DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 154, 260, and 284

[Docket Nos. RM18–11–001, RP18–415–001; Order No. 849–A]

Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate; American Forest & Paper Association

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule; order denying rehearing.

SUMMARY: The Federal Energy Commission (Commission) denies rehearing and reaffirms its determinations in Order No. 849. Order No. 849 adopted procedures for determining which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of the income tax reductions provided by the Tax Cuts and Jobs Act and the Commission's revised policy and precedent concerning tax allowances to address the double recovery issue identified by *United Airlines, Inc.* v. *FERC*. These procedures also allowed interstate natural gas pipelines to voluntarily reduce their rates.

DATES: The order denying rehearing was approved by the Commission on April 18, 2019.

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I. Introduction

1. On July 18, 2018, the Commission issued a final rule [1] (Order No. 849) adopting procedures for determining which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of the income tax reductions provided by the Tax Cuts and Jobs Act [2] and the Commission's Revised Policy Statement [3] and precedent [4] concerning tax allowances to address the double recovery issue identified by *United Airlines, Inc.* v. *FERC*.[5] These procedures also allow interstate natural gas pipelines to voluntarily reduce their rates.

2. As discussed below, we deny the requests for rehearing and reaffirm the Commission's determinations in Order No. 849.

A. Background

3. Order No. 849 established a requirement, pursuant to sections 10 and 14(a) of the Natural Gas Act (NGA),[6] that all interstate natural gas companies with cost-based stated rates that filed a 2017 FERC Form No. 2 or 2–A must file the FERC Form No. 501–G informational filing for the purpose of evaluating the impact of the Tax Cuts and Jobs Act and the *United Airlines* Issuances on interstate natural gas pipelines' revenue requirements. In addition to the FERC Form No. 501–G filing requirement, the Commission provided four options for each interstate natural gas pipeline to make a filing to address the changes to the pipeline's recovery of tax costs or explain why no action is needed: (1) A

[1] *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 83 FR 36672, 164 FERC ¶ 61,031 (2018).

[2] An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Public Law 115–97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act).

[3] *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018) (Revised Policy Statement), *order on reh'g*, 164 FERC ¶ 61,030 (2018) (Revised Policy Statement Rehearing).

[4] *SFPP, L.P.*, Opinion No. 511–C, 162 FERC ¶ 61,228, at P 9 (2018).

[5] 827 F.3d 122 (D.C. Cir. 2016) (*United Airlines*). For purposes of this order, the Revised Policy Statement, *United Airlines*, and Opinion No. 511–C will collectively be referred to as ''*United Airlines* Issuances.''

[6] 15 U.S.C. 717i(a), 717m(a) (2012).

limited NGA section 4 [7] rate reduction filing (Option 1), (2) a commitment to file a general section 4 rate case or prepackaged settlement in the near future (Option 2), (3) an explanation why no rate change is needed (Option 3), and (4) no action (Option 4). These procedures were intended to encourage natural gas pipelines to voluntarily reduce their rates to the extent the tax changes result in their over-recovering their cost of service, while also providing the Commission and stakeholders information necessary to take targeted actions under NGA section 5 [8] where necessary to achieve just and reasonable rates.

4. In Order No. 849, the Commission identified 129 interstate natural gas pipelines with cost-based rates that were required to file the FERC Form No. 501–G. As of the date of this order, the Commission has received 129 interstate natural gas pipeline filings. One pipeline still has an extension of time and eight have been granted a waiver of filing the FERC Form No. 501–G. Of the remaining 120 pipelines, nine pipelines filed limited NGA section 4 rate reduction filings under Option 1,[9] 22 pipelines filed general NGA section 4 cases or prepackaged settlements revising their rates under Option 2, 84 pipelines filed statements as to why no change in their rates is necessary under Option 3, and five pipelines filed the FERC Form No. 501–G without taking any other action under Option 4. Additionally, the Commission has initiated six NGA section 5 rate investigations.

B. Requests for Rehearing

5. The following entities filed timely requests for rehearing of Order No. 849: Process Gas Consumers Group and American Forest and Paper Association (Process Gas); Enable Mississippi River Transmission, LLC and Enable Gas Transmission, LLC (together, Enable); and the Kinder Morgan Entities,[10] Spectra Energy Partners, LP, and Enable (collectively, Pipeline Group). We deny rehearing, as discussed below.

II. Discussion

A. Legal Authority

1. Final Rule

6. As stated above, the final rule established a requirement, pursuant to sections 10 and 14(a) of the NGA, that all interstate natural gas companies, with cost-based stated rates, that filed a 2017 FERC Form No. 2 or 2–A must file the FERC Form No. 501–G informational filing for the purpose of evaluating the impact of the Tax Cuts and Jobs Act and the *United Airlines* Issuances on interstate natural gas pipelines' revenue requirements.[11] Using the data in the pipelines' 2017 FERC Form Nos. 2 and 2–A, these studies estimate (1) the percentage reduction in the pipeline's cost of service resulting from the Tax Cuts and Jobs Act and the Revised Policy Statement, and (2) the pipeline's current Returns on Equity (ROE) before and after the reduction in corporate income taxes and the elimination of income tax allowances for master limited partnership (MLP) pipelines. Recognizing that the 2017 calendar year data reported in the pipeline's FERC Form No. 2 or 2–A may not be fully representative of the pipeline's current situation when it files the FERC Form No. 501–G, the Commission provided pipelines the opportunity to file an Addendum to the FERC Form No. 501–G.[12] The Commission emphasized the informational nature of the FERC Form No. 501–G filing and explained that ''the [f]inal [r]ule contains no requirement that an interstate pipeline make any form of rate filing.'' [13] Regarding the Addendum to the FERC Form No. 501–G, the Commission stated that the filing of such an Addendum is ''purely voluntary.'' [14]

7. The final rule also permitted pipelines to use the indicated cost of service reduction calculated in the FERC Form No. 501–G as the basis for the limited NGA section 4 rate reduction filings, which the final rule allowed pipelines to make to reduce their maximum rates to reflect the reduced corporate income tax rates provided by the Tax Cuts and Jobs Act or the elimination of MLP tax allowances by the Revised Policy Statement. However, the final rule also clarified that a pipeline could base the rate reduction on the reduction calculated in its Addendum.[15]

8. The final rule found that NGA sections 10 and 14(a) provided the Commission authority to require pipelines to file the FERC Form No. 501–G. The Commission stated that it routinely initiates NGA section 5 investigations ''based upon our review of publicly available information on file with the Commission'' [16] and that the primary purpose of the FERC Form No. 501–G is to ''provide information relevant to determining whether the Commission should exercise its discretion to initiate an investigation under NGA section 5.'' [17] The Commission rejected the argument that the court's decision in *Consumers Energy* v. *FERC* reversing a Commission order requiring Hinshaw pipelines to file a petition for rate change prohibited the Commission from requiring pipelines to file the FERC Form No. 501–G. The Commission found that, to the contrary, *Consumers Energy* v. *FERC* condoned information collection as long as the Commission acts '' 'with clarity and precision' so as to ensure that any directive for the pipeline to make 'informational filings' is just that, and not an NGA section 4 filing to 'justify its current rate.' '' [18] The Commission also found in the final rule that providing pipelines with the option to submit an Addendum, which may require the pipeline to exercise some degree of judgment, does not transform the proceeding into an NGA section 4 rate filing or improperly shift to the pipeline the burden of justifying its existing rates in violation of NGA section 5.[19] The Commission explained that the D.C. Circuit rejected a similar contention in *INGAA* v. *FERC* and found that the Commission ''has authority . . . under [NGA section] 10 and [NGA section] 14 to require pipelines to submit needed information for making its [NGA section] 5 decisions.'' [20]

2. Request for Rehearing

9. Pipeline Group argues that the Commission exceeded its statutory

[7] 15 U.S.C. 717c.

[8] 15 U.S.C. 717d.

[9] Tuscarora Gas Transmission Company (Tuscarora) and Northern Border Pipeline Company (Northern Border) filed under Option 1 and Option 2. Here we have chosen to categorize Tuscarora's and Northern Border's filings under Option 2.

[10] For purposes of this pleading, the Kinder Morgan Entities are Natural Gas Pipeline Company of America LLC; Tennessee Gas Pipeline Company, L.L.C.; Southern Natural Gas Company, L.L.C.; Colorado Interstate Gas Company, L.L.C.; Wyoming Interstate Company, L.L.C.; El Paso Natural Gas Company, L.L.C.; Mojave Pipeline Company, L.L.C.; Bear Creek Storage Company, L.L.C.; Cheyenne Plains Gas Pipeline Company, L.L.C.; Elba Express Company, L.L.C.; Kinder Morgan Louisiana Pipeline LLC; Southern LNG Company, L.L.C.; TransColorado Gas Transmission Company LLC.

[11] Order No. 849, 164 FERC ¶ 61,031 at P 30.

[12] *Id.* PP 73–74.

[13] *Id.* PP 69, 72.

[14] *Id.* P 73.

[15] *Id.* P 204.

[16] *Id.* P 69 (citing *Natural Gas Pipeline Co. of America LLC,* 158 FERC ¶ 61,044, at P 1 (2017); *Wyoming Interstate Co., L.L.C.,* 158 FERC ¶ 61,040, at P 1 (2017); *Tuscarora Gas Transmission Co.,* 154 FERC ¶ 61,030, at P 1, *reh'g denied,* 154 FERC ¶ 61,273 (2016)).

[17] *Id.* PP 69–70.

[18] *Id.* P 70 (citing *Consumers Energy Co.* v. *FERC,* 226 F.3d 777, 777 (6th Cir. 2000) (*Consumers Energy* v. *FERC*)).

[19] *Id.* P 74.

