

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Equitrans, L.P.

Docket No. RP05-105-001
RP04-97-006
RP04-203-003

ORDER ON REHEARING

(Issued April 20, 2005)

1. The Independent Oil and Gas Association of West Virginia (IOGA) and The Peoples Natural Gas Company, d/b/a Dominion Peoples (Dominion Peoples) request rehearing of the Commission's December 30, 2004 Order in Docket No. RP05-105-000 (December 30, 2004 Order).¹ That order addressed a limited filing by Equitrans, L.P. (Equitrans), under section 4 of the Natural Gas Act (NGA), in which Equitrans submitted for filing tariff sheets to establish revised gathering and transportation rates for the rate zone of its system known as the CIPCO District² to reflect the Commission's recent approval of the refunctionalization of certain CIPCO District transmission facilities to gathering.³ The Commission accepted and suspended the proposed changes to the CIPCO District rates, waived the 30-day notice requirement of the NGA, permitting the rates to be effective December 1, 2004, subject to refund, set the issues raised by the

¹ *Equitrans, L.P.*, 109 FERC ¶ 61,384 (2004).

² On May 20, 2002, Equitrans and Carnegie Interstate Pipeline Company (CIPCO) filed a joint application in Docket No. CP02-233-000 seeking Commission authorization for Equitrans to acquire and operate CIPCO's pipeline services and facilities. Under the proposal, the former CIPCO facilities would be treated as a separate rate zone to be known as the "CIPCO District" at initial maximum transportation recourse rates equal to CIPCO's then-existing maximum rates. The Commission granted Equitrans certificate authority for the acquisition of these facilities and the initial rates on July 1, 2003. *Equitrans, L.P.*, 104 FERC ¶ 61,008 (2003), *reh'g denied* 106 FERC ¶ 61,013 (2004).

³ *Equitrans, L.P.*, 109 FERC ¶ 61,209 (2004).

filing for hearing, and consolidated the proceeding with Equitrans' ongoing general rate proceeding in Docket Nos. RP04-97 and RP04-203. The Commission will deny rehearing of the December 30, 2004 Order.

Background

2. On March 1, 2004, Equitrans filed a general section 4 rate case in Docket No. RP04-203-000, submitting for filing tariff sheets to reflect a rate increase for most services and rates to be effective April 1, 2004. Equitrans also proposed a rate decrease for its CIPCO District transportation rates and new gathering rates premised upon a refunctionalization of certain transmission plant to gathering plant. Equitrans' request for refunctionalization of CIPCO District transmission plant to gathering was contained in a separate filing in Docket No. CP04-76-000. Equitrans proposed to increase its annual jurisdictional cost of service to approximately \$69.3 million, an increase of approximately \$23.3 million. In an order issued March 31, 2004, the Commission accepted and suspended the proposed changes for five months, to be effective September 1, 2004, subject to refund, subject to Equitrans' removing the refunctionalized gathering costs from its proposed rates if Equitrans moved the rates into effect at the end of the suspension period prior to a Commission order in Docket No. CP04-76-000.⁴

3. Equitrans moved its Equitrans District rates into effect September 1, 2004. Because the Commission had not issued an order on Equitrans' refunctionalization proposal in Docket No. CP04-76-000 as of that date, Equitrans stated that it reserved the right to move into effect its proposed gathering and transmission rates for the CIPCO District upon issuance of an order in that docket. In an order issued on November 23, 2004, the Commission found that Equitrans could not reserve a right to move those proposed rates into effect upon the issuance of an order in Docket No. CP04-76-000 since those proposed rates were automatically rejected on the basis that the condition for their acceptance, the issuance of an order in Docket No. CP04-76-000 approving the refunctionalization, had not been met.⁵ However, because the Commission was contemporaneously issuing an order in Docket No. CP04-76-000 permitting the refunctionalization of transmission and storage plant to gathering,⁶ the Commission stated that it would allow Equitrans to make a limited section 4 filing in a new docket in order to reflect the proposed rate changes as a result of that decision and would, at that

⁴ *Equitrans, L.P.*, 106 FERC ¶ 61,340 (2004).

⁵ *Equitrans, L.P.*, 109 FERC ¶ 61,214 (2004) (November 23, 2004 Order).

