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IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
INVESTIGATION INTO NAVITAS UTILITY CORPORATION'S NOTICE OF PROBABLE SHUT DOWN AND DISCONTINUANCE OF TENNESSEE SERVICE	))))	**Docket No. 19-00084**

CONSUMER ADVOCATE'S BRIEF IN SUPPORT OF POSITION

COMES NOW the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General ("Consumer Advocate"), pursuant to the Hearing Officer's September 18, 2019 instructions, and respectfully submits its *Brief in Support of Position* for consideration by the Tennessee Public Utility Commission ("TPUC" or the "Commission").

I. BACKGROUND

TPUC Docket No. 15-00042

On September 14, 2015, the Consumer Advocate, B&W Pipeline, LLC ("B&W"), and Navitas TN LG, LLC ("Navitas"), appeared at TPUC for a Hearing on the merits in Docket No. 15-00042, a general rate case proceeding initiated by B&W. Navitas is the only customer of B&W, but as Navitas is a local distribution company, B&W's rates are passed on to Navitas' 84 customers in Byrdstown, Tennessee. The major contested issue in Docket No. 15-00042 was whether B&W could recover, through rates, the full purchase price of the pipeline.[1]

During the Hearing, and for the first time in the proceeding, "testimony from the parties and responses to questions by the [TPUC] Staff indicated that a portion of the gas B&W delivers to Navitas is ultimately consumed in the State of Kentucky."[2] As a result, a question arose of

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[1] See Final Order Setting Rates, p. 10, TPUC Docket No. 15-00042 (March 10, 2016).
[2] *Id.* at 4-5. This purchase price also included 96 oil and natural gas wells.

whether B&W Pipeline qualifies for "Hinshaw" status.[3] The Parties filed post-hearing briefs on the issue of "Hinshaw" status, and while the Parties averred that B&W Pipeline did not qualify for such treatment, the Consumer Advocate and B&W agreed that TPUC could nonetheless "assert jurisdiction as to rates charged for the gas delivered and ultimately consumed in Tennessee pending FERC's consideration of [a] blanket certificate pursuant to 18 C.F.R. § 284.224."[4]

The Commission issued its *Final Order Setting Rates* ("*Final Order*") in that Docket on March 10, 2016. In the *Final Order*, TPUC determined the following:

> Therefore, the panel concludes that as B&W is not a Hinshaw pipeline, the Company must address its status with FERC, specifically by applying for an Order No. 63 certificate exemption pursuant to 18 C.F.R. § 284.224.22. A FERC Order 63 certificate would allow B&W to acquire Hinshaw-like status with FERC and thus authorize the [TPUC] to set rates for all of the gas delivered by B&W to Navitas, including for those volumes consumed by customers in Kentucky. **As part of the application for a blanket certificate, B&W shall utilize this Order and the rate established herein for FERC for review**.[5] (Emphasis added.)

TPUC also issued a directive for steps B&W needed to take, ordering the following:

> 9. A rate design consisting of a fixed monthly charge of $13,897 from Navitas TN NG, LLC resulting in revenues of $210,624. In addition, the [TPUC] set a volumetric charge of $0.30813 per Mcf from all customers.
>
> 10. B&W Pipeline, LLC shall provide a copy of this Order to the Federal Regulatory Commission in the Company's application for a blanket certificate pursuant to 18 C.F.R. § 284.224.[6]

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[3] "Hinshaw" status, when certain standards are met, allows local distribution pipeline companies served by interstates pipelines to operate without being subject to FERC jurisdiction. *See* 15 U.S.C. § 717(c).

[4] *Final Order Setting Rates*, p. 5, TPUC Docket No. 15-00042 (March 10, 2016). Under 18 C.F.R. § 284.224(b)(3), FERC's grant of a blanket certificate "will authorize the local distribution company to engage in the sale or transportation of natural gas that is subject to [FERC's] jurisdiction under the Natural Gas Act, **to the same extent that and in the same manner that intrastate pipelines are authorized to engage in such activities** by subparts C and D of this part, except as otherwise provided in paragraph (e)(2) of this section." (Emphasis added.)

