COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

PURCHASED GAS ADJUSTMENT FILING OF NAVITAS KY NG, LLC	))	CASE NO. 2019-00241

ATTORNEY GENERAL'S COMMENTS

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("KYOAG"), and offers the following comments to the Kentucky Public Service Commission ("the Commission") in this matter.

In 2015, B&W Pipeline, LLC ("B&W") filed a rate case with the Tennessee Public Utility Commission ("TPUC") in docket 15-00042,[1] in which it elected to pursue state approval of rates. B&W sought to increase its rate from $0.60 per Mcf to $3.69 per Mcf.[2] In approving a new rate of $0.30813 per Mcf,[3] the TPUC Final Order further found:

> "Therefore, the panel concludes that as B&W is not a Hinshaw pipeline,[4] 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.[5] As part of the application

[1] Accessible at: http://share.tn.gov/tra/dockets/1500042.htm
[2] Docket 15-00042, Final Order dated March 10, 2016, p. 2.
[3] Id. at 23. The rate was comprised of a fixed monthly charge of $13,897 to Navitas, and a volumetric charge of $0.30813, for an effective rate of $1.23248. Id. at 22.
[4] Both B&W and the Tennessee Attorney General, by and through his Financial Division's Consumer Advocate Unit ("Tennessee Consumer Advocate") agreed in briefs that B&W is not a Hinshaw pipeline. The TPUC panel agreed, finding the record reflects that a large portion of the gas B&W delivers is ultimately consumed beyond Tennessee's borders. Id. at 5.
[5] TPUC's Final Order made it clear that the agency's jurisdiction applied only to Tennessee: "Though the rate design is based on total throughput volumes for both Tennessee and Kentucky, the Authority's jurisdiction applies only to the gas that is delivered to Navitas that is consumed within the borders of Tennessee. Thus, the volumetric rates set here shall apply only to the gas transported by B&W that is consumed in Tennessee. It is the intent of the Authority, with respect to this decision setting rates, that FERC review, consider and grant B&W's timely application for an Order No. 63 certificate, authorizing the use of the rate set in this Order for all gas transported on B&W's pipeline, whether ultimately consumed in Tennessee or Kentucky." Id. at 22.

for a blanket certificate, B&W shall utilize this Order and the rate established herein for FERC for review." [6]

B&W sought rehearing on the TPUC final order in docket 15-00042[7] on various issues. TPUC denied most of B&W's requests in the first rehearing request,[8] but allowed B&W to file a brief for reconsideration of whether a portion of the pipeline's acquisition costs should have been included in rate base.[9] However, the TPUC ultimately denied B&W's request to recover those costs.[10] B&W appealed the ruling, but the TPUC Final Order was upheld by the Tennessee Court of Appeals.[11]

In 2017, B&W filed a case at the Federal Energy Regulatory Commission ("the FERC")[12] in which that agency's final order[13] noted: (a) B&W is a 50-mile long pipeline located entirely in Tennessee, and is subject to TPUC jurisdiction;[14] (b) B&W initially sold gas in interstate commerce, but when its Tennessee production wells declined, it became a net recipient of gas for delivery to its then affiliate, Gasco Distribution Systems, Inc. ("Gasco");[15] (c) When Gasco sought bankruptcy in 2010, B&W's current owners acquired the pipeline and local gas wells, while Navitas Utilities Corp[16] ("Navitas") acquired Gasco's distribution facilities;[17] (d) B&W entered into a gas transportation service contract to supply

[6] Docket 15-00042, Final Order dated March 10, 2016, p. 6. A FERC blanket certificate grant under 18 C.F.R. § 284.224(b)(3) authorizes an LDC to engage in the sale or transportation of natural gas that is subject to FERC's jurisdiction under the Natural Gas Act ("NGA"), to the same extent and in the same manner that intrastate pipelines are authorized to engage in such activities by subparts C and D of that regulation (except as otherwise provided in paragraph (e)(2)).
[7] *See* petitions for rehearing dated March 28, 2016 and
[8] *See* Order dated May 16, 2016.
[9] Id. at 7.
[10] Order dated Aug. 4, 2016.
[11] *B&W Pipeline, LLC v. Tennessee Regulatory Authority, et al.*, ruling dated Nov. 6, 2017 (2017 WL 5135977).
[12] FERC Docket CP17-78-000, In Re: B&W Pipeline, LLC.
[13] Issued June 15, 2017, 159 FERC ¶ 62,297.
[14] Id. at p. 1.
[15] Id.
[16] The FERC deemed that for purposes of that proceeding, Navitas is comprised of two Local Distribution Companies ("LDCs"): Navitas TN NG, LLC ("Navitas-TN"), and Navitas KY NG, LLC ("Navitas-KY"). Id.
[17] Id.

