

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Panhandle Complainants

v.

Docket No. RP07-34-000

Southwest Gas Storage Company

ORDER SETTING COMPLAINT FOR HEARING

(Issued December 21, 2006)

1. This order addresses a complaint filed by the Panhandle Complainants (Complainants)¹ against Southwest Gas Storage Company (Southwest Gas). The Complainants allege that Southwest Gas's current rates are unjust and unreasonable. The Complainants request that the Commission grant relief in two phases: (1) an immediate rate reduction based on an analysis of Southwest Gas's current costs and revenues as provided in the pleadings; and, (2) an evidentiary hearing in order to investigate the need for further reductions and to establish revised rates on a permanent basis. Should the Commission decline to grant summary relief based on the pleadings, the Complainants ask that the Commission direct Southwest Gas to file a full cost and revenue study within 45 days of the date this order issues, and determine appropriate interim rate relief based on the Commission's analysis of that study.

2. The Commission finds that the Complainants have provided adequate information to set the complaint for hearing and to initiate an investigation into Southwest Gas's rates under section 5 of the Natural Gas Act (NGA). The Commission orders Southwest Gas to file a full cost and revenue study within 45 days of the date this order issues. Further, the Commission denies the Complainant's request to implement immediate interim rate reductions based on the cost and revenue data filed with the complaint.

¹ The Panhandle Complainants are American Forest & Paper Association, American Iron and Steel Institute, American Public Gas Association, Anadarko Petroleum Corporation and Anadarko Energy Services Company, Citizens Utility Board of Illinois, ConocoPhillips Company, ExxonMobil Gas & Power Marketing Company, Independent Petroleum Association of America, and Process Gas Consumers Group.

Background

3. Southwest Gas is a natural gas storage company providing jurisdictional storage services pursuant to a certificate the Commission issued on May 7, 1980.² Southwest Gas currently provides service under Rate Schedules FSS and ISS. Panhandle Eastern Pipe Line Company (Panhandle) is currently Southwest Gas's sole customer, holding a long-term firm contract for about 61 Bcf of annual storage. According to the Complainants, Panhandle currently pays Southwest Gas about \$45 million annually for storage services under that contract. Southwest Gas's current rates became effective on October 1, 1989, when the Commission approved them as part of a settlement in a section 5 proceeding initiated by the Commission.³ A subsequent settlement approved by the Commission in 1998 (1998 Settlement), and filed as part of a certificate proceeding whereby Panhandle abandoned certain storage facilities to Southwest Gas, kept Southwest Gas's rates unchanged.⁴

The Complaint

4. The Complainants include customers of Panhandle and producers, marketers, and consumers of natural gas shipped by Panhandle. They contend that the Commission has not reviewed Southwest Gas's rates in 17 years, and during that time, its rates have become unjust and unreasonable. As support, the Complainants include with their filing a cost and revenue study (Crowe Study) using publicly available data, including data from Southwest Gas's Form 2-A. The Crowe Study calculates Southwest Gas's current annual cost of service to be \$28.6 million, which the Complainants note is a substantial decrease from the \$45 million in revenue Southwest Gas currently receives from Panhandle under its firm storage contract. According to the Crowe Study, Southwest Gas's earned return on common equity for 2005 was 32.5 percent, which represents a 58.8-percent over-recovery of its underlying 2005 costs. The Complainants assert that these earnings are excessive and unreasonable under any cost-based ratemaking methodology. The Complainants contend that this study constitutes a prima facie case that Southwest Gas's storage rates for jurisdictional services are unjust and unreasonable within the meaning of section 5 of the NGA.

5. The Complainants seek relief under section 5 of the NGA in two phases. First, they seek an immediate rate reduction based on the costs and revenues set forth in the Crowe Study. According to the Complainants, the Crowe Study supports an immediate

² 11 FERC ¶ 61,145 (1980); amended, 19 FERC ¶ 62,299 (1982).

³ 48 FERC ¶ 61,422 (1989).