⁶ *Equitrans, L.P.*, 109 FERC ¶ 61,209 (2004).

time, include the revised rates in the issues to be litigated in the ongoing hearing proceeding in Docket No. RP04-203.⁷

4. On November 30, 2004, Equitrans submitted revised gathering rates in a limited section 4 filing as contemplated by the November 23, 2004 Order. That filing was addressed by the December 30, 2004 Order, in which the Commission accepted and suspended the proposed rates, waived the 30-day notice requirement, permitting them to become effective December 1, 2004, subject to refund and subject to the outcome of a hearing established by that order.⁸ That order also consolidated the issues raised in Docket No. RP05-105-000 with the hearing in Docket No. RP04-203-000.

Discussion

A. Waiver of 30-Day Notice Requirement

5. IOGA seeks rehearing of the Commission's determination, in its December 30, 2004 Order, to waive the 30-day notice requirement of the NGA to permit the proposed rates to become effective, subject to refund, on December 1, 2004. In the December 30, 2004 Order, the Commission found that good cause existed to grant waiver of the 30-day statutory notice requirement. The Commission stated that Equitrans had provided clear notice of its intentions to propose the rates that were the subject of that proceeding since at least March 1, 2004.⁹ Further, the Commission stated that it specifically authorized Equitrans to make the instant filing in its November 23, 2004 Order. In addition, the Commission stated that, with the Commission's finding in Docket No. CP04-76-000 approving the proposed refunctionalization, Equitrans must be provided an opportunity to recover costs associated with the gathering facilities and services. Finally, the Commission also found that, until the Commission has a complete record upon which to make a finding that the rates are just and reasonable, the only protection the Commission can offer is that provided by the NGA – the refund condition.

6. IOGA claims that the Commission's suggestion that it "specifically authorized Equitrans to make the instant filing in its November 23, 2004 Order" in Docket No. CP04-76-000 is irrelevant and immaterial to the decision to grant a waiver. It argues that the parties were not on notice because, although Equitrans filed new and increased gathering rates in Docket No. RP04-203-000, those rates were rejected by the

⁷ *Equitrans, L.P.*, 109 FERC ¶ 61,214 at P 48 (2004).

⁸ *Equitrans, L.P.*, 109 FERC ¶ 61,384 (2004).

⁹ *Equitrans, L.P.*, 106 FERC ¶ 61,340 (2004).

Commission. IOGA argues that because the gathering rates were rejected, the shippers could not be on notice of those rates. It also contends that the shippers could not have predicted that the Commission would grant the refunctionalization then pending in Docket No. CP04-76-000.

7. Further, IOGA argues that because the test period had expired, there was no way to accurately project what the gathering rates would be once the Commission granted the refunctionalization application. Although Equitrans filed the same rates as it had previously filed, it was not required to do so.

8. IOGA also contends that the Commission's waiver of notice, and its granting of a one-day suspension, ignores the reality that buyers and sellers often make arrangements to purchase and sell gas several days in advance of the coming month. Month to month sales for December 2004 were made prior to the November 30, 2004 rate filing, and in some cases, before the November 23, 2004 certificate order granting the refunctionalization. Under these circumstances, IOGA claims, a decision to waive notice and suspend a 156 percent rate increase for one-day places producers in a situation where it is impossible to recover the costs of gathering for December or January in their sales price. Further, it asserts, the lack of notice of the proposed 2.79 percent gathering fuel and shrinkage will result in disruption of shipments and imbalances. It asserts that nominations were made for December and gas was delivered without consideration of the 2.79 percent factor. It also argues that lack of notice gave producers no opportunity to shut-in supplies or explore other markets.

9. IOGA claims that in a 1991 order in *Southern Natural Gas Company*¹⁰ the Commission recognized the significance of considering the transportation environment, as opposed to a sales paradigm in denying a proposed waiver of the 30-day notice period. There, it notes that the Commission stated:

Transportation customers operate differently from sales customers. A transportation customer can be a buyer, seller, or broker of gas that generally enters into short-term arrangements for the sale and distribution of gas based on the knowledge of the cost for transporting the gas. The deal for which it bargained may no longer be valid if the transportation rate goes up after the arrangement is made. A shipper has the right to rely on the filed rate. On the other hand, sales customers tend to be long-term customers involved in Southern's rate filings on an ongoing basis, so that waiver of the 30-day notice requirement for rate increases could more easily be justified.^[11]

¹⁰ 55 FERC ¶ 61,161 (1991).

¹¹ *Id.* at 61,521.

10. IOGA argues that the Commission's contention that a producer's recovery of gathering refunds is a matter of contract, where the Commission's own decision made it impossible for the producer to factor into its sales price the full cost of moving its gas to market, arbitrarily and capriciously ignores the realities of the marketplace. IOGA argues the Commission should have taken the market rules and adverse impact on producers into account and provided an adequate notice and suspension to enable producers to protect themselves from the affects of the added financial burdens.

