IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 91-1267

INDIANA GAS COMPANY, INC.
RESPONDENT

v.

FEDERAL ENERGY REGULATORY COMMISSION
RESPONDENT

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (Commission) correctly concluded that the tariff sheets filed in this proceeding by Panhandle Eastern Pipe Line Company (Panhandle) to pass through costs to its resale customers, including Indiana Gas Company (IGC or Petitioner), did not violate the Natural Gas Act's prohibition against retroactive ratemaking and the filed rate doctrine.

STATUTES AND REGULATIONS

All applicable statutes and regulations are attached to this brief as Appendix II.

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under Section 19(b) of the Natural Gas Act (NGA), 15 U.S.C. § 717r(b).

STATEMENT OF THE CASE

In December 1977, Panhandle executed several natural gas storage service agreements with its resale customers, including IGC. (The rates, terms, and conditions of these agreements are embodied in Rate Schedules TS-2, TS-3, and TS-6 of Panhandle's FERC Gas Tariff, Original Volume No. 2.) Panhandle, in turn, subcontracted with Michigan Consolidated Gas Company--Interstate Storage Division (Mich Con) for Mich Con to provide these storage services, and with ANR Pipeline Company (ANR) for ANR to provide transportation for these storage-related services, to IGC and others. ANR's services are chargeable to Panhandle under ANR Rate Schedule X-66. This case arises out of Panhandle's pass-through of the costs of ANR's services to IGC and other resale customers. 1/ Petitioner challenges Panhandle's filing of tariff sheets, accepted by the Commission, to revise its rates effective as of the same dates as certain ANR rate revisions

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1/ As explained below, Panhandle has a special provision in each of its own rate schedules that authorizes it to adjust its rates "accordingly" to conform to any change in ANR's Rates:

> Buyer understands and agrees that if [Mich Con] makes rate adjustments for the storage service provided Panhandle and utilized hereunder, or ANR Pipeline adjusts its transportation rate as applicable to service hereunder, and provided Panhandle has received all necessary governmental authorizations, the charges set forth in Section 2.1, above, may be adjusted accordingly.

(R. 143, J.A. 14.)

(described below) as violative of the prohibition against retroactive ratemaking and of the filed rate doctrine. 2/

STATEMENT OF THE FACTS

A. Background: Panhandle's Pass-Through Of ANR Charges

On November 19, 1990, Panhandle filed with the Commission various tariff sheets seeking to pass through to IGC and other customers receiving storage services several ANR rate adjustments dating from October 1987. 3/ These adjustments derive from four distinct sources: 1) a 1986 general rate change filing by ANR that became effective as to Panhandle on July 1, 1988; 2) a 1989 general rate change filing by ANR that became effective on November 1, 1989; 3) a series of take-or-pay surcharges and adjustments that took effect on various dates between May 1989 and May 1990; and 4) a series of annual charge adjustment (ACA)

2/ The Commission's orders at issue are: 1) Panhandle Eastern Pipe Line Company, Docket No. TM91-7-28-001, Letter Order, issued December 19, 1990, 53 FERC ¶ 61,481 (1990); and 2) Panhandle Eastern Pipe Line Company, Docket No. TM91-7-28-001, Order Denying Rehearing, issued April 4, 1991, 55 FERC ¶ 61,029 (1991).

3/ Panhandle also filed revised tariff sheets seeking to collect its own annual charge adjustment (ACA) charges relating to its own ACA filings that were approved effective October 1, 1987; March 1, 1988; October 1, 1988; October 1, 1989, October 1, 1990 and November 1, 1990. These filings went into effect not subject to any refund obligation. In its rehearing request to the Commission or its opening brief to this Court, petitioner has never challenged these tariff filings as retroactive ratemaking or as a violation of the filed rate doctrine, and thus they are not at issue in this appeal.

filings made on various dates between October 1987 and November 1990. 4/

B. Panhandle's Tariff Sheet Filings And The Commission's Orders In The Proceeding Below.

1. As noted, on November 19, 1990, Panhandle filed tariff sheets with the Commission seeking to incorporate the above rate adjustments and charges into Panhandle's Rate Schedules TS-2, TS-3, and TS-6, for storage services, effective the same dates as ANR's adjustments and charges became effective. 5/ Several Panhandle customers, including IGC, intervened in the proceeding below. 6/

4/ The background of each of these rate adjustments is summarized in Appendix I to this brief, infra.

