

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

National Association of Gas Consumers,)
Complainant,)

v.

All Sellers of Natural Gas in the United)
States of America in Interstate Commerce)
Respondents.)

Docket No. RP01-223-000

MOTION OF NATIONAL ENERGY MARKETERS ASSOCIATION

FOR LEAVE TO INTERVENE AND ANSWER OPPOSING "COMPLAINT"

This Motion for Leave to Intervene and Answer Opposing "Complaint" is filed by National Energy Marketers Association (NEM) pursuant to Rules 211, 213, and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, .213, and .214 ((2000), and the Notice issued on February 6, 2001 in the above-referenced docket. NEM requests that this Motion be granted for the reasons set forth below, and that the Commission either reject the Complainant National Association of Gas Consumers' (NAGC) pleading or summarily dispose of the matter in favor of Respondents.

I.

Communications and correspondence concerning this Motion should be directed to the following:

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II.

The National Energy Marketers Association (NEM) is a national, non-profit trade association representing both wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM's membership includes: small regional marketers, large international wholesale and retail energy suppliers, billing and metering firms, Internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers, and both manufacturers and suppliers of advanced distributed generation. Our membership has both affiliated and unaffiliated companies.

NEM is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement the competitive restructuring of natural gas and electricity markets. NEM and its members appear before state Public Utility Commissions, the Federal Energy Regulatory Commission and legislative bodies throughout the nation. NEM members urge lawmakers and regulators to implement:

- a. Laws and regulations that open markets for natural gas and electricity;
- b. Rates, tariffs, taxes and operating procedures that lower the cost of energy;
- c. Standards of conduct that protect consumers;
- d. Rules to permit competition on the basis of price and quality of service; and
- e. Policies that encourage new technologies, including the integration of energy, telecommunications and Internet services.

III.

On February 1, 2001, the National Association of Gas Consumers (NAGC) tendered for filing a pleading, styled as a "complaint," alleging that the markets for natural gas in the United States do not reflect legitimate forces of supply and demand. NAGC asserts that the Commission's December 15, 2000 *San Diego* order¹ provides a basis for the Commission to issue an immediate order setting a benchmark price for natural gas in the United States at \$2.74/MMBtu to be effective from January 1, 2001 through December 31, 2003.

¹ *San Diego Gas & Electric Company. v. Sellers of Energy and Ancillary Services into the Markets Operated by the California, Independent System Operator and the California Exchange*, 93 FERC ¶ 61,294 (2000).

In the alternative, NAGC requests that the level of present natural gas prices be set for investigation and hearing as unjust and unreasonable, and upon the conclusion thereof, that sellers refund excessive prices to consumers. NAGC requests that in light of the severe impact of current prices on consumers of natural gas in the United States, the Commission act as quickly as possible.

IV. ANSWER

NEM is a trade association representing, *inter alia*, gas marketers whose business is the purchase and sale of natural gas in the United States. Therefore, some NEM members arguably fall within the ambit of the parties named as Respondents by the NAGC. Since the Commission's Notice of February 6, 2001 identifies the NAGC polemic as a complaint, NEM is filing what is labeled an Answer, to the extent an Answer may be required or anticipated by the Commission pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure. However, in submitting an Answer, NEM in no way concedes or agrees with the characterization of the NAGC pleading as a complaint, or that NEM members are properly named as Respondents in this proceeding, or that NEM members have any obligation, responsibility, or liability in this proceeding, as explained more fully below.

NAGC's pleading fails as both procedurally defective and substantively deficient. Because the NAGC filing does not meet the criteria of a complaint under the strictures of Rule 206 and, further, fails to state any substantive basis for the relief requested, it should be rejected by the Commission.

Procedural Infirmities

NAGC entitled its filing as a "Complaint," naming as Respondents "All Sellers of Natural Gas in the United States of America in Interstate Commerce." However, the NAGC pleading fails

to comply with the requirements of Rule 206 — the Commission rule regarding complaints — on numerous bases and thus should be rejected. Some of the many procedural deficiencies are detailed below.

First, NAGC does not comply with Rule 206, claiming reliance instead on Sections 4 and 5 of the Natural Gas Act. The NAGC filing ignores the Commission's enabling regulations that govern the conduct of all other parties coming before the Commission, particularly those entities such as the NAGC who are asking for affirmative relief.