⁴ 85 FERC ¶ 61,328 (1998).

reduction in revenues of \$16.9 million, which represents about 37 percent of Southwest Gas's current reported annual revenues. The Complainants calculate that this revenue reduction will result in a 31.5 percent reduction in Southwest Gas's firm capacity rate, from \$0.3419 per Dt to \$0.2342 per Dt; and a 42.3 percent reduction in Southwest Gas's firm deliverability rate, from \$2.8496 per Dt to \$1.6446 per Dt. The Complainants base their interim revenue requirement on an assumed return on equity of 13.25 percent, which they note represents a best case scenario for the pipeline. The Complainants request the Commission move swiftly with its immediate rate reduction to ameliorate Southwest Gas's over-recovery.

6. The Complainants also request that, as the second phase of rate relief, the Commission convene a full and prompt evidentiary hearing to conduct a more thorough and detailed investigation of Southwest Gas's costs, and to determine the need for any further permanent rate reductions. The Complainants ask that the Commission assure that Southwest Gas's permanent rates are just and reasonable, and fix any rates it finds to be unjust and unreasonable.

7. The Complainants assert that this two-phased approach to rate relief is similar to how the Commission resolved Southwest Gas's previous section 5 rate proceeding in 1989,⁵ and argue this approach is equally appropriate in the subject proceeding. The Complainants, however, note that they are aware of the Commission's reluctance to grant summary relief based on pleadings in a recent section 5 proceeding, citing *Pub. Serv. Comm'n of New York v. Nat'l Fuel Gas Supply Corp. (Pub. Serv. Comm'n of New York)*.⁶ Accordingly, the Complainants state that, in the alternative, should the Commission decline to grant the interim rate reduction that the Complainants desire based in their Crowe Study, the Commission should instead order Southwest Gas to submit a cost and revenue study, within 45 days of the date this order issues, based on the most recent 12-month period of available cost data. The Commission should then determine an appropriate level of interim rate relief based on its own analysis of the data contained in that cost and revenue study.

⁵ *Southwest Gas Storage Co.*, 46 FERC ¶ 61,220 (1989); *Southwest Gas Storage Co.*, 47 FERC ¶ 61,286 (1989).

⁶ 115 FERC ¶ 61,299, *reconsideration granted in part*, 115 FERC ¶ 61,368 (2006), *reh'g pending*. The Commission denied a Motion for Summary Disposition to provide immediate rate relief in a section 5 filing, and instead set the complaint for a full evidentiary hearing, suspending it for settlement procedures first.

Notice

8. Public notice of the complaint was issued on October 27, 2006, providing for motions to intervene, comments, and answers to be filed by November 14, 2006. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2005), all timely filed motions to intervene, with the exception of those discussed below. No party filed a protest or negative comments. Southwest Gas filed an answer to the complaint. It also filed an answer to motions to intervene filed by three parties. In that answer, Southwest Gas includes a motion to immediately deny the motions to intervene filed by three listed Complainants or, in the alternative, find the pleadings contain admissions against interest and dismiss those Complainants from the complaint. We discuss Southwest Gas's answers below. The Complainants filed an answer to Southwest Gas's answer. The Commission waives section 18 C.F.R. § 385.213(a)(2) (2006) of its regulations to allow the Complainants answer, since it would allow interested parties to develop a full understanding of issues involved in the complaint.

Southwest Gas's Answer

9. Southwest Gas asks that the Commission dismiss the complaint on several grounds. First, it asserts that the Complainants lack statutory standing to bring the complaint before the Commission. Southwest Gas notes that section 5 of the NGA clearly provides that the Commission, upon its own motion, or "any State, municipality, state commission, or gas distributing company" may bring a complaint that a natural gas company's rates are unjust and unreasonable. Southwest Gas asserts that not one of the listed Complainants is a state, individual municipality, state commission, or individual gas distributing company. Accordingly, Southwest Gas argues that the complaint fails to satisfy the explicit and mandatory statutory standing requirements, and is thus procedurally deficient.