5/ In this filing, Panhandle proposed that its revised tariff sheets relating to the rate adjustments from ANR's 1986 general rate case become effective on July 1, 1988 and November 1, 1990. Panhandle also proposed that its tariff sheets relating to ANR's 1989 general rate case adjustments become effective on November 1, 1989 and May 1, 1990.

Likewise, Panhandle proposed that its revised sheets relating to ANR's take-or-pay surcharge filings (discussed above) take effect on six different dates beginning May 1, 1989 and ending May 1, 1990. Finally, Panhandle proposed that its revised tariff sheets incorporating ANR's four Annual Charge Adjustment (ACA) charges become effective on various dates between October 1, 1987, and November 1, 1990.

6/ Only one protest was filed in the proceeding below. Intervenor Citizens Gas & Coke Utility (Citizens) protested that Panhandle's collection of its own ACA charges (see note 3, supra) might amount to requiring Citizens to pay twice for ACA charges relating to the transportation services performed by ANR. In the December 19 Letter Order, the Commission found that Panhandle was not doubly recovering ACA surcharges because the amounts reflected in its tariff sheet filing as ANR-related ACA surcharges were not retained by Panhandle, but were paid to ANR. See 53 FERC ¶ 61,481

(continued...)

2. On December 19, 1990, the Commission issued a Letter Order accepting all of Panhandle's ANR-related tariff sheets for filing, and making them effective, subject to refund, as of the dates requested by Panhandle. Panhandle Eastern Pipe Line Company, Docket No. TM91-7-28-000, 53 FERC ¶ 61,481 (1990) (R. 178, J.A. 15.)

3. On January 17, 1991, the petitioner filed with the Commission a request for rehearing arguing that Panhandle's tariff sheet filings seek to collect past costs from its customers "for gas service already provided," and therefore, violate the prohibition against retroactive ratemaking and the filed rate doctrine. (R. 188, J.A. 25.) Petitioner also argued that Panhandle failed to demonstrate any basis for Commission waiver of the 30-day notice requirement of 18 C.F.R. § 154.22. (R. 191, J.A. 28.)

4. On April 4, 1991, the Commission denied petitioner's rehearing request. Panhandle Eastern Pipe Line Company, Docket No. TM91-7-28-001, 55 FERC ¶ 61,029 (1991). In its rehearing order, the Commission found that "Rate Schedules TS-2, TS-3, and TS-6 establish cost-of-service rates to enable Panhandle to recover from its customers the costs of providing those services." (R. 195, J.A. 31.) The Commission's rehearing order also discussed Panhandle's pass-through of ANR's take-or-pay

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6/(...continued)
(Dec. 19, 1990). No party sought rehearing of this issue before the Commission, and it is not an issue in this appeal.

volumetric surcharges, and why they are deemed current costs to Panhandle.

Initially, the Commission noted that the question whether ANR's filing of these surcharges pursuant to Commission Order No. 528 constitutes retroactive ratemaking by ANR is one that may properly be raised only in an ANR rate proceeding. (R. 197, J.A. 33). The Commission went on to explain that, in any event, take-or-pay settlement costs must be considered current costs because, to the extent they are incurred by upstream pipelines to terminate or reform gas purchase contracts with producers, they relate to current or future service, not past service. (R. 197-98, J.A. 33-34.) 7/

Since the Commission concluded that all of ANR's charges constituted current costs to Panhandle, it found that Panhandle's pass-through of these costs did not violate the filed rate doctrine or the prohibition against retroactive ratemaking. (R. 198, J.A. 34.) Finally, the Commission found that waiver of the 30-day notice requirement of 18 C.F.R. § 154.22 is "appropriate here where Panhandle is tracking costs pursuant to a cost-of-service provision of its tariff." (R. 198, J.A. 34.)

This appeal followed.

7/ Because, as the Commission correctly observed, the question of whether ANR's take-or-pay charges violate the filed rate doctrine must be raised in an ANR rate proceeding, the Commission's Order No. 528-A analysis is not critical to this Court's disposition of the issue in this case, namely, whether Panhandle's tariff sheet filings violate the filed rate doctrine.