[5] *Id.* at 6.

[6] *Id.* at 23.

On March 28, 2016, B&W filed a *Petition to Reconsider the Final Order Issued March 10, 2016.* In this request, B&W sought to have the Commission change its decision in three ways: 1) by assigning certain specific values to the pipeline; 2) by changing the projection for throughput; and 3) by allowing rates to be periodically adjusted based on actual pipeline usage. TPUC denied most of B&W's request for reconsideration but allowed B&W to file a brief for reconsideration on the narrow issue of whether the Company could recover acquisition costs related to the purchase of the pipeline. On August 4, 2016, TPUC issued its *Final Order Denying the Petition For Reconsideration*, and therefore the *Final Order* of March 10 became operative. B&W appealed TPUC's decision, but the Tennessee Court of Appeals upheld the Commission's decision on November 6, 2017.[7]

FERC Docket Nos. CP17-78-000 and PR17-54-00

Initially, B&W followed the *Final Order* when if filed the *Application of B&W Pipeline, Inc. for a Limited Jurisdiction Blanket Certificate of Public Convenience and Necessity Pursuant to 18 C.F.R. § 284.224* ("*Application*") on March 17, 2017. FERC granted B&W's *Application* on June 15, 2017, stating:

> [u]nder section 284.334 blanket certificate authority, the rates charged by a Hinshaw pipeline may be determined by: (1) electing rates based upon a state-approved transportation rate schedules for comparable service or the methodology used in designed city-gate rates for sales or transportation service; or (2) submitting proposed rates to the Commission for approval. **B&W's [sic] chose to make a rate election based upon the rates approved by the [TPUC]**.[8] (Emphasis added.)

On July 17, 2017, B&W filed its *Compliance Filing of B&W Pipeline, LLC* with FERC, and within that filing determined to seek new rates from FERC rather than the rates determined by

[7] See *B&W Pipeline, LLC v. Tennessee Regulatory Authority et al.*, No. M2016-02013-COA-R12-CV (Tenn. Ct. App. August 24, 2017).
[8] *Id.* at 3.

TPUC after the fully litigated Docket No. 15-00042. At $5.4235 per Mcf[9], these requested rates were substantially higher than those approved by TPUC and, most importantly, B&W requested to set rates based on B&W's original purchase price of all assets (including both the pipeline and 96 oil and gas wells unrelated to B&W's regulated activities), which was raised, litigated, and specifically rejected in TPUC Docket No. 15-00042.

On March 21, 2019, B&W filed a unilateral settlement agreement in FERC Docket No. PR17-54-00. Only after submitting this unilateral settlement agreement to FERC did B&W submit it in the TPUC Docket No. 15-00042 for "informational purposes". This unilateral settlement agreement, and the rates contained therein, was approved by FERC on May 17, 2019. Moreover, FERC ordered that its decision and new rates be backdated to an effective date of July 17, 2017. The FERC rate is $2.7172 per Mcf[10], over twice the TPUC-approved rate.[11]

TPUC Docket No. 19-00084

On September 11, 2019, Navitas filed its *Notice of Probable Shut Down and Discontinuance of Tennessee Service*. Navitas, citing the FERC *Order*, stated in its *Notice* that the 84 customers in Byrdstown, Tennessee, would be required to split a $13,897 fixed monthly charge, raising the cost of gas by approximately $45 per Mcf. TPUC intended this fixed monthly charge to be split among customers in Tennessee and across the border in Kentucky. Navitas further asserts that because this cost is untenable, it "must immediately advise its customers of this impending spike in cost and suggest the option of finding and securing alternate energy sources to natural gas whether by propane or conversion to all electric."