10. Southwest Gas asserts the Commission should also dismiss the complaint, since the 1998 Settlement⁷ allegedly precludes the relief sought by the complaint. Southwest Gas states that its current rates are governed by the 1998 Settlement, which the Commission approved on December 2, 1998. According to Southwest Gas, that settlement provides that it would operate pursuant to a storage service agreement with Panhandle for an initial term of five years with the option to extend the term for an additional five years. Southwest Gas states that it exercised this extension option two years ago and accordingly its settlement remains effective until 2009. It asserts that, pursuant to the settlement, parties were only allowed to challenge the extension at the

⁷ *Panhandle Eastern Pipe Line Co. and Southwest Gas Storage Co.*, 85 FERC ¶ 61,328 (1998).

time it occurred, which no party did. Southwest Gas asserts that it cannot now be asked to collect lower rates than what the 1998 Settlement provides. Southwest Gas adds that customers continue to benefit from the stable rates that the 1998 Settlement provides.

11. Southwest Gas asserts the Commission should also dismiss the complaint because the Complainants have not satisfied the *Mobile-Sierra*⁸ “public interest” standard for reopening and rewriting a Commission approved settlement and the resulting storage service agreement. It contends that the Complainants are effectively asking the Commission to modify the service agreement that resulted from the settlement extension. Further, Southwest Gas offers that in *Nevada Power Co., et al., v. Enron Power Marketing, Inc., et al.*,⁹ the Commission set forth applicable standards of what evidence is required to modify an existing service agreement under the public interest standard. Accordingly, Southwest Gas states the Complainants must show: (1) the existing contract causes financial distress so as to threaten the ability to continue to provide service; (2) the contract creates an excessive burden on the customers; and (3) the contract is unduly discriminatory to the detriment of customers that are not parties to the proceeding. Southwest Gas asserts that the Complainants have provided no evidence proving any of these factors. It adds that the Commission has traditionally not reopened settlements unless there has been a material change in circumstances, which is not the case here. Southwest Gas further states that the 1998 Settlement did not include a comeback provision requiring it to file a section 4 rate case, and if one had been included as part of the settlement, it would have required additional concessions before agreeing to the demand.

12. Southwest Gas asserts the Commission should also dismiss the complaint because it is inconsistent and contrary to established Commission policy, including the Energy Policy Act of 2005. Southwest Gas contends that a section 5 proceeding at this time will divert finite Commission and respondent personnel and resources from critical infrastructure efforts, and is a direct challenge to Congress’s mandate of promoting the construction of natural gas storage facilities and other energy infrastructure. Southwest Gas asserts that the Commission’s rate policies must give investors the confidence that they will be able to recover their investments through rate certainty. It contends the complaint contravenes the following three objectives set forth in the Commission’s

⁸ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 322 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

⁹ 103 FERC ¶ 61,353, 62,384, *reh’g denied*, 105 FERC ¶ 61,185 (2003).

FY2007 Congressional Performance Budget Request: (1) to expedite development of energy infrastructure projects; (2) to encourage investment in energy infrastructure; and, (3) to protect the reliability, security, and safety of the energy infrastructure.¹⁰

13. Finally, Southwest Gas asserts the Commission should also dismiss the complaint because the Complainants' request for an immediate rate reduction of almost 40 percent of Southwest Gas's annual revenues is inappropriate. Southwest Gas contends that the Complainants have the burden of proof of making a prima facie case that Southwest Gas's current rates are unjust and unreasonable, and that their proposed alternative rates are just and reasonable, which Southwest Gas asserts they have not done. Southwest Gas notes that the Complainants failed to provide the detailed data required by section 154.312 of the Commission's regulations regarding what should be filed with a cost of service summary, and that the Complainants rely too heavily on unsupported assertions and generic statements, which do not meet the high threshold for initiating a section 5 proceeding. Southwest Gas argues that the Complainants request that it file a cost and revenue study shifts the burden of proof from the Complainants to the respondents, which would shift the proceeding from a section 5 to a section 4 general rate case, which courts have said cannot be done. Southwest Gas further argues that, under Rule 217,¹¹ summary disposition is available only if there is no genuine issue of fact material to the decision of a proceeding, which is not the case with the instant complaint.¹² It asserts that there are issues of material fact in dispute that preclude the Commission from ruling summarily on the matter.