[20] *Id.* PP 74–75 (citing *Interstate Nat. Gas Ass'n of Am.* v. *FERC,* 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA* v. *FERC*)).

authority under NGA sections 10 and 14 and disregarded the requirements of NGA sections 4 and 5 by requiring pipelines to complete and file the FERC Form No. 501–G.[21] Pipeline Group argues that the rate assumptions pipelines are required to make in the FERC Form No. 501–G are not merely informational and are in fact rate determinations that produce a distorted view as to whether the pipelines' rates remain just and reasonable and generate an indicated rate reduction, which the Commission later referred to as an ''indicated cost of service reduction'' in the final rule. Pipeline Group argues that the indicated cost of service reduction generated by the FERC Form No. 501–G is an implied rate and that only a pipeline is empowered to propose such a change in its rates, under its own terms, pursuant to NGA section 4.[22] Pipeline Group argues that the Commission may only propose such a reduction in a pipeline's cost of service and resulting rates pursuant to NGA section 5. Pipeline Group also argues that the Commission is shifting the burden of proof by requiring pipelines to file a form that compels a statement of an indicated rate reduction that ''can be used as evidence to the exact same extent that any other Commission form can be used as evidence.'' [23] Pipeline Group contends that the courts have been vigilant in maintaining the boundary between NGA sections 4 and 5 [24] and that, to comply with the NGA, the Commission should abandon or substantially amend the FERC Form No. 501–G requirement. Pipeline Group also points out that the Commission already collects information through FERC Form Nos. 2 [25] and 3–Q,[26] which Pipeline Group argues is evidence that the FERC Form No. 501–G is not merely an information collection requirement. Additionally, Pipeline Group argues that the option of providing an addendum to the FERC Form No. 501–G forces a pipeline to defend an existing just and reasonable rate, which is a step reserved to pipelines in an NGA section 4 or 5 proceeding.

10. Pipeline Group argues that the Commission's comparison of the final rule to Order No. 637's requirements that pipelines provide information concerning the operational feasibility of segmentation is misplaced.[27] Pipeline Group contends that the Order No. 637 informational requirement concerned pipeline operational matters, not rate matters. Pipeline Group argues that the *INGAA* v. *FERC* [28] court agreed that the Commission has authority under NGA sections 10 and 14 to require a pipeline to submit needed information for making its NGA section 5 decisions but that this agreement was limited to the specific issues of Order No. 637. Pipeline Group also argues that the comparison of the FERC Form No. 501–G to reporting requirements of Hinshaw pipelines is inaccurate.[29] Pipeline Group contends that, because the FERC Form No. 501–G runs data through a formula that produces an indicated cost of service reduction among other things, FERC Form No. 501–G is akin to the Commission's required petition for rate approval for Hinshaw pipelines that was invalidated the Sixth Circuit in *Consumers Energy* v. *FERC*.[30]

3. Commission Determination

11. We disagree with Pipeline Group's characterization of the FERC Form No. 501–G. We find that the requirement to file the FERC Form No. 501–G is a permissible collection of information pursuant to NGA sections 10 and 14(a), rather than an impermissible requirement that pipelines file a rate pursuant to NGA section 4, as argued by Pipeline Group.

12. As the Commission stated in the final rule, the FERC Form No. 501–G serves two purposes. The first purpose is to provide information relevant to determining whether the Commission should exercise its discretion to initiate an investigation under NGA section 5 as to whether the subject interstate natural gas pipeline may be collecting unjust and unreasonable rates in light of the recent reduction in the corporate income tax rate and change in the Commission's income tax allowance policies. The second purpose is to support any limited NGA section 4 filings pipelines may choose to make to reduce their maximum rates to reflect the Tax Cuts and Jobs Act or the *United Airlines* Issuances. The Commission's authority to require information for both these purposes is provided in NGA sections 10(a) and 14(a).[31]

13. With regard to the first purpose, the D.C. Circuit expressly held in *INGAA* v. *FERC* that ''[t]he Commission has authority under [section] 5 of the NGA to order hearings to determine whether a given pipeline is in compliance with FERC's rules, . . . and *under [NGA section] 10 and [section] 14 to require pipelines to submit needed information for making its [section] 5 decisions*.'' [32] In *INGAA* v. *FERC,* the court affirmed the Commission's exercise of this authority to direct each pipeline to file *pro forma* tariff sheets showing how it intended to comply with a regulation requiring pipelines to permit segmentation [33] or to explain why its system's configuration justified not acting under NGA section 5 to require full segmentation rights. In affirming this requirement, the court stated, ''As to the Commission's determination to extract information from pipelines relevant to the practical issues, we see no violation of the NGA.'' [34]

14. The FERC Form No. 501–G requires pipelines to calculate their ''Total Estimated ROE (excluding fuel)'' before and after the reduction in corporate income taxes and the elimination of income tax allowances for MLP pipelines.[35] The final rule

[21] Pipeline Group Request for Rehearing at 4–10.

[22] *Id.* at 3 (citing *Consumers Energy* v. *FERC,* 226 F.3d 777; *Pub. Serv. Comm'n of New York* v. *FERC,* 866 F.2d 487 (D.C. Cir. 1989) (*New York PSC*)).

[23] *Id.* (citing Order No. 849, 164 FERC ¶ 61,031 at P 78).

[24] *Id.* at 5–6 (citing *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.,* 350 U.S. 332, 343 (1956) (explaining that the Commission's authority under NGA section 5(a) is ''to set aside and modify any rate or contract which it determines, after a hearing, to be 'unjust and unreasonable, unduly discriminatory, or preferential''' and that ''[t]his is neither a 'rate-making' nor a 'rate-changing' procedure.''); *Western Resources* v. *FERC,* 9 F.3d 1568, 1578 (D.C. Cir. 1993) (''This court has consistently disallowed attempts to blur the line between §§ 4 and 5.''); *Sea Robin Pipeline Co.* v. *FERC,* 795 F.2d 182, 183 (D.C. Cir. 1986) (''The Commission is not free to blend, or pick and choose at will between, its section 4 and 5 authority.'')).

[25] Annual report for Major natural gas companies. 18 CFR 206.1 (2018).

[26] Quarterly financial report of electric utilities, licensees, and natural gas companies. 18 CFR 206.300.

[27] Pipeline Group Request for Rehearing at 8–9. *See Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,301–4 (cross-referenced at 90 FERC ¶ 61,109), *order on reh'g,* Order No. 637–A, FERC Stats. & Regs. ¶ 31,099, at 31,590–96 (cross-referenced at 91 FERC ¶ 61,169), *order denying reh'g,* Order No. 637–B, 92 FERC ¶ 61,062 (2000).

[28] Pipeline Group Request for Rehearing at 8 (citing *INGAA* v. *FERC,* 285 F.3d at 38–39).

[29] *Id.* at 9–10.

[30] *Id.* (citing *Consumers Energy* v. *FERC,* 226 F.3d at 781 (rejecting a requirement that a Hinshaw pipeline file periodic rate petitions)).

[31] 15 U.S.C. 717i(a) (''Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this act.''); 15 U.S.C. 717m(a) (''The Commission may permit any person to file with it a statement in writing . . . as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation.''). *See also Tuscarora Gas Transmission Co.,* 154 FERC ¶ 61,273, at PP 4–14 (2016) (requiring a pipeline to submit a more detailed cost and revenue study).

[32] *INGAA* v. *FERC,* 285 F.3d at 38–39 (emphasis supplied).

[33] 18 CFR 284.7(d) (2018).

[34] *INGAA* v. *FERC,* 285 F.3d at 38.

[35] FERC Form No. 501–G, page 3, line 26.

found that information concerning the pipeline's ROE was relevant to the issue of whether the Commission should exercise its discretion to initiate an investigation of the pipeline's rate pursuant to NGA section 5, and therefore the court's decision in *INGAA* v. *FERC* supported the Commission's authority to collect this information.

15. Pipeline Group suggests that the court's holding in *INGAA* v. *FERC* was limited to providing information on operational issues of the type at issue in that case, rather than rate issues. We disagree. NGA section 10 expressly provides that the Commission may require pipelines to report information relevant to rates including ''among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves, cost of facilities, cost of maintenance and operation of facilities for the [. . .] transportation [. . .] of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, uses, and sale of natural gas.'' This is exactly the type of cost and revenue information the FERC Form No. 501–G collects in order to calculate the pipeline's total estimated ROE for purposes of deciding whether to initiate a NGA section 5 investigation.

16. The FERC Form No. 501–G also calculates an ''Indicated Cost of Service Reduction'' [36] for use in conjunction with the limited NGA section 4 rate reduction filings that pipelines can elect to file under Option 1 of the final rule. Pipeline Group contends that the requirement to calculate an Indicated Cost of Service Reduction effectively requires the pipeline to make a NGA section 4 rate filing. This contention is wrong. Although Pipeline Group is correct that the form includes equations that calculate certain values, including the indicated cost of service reduction, the inclusion of these equations and calculated values does not transform the informational filing into a NGA section 4 rate filing. The FERC Form No. 501–G is limited to requesting cost and revenue information as permitted by NGA sections 10 and 14(a). It does not require pipelines to file any change in their existing rate schedules as is contemplated by NGA section 4. It is true that the final rule gives pipelines the option to submit a separate limited NGA section 4 filing reducing their maximum rates based on the indicated cost of service reduction calculated in the FERC Form No. 501–G. However, that is simply one option among the four options the final rule provides pipelines, including the option to take no action at all other than filing the FERC Form No. 501–G. There is no requirement that pipelines make any such limited NGA section 4 rate reduction filing, and if a pipeline does make such a filing it may base the rate reduction on data in its Addendum rather than the indicated cost of service reduction calculated in the FERC Form No. 501–G.[37] In fact, only 11 of the 129 pipelines subject to the requirement to file a FERC Form No. 501–G have thus far chosen the option of filing a limited NGA section 4 rate reduction pursuant to § 154.404 adopted pursuant to the final rule,[38] thereby demonstrating the voluntary nature of this option. This rulemaking proceeding is thus unlike *New York PSC,*[39] relied on by Pipeline Group, in which the Commission ordered a pipeline to file an actual NGA section 4 rate case every three years, with revised rate schedules setting forth proposed rates for each customer class.

17. Additionally, the Commission's decision to allow pipelines to include an addendum to their FERC Form No. 501–G does not transform the proceeding into an NGA section 4 proceeding. The Commission understood that the standardized FERC Form No. 501–G may not provide a complete cost and revenue profile for each pipeline and provided an opportunity for pipelines to voluntarily submit additional information to the Commission. The Commission did not determine in the final rule that the information provided in the FERC Form No. 501–G, with or without an addendum, would constitute a rate filing.