SUMMARY OF ARGUMENT

The Commission's orders accepting Panhandle's tariff sheets for filing, effective as of the same dates as ANR's rate changes, did not constitute retroactive ratemaking or violate the filed rate doctrine, because a cost-of-service provision in Panhandle's storage service agreement--agreed to by IGC--put IGC on notice that its rates were provisional only, and subject to change based on ANR rate changes. The Commission's waiver of the separate 30-day notice requirement for "good cause" was consistent with Section 4(d) of the Natural Gas Act, since the Commission reasonably found that Panhandle was tracking changes in ANR rates, pursuant to IGC's agreement with Panhandle that the latter could pass through the costs of ANR's transportation services to IGC.

Panhandle's tariff filings here were not so untimely as to be considered the product of unreasonably delay. In any event, IGC cannot reasonably claim prejudice growing out of the timing of Panhandle's filing because it intervened in most of the ANR rate proceedings on which Panhandle's tariff sheets are based, and thus had actual notice that these cost pass-throughs were coming. Finally, Panhandle's tariffs here were accepted subject to refund based on the outcome of the ANR rate proceedings. Thus, if ANR's rates are ultimately found to be excessive, Panhandle must pass through any refund it receives that represents overpayments by IGC.

ARGUMENT

I. THE COMMISSION'S ACCEPTANCE OF PANHANDLE'S TARIFF SHEETS DOES NOT CONSTITUTE RETROACTIVE RATEMAKING OR VIOLATE THE FILED RATE DOCTRINE.

The Commission found that allowing Panhandle's tariffs to become effective prior to their respective filing dates did not amount to retroactive ratemaking since Panhandle's Rate Schedules TS-2, TS-3, and TS-6, have cost-of-service provisions that explicitly authorize Panhandle to recover from its customers the costs of ANR's services. The record amply supports this finding. As noted, in each of the relevant rate schedules, the petitioner has agreed to Panhandle's pass-through of ANR's costs:

> Buyer understands and agrees that if [Mich Con] makes rate adjustments for the storage service provided Panhandle and utilized hereunder, or ANR Pipeline adjusts its transportation rate as applicable to service hereunder, and provided Panhandle has received all necessary governmental authorizations, the charges set forth in Section 2.1, above, may be adjusted accordingly.

(R. 143, J.A. 14.) 8/ Thus, this language provided the necessary notice to petitioner--indeed, constituted an agreement by it--that Panhandle's existing rates were provisional only, and would be subject to surcharges as Panhandle incurred costs from

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8/ The above-quoted provision exists in Panhandle Rate Schedule TS-6 and is part of the record of this case. Two identical provisions exist in Panhandle's TS-2 and TS-3 rate schedules, and though not made a part of the record here, they are on file in the official records of the Commission, see First Revised Sheet No. 1049 of Panhandle's FERC Gas Tariff, Original Volume No. 2 (Rate Schedule TS-2); and First Revised Sheet No. 1115 of Panhandle's FERC Gas Tariff, Original Volume No. 2 (Rate Schedule TS-3).

ANR. As such, the prefiling effective dates of Panhandle's tariff sheets operated prospectively, as they implemented the parties' expectations that ANR's costs would be passed through by Panhandle to petitioner.

A. Because Of The Notice Afforded Petitioner By The Cost-Of-Service Provisions In Its Storage Service Agreements, The Commission's Orders Do Not Constitute Retroactive Ratemaking Or Violate The Filed Rate Doctrine.

1. As this Court has recognized, rate adjustments or surcharges that are made effective as of a date prior to their filing with the Commission are not deemed to be retroactive where the parties are on notice that they may be revised pursuant to previously executed agreements. In City of Piqua v. FERC, 610 F.2d 950 (D.C. Cir. 1979) (Piqua), this Court upheld a Commission order that permitted rate schedules to become effective as of a date earlier than the filing, where this was contemplated by the parties' agreement. 9/

In so doing, the Piqua Court rejected claims that the Commission had retroactively substituted a just and reasonable rate for an excessively high or low rate:

> In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract. Filing under section 205(d) [of the Federal Power Act] allowed the Commission to review the agreement to ensure

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9/ Although Piqua involved waiver of analogous provisions of the Federal Power Act, 16 U.S.C. § 824d(d), it is well-established that the relevant provisions of the NGA "are in all material respects substantially identical." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981).