14. Southwest Gas requests that, should the Commission not dismiss the complaint outright, in the alternative, the Commission should set the subject issues for hearing, but first direct parties to utilize settlement procedures. It states that this course of action is consistent with Commission action in other similar recent proceedings, citing *National Fuel*.¹³ Southwest Gas states that it strongly supports negotiated settlements since they provide regulatory certainty, promote administrative efficiency for the Commission, and eliminate the need for additional financial and personnel resources by all parties. Southwest Gas asks that the Commission order any settlement procedures for a period of at least 60 days.

¹⁰ FERC FY2007 Congressional Performance Budget Request (February 2006), p.11.

¹¹ 18 C.F.R. § 385.217 (2006).

¹² In its answer, Southwest Gas disputes, among other things, the Complainants' data regarding operation and maintenance expenses, rate base, taxes, and return.

¹³ 115 FERC ¶ 61,299, *reconsideration granted in part*, 115 FERC ¶ 61,368 (2006).

Motion to Deny Interventions

15. Along with its answer to the complaint, Southwest Gas also filed an answer to three motions to intervene filed by Process Consumers Group (PCG), the American Forest & Paper Association (AFPA), and the American Iron and Steel Institute (AISI). Southwest Gas points out that these three entities are also among the Panhandle Complainants who filed the complaint. Southwest Gas asserts that the entities cannot be both complainant parties and intervening parties in the same proceeding. Southwest Gas contends that, as more fully explained in its answer to the complaint, the three entities lack statutory standing to file a complaint, and states that filing a motion to intervene does not cure this lack of standing. Accordingly, Southwest Gas requests that the Commission deny the three motions to intervene or, in the alternative, find the pleadings contain admissions against interest and dismiss those Complainants from the complaint.

16. We dismiss the motions to intervene filed by PCG, AFPA, and AISI as unnecessary. These three entities already have full party status in the proceeding by virtue of filing the complaint. Southwest Gas's contents concerning standing are addressed below.

Discussion

17. The Commission finds that the Complainants have raised serious questions as to whether Southwest Gas's currently effective tariff rates allow Southwest Gas to recover revenue substantially in excess of its costs. The publicly available data included in the Crowe Study reveal that Southwest Gas may be substantially over-recovering its cost of service. Accordingly, we find that questions raised by the Complainants warrant a hearing and an investigation into Southwest Gas's rates under section 5 of the NGA. Accordingly, the Commission will set the complaint for hearing and initiate an investigation into Southwest Gas's rates under NGA section 5.

18. As we have done in other cases initiating section 5 investigations of a pipeline's rates,¹⁴ the Commission directs Southwest Gas to file a cost and revenue study within 45 days of the date this order issues. Contrary to Southwest Gas's contention, requiring such an informational filing does not improperly transform this proceeding from a section 5 proceeding to a section 4 proceeding, where the pipeline would have the burden to support its proposed rates.¹⁵ We are simply requiring the company to file information we

¹⁴ See *Southwest Gas Co.*, 46 FERC ¶ 61,145 (1980); *Pub. Serv. Comm'n of New York*, 115 FERC ¶ 61,299 (2006).

¹⁵ See *Consumers Energy Co. v. FERC*, 226 F.3d 777 (6th Cir. 2000) (Commission may request information to satisfy its obligation under NGA section 5).

need to carry out our responsibilities under NGA section 5 to ensure that rates are just and reasonable, and we recognize that in order to require Southwest Gas to reduce its rates, we will have the burden under NGA section 5 both to show that Southwest Gas's current rates are unjust and unreasonable and any new rates we may impose are just and reasonable. The cost and revenue study required by this order should include actual data for the latest 12-month period available as of the date of this order. The filing should include all the schedules required for submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations,¹⁶ with one exception. Because Southwest Gas does not have an NGA section 4 burden in this section 5 complaint proceeding and will be filing testimony in response to other parties, Southwest Gas need not file the Statement P required by section 154.312(v) at this juncture.¹⁷ In addition, we will not require Southwest Gas to file nine months of post-base period adjustment data required by section 154.303(a) at this point in the proceeding.¹⁸ Parties may raise issues regarding Southwest Gas's rates at the hearing.