18. In both *Consumers Energy* v. *FERC* and *INGAA* v. *FERC,* the courts considered the Commission's intent when deciding whether an information collection requirement constituted an impermissible requirement for a pipeline to justify its existing rates under NGA section 4, *i.e.,* was the Commission's intent (1) only to collect information for use in satisfying its burdens under NGA section 5 or (2) instead to require the pipeline to modify its rates under NGA section 4. Thus, in *Consumers Energy* v. *FERC,* reversing a Commission information collection requirement, the court stated, ''If all FERC had really wanted to do was require Consumers to make periodic 'informational filings,' then it is difficult to understand why, for example, FERC's initial order provides that . . . Consumers shall file '*a petition for rate approval to justify its current rate* or to establish a new maximum rate.' '' [40] The court also pointed to the fact that the Commission did not use the term ''informational filings'' nor any obvious synonym to describe the petition in either of its orders.[41] By contrast, in *INGAA* v. *FERC,* the court affirmed an information collection requirement, finding that ''the orders contain some express language supporting the position of the Commission's counsel at oral argument that FERC will indeed shoulder the burden under [section] 5 of the NGA to show the requisite operational feasibility,'' [42] and the court cited, among other things, the Commission's statement in Order No. 637–B that the Commission ''will be acting under section 5 to implement changes.'' [43]

19. Consistent with the Commission orders at issue in *INGAA* v. *FERC,* and contrary to the orders at issue in *Consumers Energy* v. *FERC,* the final rule consistently treats the FERC Form No. 501–G as simply an informational filing, and the final rule recognizes that the Commission must proceed under NGA section 5 in order to require any pipeline to reduce its rates to reflect the income tax reduction in the Tax Cuts and Jobs Act or the elimination of the MLP tax allowance in the Revised Policy Statement. For example, the final rule states, ''The primary purpose of the One-time Report . . . is to provide information relevant to determining whether the Commission should exercise its discretion to initiate an investigation under NGA section 5 as to whether the subject interstate natural gas pipeline may be collecting unjust and unreasonable rates in light of the recent reduction in the corporate income tax rate and change in the Commission's income tax allowance policies.'' [44] The final rule also

[36] FERC Form No. 501–G, page 1, line 34.

[37] Order No. 849, 164 FERC ¶ 61,031 at P 204.

[38] East Tennessee Natural Gas, LLC in Docket No. RP19–64–000; Millennium Pipeline Co., LLC in Docket No. RP19–66–000; North Baja Pipeline, LLC in Docket No. RP19–72–000; Vector Pipeline L.P. in Docket No. RP19–61–000; Central Kentucky Transmission Co. in Docket No. RP19–156–000; Gulf Shore Energy Partners, LP in Docket No. RP19–252–000; Southeast Supply Header, LLC in Docket No. RP19–267–000; Great Lakes Gas Transmission Limited Partnership in Docket No. RP19–409–000; Nautilus Pipeline Co., L.L.C. in Docket No. RP19–401–000; Northern Border Pipeline Company in Docket No. RP19–414–000; Tuscarora Gas Transmission Co. in Docket No. RP19–419–000.

[39] 866 F.2d at 489.

[40] *Consumers Energy* v. *FERC,* 226 F.3d at 781 (emphasis in court decision).

[41] *See id.*

[42] *INGAA* v. *FERC,* 285 F.3d at 38.

[43] *Id.* (quoting Order No. 637–B, 92 FERC at 61,165).

[44] Order No. 849, 164 FERC ¶ 61,031 at P 69. *See also id.* P 104 (''[A]ny rates determined in an NGA section 5 investigation, including ROE, will be based on the record developed in any hearing

expressly states that ''[i]f we decide based on the information in the One-time Report to initiate a section 5 investigation, we will, as in the Order No. 637 compliance filings addressed in *INGAA,* 'shoulder the burden under [section] 5 of the NGA.' '' [45] Moreover, unlike the Commission orders addressed in *Consumers Energy* v. *FERC,* the final rule consistently described the FERC Form No. 501–G as an ''informational filing.'' [46]

20. Pipeline Group points out that, on remand of the court's decision in *Consumers Energy* v. *FERC,* the Commission established a policy of requiring Hinshaw Pipelines to make periodic informational filings in the form specified by § 154.313 of the Commission's regulations for minor rate changes, instead of requiring them to file a petition for rate change.[47] Pipeline Group asserts that, although NGA sections 10 and 14(a) may permit the Commission to require pipelines to file the information contained in § 154.313, the FERC Form No. 501–G is different from § 154.313. Pipeline Group asserts that the FERC Form No. 501–G does not simply require pipelines to file the data listed in § 154.313, but instead it runs the data through a formula that produces an indicated cost of service reduction, among other things. Therefore, Pipeline Group argues, the FERC Form No. 501–G is akin to the impermissible requirement to file a petition for rate change invalidated by *Consumers Energy* v. *FERC,* ''because it produces an output, requiring the pipeline to justify whether its rates remain just and unreasonable.'' [48]

21. We disagree. First, Pipeline Group's attempt to distinguish the FERC Form No. 501–G from § 154.313 is factually incorrect. For example, § 154.313(b) requires the pipeline to file the Statements I–1 through I–4 and Statement J required by § 154.312. Statement I–1 through I–4 require the pipeline to functionalize, classify, and allocate its cost of service and provide the formulae used in the allocation of the cost of service. Schedule J requires the pipeline to compare total revenue by rate schedule to the allocated cost of service, and Schedule J–2 requires the pipeline to show the derivation of each rate component of each rate schedule. Thus, § 154.313, similar to the FERC Form No. 501–G, requires the pipeline to run data through formulas that produce ''an output.'' Moreover, in the case of § 154.313, the ''output'' is not simply an overall indicated reduction in cost of service, but specific rates for each rate schedule. Thus, § 154.313 requires the pipeline to provide substantially more detailed information concerning its costs, revenues, and rates than the five-page FERC Form No. 501–G, which does not require any allocation of costs among rate schedules or derivation of rates for each service.

22. In any event, as discussed above, the key question in determining whether the FERC Form No. 501–G is a permissible information collection requirement is whether the Commission intended only to collect information for use in satisfying its burdens under NGA section 5 or whether the FERC Form No. 501–G actually requires the pipeline to modify its rates. As with our requirement for Hinshaw pipelines to file a cost and revenue study consistent with § 154.313, our intent in requiring the FERC Form No. 501–G is only to collect information for use in satisfying our burdens under NGA section 5. Aside from the express language in Order No. 849 summarized above stating this intent, the Commission has in fact used the FERC Form No. 501–G in precisely the manner it said it would—to determine whether to exercise its discretion to initiate an NGA section 5 rate investigation of each pipeline.

23. A common outcome following the filing of the FERC Form No. 501–G has been a Commission order explaining that the Commission has determined not to exercise its discretion to initiate a NGA section 5 rate investigation and the closure of the docket without further Commission action.[49] In the cases in which the Commission has initiated an NGA section 5 investigation and established a hearing, it has done so based upon the FERC Form No. 501–G, comments to the form, and publicly available information on file with the Commission,[50] and has expressly recognized that the pipeline does not have an NGA section 4 burden to justify its existing rates.[51] Moreover, the Commission has required the pipeline to submit a cost and revenue study based on the latest 12-month period available, and authorized use of an abbreviated six-month adjustment period following the 12-month base period used in the cost and revenue study.[52] Thus, any rate change that may be required in the NGA section 5 proceeding is likely to be based on cost and revenue data from 2018 and early 2019, rather than the 2017 Form Nos. 2 and 2–A data reflected in the FERC Form No. 501–G or the indicated cost of service reduction calculated based on that data.

24. In summary, contrary to Pipeline Group's arguments, requiring the informational FERC Form No. 501–G filing is squarely within the Commission's authority and it has not served as a rate filing. Pipeline Group suggests that the Commission may only propose a reduction in a pipeline's cost of service and resulting rates pursuant to NGA section 5, and that is in fact what has occurred following the final rule. The FERC Form No. 501–G is not an NGA section 4 filing and the pipeline is not required to show that its rates are just and reasonable. The pipeline need only provide accurate information in its FERC Form No. 501–G filing, as required by NGA section 10(a).[53] Pipeline Group is also incorrect in its assertion that, because the Commission already collects information through FERC Form Nos. 2 and 3–Q, the FERC Form No. 501–G is somehow more than an information collection requirement. The FERC Form No. 501–G collects information that is not required in FERC Form Nos. 2 and 3–Q, specifically the effect of the recent reduction in the corporate income tax rate and change in the Commission's income tax allowance policies on a pipeline's cost of service. Pursuant to NGA sections 10(a) and 14(a), the Commission is permitted to

established by the Commission, and in such a hearing the Commission will have the burden of persuasion under NGA section 5 on all issues, including ROE.'').

[45] *Id.* P 76.

[46] *See, e.g., id.* PP 2, 21, 30, 59, 103, and 111.

[47] *See Consumers Energy Co.,* 94 FERC ¶ 61,287 (2001).

[48] Pipeline Group Request for Rehearing at 10.

[49] *See, e.g., ETC Tiger Pipeline, LLC,* 166 FERC ¶ 61,028 (2019); *American Midstream (AlaTenn), LLC,* 166 FERC ¶ 61,118 (2019); *Cheniere Creole Trail Pipeline, L.P.,* 166 FERC ¶ 61,198 (2019); *Dominion Energy Transmission, Inc.,* 166 FERC ¶ 61,178 (2019); *Enable Gas Transmission, LLC,* 166 FERC ¶ 61,176 (2019); *High Point Gas Transmission, LLC,* 166 FERC ¶ 61,153 (2019); *Kern River Gas Transmission Co.,* 166 FERC ¶ 61,154 (2019); *Southern Star Central Gas Pipeline, Inc.,* 166 FERC ¶ 61,155 (2019); *Trunkline Gas Co., LLC,* 166 FERC ¶ 61,215 (2019).