> its reasonableness. Such review does not, when good cause is shown, however, preclude enforcing the contract as of the date specified therein. Moreover, the Commission, in finding the Agreement reasonable, did not retroactively substitute a rate; it merely approved the rate change and effective date agreed upon by the parties.

610 F.2d at 955. Other courts have relied on Pigua to find that permitting prefiling effective dates would not amount to retroactive ratemaking where this "gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract." Hall v. FERC, 691 F.2d 1184, 1192 (5th Cir. 1982) (Hall); see also City of Holyoke Gas & Electric Dept. v. FERC, No. 90-1565, slip op. at 8-9 (D.C. Cir. Jan. 28, 1992) (Holyoke); cf. Towns of Concord and Wellesley v. FERC, 844 F.2d 891, 897 (1st Cir. 1988) (allowing regulatory change to take effect as of the date of the underlying mutually-agreed change in the parties' relations which prompted it).

2. More recently, this Court has recognized that the notice implicit in parties' contractual agreements is of paramount importance in determining whether the Commission's acceptance of a prefiling effective date constitutes lawful prospective ratemaking, as opposed to prohibited retroactive ratemaking. Thus, in Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791, 796 (D.C. Cir. 1990)(Columbia II), this Court characterized Pigua and Hall as holding that "because of pre-existing agreements and the notice that went automatically with them, those rates were

not in fact retroactive." (Emphasis supplied.) 10/ The Columbia II Court went on to say:

> Notice does not relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision. This in no way dilutes the general rule that once a rate is in place with ostensibly full legal effect and is not made provisional, it can be changed only prospectively.

895 F.2d at 797. (Emphasis in original.)

With full awareness of Columbia II, the Commission very recently concluded that the requirement of notice, sufficient to overcome the filed rate doctrine, was satisfied by a cost-of service provision in another pipeline's storage service tariff similar to the one involved here. In Transcontinental Gas Pipe Line Corporation, Docket No. TM91-8-29-000 (Transco), the Commission, citing Columbia II, initially rejected a prefiling effective date as violative of the filed rate doctrine where, as here, a cost-of-service provision authorized a pipeline to track changes in its supplier's costs, but did not make specific mention of an effective date for pass-throughs coinciding with the supplier's rate changes. 55 FERC ¶ 61,347 at pp. 62,032-33.

10/ Agreements are not the only vehicle by which customers become notified that existing rates are provisional only. As the Columbia II Court stated, "[t]he same principle obtains when the Commission itself places the parties on notice . . . that the rates they will be paying are subject to retroactive adjustment at a later date." 895 F.2d at 796-97.

On rehearing, however, the Commission reversed itself and accepted the rate filing because Transco's customers had notice from the cost-of-service provision in its tariff that Transco was authorized to recover any increases billed to it by its supplier. 11/

Applying these principles, the Commission's orders, allowing Panhandle's tariff sheets to become effective as of the effective dates of ANR's filings, do not amount to retroactive ratemaking in view of the notice implicit in the cost-of-service provisions in Panhandle Rate Schedules TS-2, TS-3, and TS-6. As noted, the petitioner has explicitly agreed that Panhandle may adjust "accordingly" the rates chargeable under these rate schedules to incorporate any rate adjustments made by ANR. (R. 143, J.A. 14) For present purposes, the effect of this agreement is two-fold: 1) it provides Panhandle with the necessary contractual authorization to change its rates to conform to adjustments in ANR's rates; and 2) it affords the parties the requisite notice

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11/ Thus, the fact that, unlike the new rate schedules involved in Holyoke and Piqua, the cost-of-service provisions involved here do not specifically provide for a prefiling effective date corresponding to the effective dates of future ANR adjustments is not critical. In Hall v. FERC, 691 F.2d at 1192, the Fifth Circuit held that a rate could be adjusted to take effect twenty years before the filing and still operate prospectively, even where apparently there had been no explicit agreement reflected in the relevant "favored nations" clause allowing for prefiling effective dates.

that the affected rates are provisional in nature, and are subject to change on the basis of ANR rate adjustments. 12/

B. In These Circumstances, The Commission Acted Well Within Its Discretion In Waiving The Notice Requirements Of Section 4(d) Of The Natural Gas Act And Its Own Regulations.