Second, NAGC has failed to satisfy the service requirements in Rule 206(c), which mandate actual service “on the respondent, affected regulatory agencies, and others the complainant reasonably may be expected to be affected by the complaint.” NAGC concedes in footnote 10 at page 11 that it did not serve all the Respondents named.

Third, the NAGC pleading does not comply with Rule 206(b)(9), which requires the complainant to state whether the Enforcement Hotline, Dispute Resolution Service, or other alternative means were considered or used and other related requirements.

Fourth, NAGC has not advised the Commission, per Rule 206(b)(6), whether the issues presented are pending before the Commission in another proceeding. As the Commission is aware, some of the same contentions advanced by NAGC also appear in *San Diego Gas & Electric Company*, Docket No. RP01-180-000.

Fifth, and most importantly, NAGC completely fails to identify — per Rule 206(b)(1) — the specific statutory or regulatory provisions which “natural gas marketers” are alleged to have violated. It is true that NAGC makes a generic claim that present and future natural gas prices are unjust and unreasonable under Sections 4 and 5, but NAGC does not assert that the prices charged by “natural gas marketers” are inconsistent with any order or ruling of the Commission. Indeed,

unless the NAGC can come forward with evidence to the contrary, prior findings by this Commission would support the conclusion that the market price for natural gas is *per se* just and reasonable.

It should be readily apparent from this compendium of procedural errors that the NAGC pleading does not qualify and should not be processed by the Commission as a complaint under Rule 206. Therefore it should be rejected as procedurally defective and for not stating a basis on which the Commission reasonably should proceed.²

Substantive Response

Although NEM does not believe that the NAGC pleading qualifies as a complaint under Rule 206, NEM will, to the extent possible due to the unfocused/rhetorical nature of the NAGC pleading, comply with the requirements in Rule 213 regarding an answer to a complaint.

Rule 213(c)(1) requires an admission or denial, “to the extent practicable,” of each material allegation in the complaint. This is a particularly challenging endeavor in this case, since there are no material allegations of impropriety by “natural gas marketers” in the NAGC pleading and thus there is nothing to admit or deny. Nevertheless, for the record, to the extent NAGC contends that current natural gas prices charged by “natural gas marketers” are in violation of Sections 4 and 5 of the Natural Gas Act, NEM categorically denies that allegation as to any “natural gas marketer” that is a member of NEM, as well as any suggestion that these natural gas sales are inconsistent with any effective rule or order of this Commission.

² See e.g., *Energy Management Corp. v. Peoples Gas System*, 78 FERC ¶ 61,044 at 61,181 (1997), citing 18 C.F.R. § 385.203(a)(3), (6) and (7) for the proposition that the Commission can dismiss a complaint found to be “vague and confusing,” based on mere “conclusory statements devoid of any factual support,” “cryptic and difficult to understand,” and, as such, “patently deficient under rule 203.”

Having taken care of that formality, NEM would offer the following observations regarding NAGC's contentions, the sum total of which should convince the Commission to dismiss the proceeding outright.

NAGC claims, at pages 3-7, that present and projected wholesale natural gas prices are grossly excessive and adversely affect U.S. consumers. A market price for any commodity cannot, by definition, be "excessive" grossly or otherwise. Absent a scintilla of evidence by the Proponents of such a statement, a market price is merely the point at which supply and demand reach equilibrium in an economic sense. Natural gas prices effectively and efficiently reflect prevailing market forces, which was precisely the intention of Congress in deregulating first sale prices,³ and of the Commission in following suit for sales by affiliated marketers.⁴ Moreover, the NAGC presents no evidence that gas markets are not functioning as intended; instead, NAGC merely asserts that current prices are higher than in the recent past (NAGC at 6-7). However, just because prices are higher in the near term is not proof that natural gas prices are improper or that gas markets are failing to work competitively. If such proof were sufficient to state a cause of action, natural gas producers would have had much to complain about when wellhead prices were under \$1/MCF not long ago. Clearly, the market price of a commodity is no grounds for a complaint absent evidence of impropriety, and no such evidence has been adduced or even alleged in this proceeding.

³ Natural Gas Wellhead Decontrol Act of 1989, 15 U.S.C. §§ 3301-3432 (1996).

⁴ Order No. 547, FERC Stats. & Regs. ¶ 30,957 (1992). As FERC explained, its rule would "provide to all merchants of natural gas the 'level playing field' that the Commission continually strives to promote." *Id.* at 30,719.