[50] *See East Tennessee Natural Gas, LLC,* 165 FERC ¶ 61,198 (2018); *Bear Creek,* 166 FERC ¶ 61,034; *Northern Natural Gas Co.,* 166 FERC ¶ 61,033 (2019); *Panhandle Eastern Pipe Line Co., LP,* 166 FERC ¶ 61,032 (2019); *Southwest Gas Storage Co.,* 166 FERC ¶ 61,117; *Stagecoach Pipeline & Storage Co. LLC,* 166 FERC ¶ 61,199 (2019).

[51] *East Tennessee,* 165 FERC ¶ 61,198 at P 27; *Bear Creek,* 166 FERC ¶ 61,034 at P 15; *Northern Natural Gas Co.,* 166 FERC ¶ 61,033 at P 24; *Panhandle Eastern,* 166 FERC ¶ 61,032 at P 16; *Southwest Gas Storage,* 166 FERC ¶ 61,117 at P 11; *Stagecoach,* 166 FERC ¶ 61,199 at P 13.

[52] *East Tennessee,* 165 FERC ¶ 61,198 at PP 27–28; *Bear Creek,* 166 FERC ¶ 61,034 at PP 15–16; *Northern Natural Gas Co.,* 166 FERC ¶ 61,033 at PP 24–25; *Panhandle Eastern,* 166 FERC ¶ 61,032 at PP 16–17; *Southwest Gas Storage,* 166 FERC ¶ 61,117 at PP 11–12; *Stagecoach,* 166 FERC ¶ 61,199 at PP 13–14.

[53] 15 U.S.C. 717i(a) (''Such reports shall be made under oath unless the Commission otherwise specifies.'').

collect information to assist in the proper administration of the NGA, and the Commission is not limited to the information required in FERC Form Nos. 2 and 3–Q.

B. ROE and Capital Structure Used in FERC Form No. 501–G

1. Final Rule

25. In the final rule, the Commission required that each pipeline's FERC Form No. 501–G be completed using an indicative ROE of 10.55 percent, consistent with the ROE determined in *El Paso,*[54] the last rate case where that issue was fully litigated.[55] The final rule also revised the originally proposed FERC Form No. 501–G to ask respondents a series of factual questions about their actual capital structure in order to elicit the information necessary to apply the Commission's capital structure policy set forth in *Transcontinental Gas Pipe Line Corp.*[56] Under that policy, a pipeline may use its own capital structure, if its debt is issued in its own name and publicly traded, the debt is rated by a rating agency, and the equity portion of the capital structure is not excessive.[57] If the pipeline's own debt does not satisfy these standards, it can use its parent's capital structure, if the parent satisfies the same standards. Otherwise, the pipeline must use a hypothetical capital structure. Based on the FERC Form No. 501–G's questions as to whether the pipeline or its parent satisfies these standards, the form automatically uses either the reported capital structure of the pipeline or its parent or a hypothetical capital structure.[58] The final rule also held that, if a hypothetical capital structure was used, it would be 57 percent equity and 43 percent debt, consistent with the average capital structures of the proxy companies used to determine the 10.55 percent ROE in *El Paso.*[59]

2. Request for Rehearing

26. Pipeline Group argues that the inputs to the FERC Form No. 501–G, such as the Indicative ROE and the Hypothetical Capital Structure, are not supported by the record or justified, and are arbitrary and capricious.[60] Pipeline Group contends that the Commission did not sufficiently respond to its comments to the Notice of Proposed Rulemaking that the criteria pipelines are directed to utilize in the FERC Form No. 501–G (such as the Indicative ROE of 10.55 percent and the specified Hypothetical Capital Structure) are misplaced, unlawful, and should be deleted from the form and left for each individual pipeline to determine. Pipeline Group argues that the Commission made no showing that the proxy group in the *El Paso* proceeding used to calculate the 10.55 percent indicative ROE in the FERC Form No. 501–G would produce the same ROE six years later. Pipeline Group argues that the Commission did not make a showing pursuant to NGA section 5 that such an ROE is appropriate for a different pipeline serving different markets.

27. Pipeline Group also argues that the Commission departed from prior practice in its review of pipeline Form Nos. 2 and 2–A reports for purposes of deciding whether to initiate NGA section 5 rate investigations when it required pipelines to propose a capital structure and make a legal determination as to whether that proposed structure and debt cost meets the requirements of Opinion No. 414. Pipeline Group asserts that the Commission has not previously imposed such a requirement on pipelines.[61]

28. Additionally, Pipeline Group argues that pipelines' current rates may be established pursuant to settlements of NGA section 4 or 5 proceedings on a ''black box'' basis without specifying individual components used to calculate rates including ROE and capital structure. Pipeline Group contends that, by requiring certain ROE and capital structure inputs, the Commission is expanding the review of pipeline's existing rates from reductions in light of the Tax Cuts and Jobs Act to the overall costs and revenues of the pipeline akin to a traditional NGA section 5 proceeding.

3. Commission Determination

29. The Commission addressed many of the same arguments in the final rule that Pipeline Group raises on rehearing. As explained in the final rule, a cost and revenue study requires an indicative ROE and, consistent with Commission practice in other contexts, the final rule used the last litigated ROE determined by Commission. For example, the Commission has used the last litigated ROE in developing initial rates for existing facilities being acquired by a new pipeline.[62] Here, the last litigated ROE was in *El Paso* wherein the Commission adopted an ROE of 10.55 percent.

30. The Commission recognized that the 10.55 percent ROE determined in *El Paso* was based on financial data from 2011. However, no commenter provided any updated ROE analysis using current financial data that the Commission could use in the FERC Form No. 501–G. The Commission considered pipeline commenters' suggestion that they be permitted to use their own ROEs or ROEs derived in a rate proceeding or established pursuant to approved settlements, but the Commission determined that the last rate cases of many pipelines occurred as long ago as, or even before, the *El Paso* rate case. The Commission also determined that many settlements are ''black box'' settlements that do not have an ROE and, therefore, using the *El Paso* 10.55 percent ROE as the indicative ROE in all pipelines' FERC Form No. 501–G is preferable to pipelines' using a variety of ROEs, which in almost all cases were not fully litigated.[63]

31. The Commission also rejects Pipeline Group's contention that the Commission failed to support the hypothetical capital structure mandated by the FERC Form No. 501–G where the capital structure of the pipeline or its parent is deemed unacceptable for ratemaking purposes. Pipeline Group argues that the Commission has not previously in its NGA section 5 rate investigations required a pipeline to propose a capital structure and make a

[54] *El Paso Natural Gas Co.,* Opinion No. 528, 145 FERC ¶ 61,040, at P 642 (2013), *reh'g denied,* Opinion No. 528–A, 154 FERC ¶ 61,120 (2016) (*El Paso*).

[55] Order No. 849, 164 FERC ¶ 61,031 at PP 103–106.

[56] *Transcontinental Gas Pipe Line Corp.,* Opinion No. 414, 80 FERC ¶ 61,157 (1997), *reh'g,* Opinion No. 414–A, 84 FERC ¶ 61,084 (1998) (*Transco*).

[57] The FERC Form No. 501–G treats the equity portion of a pipeline's capital structure as excessive if it is above 65 percent.

[58] Order No. 849, 164 FERC ¶ 61,031 at PP 111, 114.

[59] *Id.* P 115.

[60] Pipeline Group Request for Rehearing at 10–12.

[61] *Id.* at 11 (citing *Natural Gas Pipeline Co. of America LLC,* 129 FERC ¶ 61,158 (2009); *Northern Natural Gas Co.,* 129 FERC ¶ 61,159 (2009); *Great Lakes Gas Transmission Limited Partnership,* 129 FERC ¶ 61,160 (2009); *Kinder Morgan Interstate Gas Transmission LLC,* 133 FERC ¶ 61,157 (2010); *Ozark Gas Transmission, L.L.C.,* 133 FERC ¶ 61,158 (2010); *Bear Creek Storage Co.,* 137 FERC ¶ 61,134 (2011); *MIGC LLC,* 137 FERC ¶ 61,135 (2011); *ANR Storage Co.,* 137 FERC ¶ 61,136 (2011); *Wyoming Interstate Co.,* 141 FERC ¶ 61,117 (2012); *Viking Gas Transmission Co.,* 141 FERC ¶ 61,118 (2012); *Tuscarora Gas Transmission Co.,* 154 FERC ¶ 61,030; *Empire Pipeline, Inc.,* 154 FERC ¶ 61,029 (2016); *Iroquois Gas Transmission System, L.P.,* 154 FERC ¶ 61,028 (2016); *Columbia Gulf Transmission, LLC,* 154 FERC ¶ 61,027 (2016); *Wyoming Interstate Co.,* 158 FERC ¶ 61,040; *Natural Gas Pipeline Co. of America LLC,* 158 FERC ¶ 61,044; *Dominion Energy Overthrust Pipeline, LLC,* 162 FERC ¶ 61,218 (2018); *Midwestern Gas Transmission Co.,* 162 FERC ¶ 61,219 (2018)).

[62] *See, e.g., Southern Natural Gas Co. L.L.C.,* 139 FERC ¶ 61,237, at P 154 (2012); *High Point Gas Transmission, LLC,* 139 FERC ¶ 61,237 (2012); *Northern Natural Gas Co.,* 119 FERC ¶ 61,035, at P 37 (2007).

[63] Order No. 849, 164 FERC ¶ 61,031 at PP 103–106.

legal determination as to whether that capital structure satisfies the *Transco* requirements. As the final rule explained, the Commission modified the FERC Form No. 501–G so that it would not require a pipeline to make a legal determination as to whether its capital structure is consistent with Commission policy or propose a capital structure. Rather, the FERC Form No. 501–G requires the pipeline to answer three questions concerning facts relevant to determining what capital structure should be used to determine the pipeline's rates.[64] Then, based on the pipeline's answers to these questions, the FERC Form No. 501–G automatically chooses a capital structure consistent with the pipeline's answers to the questions. Thus, the pipeline is not asked to make any legal determination concerning what capital structure is consistent with Commission policy.