As noted, the Commission found that there was "good cause" to waive the statutory notice requirement in this case because "waiver is appropriate . . . where Panhandle is tracking costs pursuant to a cost-of-service provision of its tariff." 55 FERC ¶ 61,029 at p. 61,081. As explained below, the "contractual" notice, and agreement provided by Panhandle's cost-of-service tariff provision, which support the Commission's view that Panhandle's prefiling effective dates are not retroactive, also support the Commission's waiver of the 30-day notice requirement of Section 4(d) of the Natural Gas Act, and 18 C.F.R. § 154.22.

As this Court has recognized, "the Commission has considerable latitude to waive the notice requirement under section 4(d) . . . ." Columbia II, 895 F.2d at 795. It is well-

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12/ The Commission submits that the notice implicit in the cost-of-service provisions in petitioner's storage service agreements with Panhandle was sufficient in and of itself to take this case outside the filed rate doctrine.

But even if timely notice to petitioner of the underlying ANR proceedings were also a requirement, this requirement was also satisfied in this case to a very significant extent. As explained in Appendix I to this brief, infra, petitioner has intervened in the two ANR general rate cases and all of the ANR take-or-pay surcharge proceedings that gave rise to Panhandle's tariff sheet filings in this case. Thus, petitioner has had actual notice from the very outset of most of Panhandle's cost pass-throughs.

established that the Commission may grant a waiver of the statutory notice requirement to permit a prefiling effective date where there is an agreement as to prospective rate changes between the parties. Holyoke, slip op. at 8-9; Piqua, 610 F.2d at 955; Hall v. FERC, 691 F.2d at 1192; Towns of Concord & Wellesley v. FERC, 844 F.2d at 896-97. And this Court recently recognized that the Commission is on solid ground when it waives the 30-day statutory notice requirement for "good cause" to give effect to previous agreements that convey notice of prospective rate changes. Columbia II, 895 F.2d at 795-96 (citing Hall and Piqua).

Thus, the rationale (discussed above) that supports a finding that Panhandle's prefiling effective dates operate prospectively likewise supports the Commission's waiver of the statutory notice requirement in this case. That is, the notice to petitioner, implicit in the cost-of-service agreements within TS-2, TS-3, and TS-6, that Panhandle's rates are provisional and subject to pass-throughs based on ANR rate adjustments, also satisfies the "good cause" requirement of Section 4(d) of the NGA and 18 C.F.R. § 154.22 since the rate change sought was "already in full force and effect." Columbia II, 895 F.2d at 795.

II. PETITIONER'S CLAIMS TO THE CONTRARY LACK MERIT

1. In its brief, petitioner makes a number of unfounded assertions. Initially, it states (Pet. Br. 3) that Panhandle Rate Schedules TS-2, TS-3, and TS-6 "contain no cost-of-service adjustment provisions, but instead specify a fixed rate for each

schedule." However, this is clearly not the case. As shown above, each of the rate schedules contains language, in identical terms, authorizing Panhandle to adjust its rates to conform to adjustments in ANR's rates. By this language, the parties clearly intended for Panhandle to operate simply as an accounting conduit that would pass through whatever transportation charges it received from ANR.

2. Petitioner further asserts (Pet. Br. 9) that "some of the ANR rates at issue for which Panhandle sought recovery had been in effect since November 1, 1986 and others since July 1, 1988." (Emphasis omitted.) According to petitioner, Panhandle had notice since 1986 that "it was paying higher rates to ANR and could have sought at that time to prospectively recover such costs." Id. In fact, these claims are unsupported by the record.

To the contrary, ANR's X-66 rates to Panhandle were completely unaffected by ANR's 1986 general rate case between November 1, 1986 and June 30, 1988. 13/ Those rates were adjusted for the first time, effective July 1, 1988, based on a settlement the Commission approved in October 1989. And the result of Panhandle's pass-through of ANR's July 1, 1988 X-66 rate adjustment was a minor decrease in rates under Panhandle

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13/ For a detailed explanation of how and when ANR's 1986 general rate case affected ANR's X-66 rates to Panhandle, see pp. 1-2 of Appendix I to this Brief, infra.

Rate Schedules TS-2 and TS-3, while only the rate under Schedule TS-6 was increased.