11. The Commission denies rehearing. Good cause for the waiver of the 30-day notice requirement existed because Equitrans' customers were previously on notice of its proposal to charge CIPCO District gathering rates reflecting its refunctionalization proposal in Docket No. CP04-76-000, Equitrans would otherwise be prevented from recovering the cost of gathering service then being provided at no charge, and the refund condition protects its customers against being charged unjust and unreasonable rates once those rates took effect. NGA section 4(d) provides that pipelines may not change rates "except after 30-days' notice to the Commission and to the public," unless the Commission "for good cause shown" allows the changes to take effect "without requiring the 30-days' notice herein provided for." Thus, the Commission clearly has authority to waive the 30-day notice requirement if good cause is shown.¹²

12. As the Commission stated in the December 30, 2004 Order, good cause for the waiver existed because Equitrans had provided clear notice of its intention to propose rates reflecting the refunctionalization since at least March 1, 2004. In *Kentucky West Virginia Gas Company*,¹³ the Commission upheld a waiver of the 30-day notice requirement because it found that

Columbia clearly had notice when it was purchasing the gas in question that Kentucky West was claiming that it was entitled to collect additional amounts with respect to those sales. The Commission's April 30, 1979 Order rejecting Kentucky West's tariff sheets which applied NGPA prices to its own production, stated that the Commission 'shall permit Kentucky West at a future date to recover the revenues lost' if the regulations prohibiting collection of NGPA prices for company-owned production were overturned. As the Commission pointed out in the January 13 Order, the court in *Kentucky West* found that Columbia was on notice of Kentucky West's claim of entitlement to collect additional amounts, stating that the NGPA pricing "issue was consigned for resolution to another

¹² See, e.g., *Tennessee Gas Pipeline Co.*, 54 FERC ¶ 61,165 (1991).

¹³ 47 FERC ¶ 61,001 (1989) (*Kentucky West*).

forum, in which Kentucky West was vigorously participating and of which the Commission and the pipeline's customers were only too aware."¹⁴

13. As in *Kentucky West*, the Commission denied Equitrans recovery and stated that Equitrans was permitted to file for recovery of its costs. IOGA was on notice that Equitrans would seek to recover these costs if the Commission approved the proposed refunctionalization that was pending in another proceeding. Also in *Kentucky West*, the Commission found that because Kentucky West's customers did not have notice of the manner in which its costs would be recovered, the notice may not have been sufficiently explicit to meet the 30-day notice requirement. However, the Commission stated that it was sufficient to support a finding of good cause to waive that requirement. In the instant proceeding, there is no such issue. Equitrans' proposed method of cost recovery was known from its rejected proposal and subsequently reflected in the instant proceeding.

14. The Commission rejects IOGA's argument that, because the gathering rates were rejected in Docket No. RP04-203, Equitrans' customers were not on notice of the subject rates. IOGA fails to recognize the sequence of events. In its March 31, 2004 Order, the Commission accepted and suspended the gathering rates proposed in Docket No. RP04-203-000, subject to the condition precedent. In recognition of the pendency of its refunctionalization proposal, and this condition, Equitrans proposed to maintain its right to move those suspended gathering rates into effect later upon issuance of an order approving the proposed refunctionalization. During the suspension period and the period between the time of Equitrans' reserved motion right proposal and the Commission's rejection order, parties were well informed of Equitrans' intent. Indeed, IOGA protested Equitrans' proposed reservation of its right to move the rates into effect and the Commission agreed.¹⁵ Only later, when the condition precedent was not satisfied at the end of the suspension period, were the proposed gathering rates deemed rejected. Thus, IOGA was clearly aware of Equitrans' intent to establish the very same gathering rates after approval of the refunctionalization as it filed on March 1, 2004, in Docket No. RP04-203-000.¹⁶

¹⁴ *Kentucky West*, 47 FERC at 61,004 (citations omitted).

¹⁵ November 23, 2004 Order, 109 FERC ¶ 61,214 at P 46-48.

¹⁶ IOGA argues that parties were not on notice as to what Equitrans might have done with its gathering rate proposal if the Commission had ruled differently than it did in Docket No. CP04-76-000. This argument is irrelevant because the parties and Equitrans never faced this situation.

B. Suspension

15. Dominion Peoples and IOGA seek rehearing of the Commission's determination, in its December 30, 2004 Order, to suspend the rate increase, which they emphasize was a 156 percent, for one day. They ask the Commission to grant rehearing and impose a five-month suspension. In the December 30, 2004 Order, citing its long-standing suspension policy in *Valley Gas Transmission, Inc.*,¹⁷ the Commission stated that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results and that such circumstances existed in this proceeding.

