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PUBLIC SERVICE
COMMISSION

Gwen R. Pinson, Esq., Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602

Re: Case No. 2019-00241
Purchased Gas Adjustment of Navitas KY NG, LLC

Dear Ms. Pinson:

On behalf of B&W Pipeline, LLC ("B&W Pipeline" or "B&W"), I am writing in response to the "Data Request Responses of Navitas KY NG, LLC" ("Navitas KY") filed in the above-captioned docket on July 31, 2019. I am writing specifically to point out several misleading statements that, if not corrected, may lead to further confusion in this docket.

I am also writing to comment briefly on the interim Order entered by the K.P.S.C. on August 6, 2019 in this docket.

Background

On June 15, 2017, the Federal Energy Regulatory Commission ("the FERC") granted an application by Navitas KY for an "Order Determining Service Area" under Section 7(f) of the Natural Gas Act, 15 U.S.C. § 717(f)(f).[1] The FERC Order allows Navitas KY to operate as a local gas distribution company under the jurisdiction of the Kentucky Public Service Commission even though the Navitas KY distribution system extends across the Kentucky state line into Pickett County, Tennessee.[2]

On the same day, the FERC also issued an Order under Section 7(c) of the Natural Gas Act granting B&W Pipeline a certificate of public convenience and necessity to transport gas in interstate commerce to

[1] Copies of all the state and federal orders cited in this letter have been filed in this Docket by either B&W or Navitas KY.

[2] In applying for a Section 7(f) service area determination, Navitas KY told the FERC that although the Navitas KY local gas distribution facility extends a short distance into Tennessee where it connects with B&W Pipeline, the Navitas KY facility "is used exclusively for local distribution to Kentucky residential and commercial customers." See FERC Docket CP17-171-000, "Navitas KY NG LLC Abbreviated Application for NGA Section 7(f) Service Area Determination" at p. 2.

That is incorrect. There are six gas customers located in Tennessee receiving service from the Navitas KY distribution system. Since Navitas KY did not inform the FERC of those customers, the FERC Order states erroneously that the designated service area of Navitas KY, though located in two states, is entirely under the jurisdiction of the Kentucky Commission. Federal law states that once a service area determination has been made, the local distribution company "shall be subject to the exclusive jurisdiction of the State commission in the State where the gas is consumed." 15 U.S.C. § 717(f)(f)(2). Therefore, the Tennessee Commission has jurisdiction over that portion of the service area of Navitas KY that is located in Tennessee and the six customers the company serves there.

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serve Navitas KY. See 15 U.S.C. § 717(f)(c). As I described in my letter filed July 16, 2019 in this docket and as the K.P.S.C. noted in its August 6 Order, the FERC certification order directed B&W to file proposed rates within thirty days and noted that B&W could either elect "rates based upon a state approved transportation schedules for comparable service" or submit "proposed rates to the Commission for approval." Order at 3, footnote 5. B&W chose the second option and filed proposed rates and supporting documentation on July 17, 2017. Following negotiations between the FERC staff and B&W, the parties eventually agreed to a settlement rate of $2.7172 per Mcf. The FERC approved the parties' settlement in an Order issued May 17, 2019. The FERC approved rate is effective as of July 17, 2017.

<u>Responses of Navitas KY to Data Requests</u>

First, in response to data requests from the KPSC staff, Navitas KY states that the Tennessee Public Utility Commission ("the Tennessee Commission") "ordered B&W to get FERC approval" of the $.31 per Mcf flow rate set by the Tennessee Commission. That is misleading. Here is what the Tennessee Commission (formerly called the Tennessee Regulatory Authority) said:

> "For these reasons, the panel adopts a rate design comprised of a fixed monthly charge of $13,897 to Navitas and a fixed monthly charge of $3,655 to B&W's other customer, affiliate Rugby Energy, LLC. In addition, the panel adopts a volumetric charge of $0.3081 per Mcf from all customers going forward. The adoption of this rate design results in an effective rate per Mcf of $1.23248. The rate design adopted by the panel is based upon the entire throughput of volumes transported to Navitas, which includes the volumes sold to Kentucky customers. 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."

That is, the Tennessee Commission set rates for B&W Pipeline that included both a fixed monthly charge of $13,897 to Navitas TN and a volumetric charge of $0.3081 that would apply only to gas consumed in Tennessee. The Tennessee Commission recognized that it had no jurisdiction over gas transported in interstate commerce for consumption in Kentucky but stated its "intent" to have the FERC review and adopt the $.31-per-Mcf volumetric rate and apply it to the transportation of gas to Kentucky.

As directed by the Tennessee Commission, B&W Pipeline filed a copy of the Tennessee Order and, as instructed by the state commission, requested that the FERC authorize the use of the volumetric rate set by Tennessee for all gas transported in the pipeline, including gas consumed in Kentucky.

That, of course, is not what occurred. When the FERC granted B&W's request for an interstate certificate, the FERC Order stated (footnote 5) that the agency's rules allowed B&W Pipeline either to adopt the Tennessee rates for interstate transportation or file a rate case and abide by whatever rate the FERC set. Believing that the Tennessee rates were too low, B&W Pipeline chose to file an interstate rate case; and the FERC, instead of adopting the Tennessee rates as the state commission had requested, found that B&W's annual revenue requirement was higher than determined by the Tennessee Commission and established a volumetric rate of $2.7172 per Mcf that now applies to all interstate transportation.[3]

As also discussed in my July 16 letter, and in the last section of this letter, the FERC's rules state that once the federal agency has determined an appropriate interstate rate, that rate preempts any rate set by a state commission. Even if B&W Pipeline asked again to adopt the Tennessee rates – which B&W would not do – the pipeline no longer has that option. The state rates have been "superceded" by the FERC rate.