3. Even if these claims had merit, however, the short and dispositive answer would be that Panhandle was operating under cost-of-service provisions in its tariffs authorizing it to pass ANR's costs through in future rate filings. The prefiling effective dates would operate prospectively regardless of when Panhandle's rate filings were made. Thus, the filed rate doctrine and the prohibition against retroactive ratemaking are simply not implicated here.

This is not to suggest that the Commission may countenance unreasonable delays by pipelines who seek to pass through rate adjustments pursuant to cost-of-service provisions in their rate schedules. Late filings, though not barred by the filed rate doctrine, may nonetheless be rejected under Section 4(d) of the NGA. That is, the Commission may declare such filings to be "unjust, unreasonable, unduly discriminatory or preferential" if unreasonable delays have adversely affected pipeline customers. Because petitioner's rehearing request and appeal brief have rested entirely on its erroneous view of the filed rate doctrine, and because petitioner has never alleged that it has been prejudiced by the interval between ANR's effective dates and Panhandle's rate filing, it was unnecessary for the Commission to address this issue in the proceeding below. 14/

14/ Upon further analysis of this issue in the context of an unrelated, later case, the Commission did impose timeliness (continued...)

In any event, none of the tariff sheet filings here was so late as to be considered the product of unreasonable delay. First, as already noted (supra, pp. 15-16), the tariff filing seeking a July 1, 1988 effective date (related to ANR's 1986 general rate filing) involved both an increase and rate decreases passed through to petitioner. Second, Panhandle's tariff sheets seeking to pass through costs related to ANR's 1989 general rate case were filed approximately 12 months after ANR's 1989 rates became effective. The oldest of the six ANR take-or-pay surcharges became effective just 18 months prior to Panhandle's corresponding tariff sheet filings. More to the point, however, is the fact that petitioner has had actual notice of each of these proceedings from the very outset, as evidenced by its interventions in those proceedings. 15/ Thus, petitioner

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14/(...continued)
requirements on a pipeline's pass-through of rate changes by upstream suppliers. See Transco, 56 FERC ¶ 61,274 at p. 62,081 (1991). Thus, in the Transco order on rehearing, while it accepted the prefiling effective date sought in that case, the Commission directed Transco, in the future, "to file track any Commission approved rate changes in its supplier's rates within 15 days of the Commission order accepting the supplier's rate changes." Id.

Because of impracticalities inherent in this 15-day "cost-tracking" filing requirement, the Commission on further rehearing modified the 15-day filing requirement, but maintained a requirement that Transco make its filing as early as reasonably practicable. See 57 FERC ¶ 61,162 (1991).

15/ As noted, petitioner's interventions in the 1986 ANR general rate case, the 1989 ANR general rate case, and the six ANR take-or-pay surcharge proceedings, are detailed in Appendix I, infra, to this Brief.

cannot reasonably claim prejudice by reason of Panhandle's failure to make its pass-through tariff sheet filings more timely.

Third, two of ANR's four ACA filings became effective just 13 months before Panhandle's corresponding filings in the proceeding below. The other two ANR ACA filings became effective 24 and 36 months before Panhandle's filing. Petitioner apparently did not intervene in any of ANR's ACA proceedings, and thus its actual notice of these ANR annual charge filings cannot be demonstrated here. But actual notice was not critical here as petitioner could not have avoided these charges, regardless of which pipeline's storage services it utilized: As explained in Appendix I to this Brief, infra, these charges are imposed by the Commission on all pipelines at a uniform "per mcf" rate on all throughput.

Finally, it is noteworthy that all of Panhandle's tariff sheets, which pass through ANR's rate adjustments, were accepted for filing subject to refund based on the outcome of ANR's rate proceedings. Thus, if ANR's rates are ultimately found to be excessive, Panhandle must pass through any refund it receives that represents overpayments by petitioner.

CONCLUSION

For the foregoing reasons, the orders of the Commission should be affirmed.