32. The use of an indicative ROE and stated capital structure in FERC Form No. 501–G is necessary to estimate a pipeline's return on equity and achieve the Commission's goal of developing a form that serves two purposes: (1) To help determine whether to initiate NGA section 5 investigations of interstate natural gas pipelines' rates and (2) provide support for limited NGA section 4 filings pipelines may choose to make to reduce their rates to reflect the Tax Cuts and Jobs Act or the *United Airlines* Issuances. As stated in the final rule, for purposes of helping determine whether to initiate NGA section 5 investigations of interstate natural gas pipelines' rates, the FERC Form No. 501–G is only intended to produce a rough estimate of the pipeline's ROE before and after the Tax Cuts and Jobs Act or the *United Airlines* Issuances. Pipeline Group contends that the Commission has not met its NGA section 5 burden to show that a pipeline's existing ROE is unjust and unreasonable or that the *El Paso* 10.55 percent ROE or hypothetical capital structure would be just and reasonable for a different pipeline today. However, as explained in the final rule, the Commission is not using the FERC Form No. 501–G, including its indicative ROE and capital structure, to satisfy its burden under NGA section 5 to show that any pipeline's existing rates are unjust and unreasonable. Rather, the FERC Form No. 501–G is simply intended to provide a rough estimate of the pipeline's current return on equity for purposes of deciding whether the Commission should exercise its discretion to initiate a rate investigation pursuant to NGA section 5. The data in the FERC Form No. 501–G will not be used to actually establish rates in any NGA section 5 investigation that the Commission may initiate. If the Commission does initiate an investigation pursuant to NGA section 5, any rates determined in that proceeding, including the capital structure and ROE, will be based on the record developed in the hearing, and in such a hearing, the Commission will have the burden of persuasion under NGA section 5 on all issues, including ROE. Indeed, in our orders establishing NGA rate investigations based on the information in a pipeline's FERC Form No. 501–G, the Commission has stated that it makes no finding as to what would constitute a just and reasonable ROE for the company and, if the FERC Form No. 501–G required a hypothetical capital structure, the Commission has also stated that it makes no finding as to a just and reasonable capital structure. Those are among the issues set for hearing.[65]

33. Regarding the second purpose of the FERC Form No. 501–G (providing support for limited NGA section 4 filings pipelines may choose to make to reduce their rates), the Commission explained that a pipeline may submit an Addendum with its FERC Form No. 501–G setting forth an alternative ROE, along with full support for its proposed ROE, and use that ROE in calculating its proposed percentage rate reduction in its limited NGA section 4 rate filing. Similarly, pipelines are permitted to use a capital structure other than those used in its FERC Form No. 501–G in its limited NGA section 4 rate filing by submitting an Addendum to their FERC Form No. 501–G if they believe that the form inaccurately represents their financial situation. But, as previously stated, the limited NGA section 4 filing is voluntary and a pipeline is not required to submit additional information regarding its capital structure in an Addendum.

34. Finally, Pipeline Group contends that by requiring an indicative ROE and capital structure the Commission is expanding its review of pipeline rates from reductions in light of the Tax Cuts and Jobs Act to the overall costs and revenue of the pipeline—a review traditionally done in an NGA section 5 proceeding. The Commission is properly considering all the pipelines' cost and revenues in deciding whether to initiate NGA section 5 rate investigations. As explained in the final rule,[66] despite the reduction in the corporate income tax and the change in policy concerning MLP tax allowances, a rate reduction may not be justified for a significant number of pipelines, because the pipeline's existing rates may not fully recover its cost of service. The Commission must consider all the pipeline's costs and revenues to determine whether this is true. By the same token, the FERC Form No. 501–G may suggest that a pipeline is over-recovering its cost of service for reasons that go beyond the Tax Cuts and Jobs Act and the revised MLP tax allowance policy. It is consistent with our responsibilities under the NGA to investigate those possible cost over-recoveries as well.

C. Order No. 849 Rate Moratorium

1. Final Rule

35. In the final rule, the Commission granted in part commenters' request for a moratorium on NGA section 5 investigations in the event a pipeline chooses the limited NGA section 4 option. The Commission determined that it is ''reasonable to provide pipelines an incentive to make [] limited NGA section 4 rate reduction filings'' in the form of a three-year moratorium on NGA section 5 investigations, noting that such a filing is an ''efficient and expeditious method of passing along to ratepayers the benefit of the reduction in the corporate income tax rate or the elimination of the MLP income tax allowance, without the need for the costly and time-consuming litigation entailed in an NGA section 5 rate investigation.'' [67] Recognizing that a pipeline could make a limited NGA section 4 rate reduction filing and yet still have a significantly excessive ROE, the Commission outlined the following requirements to qualify for the three-year moratorium on NGA section 5 rate investigations: (1) The Commission accepts the pipeline's limited NGA section 4 filing and (2) the pipeline's Total Estimated ROE after the filing, as calculated on page 3, line 26, column (E) of its FERC Form No. 501–G, is 12 percent or less.[68]

2. Request for Rehearing

36. Pipeline Group argues that the 12 percent ROE test to qualify for the rate moratorium for limited NGA section 4

[64] The questions are: ''(1) Is the debt issued in the entity's name and traded? (2) Is the debt rated by a rating agency) (3) Is the equity ratio less than 65%?''

[65] *East Tennessee,* 165 FERC ¶ 61,198 at P 24 n 43; *Bear Creek,* 166 FERC ¶ 61,034 at P 14 n 22; *Northern Natural Gas Co.,* 166 FERC ¶ 61,033 at P 20 n 41; *Panhandle Eastern,* 166 FERC ¶ 61,032 at P 15 n 16; *Southwest Gas Storage,* 166 FERC ¶ 61,117 at P 10 n 14; *Stagecoach,* 166 FERC ¶ 61,199 at P 12 n 20.

[66] Order No. 849, 164 FERC ¶ 61,031 at P 222.

[67] *Id.* P 199.

[68] *Id.*

filings is not supported by the record or justified, and is arbitrary and capricious.[69] Pipeline Group states that it supports a rate moratorium for pipelines voluntarily participating in the limited NGA section 4 process but that establishing an arbitrary threshold to qualify for such moratorium limits any incentive that the Commission intended to provide pipelines and expands the terms of a limited NGA section 4 proceeding that the Commission intended to be limited. Pipeline Group argues the voluntary reduction alone should be sufficient to entitle the pipeline to a moratorium. Pipeline Group argues that the Commission did not provide the reasoned decision making required to justify the Commission's 12 percent threshold policy. Pipeline Group contends that the Commission has not attempted to tie the 12 percent ROE threshold to evidence in the record or to show that the threshold is representative of an appropriate ROE for pipelines across the country that operate in different markets and face differing risks. Pipeline Group claims that, over the last five years, the average ROE estimated by the Commission when instituting NGA section 5 proceedings was 18.6 percent and the lowest ROE estimated by the Commission was 15.7 percent. Pipeline Group argues that the Commission ''must supply a reasoned analysis indicating that prior policies standards are being deliberately changed, not casually ignored'' when it departs from an established policy, precedent, or standard.[70]

3. Commission Determination

37. We reject Pipeline Group's argument that the 12 percent ROE test to qualify for the three-year rate moratorium for limited NGA section 4 filings is not supported by the record or justified, and is arbitrary and capricious. The terms the Commission established for qualifying for the three-year moratorium on rate investigations are a reasonable exercise of the Commission's discretion in deciding whether to initiate an NGA section 5 investigation.[71] Pipeline Group is correct that the threshold to qualify for the moratorium limits the incentive provided by the moratorium, but only for pipelines that still may have a significantly excessive ROE even after choosing the limited NGA section 4 filing option. Based on comments and other record evidence, the Commission chose a threshold that would create an appropriate balance between incentivizing the limited NGA section 4 filing and preventing a pipeline that may have a significantly excessive ROE from shielding its rate from Commission scrutiny.

38. While Pipeline Group points out that the Commission has not initiated an NGA section 5 investigation against a pipeline with an estimated ROE below 15.7 percent in the last five years, our discretion to initiate such investigations is not restricted to pipelines with ROEs that exceed any particular level of ROE. In any event, Pipeline Group inappropriately conflates the Commission's past decisions concerning when to exercise its discretion to initiate an NGA section 5 investigation with the final rule's moratorium incentive to make the limited NGA section 4 filing. In establishing the 12 percent ROE threshold for qualifying for the moratorium, the Commission has not departed from an established policy as Pipeline Group claims. The final rule addressed a new situation not previously faced by the Commission: Whether and how to modify the stated rates of natural gas pipelines as a result of the substantial reduction in the corporate income tax by the Tax Cuts and Jobs Act and the elimination of MLP tax allowances by the *United Airlines* Issuances. Among other things, the Commission adopted a new rule permitting pipelines to reduce their rates to reflect these actions in limited NGA section 4 rate filings as an exception to the Commission's general policy prohibiting such limited NGA section rate reductions. In conjunction with this action, the Commission chose to agree to a three-year moratorium on rate investigations if the pipeline's ROE as calculated in the FERC Form No. 501–G was reduced to 12 percent or less. The Commission has not previously provided any such moratorium on NGA section 5 rate investigations. Thus, the Commission was adopting a new policy to address a new situation—there was no established policy from which to depart. Instead, the moratorium described in the final rule is an incentive created by the Commission to encourage pipelines to make a limited NGA section 4 filing, and the moratorium incentive is specific to that rulemaking.