Navitas and when it expired B&W initially tried to raise rates, but TPUC advised B&W that it must first obtain a certificate of convenience and necessity, and a limited jurisdiction blanket certificate to sell or transport gas in interstate commerce from the FERC;[18] (e) approximately three-fourths of the gas transported on B&W's system is delivered at a Tennessee-based meter to Navitas-KY, which transports the gas to Kentucky customers; (f) B&W requested that FERC allow it to charge the intrastate rates approved by TPUC for the transportation of all gas on its pipeline, whether the gas is consumed in Tennessee or Kentucky;[19] (g) FERC found that "B&W's primary role will continue to be that of a state-regulated pipeline";[20] (h) B&W elected to pursue rates approved by TPUC, which the FERC accepted;[21] and (i) within thirty days of the final order in that proceeding, B&W was required to file a rate election[22] and Statement of Operating Conditions ("SOC") as a baseline tariff.[23] Pursuant to 18 C.F.R. § 284.402, the FERC granted B&W's request for a limited jurisdiction blanket certificate authorizing the sale or transport of gas in interstate commerce, to the same extent and in the same manner that intrastate pipelines are authorized to engage in such activity by subparts C and D of the FERC's regulations.[24]

On July 17, 2017 B&W submitted its SOC.[25] However, rather than submit the specific $0.30813 per Mcf volumetric rate which the TPUC set in its March 10, 2016 Order entered in Docket 15-00042 – which TPUC *ordered* B&W to do – B&W instead for the first time sought

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[18] Id. at 2.
[19] Id.
[20] Id.
[21] Id. at 3.
[22] Pursuant to 18 C.F.R. § 284.224 (2016), an intrastate pipeline's rates 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 FERC for approval.
[23] 159 FERC ¶ 62,297 at 3-4.
[24] Id. at 3.
[25] FERC Docket PR17-54-00. Neither Navitas nor any other party intervened in this proceeding.

rates that FERC itself would set pursuant to §284.123(b)(2).[26] B&W's new FERC rate as originally filed was $5.4235 per Mcf,[27] far greater than the TPUC-approved volumetric rate of $0.30813 per Mcf, as set in the fully-litigated TPUC Docket 15-00042.[28] Quite significantly, it appears that B&W sought FERC's permission to base its rates on B&W's original <u>purchase price</u> of *all assets* (including not just the pipeline, but also 96 oil and gas wells *unrelated* to B&W's regulated activities).[29] The issue of including those costs had been raised, litigated and **specifically rejected** in TPUC Docket 15-00042.[30] Ostensibly, B&W decided to transition to FERC rate regulation because it would provide them higher rates than the TPUC.

On March 21, 2019 B&W tendered a "unilateral settlement agreement" in FERC Docket PR17-54-00, setting an interstate rate of $2.7172 per Mcf applicable to gas consumed by Navitas_KY customers, which FERC approved on May 17, 2019,[31] and backdated retroactive to July 17, 2017. B&W, on May 24, 2019 then tendered the "unilateral settlement agreement" into TPUC docket 15-00042, for "informational purposes."

Contemporaneously with B&W's FERC Docket CP17-78-000 filing, Navitas-KY sought and obtained FERC authorization pursuant to section 7(f) of the NGA requesting a service area determination permitting the company, as an LDC, to enlarge or expand its gas distribution facilities across the Kentucky-Tennessee border without becoming subject to