Respectfully submitted,

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January 29, 1992

APPENDIX I

The background of each ANR rate adjustment, which Panhandle has sought to pass through in this proceeding, can be fairly summarized as follows:

1. ANR's 1986 Rate Case

On September 30, 1986, ANR filed for a general rate increase (Docket No. RP86-169-000) under Section 4 of the Natural Gas Act. IGC sought and was granted leave to intervene in this proceeding. See ANR Pipeline Company, 37 FERC ¶ 61,080, at p. 61,207. The Commission accepted these rates for filing, suspended them, and allowed them to go into effect on November 1, 1986, subject to refund. In the ensuing proceeding to determine the lawfulness of these rates, an Administrative Law Judge (ALJ) issued an initial decision in November 1987 which recommended a substantial decrease in ANR's rates. 41 FERC ¶ 63,017.

While the case was on appeal to the Commission, ANR on August 16, 1989 filed a settlement offer to resolve all of the issues in this case. By order dated October 6, 1989, the Commission accepted this settlement offer with modifications. 49 FERC ¶ 61,022. For ANR services performed between July 1, 1988 and November 1, 1989 (the date on which new ANR rates took effect pursuant to a subsequent rate case discussed below), the settlement established a rate that was lower than the one that had become effective on November 1, 1986. Refunds were established for overcharges.

Even though new ANR rates became effective November 1, 1986 and lasted until they were adjusted effective July 1, 1988, these rates affected only other ANR rate schedules, and did not alter the preexisting rates to Panhandle under X-66. Moreover, when ANR's rates underwent adjustment effective July 1, 1998, Panhandle's pass-through of this adjustment had the dual effect of slightly lowering rates to petitioner under Panhandle Rate Schedules TS-2 and TS-3, while increasing the rate only under Schedule TS-6. 1/

2. ANR's 1989 Rate Case

In May 1989, ANR filed (Docket No. RP89-161-000) for an additional rate change under section 4 of the NGA. IGC intervened in this proceeding as well. See ANR Pipeline Company, 47 FERC ¶ 61,304 at p. 62,094. ANR requested that its new rates be made effective as of June 1, 1989. By order dated May 31, 1989, the Commission accepted the rates for filing, but suspended them for five months. Thus, the new rates became effective November 1, 1989, subject to refund. Because of an August 3, 1990 Commission order directing ANR to make specific adjustments to the proposed rates, and ANR on September 4, 1990 made a compliance filing further adjusting its rates, effective November 1, 1989 and May 1, 1990, respectively.

1/ In October 1990, ANR made a compliance filing in its 1986 rate case that implemented a cost reallocation affecting service under ANR Rate Schedule X-66. This caused an increase in rates under the X-66 schedule that became effective on November 1, 1990, i.e., just eighteen days before Panhandle tariff sheets were filed to pass through these costs.

3. ANR's Take-Or-Pay Surcharges And Adjustments

a. On December 14, 1988, ANR filed tariff sheets (Docket No. RP89-45-000) to establish procedures to recover take-or-pay charges pursuant Commission Order No. 500, which was then still in effect. IGC intervened in this proceeding. See ANR Pipeline Company, 46 FERC ¶ 61,022, at p. 61,125. On March 31, 1989, ANR filed tariff sheets in another case (Docket No. RP89-127-000) to recover approximately $160.1 million in take-or-pay costs from its customers, including Panhandle. IGC intervened in this proceeding as well. See ANR Pipeline Company, 47 FERC ¶ 61,146 at p. 61,439.

On June 9, 1989, ANR filed tariff sheets in yet another case (Docket No. RP89-193-000) seeking to recover an additional $86.8 million in take-or-pay costs from customers. IGC also intervened here. See ANR Pipeline Company, 48 FERC ¶ 61,013 at p. 61,093. By order issued September 29, 1989, the Commission accepted revised tariff sheets in the above dockets, suspended them, and allowed them to become effective May 1, 1989 and July 10, 1989, respectively, subject to refund. See ANR Pipeline Company, 48 FERC ¶ 61,403.

b. On October 25, 1989, ANR filed tariff sheets (Docket No. RP90-18-000) seeking to recover $21.9 million in additional take-or-pay costs from its customers. IGC intervened here as well. See ANR Pipeline Company, 49 FERC ¶ 61,229 at p. 61,814. By order issued November 24, 1989, the Commission accepted these

sheets for filing and suspended them, allowing them to become effective on November 25, 1989, subject to refund. Id.

c. On November 27, 1989, ANR again filed tariff sheets (Docket No. RP90-46-000) to recover an additional $24.8 million of take-or-pay settlement costs. IGC intervened in this proceeding as well. See ANR Pipeline Company, 49 FERC ¶ 61,418 at p. 62,494. The Commission accepted these sheets for filing and suspended them. As a result, they became effective on December 27, 1989, subject to refund. Id.