D. Accumulated Deferred Income Taxes

1. Final Rule

39. As the Commission explained in the final rule, Accumulated Deferred Income Taxes (ADIT) balances are accumulated on the regulated books and records of interstate natural gas pipelines based on the requirements of the Commission's Uniform System of Accounts.[72] ADIT balances arise from differences between the method of computing taxable income for reporting to the Internal Revenue Service (IRS) and the method of computing income for regulatory accounting purposes. The Commission's regulatory accounting requirements then serve to inform the development of a natural gas pipeline's rates, including the depreciation and ADIT ratemaking components. The Commission stated that ADIT generally affects regulated natural gas pipelines' ratemaking either by decreasing rate base, in the case of an ADIT liability, or increasing rate base, in the case of an ADIT asset. As a result of the reduction in the federal corporate income tax rate, taxes that have been previously deferred and reflected in ADIT will be owed to the IRS based on the 21 percent tax rate, rather than the 35 percent tax rate used to recognize the ADIT initially. The difference between the already recognized ADIT based on a 35 percent tax rate and the recomputed deferred taxes, which will actually be owed to the IRS, at a 21 percent tax rate requires an adjustment to ADIT balances for the excess or deficiency.[73]

40. The Commission explained that the FERC Form No. 501–G would require pipelines to use calendar year 2017 ADIT balances as reported in their 2017 FERC Form Nos. 2 and 2–A in calculating rate base. The Commission stated that FERC Form No. 501–G would also require the pipelines to reduce their income tax allowance by an amount reflecting the first year's amortization of excess ADIT resulting from the reduced income tax rates under the Tax Cuts and Jobs Act. The Commission also set forth a policy concerning the treatment of ADIT when the tax allowances of pass-through pipelines (including MLP pipelines) are eliminated. The Commission modified FERC Form No. 501–G so that, if a pass-through entity states that it does not pay taxes, the form would not only eliminate its income tax allowance, but would also eliminate ADIT.[74] The Commission noted that the modification only applies to the FERC Form No. 501–G (and the

[69] Pipeline Group Request for Rehearing at 12–16.

[70] *Id.* at 16 (citing *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, at 852 (D.C. Cir. 1970); *West Deptford Energy, LLC* v. *FERC,* 766 F.3d 10, at 20 (D.C. Cir. 2014); *Williams Gas Processing-Gulf Coast Co., L.P.* v. *FERC,* 475 F.3d 319, at 322 (D.C. Cir. 2006)).

[71] *See General Motors Corp* v. *FERC,* 613 F.2d at 944 (''[A]n administrative agency's decision to conduct or not to conduct an investigation is committed to the agency's discretion'') (citations omitted).

[72] 18 CFR part 201 (2018).

[73] Order No. 849, 164 FERC ¶ 61,031 at PP 63–65.

[74] *Id.* PP 130–132.

optional limited NGA section 4 filings pursuant to § 154.404(a)) of the Commission's regulations, and that it does not establish a broader rule.[75]

2. Requests for Rehearing

41. Process Gas argues that the Commission erred by allowing the elimination of ADIT balances for pass-through pipelines without a reduction to the pipeline's rate base contrary to the Commission's normalization policy.[76] Process Gas contends that the Commission's normalization policy, as affirmed by the D.C. Circuit,[77] allows all ratepayers who take service from a utility throughout its depreciable life to receive the benefit of a tax deduction that the utility enjoys in the early years of operation. Process Gas states that, as a result of normalization, the pipeline's rates include a higher tax allowance in the early years than what the utility actually pays and a lower tax allowance in the later years than what it actually pays. Process Gas argues that the Commission's elimination of ADIT for pass-through pipelines that remove the allowance for income taxes from current rates without adjusting rate base violated the principle that normalization will not result in any permanent tax savings by the pipeline that are not reversed in subsequent periods. Process Gas also argues that, contrary to the D.C. Circuit's finding regarding Order No. 144,[78] the benefits of the deferred taxes will accrue to the utility's stockholders because they will retain the benefits that ADIT represents under normalization and will not be required to pass them on to future ratepayers through lower rates.

42. Process Gas also argues that the Commission incorrectly relied upon *Public Utilities Commission of State of California* v. *FERC*[79] for the proposition that continuing to deduct ADIT from rate base would constitute retroactive ratemaking.[80] Process Gas contends that an important aspect of the Court's reasoning that the Commission had no legal right to adjust rates to reflect ADIT in *CPUC* was the removal of transportation assets from the pass-through entity's rate base. Process Gas argues that *CPUC* is inapposite because the Commission only asserts that the pipeline's double recovery of tax costs associated with those assets has been removed, not the actual transportation assets. Process Gas also contends that the removal of the tax allowance from an MLP pipeline's cost of service is not a change from cost-based rate regulation to non-cost based rate regulation, as was the case in *CPUC*. Additionally, Process Gas argues that, unlike *CPUC,* the pipeline assets to which ADIT directly relates have not been removed from the pipelines' jurisdictional rates.

43. Process Gas also contends that the Commission's failure to apply ADIT as a credit retroactively increases the pipeline's returns in violation of the rule against retroactive ratemaking.[81] Process Gas argues that, while the rule against retroactive ratemaking prohibits the Commission from adjusting current rates to make up for a utility's over-collection or under-collection in prior periods, the rule does not apply when the parties are on notice that the rates may be changed.[82] Process Gas argues that, in allowing normalization, the Commission placed parties on notice that any tax savings in the early years of a pipeline's useful life would be offset by reductions to rate base in subsequent years. Process Gas also argues that parties were on notice that the account balances for the timing differences are expected to offset costs reflected in rate charges to customers in future periods and that the balance of the account is not to be transferred to earnings. Process Gas notes that ADIT is booked under the Commission's accounting regulations in Account Nos. 281 and 282, which both indicate that ''[t]he utility is restricted in its use of this account to the purposes set forth above. It shall not transfer the balance in this account or any portion thereof to retained earnings or make any use thereof except as provided in the text of this account without the prior approval of the Commission.'' [83] Process Gas also argues that the Commission has previously found that disregarding prior treatment of specific expenses over the life of the facilities is unjust and unreasonable [84] and that there are no retroactive ratemaking concerns with requiring a pipeline to continue to account for prepaid costs on a going forward basis.[85]

44. Process Gas also argues that the Commission misconstrued prior precedent regarding whether deferred taxes can be analogized to a loan.[86] Process Gas contends that the Commission held in Order No. 849 that deferred taxes are not loans from customers and, thus, customers have no right to future rate reductions relying on its determinations in Order No. 144. Process Gas argues that, in fact, the Commission held in Order No. 144 that the loan analogy was illustrative and rejected the proposition that today's customers pay tomorrow's customer's tax costs under normalization. Process Gas argues that the Commission made clear that each generation of customers pays its own costs, and that the flow-through method gives current customers tax benefits that belong to future customers. Therefore, Process Gas argues, the Commission's determination in Order No. 849 takes away the future tax benefits from future period customers and gives them to the pipeline, which is inconsistent with Order No. 144 and its finding that deferred taxes represent a benefit owed to future customers.

3. Commission Determination

45. We reject Process Gas' argument that Order No. 849 erred by requiring that pass-through entities that eliminate the income tax allowance also eliminate ADIT on the FERC Form No. 501–G. Rather, the treatment of ADIT in Order No. 849 is consistent with both Commission policy [87] and relevant court precedent. While the Commission can make changes to rates on a prospective basis, if an income tax allowance is removed from cost of service, continuing to deduct ADIT from rate

[75] *Id.* P 136.

[76] Process Gas Request for Rehearing at 4–9.

[77] *Id.* at 4 (citing *Public Systems* v. *FERC,* 709 F.2d 73 (D.C. Cir. 1983) (*Public Systems*)).

[78] *Id.* at 7 (citing *Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes,* Order No. 144, FERC Stats. & Regs. ¶ 30,254, at PP 86–89 (1981), *order on reh'g,* Order No. 144–A, FERC Stats. & Regs. ¶ 30,340 (1982); *Public Systems,* 709 F.2d at 83 (''Fourth, the Commission found that the rate of return earned on common equity is the same under either flow-through or normalization. Deferred taxes do not accrue to the benefit of utility stockholders.'')).

[79] 894 F.2d 1372 (D.C. Cir. 1990) (*CPUC*).

[80] Process Gas Request for Rehearing at 7–9.

[81] *Id.* at 10–13.

[82] *Id.* at 10 (citing *Towns of Concord* v. *FERC,* 955 F.2d 67, 71 n.2 (D.C. Cir. 1992); *Columbia Gas Transmission Corp.* v. *FERC,* 895 F.2d 791, 797 (D.C. Cir. 1990)).

[83] *Id.* at 11 (citing USOA Accounts 281.D and 282.D, 18 CFR part 101 (2018)).

[84] *Id.* (citing *Williams Natural Gas Co.,* 60 FERC ¶ 61,140, at 61,506 (1992) (''[t]o disregard depreciation expenses already paid by transportation customers with respect to service on particular gathering facilities would mean that those transportation customers would have to pay more over the life of the facilities than they would have to pay if the reserve for depreciation appropriately reflected the depreciation expenses already paid.'')).

[85] *Id.* at 11–12 (citing *BP Pipelines Alaska Inc.,* 119 FERC ¶ 63,007, at P 168 (2007), *aff'd,* Opinion No. 502, 123 FERC ¶ 61,287, at P 163 (2008)).

[86] *Id.* at 13–14.

[87] *See* Revised Policy Statement Rehearing, 164 FERC ¶ 61,030 (providing non-binding guidance that where an MLP or other pass-through pipeline eliminates its income tax allowance from its cost of service pursuant to the Commission's post-*United Airlines* policy, the Commission anticipates that ADIT will similarly be removed from cost of service); *SFPP, L.P.,* Opinion No. 511–D, 166 FERC ¶ 61,142 (2019) (holding that an MLP oil pipeline appropriately eliminated ADIT where its income tax allowance was eliminated from cost of service).

base or crediting ratepayers the excess ADIT balance would constitute impermissible retroactive ratemaking.[88] We conclude that this precedent compels the approach adopted by the Commission in Order No. 849.

46. Contrary to Process Gas' arguments, the elimination of ADIT does not violate the Commission's normalization policy.[89] As the Commission explained in Order No. 849, the Commission's normalization policies only apply to entities with an income tax allowance component in their regulated cost-of-service rates.[90] In contrast, where a pipeline's income tax allowance is eliminated on the FERC Form No. 501–G under the Commission's post-*United Airlines* policy, there is no rationale for requiring the pipeline to record current or deferred income taxes. The Commission in Order No. 849 explained that the purpose of normalization is matching the pipeline's cost-of-service expenses in rates with the tax effects of those same cost-of-service expenses.[91] If there is no income tax allowance in Commission rates, there is no basis for the matching function of normalization and no liability for the deferred taxes reflected in ADIT.