16. On rehearing, IOGA asserts that the Commission improperly relied on *Valley Gas* to support the one day suspension period. IOGA also claims that the circumstances in the instant proceeding do not rise to the level of *Valley Gas's* "harsh and inequitable results." IOGA contends that the Commission did not find that the lost revenue opportunities would be significant in the context of Equitrans' rate filing. Dominion Peoples claims that the December 30, 2004 Order does not explain what harsh and inequitable results would result from the imposition of the maximum suspension period. It argues that although Equitrans claims lost revenue opportunities, it does not quantify them and that there has not been a balancing of the harshness of such result against the harshness of higher rates to Equitrans' customers.

17. IOGA cites several cases in which the Commission examined whether the impact of the suspension was significant and did not waive the 30-day notice requirement.¹⁸ IOGA asserts that the Commission reviewed the relative insignificance of the cost to the pipeline of deferring recovery of costs during a five-month suspension. IOGA contends that the December 30, 2004 Order fails to examine the significance of Equitrans' cost recovery. In addition, IOGA argues that Equitrans' lost revenue opportunities are "wholly of Equitrans' own making" because Equitrans took the risk that the Commission would not act on its certificate application in Docket No. CP04-76-000 prior to the end of the test period in its rate case in Docket No. RP04-203-000.¹⁹ IOGA claims that Equitrans could have sought to recover its proposed cost of service by increasing its filed

¹⁷ *Valley Gas Transmission, Inc.*, 12 FERC ¶61,197 (1980) (*Valley Gas*) (one-day suspension).

¹⁸ See IOGA Request for Rehearing at 4, citing *Southern Natural Gas Company*, 55 FERC ¶ 61,161 at 61,521 (1991); *Tennessee Gas Pipeline Company*, 71 FERC ¶ 61,339 at 62,585 (1995).

¹⁹ IOGA Request for Rehearing at 5.

transportation and storage rates to reflect the facilities and services that remained in those functions on August 31, 2004, but that it voluntarily elected to forego recovery. IOGA contends that, unlike *Valley Gas*, which had no alternatives, it asserts that this is not a case in which the loss would be beyond the pipeline's control.

18. IOGA claims that in granting the suspension period, the Commission departed from past precedent. IOGA argues that in Docket No. RP04-203-000, Equitrans requested a one-day suspension based on the Commission's rejection of Equitrans' December 1, 2003 rate filing in Docket No. RP04-97-000, which also resulted in a delay in Equitrans' ability to institute new and increased gathering charges. It notes that the Commission denied Equitrans' request in that case.²⁰ IOGA maintains that the Commission cannot rationally distinguish its decision in Docket No. RP04-203-000 and its decision in the instant docket.

19. IOGA also argues that the December 30, 2004 Order is inconsistent with the NGA's consumer protection goals. It contends that for the Commission to grant a one-day suspension of a significant rate increase and then suggest that the only protection it can offer is a refund condition reads the notice and suspension provisions out of the statute. It claims that, under the NGA, a pipeline initiating a rate increase "assumes the hazards involved in that procedure."²¹

20. Dominion Peoples states that it agrees that Equitrans must be provided an opportunity to recover costs associated with the gathering facilities and services, but that this does not mean that the statutory suspension period should be waived. It claims that, "[b]y definition, every pipeline that supports a rate increase is underrecovering its costs at the time it files its rate case and every pipeline could claim that suspension of proposed higher rates results in lost revenue opportunities, but, still, the statutory scheme and Commission policy call for suspension of proposed increased rates that may be unjust and unreasonable for the maximum suspension period."²²

²⁰ *Equitrans, L.P.*, 106 FERC ¶ 61,340 at P30 (2004).

²¹ IOGA Request for Rehearing at 8, *citing FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962); *Northeast Energy Associates v. FERC*, 158 F.3d 150, 155 (D.C. Cir. 1998) (pipeline bears the risk that rate changes will take effect at different points in time).

²² Dominion Peoples at 7.