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[9] *Statement of Operating Conditions of B&W Pipeline, LLC*, p. 11, FERC Docket No. PR17-54-000 (July 17, 2017).
[10] *Letter Order Pursuant § 375.307*, Federal Energy Regulatory Commission Docket No. PR17-54-000 (May 17, 2017).
[11] This rate applies to interstate customers in Kentucky but not customers in Tennessee, who are under the sole jurisdiction of this Commission; however, the FERC *Order* disrupted, and now calls into question, the fixed monthly charge that Navitas was splitting between Kentucky and Tennessee customers.

On September 13, 2019, the Consumer Advocate filed a *Petition to Intervene* in this Docket along with an *Emergency Motion to Revise Fixed Monthly Charge in Tariff.* The Consumer Advocate also issued a letter to Navitas demanding that natural gas service continue to the Byrdstown customers until TPUC can determine the appropriate rate and requesting that customers not be advised of the discontinuance of service pending the resolution of this Docket. On September 17, 2019, the Parties met with the Hearing Officer for a status conference, at which time the Hearing Officer issued a briefing schedule and notified the Parties that this matter would be taken up by the Commission at the October 14, 2019 TPUC Conference.

II. COMMISSION'S ABILITY TO CHANGE RATES

Tenn. Code Ann. § 65-5-101(a) states as follows:

> The Tennessee public utility commission has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof . . . whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established.

Therefore, TPUC may fix just and reasonable rates whenever it determines an existing rate is unjust, unreasonable, or excessive. The Commission has "the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Tenn. Code Ann. § 65-5-110(a).

At the September 17, 2019 Status Conference, the Hearing Officer appointed to this case informed the Parties that this matter would be considered by the Commission on October 14, 2019, at the regularly scheduled TPUC Conference. She also established a briefing schedule that allows the Commission the opportunity to review and make an appropriate determination based on the Parties' positions.

Based on discussions prior to filing this *Brief*, the Parties all believe that the fixed monthly charge results in untenable rates, the fixed monthly charge can immediately be lifted, and just and reasonable rates can be determined by this Commission within this proceeding. The Consumer Advocate initially proposed two options, both eliminating the fixed monthly charge: 1) utilize the effective volumetric rate of $1.23248 per Mcf the Commission determined to be appropriate in Docket No. 15-00042; or 2) recalculate the Tennessee jurisdictional revenue requirement by utilizing the original TPUC revenue requirement, subtracting the revenues from the customers in Kentucky who pay the FERC rate, and assigning the residual difference to Tennessee customers.[12] On September 16, 2019, B&W filed its *Proposed Rate Adjustment of B&W Pipeline, LLC*, stating "the pipeline's intrastate rates, which are applicable to gas transported by B&W and consumed by customers located in Tennessee, should be reduced as soon as possible."[13] And on September 17, 2019, Navitas indicated its support for the Consumer Advocate's position.[14]

III. CONSUMER ADVOCATE'S POSITION

A. B&W's interstate rate for customers in Kentucky, as determined in a separate FERC "Compliance Filing", is inappropriate for this TPUC proceeding.

B&W, in its September 17 *Response*, proposed using the FERC rate of $2.7172 per Mcf, the rate adopted for interstate customers in Kentucky, for customers in Tennessee. This rate,

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[12] Concerning the second option, the Consumer Advocate initially indicated in our *Emergency Motion* that the revenue requirement was $250,835. This was determined by adding the revenues to the revenue deficiency from page 23 of TPUC's *Final Order*. It appears, however, after reviewing page 20 of the *Final Order* and the transcript of Commissioner Hilliard's oral decision, there was a typo in the *Final Order*, and the revenue deficiency should have been $144,118 instead of $114,118. Therefore, B&W's revenue requirement is $280,835.

[13] *Proposed Rate Adjustment of B&W Pipeline, LLC*, p. 1, TPUC Docket No. 18-00084 (September 16, 2019). B&W further proposed to set aside the fixed monthly charge and utilize the FERC interstate volumetric rate.

[14] *Response in Support of Consumer Advocate's Emergency Motion to Fix Revised Monthly Charge in Tariff*, Navitas TN NG, LLC, TPUC Docket No. 19-00084 (September 17, 2019).

however, is not an appropriate rate for B&W's customers for a number of reasons, even in the interim.