[26] FERC Docket PR17-54-000, B&W Unilateral Stipulation and Agreement, p. 6.
[27] Id., B&W SOC, filed July 17, 2017, p. 12.
[28] Docket 15-00042, Final Order dated March 10, 2016, at 23. The rate was comprised of a fixed monthly charge of $13,897 to Navitas, and a volumetric charge of $0.3081, for effective rate of $1.23248. Id. at 22.
[29] FERC Docket PR17-54-000, B&W's Stipulation and Agreement, Attachment C Sch. 4, and Attachment D Sch. 6.
[30] TPUC Docket 15-00042, Final Order dated March 10, 2016, pp. 10-15. *See also* direct testimony of Tennessee Consumer Advocate witness Ralph C. Smith, pp. 18-19, 22 (Aug. 24, 2015), stating that any amount paid for utility plant in excess of the utility's original costs are referred to as "goodwill" or Acquisition Premium, and not allowed recovery in rates because it is not used or useful in the provision of utility service. B&W acquired the pipeline and the 96 oil and gas wells for $2.6 million in Gasco' 2010 bankruptcy.
[31] *Letter Order Pursuant to § 375.307*, FERC Docket No. PR17-54-000 (May 17, 2017). On August 7, 2019 Navitas-KY sought rehearing of the FERC letter order, which FERC denied on the basis that neither Navitas-KY nor any other party sought intervention in that matter, and as such lacked standing.

FERC regulation.[32] Navitas-KY and Navitas-TN would remain subject to jurisdiction of the Commission and TPUC, respectively.

On September 11, 2019, Navitas-TN filed a new TPUC docket, "Investigation Into Navitas Utility Corporation's Notice of Probable Shutdown and Discontinuation of Tennessee Service."[33] While B&W was applying its new interstate rate of $2.7172 approved in FERC Docket PR17-54-000 to Navitas-KY customers, it was also charging Navitas-TN customers the $13,897 fixed monthly charge that the TPUC approved in Docket 15-00042.[34] That customer charge was designed based upon customer counts and demand from both the Tennessee and Kentucky portions of the B&W system.[35] Allocating the fixed monthly charge between its 84 Tennessee customers would raise the net gas cost per customer by $45.00 per Mcf per month.[36] The Tennessee Consumer Advocate moved to intervene in Docket 19-00084[37] on September 13, 2019, simultaneously filing an "Emergency Motion to Revise Fixed Monthly Charge in Tariff." The Tennessee Consumer Advocate also submitted testimony opining, *inter alia*, that: (a) the TPUC's fixed monthly charge of $13,897 is no longer applicable to Navitas-KY on a pro rata basis as a result of FERC's May 17, 2019 ruling;[38] and (b) TPUC's 2015 volumetric rate of $0.3081 per Mcf was based on then-prevalent throughput into both Tennessee and Kentucky. However, B&W's 2018 throughput has fallen 40% since the 2015 rate was set, which means the older rate is likely no longer sustainable. Additionally,

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[32] *See* FERC Docket CP17-171, Order dated June 15, 2017, p. 5. Navitas-TN filed a similar FERC application in Docket CP17-172-000, which was approved by FERC order dated June 15, 2017.
[33] TPUC Docket 19-00084, accessible at: http://share.tn.gov/tra/dockets/1900084.htm
[34] Id., B&W Responses to TPUC Staff's data requests.
[35] TPUC Docket 15-00042, Final Order dated March 10, 2016, p. 22.
[36] TPUC Docket 19-00084, Navitas-TN's "Notice of Probable Shut Down and Discontinuation of Tennessee Service;" and B&W's Responses to TPUC Staff's data requests, item no. 1.
[37] *See* TPUC Docket 19-00084, Order dated Oct. 4, 2019, setting a hearing date of October 14, 2019.
[38] TPUC Docket 19-00084, Testimony of David N. Dittemore, p. 4. This is consistent with B&W's Responses to TPUC Staff's data requests.

the reduced throughput greatly increases the risk of B&W filing another rate case.[39] As a result, the Tennessee Consumer Advocate is recommending that TPUC support a proposed settlement rate of $2.06 per Mcf, coupled with a stay-out provision until 2022.[40]

B&W's FERC-approved rate is inequitable for the following reasons. First, the 2015 TPUC rate was adopted in a fully-litigated rate case in which B&W, whose books and records were painstakingly evaluated, elected to pursue state rate regulation.[41] This stands in stark contrast with the FERC docket, in which B&W, apparently unsatisfied with the state rate relief it elected to pursue, essentially set its own rates under the guise of a "unilateral settlement" (*i.e.*, it settled with itself), with little to no oversight. Second, B&W's FERC rate intentionally embeds costs that at best would be questionable under Kentucky law, *i.e.*, the purchase price of the pipeline and 96 oil and natural gas wells, the majority of which both are no longer producing,[42] and have already been fully depreciated.[43] TPUC explicitly rejected B&W's attempt to recover these costs, and upon doing so, it appears that B&W's shift to FERC rate regulation was an attempt to recover those same costs. Third, since Navitas KY has obtained section 7(f) status with FERC, and in the event B&W re-elects state rate regulation, a state resolution of this matter is more appropriate.[44] Fourth, as evidenced by B&W's pleadings in TPUC docket 19-00084, it is once again submitting and availing itself to