21. Dominion Peoples also argues that Equitrans took the risk that the Commission would act on its certificate application in Docket No. CP04-76-000 when it filed its rate case before obtaining Commission approval to refunctionalize its plant.
22. Dominion Peoples rejects the argument that a longer suspension period would deprive CIPCO District transportation customers of the benefits of lower transportation rates. It claims that the December 30, 2004 Order failed to acknowledge that Dominion Peoples was the only CIPCO District transportation customer to state a position on this issue. Moreover, it contends that nothing would prevent the Commission from putting into effect without suspension Equitrans' proposed lower, CIPCO District transportation rates while suspending for the maximum suspension period the increased CIPCO District gathering rates and increased gathering and transportation fuel retention factors.
23. The Commission denies rehearing. The Commission has broad discretion in suspending rate filings.²³ The Commission suspends rate filings when, based upon a review of the filing, the proposed tariff sheets have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. The Commission's general rule is that when rates have not been shown to be just and reasonable, the filing will be suspended for five months. The Commission suspends filings for shorter periods when it finds that suspension for the maximum period permitted would lead to harsh and inequitable results.²⁴
24. In the instant proceeding, good cause existed to suspend the subject limited section 4 rate filing for one day rather than the full five months because of the unique circumstances of the case. It is these unique circumstances that distinguish this case from Docket No. RP04-203-000, where the Commission suspended a full-blown general section 4 rate filing for five months. The facilities at issue were newly functionalized as gathering facilities. Equitrans needed to have a gathering rate on file associated with those facilities to recover its costs of providing service on these facilities. Prior to the December 30, 2004 Order, Equitrans only had transportation rates for the CIPCO District on file. During the suspension period in Docket No. RP04-203-000 proceeding, when the Commission examined the jurisdictional status of the facilities at issue in Docket No. CP04-76-000, rates remained in effect that provided for their cost recovery. Equitrans voluntarily, at the end of the suspension period, moved reduced transportation rates into

²³ *Exxon Pipeline Co. v. U.S.*, 725 F.2d 1467, 1473, (D.C. Cir. 1984) (Commission must merely state the length of the suspension and a reason "adequate to enable the court to determine whether the Commission's decision was reached for an impermissible reason or for no reason at all.").

²⁴ *See Valley Gas*, 12 FERC ¶ 61,197.

effect that were based on costs that did not include the costs of the proposed refunctionalized plant. Thus, the effective Equitrans' District gathering rate at that time was zero. The point is that, following compliance with the Commission's order, Equitrans did not have any rate that would compensate them for service provided on these facilities. To suspend for five months would have required Equitrans to effectively absorb an additional five months of costs, having already previously absorbed the costs from September 1, 2004 through November of 2004, and to provide free service for that period. Therefore, in order for Equitrans to begin charging gathering rates applicable to the services it continued to provide on these refunctionalized gathering facilities, the Commission properly suspended the rates for one day.

C. Incorporation of Information by Reference

25. IOGA also requests rehearing of the Commission's decision to allow Equitrans to incorporate by reference information previously filed in Docket No. RP05-105. It states that the Commission erroneously misapplied section 154.302 of the regulations which, IOGA states, permits rate filings to incorporate by reference information filed within the previous six months in another docket. IOGA argues that the Commission improperly permitted Equitrans to incorporate by reference in a November 30, 2004 filing information filed (and rejected) in a March 1, 2004 filing. It claims that this information is nine-months old and it is not properly incorporated by reference under section 154.302. Further, IOGA states that the Commission did not waive the regulation, it simply stated that Equitrans complied, and qualified for incorporation by reference, where it clearly had not.

26. The Commission denies rehearing. The entire text of section 154.302(a) states that: "[i]f all, or any portion, of the information called for by this part has already been submitted to the Commission within six months of the filing date of this application, or is included in other data filed pursuant to this part, specific reference thereto may be made in lieu of resubmission." Thus, the regulation does not limit information incorporated by reference solely to information filed within six months. It also permits information "included in other data" filed pursuant to part 154 of the regulations. In its Statement of Nature, Reasons, and Basis for the changes in its tariff, Equitrans stated that, to the extent necessary, it incorporates by reference into its filing all of the underlying cost of service, cost allocation and rate design statements submitted in Docket No. RP04-203-000. However, Equitrans does not rely solely on the information previously submitted in that docket. It also submitted substantial cost information in the instant proceeding to support its limited section 4 rate filing. Moreover, the Commission notes that, on September 30, 2004, in Docket No. RP04-203-000, Equitrans filed an update of certain cost information - less than six months prior to the instant filing. In addition, the Docket No. RP04-203 materials Equitrans has incorporated were filed pursuant to the Part 154 filing

requirements. Further, given our November 23, 2004 Order, which gave Equitrans the permission to submit the very filing they made, the Commission effectively waived the regulation to the extent that the instant filing failed to meet the requirements of that section. Therefore, the Commission properly allowed Equitrans to incorporate by reference information filed in the previous proceeding.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.