Embedded within the FERC rate is the purchase price of the pipeline and 96 oil and natural gas wells. This is a position that was litigated in TPUC Docket No. 15-00042, and one which this Commission already explicitly rejected. To adopt the FERC rate at this time would be to overturn the Commission's most recent decision concerning B&W's rates, and to do so absent a closer evaluation of B&W's books and records.

Further, FERC evaluated B&W's Compliance Filing over a nearly two-year period between July 2017 and May of this year. Only B&W's unilateral settlement agreement and *Letter Order* have been filed with TPUC in Docket No. 15-00042. Temporarily disregarding the disagreement over the full purchase price, for the Commission and Intervenor Parties to determine the FERC rate is appropriate for Tennessee customers would require extensive discovery and likely expert testimony. This could not be achieved absent a longer process, and as established in the Consumer Advocate's *Emergency Motion*, the issue of setting a just and reasonable rate must be addressed as quickly as possible.

B. The Commission's effective rate of $1.23248 per Mcf, as determined in TPUC Docket No. 15-00042, is an appropriate interim rate for B&W.

Absent other factors, which are discussed in the following sections of this *Brief*, the most appropriate rate to use for B&W's Tennessee jurisdiction customers is $1.23248 per Mcf. In its *Final Order* in Docket No. 15-00042, TPUC stated "the adoption of this rate design results in an effective rate per Mcf of $1.23248."[15] Therefore, TPUC envisioned the fixed monthly charge and volumetric charge combined would result in this effective rate. TPUC clearly determined that this effective volumetric rate was just and reasonable. And as a new rate must be determined by the

[15] *Final Order*, at 22.

Commission at the October 2019 TPUC Conference, the effective rate from the Commission's most recent evaluation is fair, just and reasonable, and certainly in no way a surprise to any Party to this proceeding or customer.

C. The Commission can update the Docket No. 15-00042 effective rate of $1.23248 per Mcf to incorporate B&W's 2018 volumes to achieve an effective rate – still based on the Commission's decision in the most recent rate case – of $2.06 per Mcf.

In Docket No. 15-00042, TPUC, in setting rates, utilized an anticipated throughput of 227,861 Mcfs per year.[16] As demonstrated in B&W's Annual Report, which this Commission took administrative notice of on September 18, 2019, throughput in 2018 for the B&W system was actually 136,210.[17] Therefore, the system has not yielded the throughput expected in the last general rate case.

Generally, there is a prohibition on single-issue ratemaking, and this is for good cause. General rate cases provide a close look at the books and records of a utility company, and Commissions can evaluate the entirety of a business' operations in determining the appropriate rate to set for service. Absent extraordinary circumstances, a company's rate should not be reset or modified without an analysis of up-to-date data that provides a closer look at **all** factors involved. This prevents a utility from "cherry-picking" the factors that weigh in favor of increasing rates while at the same time disregarding factors that should decrease rates.

In this circumstance, however, the Commission can adopt the throughput for 2018 to recalculate the volumetric rate to $2.06178 per Mcf. This may be appropriate because the anticipated throughput from the last rate case has not been achieved, and if throughput is increased in the future, the Commission will know immediately because both B&W and Navitas provide

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[16] *Id.* at 7-8.
[17] *B&W 2018 Annual Report*, p. 14.

Quarterly and Annual Reports. If throughput significantly increases, the Commission can initiate a proceeding to reevaluate rates, and that proceeding should have much less of an emergency timeframe than the current one. And as discussed below, this update for throughputs should only be considered in conjunction with a rate case moratorium for B&W. Absent a period without rate cases, there is not a compelling reason to update B&W's throughput, because the Commission could impose the $1.23248 volumetric rate in the interim, and B&W could then elect to seek a more detailed rate review.

D. If the Commission updates rates to reflect actual volumes in 2018, the Commission should affirm the Parties' uncontested position concerning a moratorium on rate cases until January of 2022.