19. Both the Complainants and Southwest Gas ask that the Commission take certain final actions with respect to the complaint at this stage. The Complainants ask for immediate, interim rate relief based on the cost and revenue data they filed in their Crowe Study. Southwest Gas, by contrast, requests that the Commission dismiss the complaint in its entirety. For the reasons discussed below, the Commission denies all these requests.

20. The Complainants state that granting immediate, interim relief would be consistent with Commission action in *Southwest Gas*,¹⁹ where the Commission ordered an interim rate reduction. However, in that proceeding, the Commission did not grant any relief until after Southwest Gas had an opportunity to file a full cost and revenue study to support its rates. The Commission initiated the previous section 5 investigation into Southwest Gas's rates and setting the matter for hearing by order issued February 23, 1989, and directed the storage company to file a cost and revenue study. The Commission then approved rate relief in two phases. First, the Commission ordered an initial rate reduction down to the level supported by Southwest Gas's cost and revenue study. These rates went into effect on June 1, 1989, about two months after Southwest Gas filed its cost and revenue study. The Commission directed further review of the cost and revenue study in the ongoing hearing and subsequently provided additional rate relief by approving further reduced rates that were part of an uncontested settlement that

¹⁶ 18 C.F.R. § 154.312 (2006).

¹⁷ *Pub. Serv. Comm'n of New York*, 115 FERC ¶ 61,368 at P 6 (2006).

¹⁸ *Id.*

¹⁹ *Southwest Gas*, 46 FERC ¶ 61,220; *Southwest Gas*, 47 FERC ¶ 61,286.

Southwest Gas filed as a result of settlement procedures between parties. In this case, we will deny the Complainants' request to effectuate immediate rate relief based on the cost data it provided the Crowe Study. However, if the cost and revenue study filed by Southwest Gas in response to this order does not support its existing rates, the Commission will order an immediate rate reduction down to the level its cost and revenue study does support. Such action would be consistent with Commission action in Southwest Gas's previous section 5 proceeding.

21. In its answer, Southwest Gas asks that the Commission dismiss the complaint on several grounds. First, Southwest Gas argues that the Complainants lack statutory standing to bring the complaint before the Commission, since section 5 only gives a "State, municipality, State commission, or gas distributing company" the right to file a complaint and the Complainants do not fall into any of those categories. In support of its contention, Southwest Gas points out that in *Transwestern Pipeline Co.*,²⁰ the Commission stated its agreement "with the position of protesters that the Natural Gas Act does not give [certain parties] the right to file a complaint initiating a section 5 investigation, since neither is a 'State, municipality, State commission, or gas distributing company.'" However, Southwest Gas fails to mention the Commission's next sentence in *Transwestern*: "Accordingly, the petitions are interpreted as requests for the Commission to institute a section 5 investigation, which is solely within the Commission's discretion," citing *General Motors Corp. v. FPC*.²¹ The Commission then proceeded to set the complaint in that case for hearing under section 5. Therefore, the mere fact the Complainants are not among the entities listed in section 5 does not justify dismissal of their complaint on a basis of lack of standing. Further, in the instant complaint, the Complainants do not purport to initiate the section 5 proceedings themselves, but instead expressly request that the Commission initiate section 5 proceedings. For the reasons already described, we find it appropriate to so exercise our discretion in this case.²²

22. Southwest Gas also asserts the Commission should dismiss the complaint on the grounds that the rate reduction sought is precluded by the 1998 Settlement. We see nothing in the 1998 settlement either to prevent the Complainants from seeking a rate reduction pursuant to NGA section 5 or to prevent the Commission from granting such a rate reduction. The 1998 Settlement contained no rate moratorium. To the contrary,

²⁰ 24 FERC ¶ 61,394 at 61,833 (1983) (*Transwestern*).

