

should be allowed regardless of when they were incurred. For example, costs related to environmental assessments, preliminary engineering assessments, or procurement of rights-of-way, which facilitate the application process and relate directly to the construction and operation of the pipeline, should be permitted AFUDC expenses, while costs related to developing the underlying economics of the project, drafting and negotiating precedent agreements, or exploring financing options should be excluded from AFUDC.

The expenses Ruby proposes to recover include money spent on environmental assessments, procurement of rights-of-way, engineering, and payments for pipeline supplies and equipment. These items either facilitated the certificate application process or are costs which would have had to be incurred in any event before the pipeline could be placed into service. Had Ruby delayed its incurrence of these costs until after the Application had been filed, the certificate process and/or construction of the project likely would have been delayed. Yet, had Ruby waited, these costs would have been includable in AFUDC. Rather than relying on a bright-line date test for eligibility for inclusion of costs in AFUDC, the WPA suggests that the Commission's traditional ratepayer protection concerns can be satisfied by application of the traditional "used and useful" test to determine which cost are eligible for AFUDC. The consequence from a change in the Commission's AFUDC policy will be to encourage development of green field interstate pipeline projects and to expedite the certification process for such projects.

III. CONCLUSION

The WPA respectfully requests the Commission to grant Ruby's Request for Clarification and to remove the rate-related conditions imposed on the Commission's grant of certificate authority to Ruby.

Respectfully submitted,

THE WYOMING PIPELINE AUTHORITY

By: *William F. Demarest, Jr.*

William F. Demarest, Jr.
Shannon P. Coleman
Husch Blackwell Sanders LLP
750 17th Street, N.W., Suite 1000
Washington, D.C. 20006

Attorneys for The Wyoming Pipeline Authority

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 Secretary in these proceedings.

Dated at Washington, D.C., this 13th day of October 2009.

Sarah Vail
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