Rate cases can be expensive, particularly if utilities use multiple attorneys. Attorney fees, expert witness contracts, and other legal costs accrue constantly over the months necessary to litigate a general rate case.

This Commission has consistently approved companies' requests to pass the entirety of rate case expenses on to consumers.[18] For instance, in the most recent rate case filed by a natural gas utility, the Commission determined that the **entire** rate case expense of $1,241,665 should be borne by ratepayers.[19]

While B&W's rate case expense may not amount to the level attained by Chattanooga Gas Company and its attorneys, even a far smaller amount would prove burdensome to the 84 customers in Byrdstown, Tennessee, with an average income of $21,300.[20] In Docket No. 15-00042, TPUC approved a rate case expense of $60,000, or approximately $714 per customer.

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[18] *See e.g., Amended Order*, pp. 49-51, TPUC Docket No. 18-00017 (January 15, 2019).
[19] *Id.*
[20] U.S. Census Bureau (2017). *American Community Survey 5-year estimates.* Retrieved from *Census Reporter Profile page for Census Tract 9251, Pickett, TN* <http://censusreporter.org/profiles/14000US47137925100-census-tract-9251-pickett-tn/>.

And in this situation, the 84 customers in Byrdstown are at risk of double the rate case expense – Navitas' rate case expense may be applied to them, and B&W's rate case expense may be passed through Navitas and to these 84 customers. In fact, Navitas filed for an increase in general rates in Docket No. 19-00057, so ratepayers will likely soon find themselves in the position of paying their utility company for these costs.

But an alternative is available. Rate case expenses related to B&W, for approximately two and a half years, can be avoided by the 84 customers in Byrdstown if the Commission acknowledges the Parties' proposed rate case moratorium. If the Commission determines throughput should be updated to reflect the 2018 volumes, this rate case moratorium is crucial to achieving a fair result, and no Party is opposed to such a moratorium.

E. TPUC's *Order* in this proceeding should make the $2.06178 per Mcf rate effective as of October 1, 2019, and reaffirm the $1.23248 effective volumetric rate back to July 17, 2017, the effective date of FERC's *Order*.

The Parties do not contest that the new $2.06178 per Mcf rate can be applied beginning October 1, 2019. This approach is appropriate because it provides an immediate resolution to this emergency situation.

To eliminate any possible concerns, the Commission should also reaffirm its determination in Docket No. 15-00042 that, for the period prior to this new rate, the effective volumetric rate for customers in Tennessee has been $1.23248 per Mcf. Doing so will ensure that no back-charges or arrearages will be assessed to customers in Tennessee. The FERC *Order* initiated the emergency nature of this proceeding. Therefore, FERC's determination that rates should be applied back to an effective date of July 17, 2017[21], along with the ongoing docket in Kentucky concerning the

[21] This is the date B&W submitted its *Compliance Filing to FERC*.

FERC rates[22], could create uncertainty for the rates Tennesseans have been paying for natural has service. While customers in Tennessee have paid the TPUC-approved rate each month for natural gas service, in order to protect these customers from any potential negative impact from FERC's decision, reaffirming TPUC's effective volumetric rate leading up to this change should eliminate any concerns.

IV. CONCLUSION

Setting aside B&W's fixed monthly charge and utilizing a volumetric rate of $1.23248 per Mcf – the effective volumetric rate from TPUC Docket No. 15-00042 – is the most appropriate outcome for this proceeding absent any other factors. This rate can be updated, however, to account for the smaller transmission volumes realized by B&W, while still utilizing the revenue requirement determined by TPUC in the prior rate case. Doing so achieves a volumetric rate of $2.06178, which is appropriate only if a rate case moratorium is imposed until January of 2022.

RESPECTFULLY SUBMITTED,

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[22] *See Purchased Gas Adjustment Filing of Navitas KY NG, LLC*, Kentucky Public Service Commission Case No. 2019-00241 (opened July 8, 2019).

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 27th day of September 2019.

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