²¹ 613 F.2d 939 (D.C. Cir. 1979).

²² This finding is further supported by the fact that the Commission's Rules and Regulations provide that "[a]ny person may file a complaint seeking Commission action against any other...."[emphasis supplied] 18 C.F.R. § 385.206 (2006).

Article IV of the settlement explicitly provides that the Settlement shall remain in effect until certain conditions occur, one being “the commencement of a section 5 proceeding with respect to Panhandle or Southwest Gas by the Commission.” Thus, the settlement expressly contemplated that it could be terminated at any time under NGA section 5. In fact, Southwest Gas and Panhandle clarified in their September 25, 1998, reply comments on the 1998 Settlement, “the Stipulation and Agreement also does not bind the Customer Group or any party from freely exercising all rights to participate in or initiate proceedings under the Natural Gas Act.”

23. Southwest Gas also argues that the Commission should dismiss the complaint on grounds that the Complainants have not provided sufficient evidence to satisfy the *Mobile-Sierra* public interest standard for modifying the 1998 Settlement and the service agreement between Southwest Gas and Panhandle. The *Mobile-Sierra* public interest standard is not applicable in the circumstances of this case. As already discussed, the 1998 settlement expressly permits the parties to initiate proceedings under NGA section 5 and provides for the settlement to terminate upon the filing of such a section 5 complaint. In addition, Southwest Gas’s service agreement with Panhandle entered into pursuant to the 1998 Settlement incorporates Southwest Gas’s *pro forma* Form of Storage Service Agreement. Article 3 of that agreement provides that: “For the services provided or contracted for hereunder, Buyer agrees to pay Sellers the then-effective applicable rates and charges under Seller’s Rate Schedule FSS filed with the Commission, as such rates and charges may hereafter be modified, supplemented, superseded or replaced generally or as to the service hereunder.” Accordingly, the service agreement does not contain a fixed rate, but rather includes a *Memphis* clause²³ which allows for the review of rate changes under the just and reasonable standard.

24. Southwest Gas contends the Commission should dismiss the complaint as being contrary to the Energy Policy Act of 2005, which was implemented to, among other things, facilitate and encourage the development of energy infrastructure, including the development of sufficient storage capacity. We find nothing in the Energy Policy Act of 2005 that contravenes our obligation to ensure just and reasonable rates. First, this complaint involves an existing pipeline and not new construction, so there should be no direct impact on infrastructure development. Further, any indirect impact is outweighed by the Commission’s obligation to ensure just and reasonable rates, including a just and reasonable rate of return.

²³ See *United Gas PipeLine Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958), in which the United States Supreme Court held that the public interest standard of review does not apply to service agreements entered into pursuant to the “tariff and service agreement” system used by natural gas pipelines.

25. Finally, Southwest Gas argues the Commission should dismiss the complaint because the level of immediate rate relief sought by Complainants is inappropriate. As discussed above, the Commission will not grant immediate rate relief based on data included in the Crowe Study, as requested by the Complainants. Instead, any rate relief approved by the Commission will occur only after Southwest Gas files its cost and revenue study, and after all parties have an opportunity to comment.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Natural Gas Act, particularly section 5 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Natural Gas Act, a public hearing shall be held concerning whether Southwest Gas's rates are unjust, unreasonable, or otherwise unlawful.

(B) The presiding administrative law judge shall, within thirty (30) days of the date of this order, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The Commission directs that an initial decision be issued in this proceeding within 12 months of the commencement of the hearing procedures.

(D) Southwest Gas shall file a cost and revenue study within 45 days of this order. The filing should include actual data for the latest 12-month period available as of the date of this order. The filing should include all of the schedules required for the submission of a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, except Statement P.²⁴

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁴ 18 C.F.R. § 154.312 (2005).