47. We also reject Process Gas' argument that Order No. 849 deprives future customers of the benefit of deferred taxes that they are owed. Process Gas concedes that under normalization ''each generation of customers pays its own [income tax] costs.'' [92] As such, future customers have no equitable right to the sums accumulated in ADIT that were paid by prior customers for prior period service.[93] ADIT is not money owed to past or future ratepayers, but rather deferred taxes that are ultimately owed to the government.[94] Moreover, because future customers are not paying tax costs in rates where a pass-through pipeline's income tax allowance has been eliminated, such customers are not owed the associated ''benefits'' resulting from deferred taxes under the Commission's normalization policy.

48. Similarly, contrary to Process Gas' arguments, we reaffirm that it comports with retroactive ratemaking principles to require pipelines that eliminate the income tax allowance on FERC Form No. 501–G to also eliminate ADIT on the FERC Form No. 501–G.[95] As Process Gas recognizes, normalization merely requires customers to pay their properly allocated share of the pipeline's tax expenses for the period of their service.[96]

49. As the Commission explained in Order No. 849, requiring pipelines to return ADIT amounts collected in prior rates for this prior period service would constitute impermissible retroactive ratemaking.[97] Although Process Gas attempts to distinguish the *CPUC* decision discussed in Order No. 849, in both *CPUC* and the scenario addressed by Order No. 849 where a pipeline's income tax is eliminated pursuant to the Commission's post-*United Airlines* policy, the income tax allowance is removed from cost of service and, accordingly, the basis for tax normalization in a pipeline's cost-of-service rates is no longer applicable.[98] Therefore, notwithstanding the various arguments raised by Process Gas, we continue to find that the D.C. Circuit's holding in *CPUC* is controlling here. As the D.C. Circuit stated, ADIT ''is composed entirely of rate revenue that [the pipeline] has already collected. Refund of such property, or its earnings, would effectively force [the pipeline] to return a portion of rates approved by FERC, and collected by [the pipeline].'' [99] The D.C. Circuit elaborated that, to the extent any basis for requiring the pipeline to credit ratepayers for earnings on previously accumulated ADIT sums rested on the view that the pipeline's prior cost-of-

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[88] *CPUC,* 894 F.2d 1371; *see also SFPP, L.P.,* Opinion No. 511–D, 166 FERC ¶ 61,142 at PP 93–95.

[89] Process Gas Request for Rehearing at 3–7.

[90] Order No. 849, 164 FERC ¶ 61,031 at P 132. Commission and IRS regulations regarding normalization (including ADIT) only apply to entities with an income tax allowance component in their regulated cost-of-service rates. *See* 18 CFR 154.305(a) (2018) (''An interstate pipeline must compute *the income tax component* of its cost-of-service by using tax normalization for all transactions''); 18 CFR 154.305(b)(1) (''Tax normalization means *computing the income tax component* as if transactions recognized in each period for ratemaking purposes are also recognized in the same amount and in the same period for income tax purposes''); 18 CFR 154.305(b)(4) (''*Income tax component* means that part of the cost-of-service that covers income tax expenses allowable by the Commission''); 26 U.S.C. 168(i)(9)(A) (''the taxpayer must, in computing its *tax expense for purposes of establishing its cost of service for rate-making purposes* . . . use a method of depreciation with respect to such property that is the same as, and a depreciation period for such property that is no shorter than, the method and period used to compute its depreciation expense for such purposes. . . . '') (emphasis added). *See also Algonquin Gas Transmission Co.,* 76 FERC ¶ 61,075, at 61,449 (1996); 18 CFR 154.305(c)(2) (''rate base reductions or additions'' for ADIT ''must be limited to deferred taxes related to rate base, construction, or other *costs and revenues affecting jurisdictional cost-of-service*'') (emphasis added); 18 CFR 154.305(d)(1) (requirements relating to excess or deficient ADIT balances apply where the discrepancy is ''a result of changes in tax rates'' or where ''the rate applicant has not provided deferred taxes in the same amount that would have accrued had tax normalization always been applied'').

[91] Order No. 849, 164 FERC ¶ 61,031 at P 132 (citing Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,522 (''The primary rationale for normalization is matching: the recognition in rates of the tax effects of expenses and revenues with the expenses and revenues themselves'')); *see also Public Systems,* 709 F.2d at 80 (The Commission's primary justification for its decision to adopt tax normalization was ''the matching principle: as a matter of fairness, customers who pay an expense should get the tax benefit that accompanies the expense . . . .'').

[92] Process Gas Request for Rehearing at 13.

[93] Judicial and Commission precedent establish that customers have no equitable interest or ownership claim in ADIT. *See Public Systems,* 709 F.2d at 85 (rejecting the notion ''that ratepayers have an ownership claim'' to the ADIT balance); *CPUC,* 894 F.2d at 1381 (''The Commission and this Court have both rejected'' ''the notion that under normalization accounting customers enjoy an equitable interest in a utility's deferred tax account''); Order No. 144, FERC Stats. & Regs. ¶ 30,254 at 31,539 (addressing the ''erroneous premise that a loan is being made by ratepayers to utilities'' through the normalization process and stating that ratepayers do not ''have an ownership claim or equitable entitlement to the 'loaned monies'''); *id.* at 31,539 n.75 (''This is not to say that customers do not pay rates that recover deferred taxes. They do. But paying deferred taxes in rates does not convey an ownership or creditor's right''); Opinion No. 511–D, 166 FERC ¶ 61,142 at P 92 (''ratepayers have no equitable interest or ownership claim in ADIT''); *id.* P 100 (''the Commission and D.C. Circuit have consistently held that shippers do not have an equitable interest in ADIT'').

[94] Opinion No. 511–D, 166 FERC ¶ 61,142 at P 100. The Commission has also explained that ADIT is not a true-up or tracker of money owed to shippers. *Lakehead Pipe Line Co. L.P.,* Opinion No. 397–A, 75 FERC ¶ 61,181, at 61,594 (1996). In any case, as explained elsewhere in this order, FERC Form No. 501–G is merely an informational filing. Although FERC Form No. 501–G includes certain assumptions based on Commission ratemaking policy in order to produce a rough estimate of the pipeline's ROE before and after the Tax Cuts and Jobs Act or the *United Airlines* Issuances for informational purposes, the data in the FERC Form No. 501–G will not be used to actually establish rates in any NGA section 5 investigation that the Commission may initiate.

[95] Order No. 849, 164 FERC ¶ 61,031 at PP 133–134; *see also SFPP, L.P.,* Opinion No. 511–D, 166 FERC ¶ 61,142 at PP 93–95.

[96] Process Gas Request for Rehearing at 13 (stating that under the Commission's income tax allowance policies, ''each generation pays its own costs'').

[97] Order No. 849, 164 FERC ¶ 61,031 at P 133 (citing *CPUC,* 894 F.2d 1371).

[98] In *CPUC* the pipeline switched to statutory, proscribed rate ceilings from cost-of-service rates. *CPUC,* 894 F.2d at 1379 (the switch ''wiped out the premise of tax normalization'' and hence the matching principle ''ceased to operate as an explicit guide''); *id.* at 1382 (''Tax normalization sought to 'match' the timing of a customer's contribution toward a cost with enjoyment of any offsetting tax benefit. . . . Enactment of the NGPA, however, mooted the whole question to which normalization was an answer.''). This contrasts to situations in which the income tax allowance and the required normalization remains in cost of service. *Public Systems,* 709 F.2d at 80 (the Commission's primary justification for its decision to adopt tax normalization was ''the matching principle: as a matter of fairness, customers who pay an expense should get the tax benefit that accompanies the expense. . . . To do otherwise would subsidize present customers at the expense of future ones.'').

[99] *CPUC,* 894 F.2d at 1383; *see also id.* at 1382 (''[t]his kind of post hoc tinkering would undermine the predictability which the [retroactive ratemaking] doctrine seeks to protect.'').

service rates were ''in retrospect too high'' or ''unjust and unreasonable,'' then the credit violated the rule against retroactive ratemaking.[100] In sum, we find that Order No. 849 correctly applied the D.C. Circuit's reasoning in *CPUC* in determining that requiring a pass-through pipeline whose income tax allowance has been eliminated to apply ADIT as a credit to rate base on the Form No. 501–G would be inconsistent with the rule against retroactive ratemaking.[101]

50. We also reject Process Gas' argument that applying ADIT as a credit to rate base on the FERC Form No. 501–G does not constitute retroactive ratemaking because pipelines were on notice based on the Commission's normalization regulations. As explained above, the Commission's normalization policy does not apply in the context of a complete elimination of a pipeline's income tax allowance from cost of service.[102]

51. We also dismiss Process Gas' argument that this case is analogous to *BP Pipelines Alaska,* where the Commission found that requiring a pipeline to account for prepaid costs for Dismantlement Removal and Restoration (DR&R) on a going-forward basis did not constitute retroactive ratemaking.[103] In that case, the DR&R continued to be recoverable in rates, but had merely been over-collected. In contrast, the adjustment to the FERC Form No. 501–G to remove ADIT reflects a situation where a pass-through entity's income tax allowance has been removed from cost of service, and there is thus no justification for tax normalization in going-forward rates. In these circumstances, the Commission has ''no legal right to reduce [the pipeline's going forward] rates . . . below levels found to be just and reasonable'' as this would constitute ''in substance a retroactive adjustment of prior rates based on normalization.'' [104]

52. Finally, to the extent Process Gas or any other entity objects to the treatment of ADIT for purposes of the FERC Form 501–G, as set forth in Order No. 849, we reiterate that the treatment of a pass-through entity's ADIT for purposes of the FERC Form No. 501–G does not establish a broader rule, nor does Order No. 849 itself preclude shippers and pipelines from advocating for a different treatment of ADIT in any future rate litigation.[105] Rather, as explained elsewhere in this order, the FERC Form No. 501–G serves a limited informational purpose to assist the Commission in determining whether to exercise its discretion to initiate NGA section 5 investigations of interstate natural gas pipelines' rates.[106] In Order No. 849, the Commission determined that the informational FERC Form No. 501–G is likely to be the most useful if it removes ADIT whenever the income tax allowance is eliminated.[107] However, if Process Gas or another entity seeks to take a different position in a litigated rate proceeding, Order No. 849 does not preclude them from doing so.