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[39] Id., pp. 4-6.
[40] Id. at 7-8.
[41] Pursuant to 18 CFR § 284.123 (a), rates and charges for transportation of natural gas must be "fair and equitable," as determined in accordance with subparagraph (b) of that regulation. Subparagraph (b) gives intrastate pipeline owners the option of either obtaining rate approval from an appropriate state regulatory agency, or, if an owner fails to obtain such approval, it may seek approval from the FERC.
[42] Only 13 of the 96 wells are still producing. TPUC Docket 15-00042, Final Order dated March 10, 2016, p. 11.
[43] Id., p. 15.
[44] *See also* Navitas-KY's Response dated August 29, 2019 to B&W's Piepline's Public Comment, Case No. 2019-00241 (Ky. PSC); and Navitas-KY's Response to B&W's September 16, 2019 Public Comment Addressing FERC's September 4, 2019 Order, Case No. 2019-00241 (Ky. PSC).

that agency's jurisdiction, which has a direct impact on whether B&W is rate regulated by the FERC.

Finally, as noted *supra*, B&W's actions clearly amount to forum shopping for its own benefit. B&W now comes to this Commission and chooses to argue its case from the sideline via public comments filed into the record. The Commission should give such weight to B&W's comments as to effectively ignore them. Requiring Navitas to respond to B&W's shouts from afar is inappropriate and effectively undermines the Commission's jurisdiction. As the Commission has previously noted, ". . . public comments are not subject to statutory or regulatory requirements . . . [they] do not typically carry the same weight as evidence submitted under oath or comments filed by stakeholders and utilities that have expertise in a particular matter [in a docket]."[45] In fact, record evidence from the aforementioned Tennessee cases indicates that B&W has a history of ignoring or violating orders of a state regulatory commission in matters for which it is a party. Insofar as the Commission requires factual evidence from B&W, particularly regarding jurisdiction, such evidence should be solicited from B&W as a party to this matter, rather than through comment-based assertions. Failing to require B&W to voluntarily subject itself to the jurisdiction of the Commission, thus requiring B&W's adherence to orders, but nevertheless acknowledging its "comments" is simply a mistake. The Commission has previously noted the importance of jurisdiction over a party to a case as it relates to the Commission's ability to ensure a party's compliance with Commission orders.[46] By giving evidentiary weight to B&W's comments, and by requiring a

[45] In Re: Electronic Consideration of the Implementation of the Net Metering Act, Case No. 2019-00256, Order dated Sept. 4, 2019, p. 3.

[46] *See, e.g.,* In Re: Application of East Kentucky Power Cooperative, Inc. for a Declaratory Order Confirming The Effect Of Kentucky Law And Commission Precedent On Retail Electric Customers' Participation In Wholesale Electric Markets, Case No. 2017-00129, Order dated June 6, 2017, pp. 20-21.

party to respond to them, the Commission is only undermining its ability to fact-find and efficiently and effectively adjudicate this, and other, matters. Navitas-KY's customers deserve certainty in knowing whether their utility's gas supplier will constantly be undulating back and forth between TPUC or FERC jurisdiction to obtain rate relief. If B&W believes it has something of substance to provide to the Commission it should move to intervene in this matter, in order to submit verified pleadings required by 807 KAR 5:001 § 4, as well as testimony, if necessary. Otherwise, B&W should stop with its sideline jeers, and the Commission should ignore them.

Therefore, the KYOAG urges the Commission to review the final rate which TPUC will set in the October 14, 2019 hearing in its docket 19-00084, which likely will be the $2.06 per Mcf compromise position which the parties in that proceeding are supporting.[47] The TPUC's final order in that proceeding may require Navitas-KY to recalculate its GCR.

Respectfully submitted,
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[47] TPUC Docket 19-00084, briefs filed by the Tennessee Consumer Advocate, Navitas-TN, and B&W. If B&W agrees to the resolution TPUC will impose in its final order in that docket, then it should also file a notice with the FERC to the effect that it is relinquishing its FERC rate and electing TPUC rate regulation.

Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Ms. Gwen R. Pinson, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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This 11th day of October, 2019

Assistant Attorney General