Navitas KY further confuses matters by writing, "If it is determined that the BW pipeline FERC ruling supersedes the Navitas FERC Order" then Navitas KY should be able to recover the FERC-ordered rate as "part of the quarterly gas cost." Response 6 at p. 5. Navitas KY implies that the B&W FERC Order and the Navitas KY FERC Order are inconsistent. They are not. The Navitas KY Order simply defines the local service territory of Navitas KY and states that, within that area, Navitas KY may expand its distribution system across the state line without FERC approval but under the jurisdiction of the appropriate state commission. The B&W Order grants an interstate operating certificate to B&W and sets a rate for that delivery of gas to Navitas KY. The service area determination order has nothing to do with B&W's charges for transporting interstate gas. Conversely, the B&W certification order has nothing to do with state regulation of the local rates of Navitas KY. The orders are not in conflict. They address two completely different matters.

Finally, Navitas KY writes that since the Section 7(f) FERC Order states that Navitas KY "will be regulated by the local jurisdiction," B&W Pipeline's flat and volumetric rates set by the Tennessee Commission should apply to gas shipped to Navitas KY. This non sequitur is baffling. Yes, Navitas KY is locally "regulated" by the state commissions regarding the utility's local distribution service to its Kentucky and Tennessee customers, but that bears no relation to the regulation of B&W's interstate transportation rates by the FERC. The basic responsibilities of the FERC and state utility commissions have been well established for three-quarters of a century. States regulate local gas distribution companies; the FERC regulates pipelines that transport gas in interstate commerce. Navitas KY seems to be intentionally conflating the state and federal jurisdictions.[4]

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[3] The FERC rate covers all of B&W's interstate gas transportation and, therefore, the $13,897 flat monthly charge, a large portion of which Navitas KY has been passing through to its Kentucky customers, will be billed entirely to Navitas TN and, subject to the approval of the Tennessee Commission, passed through to the customers of Navitas TN.

[4] At one time, Mr. Thomas Hartline, who wrote the responses to the data requests, had a more accurate understanding of the jurisdiction of the Tennessee Commission and the FERC. After the Tennessee Commission expressed its "intent" to have the FERC review and adopt the $.31 per Mcf volumetric rate set by the Tennessee Commission and apply it to gas consumed in Kentucky, B&W tried to collect those charges from Navitas KY. The Kentucky utility refused to pay them, correctly pointing out that the Tennessee Commission had no authority to set a rate for the transportation of gas consumed in Kentucky.

In a letter dated June 21, 2016 Mr. Hartline explained why Navitas KY would not pay any volumetric charges for gas that crossed the state line.

Interim K.P.S.C. Order

On August 6, 2019, the K.P.S.C. issued an Order in this docket approving Navitas KY's GCA on an interim basis using the FERC rate of $2.7172 per Mcf to calculate the gas transportation costs of Navitas KY. The Order explained that this docket will remain open because the record is not yet sufficiently developed for the Commission to make a final determination as to whether the FERC rate or the Tennessee flat and volumetric rates should be used to calculate those costs. In a footnote, the K.P.S.C. observed that Navitas KY had not responded to a staff data request asking the utility to explain why the utility believed that the Commission should use the Tennessee rates instead of the FERC rate.

As discussed earlier, Navitas KY finally responded to those data requests on July 31, 2019. For the reasons set forth in the body of this letter, Navitas KY's attempt to explain why the Tennessee rates should apply to B&W's interstate transportation service is based on misleading characterizations of the Tennessee and FERC orders and apparent confusion over the respective regulatory roles of the FERC and the state commissions.

B&W Pipeline hopes that after reviewing the Navitas KY responses and this letter, the K.P.S.C. will be able to make a final determination confirming the conclusions of the interim Order. As described on page 3 of this letter, FERC rule 18 C.F.R. §284.123(b)(2)(iii) states that once the federal agency has issued a final order approving a pipeline transportation rate, the FERC rate "supercedes" any state rate that the pipeline might otherwise have elected to use. This rule expressly addresses the issue before this Commission. The Tennessee rates that Navitas KY believes should be used to calculate the utility's transportation costs have been superceded by the FERC rate and B&W Pipeline's interstate tariffs preempt any rate set by a state commission for the same service. I respectfully suggest that the issue of which rate should be used to calculate the transportation costs of Navitas KY has been resolved.

Finally, as the Commission noted in the August 6 Order, the FERC rate is effective as of July 17, 2017. This creates a substantial arrearage which B&W Pipeline is legally required to collect from Navitas KY. The pipeline has offered to accept payment of the arrearage, with interest, over a period of time so as not to unduly burden the distribution company's Kentucky customers. Navitas KY has still not responded. I would urge the Commission to encourage the company to do so.

> "As you correctly point out Navitas is not remitting the volumetric billing for Kentucky customers, nor is it collecting volumetric charges from its Kentucky customers. The Tennessee Regulatory Authority clearly stated they have no jurisdiction over Kentucky customers and that it is incumbent on B&W to file for a receive a tariff covering Kentucky for said volumetric charges. Navitas is not aware of B&W receiving such a tariff from either the Kentucky Public Service Commission or the Federal Energy Regulatory Commission. In our judgment it is unlikely that a Kentucky tariff, when received, will be retroactive."

For that reason, B&W Pipeline, while regularly receiving the flat monthly charge set by the Tennessee Commission has not been paid any volumetric rates on gas shipped to Navitas KY since December, 2015. Although the FERC rate Order is effective as of July 17, 2017, it appears unlikely that B&W will be able to recover those volumetric charges for the period January, 2016 until the effective date of the FERC tariff.

Sincerely,

BRADLEY ARANT BOULT CUMMINGS, LLP

Henry Walker

cc: Don Baltimore

Kent Hatfield
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