E. Tax Allowance for Pass-Through Entities

1. Final Rule

53. For purposes of FERC Form No. 501–G, if a pipeline states that it is not a taxpaying entity, the form will automatically enter a federal and state income tax of zero.[108] The Commission stated in the final rule that a natural gas company organized as a pass-through entity, all of whose income or losses are consolidated on the federal income tax return of its corporate parent, is considered to be subject to the federal corporate income tax, and is thus eligible for a tax allowance for purposes of the final rule.[109] The Commission reasoned that an income tax allowance is appropriate in the cost of service of a pass-through subsidiary of a corporation ''when such a subsidiary does not itself incur a tax liability but generates one that might appear on a consolidated return of the corporate group.'' [110]

2. Requests for Rehearing

54. Process Gas contends that the Commission erred by assuming that all subsidiaries of corporations that appear on the consolidated parent's tax return are generating actual income taxes for the corporation.[111] Process Gas also contends that the Commission eliminated the burden of proof for a pass-through entity claiming such a tax allowance. Process Gas argues that the determination in Order No. 849 that a natural gas company organized as a pass-through entity whose income or losses are consolidated on the federal income tax return of its corporate parent is considered to be subject to federal income taxes for the purpose of filing the limited NGA section 4 filing is not supported by the precedent cited by the Commission.[112] Process Gas argues that the *BP West Coast Products, LLC* precedent can be distinguished because the court appeared to require proof that a subsidiary actually generated a tax liability for the parent corporation to justify an allowance for income tax for a corporate subsidiary. Process Gas contends that the Commission may be awarding an income tax allowance based upon phantom taxes.

55. Enable argues that the Commission erred in determining that a pipeline with an MLP in its organizational structure that is owned in part indirectly by corporate unitholders should not receive an income tax allowance, yet a pass-through entity that is a wholly owned subsidiary of a corporation should be eligible for an income tax allowance.[113] Enable contends that the Commission failed to explain the purported distinction between the two pass-through structures and that the distinction is not supported by precedent. Enable argues that the Commission has inverted the logic of *BP West Coast Products, LLC,* and asserts that the case actually criticizes the Commission for limiting an income tax allowance to corporate unitholders (not just those consolidating on a federal return the entirety of income from an affiliate in which the corporation owed an interest). Enable also argues that the Commission ignored the fact that *United Airlines* did not validate a distinction between a pass-through entity wholly owned by corporate unitholders and an MLP owned in part by corporate unitholders for purposes of assessing income tax allowance eligibility.

[100] *Id.* at 1380, 1382.

[101] *See also* Opinion No. 511–D, 166 FERC ¶ 61,142 at PP 93–95, 101–105.

[102] *Id.* PP 97, 104–105. We are similarly unpersuaded by Process Gas' argument that removing ADIT from the FERC Form No. 501–G is itself retroactive ratemaking. Process Gas Request for Rehearing at 12. As explained above, ADIT consists of the tax costs collected by the pipeline from prior shippers' rates and paid for the prior shippers' service.

[103] Process Gas Request for Rehearing at 12 (citing *BP Pipelines Alaska Inc.,* 119 FERC ¶ 63,007 at P 168, *aff'd,* Opinion No. 502, 123 FERC ¶ 61,287 at P 163).

[104] *CPUC,* 894 F.2d at 1383–1384.

[105] Order No. 849, 164 FERC ¶ 61,031 at P 135.

[106] FERC Form No. 501–G's only other potential use was as part of a pipeline's discretionary limited NGA section 4 filings pursuant to § 154.404(a). However, Order No. 849 permitted these limited NGA section 4 filings to be based upon an Appendix to the FERC Form No. 501–G. Thus, had Order No. 849 not permitted the removal of ADIT on FERC Form No. 501–G itself, the pipeline could have nonetheless removed ADIT in the Appendix to the FERC Form No. 501–G. In such a scenario, the removal of ADIT would have been reflected in any discretionary limited NGA section 4 rate reduction filed by the pipeline.

[107] Order No. 849, 164 FERC ¶ 61,031 at P 135.

[108] *Id.* P 3.

[109] *Id.*

[110] *Id.* P 56 (citing *BP West Coast Products, LLC* v. *FERC,* 374 F.3d 1263, at 1289 (D.C. Cir. 2004) (*BP West Coast Products, LLC*)).

[111] Process Gas Request for Rehearing at 14–16.

[112] *Id.* at 14 (citing Order No. 849, 164 FERC ¶ 61,031 at P 57 (citing *BP West Coast Products, LLC,* 374 F.3d at 1289).

[113] Enable Request for Rehearing at 4–8.

3. Commission Determination

56. We deny both Process Gas' and Enable's rehearing requests. Commission policy supports the position adopted by Order No. 849.

57. Specifically, we reject Process Gas' argument that Order No. 849 incorrectly permitted the wholly owned subsidiary of a corporation to claim an income tax allowance on FERC Form No. 501–G.[114] Rather, the Commission's standalone income tax policies have long permitted a wholly owned pipeline subsidiary to recover the income tax costs of its corporate parent that arise from jurisdictional service.[115] Moreover, under the stand-alone methodology, it is not relevant that the income from the subsidiary allocated to the corporate parent may be offset by other deductions or losses of the parent or affiliates.[116] Rather, as the D.C. Circuit has explained, under the stand-alone methodology, ''pipeline ratepayers may be assessed with a tax expense when the consolidated company in fact pays *no* taxes.'' [117]

58. Enable's arguments are also unpersuasive. The Commission addressed similar arguments in its July 30, 2018 *Enable MRT* decision, which addressed Enable's own NGA section 4 rate proceeding where Enable argued that an income tax allowance should be permitted for the income tax costs of its corporate MLP unitholders.[118] In the *Enable MRT* decision, the Commission explained that *United Airlines'* double-recovery concern precludes an income tax allowance for the income tax costs of corporate MLP unitholders as well as other MLP unitholders. The *Enable MRT* decision emphasized the distinction between (a) a pipeline organized as a pass-through entity that is owned by an MLP that has corporate unitholders; and (b) a pipeline organized as a pass-through entity that is a wholly owned subsidiary of a corporation. The Commission explained that an MLP incurs no tax liability prior to making the distribution to its unitholders that is reflected in the DCF model's determination of the MLP's ROE.[119] Thus, the MLP's distribution includes funds that the corporate and individual unitholders may use to pay taxes on their share of the MLP's income.[120] In contrast, a corporation that wholly owns a pass-through pipeline pays the corporate income tax prior to the investor-level dividend reflected in the DCF model's calculation of the pipeline's ROE.[121] Although a double-recovery results from granting a pipeline an income tax allowance to reflect the tax liability of corporate or other MLP unitholders, no double-recovery results from granting an income tax allowance to the wholly owned subsidiary of a corporation.[122] Consistent with this logic, Order No. 849 permitted an income tax allowance for the wholly owned subsidiary of a corporation while denying an income tax allowance for the tax costs of an MLP's corporate unitholders.

59. In any case, in regard to both Enable's and Process Gas' concerns, we reiterate that the FERC Form No. 501–G serves a limited informational purpose involving the Commission's exercise of its discretion to initiate NGA section 5 investigations of interstate natural gas pipelines' rates [123] and the holdings of Order No. 849 do not establish a broader rule constraining pipelines or shippers from adopting contrary positions in other proceedings.[124]

[114] Order No. 849, 164 FERC ¶ 61,031 at P 57 (citing *BP West Coast Products, LLC,* 374 F.3d at 1289).

[115] Under the stand-alone policy, a regulated entity is permitted an income tax allowance notwithstanding the fact that it is the corporate parent that pays the income tax on behalf of the regulated entity. *City of Charlottesville* v. *FERC,* 774 F.2d 1205, 1207–1208 (D.C. Cir. 1985). *See also BP West Coast Products, LLC,* 374 F.3d at 1289 (explaining that an income tax allowance is appropriate in the cost of service of a pass-through subsidiary of a corporation ''when such a subsidiary does not itself incur a tax liability but generates one that might appear on a consolidated return of the corporate group'').

[116] *City of Charlottesville,* 774 F.2d at 1215.

[117] *Id.* (emphasis original).

[118] *Enable Mississippi River Transmission, LLC,* 164 FERC ¶ 61,075, at PP 29–40 (2018) (*Enable MRT*). Enable MRT was a wholly owned subsidiary of an MLP. Because 86 percent of the MLPs unitholders were corporations, Enable MRT claimed that it should receive an income tax allowance based upon the corporate income tax rate as applied to this 86 percent corporate ownership share.

[119] *Id.* P 35.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] As noted elsewhere in this order, the pipeline may also use FERC Form No. 501–G and an Appendix to FERC Form No. 501–G in any discretionary limited NGA section 4 rate reduction pursuant to Order No. 849. *See supra* note 106. However, regardless of the tax treatment of wholly owned corporate subsidiaries on the FERC Form No. 501–G, the pipeline in the Appendix could claim that as a subsidiary of a corporation it incurs a corporate income tax allowance. This Appendix could then serve as the basis for any rate adjustment pursuant to the limited NGA section 4 rate filings permitted by Order No. 849.

[124] *See* Order No. 849, 164 FERC ¶ 61,031 at P 135. The electronic version of FERC Form No. 501–G filed by a pipeline can easily be modified by any shipper to change the taxpaying status of the regulated entity and the shipper could attempt to use this as the basis of its own NGA section 5 complaint (as opposed to relying upon the Commission's discretionary unilateral action).

III. Document Availability

60. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page *www.ferc.gov* and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE, Room 2A, Washington, DC 20426.

61. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits in the docket number field.

62. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov*.

By the Commission. Commissioner McNamee is not participating.

Issued: April 18, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[Docket No. OAG 161; AG Order No. 4443–2019]

Updating the Description of Functions for the Executive Office for United States Attorneys

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the organizational regulations of the Department of Justice to make ministerial changes to the description of the organization and functions of the Executive Office for United States Attorneys (EOUSA).

DATES: Effective April 26, 2019.

FOR FURTHER INFORMATION CONTACT: Jay Macklin, General Counsel, Executive