d. On December 29, 1989, ANR filed tariff sheets (Docket No. TM90-3-48-000) proposing to adjust its take-or-pay charges in the four (take-or-pay) dockets discussed above to reconcile its projections of estimated take-or-pay costs with actual payment data. IGC intervened in this proceeding as well. See ANR Pipeline Company, 50 FERC ¶ 61,102 at p. 61,334. By order issued January 31, 1990, the Commission accepted these sheets for filing, suspended them, which allowed them to become effective February 1, 1990, subject to refund. Id.

e. Finally, on May 14, 1990, ANR filed revised tariff sheets in subdocket 012 of Docket No. RP89-161 to reflect adjustments in ANR's rates because of changes in ANR's gas measurement methodology. These adjustments affected take-or-pay surcharges that ANR had already filed. As noted above, IGC had already intervened in Docket No. RP89-161 (the 1989 ANR general rate case). By letter order dated June 1, 1990, the Director of the Commission's Office of Pipeline and Producer Regulation

accepted these sheets for filing, effective May 1, 1990, subject to the outcome of, inter alia, Docket No. 89-161.

4. ANR's Annual Charge Adjustments

Pursuant to Order No. 472 [FERC Statutes & Regulations § 30,746], 2/ the Commission has afforded natural gas pipelines the option of passing along annual charges to their customers through an annual charge adjustment (ACA) cost-tracking provision in their tariffs, instead of recovering these charges in general rate proceedings. On September 1, 1987, ANR filed tariff sheets in Docket No. RP87-134-000 containing ACA charge provisions, proposing to pass along those annual charges to its customers, including Panhandle. By order issued November 19, 1987, the Commission accepted the tariff sheets for filing, effective October 1, 1987. 3/ Since that time, ANR annually has made

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2/ Annual Charges Under the Omnibus Reconciliation Act of 1986, 52 Fed. Reg. 21,263 (1987), III FERC Statutes & Regulations ¶ 30,746, clarified, 52 Fed. Reg. 23,650 (1987), III FERC Statutes & Regulations ¶ 30,750 (Order No. 472-A), reh'g granted in part and denied in part, 52 Fed. Reg. 36,013 (1987), III FERC Statutes & Regulations ¶ 30,767 (Order No. 472-B), reh'g granted in part, 53 Fed. Reg. 1748 (1988), 42 FERC ¶ 61,013 (Order No. 472-C).

In these orders, the Commission promulgated regulations, required by the Omnibus Budget Reconciliation Act of 1986, establishing annual charges pursuant to which interstate natural gas pipelines would annually reimburse the Commission for any gas regulatory program costs which the Commission had not already recouped through filing fees. These charges apply uniformly to all pipelines based on the same unit charge applicable to all throughput.

3/ ANR Pipeline Company, 41 FERC ¶ 61,194 (1987). For the 12-month period commencing October 1, 1987, the Commission established the ACA unit charge to be $0.0021 mcf, adjusted for heating and pressure base. See 40 FERC ¶ 62,393 (1987).

three other tariff filings to revise its rate schedules to reflect the inclusion of annual charges. These filings were approved and allowed to become effective October 1, 1988, 4/ October 1, 1989, 5/ and October 1, 1990. 6/ It does not appear that IGC intervened in any of the four ANR ACA filings.

4/ ANR Pipeline Company, Order of the Director Accepting Annual Charge Adjustments, 44 FERC ¶ 62,341 (Sept. 28, 1988). The ACA unit charge was established by the Commission to be $0.0018 per mcf, effective October 1, 1988.

5/ ANR Pipeline Company, 48 FERC ¶ 62,236 (Sept. 28, 1989). The ACA unit charge was established by the Commission to be $0.0017 per mcf, effective October 1, 1989.

6/ See Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, Docket No. RM87-3-000, 52 FERC ¶ 61,337 (Sept. 1990). Because this order authorized ANR to file revised tariff sheets reflecting a minor increase over its October 1, 1990 surcharge, an increased ACA became effective on November 1, 1990. Under this increase, the ACA rate effective November 1, 1990 was established by the Commission to be $0.0022 per mcf.