Deregulated markets necessarily experience price fluctuations as supply and demand vary, and as other contributing factors change over time, such as weather, the price of competing fuels, physical delivery capability (*i.e.*, pipeline capacity), regional and interregional competition, conservation, and general economic conditions. Sometimes that produces higher prices, as now, and sometimes lower prices, which is what prevailed circa 1996-1998. Interestingly, no complaints were filed when low natural gas prices provided a disincentive for aggressive exploration and production in the Lower 48. Since NAGC offers no evidence that the currently-applicable prices for natural gas are in conflict with any effective statutory provision or regulation, there is no basis on which the Commission can conclude that market prices are in any way improper, or that any change in current law or regulation is justified.

NAGC next contends, at pages 7-10, that current and projected natural gas prices are unjust and unreasonable. For support, NAGC looks to the Commission's December 15, 2000 *San Diego* order addressing the electric sales and supply problems in California,⁵ and the purported similarity between Sections 205 and 206 of the Federal Power Act and Sections 4 and 5 of the Natural Gas Act. While it is true that the Commission in the *San Diego* order did establish a benchmark price for electricity for use as a reference to just and reasonable rates, NAGC fails to note that this order applied solely to a limited market. Also, the Commission was specific in providing a remedy that was "within our authority under the Federal Power Act...,"⁶ but even the

⁵ *San Diego Gas & Electric Company. v. Sellers of Energy and Ancillary Services into the Markets Operated by the California, Independent System Operator and the California Exchange*, 93 FERC ¶ 61,294.

⁶ *Id.* at 61,981.

NAGC concedes that the Commission no longer has authority to set maximum prices for first sales of natural gas. NAGC at 8 n.7.

To the extent NAGC is asserting that the Commission should or can establish the \$2.74/MMBtu benchmark price only for sales by affiliated marketers but not first sellers, any such “remedy” would be overtly and improperly discriminatory, establishing one set of price-regulated marketers and another set of unregulated marketers. The NAGC has not provided any evidentiary or policy rationale why the Commission should overturn its decision in Order No. 547 prescribing a level playing field for all gas sellers and thus give unaffiliated shippers market power over other sellers in the same market. Likewise, NAGC fails to address or even recognize the grave practical consequences — for both sellers and buyers — that would result from an energy market with a two-tier selling regimen.⁷

NAGC uses this dubious backdrop as support for its requested remedy, which, as noted above, is the establishment of \$2.74/MMBtu as a benchmark price for natural gas sales to be effective from January 1, 2001 through December 31, 2003, and to the extent sales are made above that level, an aggrieved party could file a complaint with the Commission seeking refunds. The proposed benchmark price of \$2.74/MMBtu is said to be the estimated future average wellhead price

⁷ In referencing purportedly excessive natural gas “prices,” NAGC makes reference to the Commission’s authority over pipeline transportation rates. NAGC at 8, n.7. This is confusing, since pipeline’s themselves generally are no longer in the wholesale gas sales business. However, if NAGC is making an oblique reference to the Commission’s removal in Order No. 637 of the capacity release price cap for short-term transactions, that argument is, at a minimum, inapposite. There is no evidence or policy reason why the Commission should overturn Order No. 637 and reimpose price controls without legislation, based on less than three months of one winter heating season’s experience.

through 2010 as projected by the National Petroleum Council (NPC) in a December 1999 report which appears as Exhibit 1 to the NAGC pleading.

Of course, in arguing for what would apparently be a price cap of \$2.74/MMBtu, NAGC ignores the fact that the NPC projection is an **average** price over the next ten years. So even if this NPC projection were somehow considered to be an appropriate benchmark price, there is no evidence that now, in only the first year of a ten-year period, the NPC benchmark will be exceeded. As such, there is simply no evidentiary basis on which the Commission should reverse fifteen years of natural gas price decontrol based on three months of higher than expected natural gas prices. Indeed, NEM maintains that such action will cause serious supply dislocations and potential blackouts if the regulated supply price for natural gas is less than market-clearing levels.

NAGC's proposed benchmark price proposal also suffers from numerous other problems. First, the NPC projection was not binding on anyone; it certainly was not adopted by the Commission as a maximum lawful price. Second, applying an average predicted for a ten-year period to current market prices is completely arbitrary and without basis in fact. Third, establishing a price cap for natural gas wellhead sales would be directly contradictory to the Congressional mandates in the Natural Gas Wellhead Decontrol Act and in conflict with the Commission's findings in Order No. 547. Moreover, price caps produce results completely contrary to those sought by the "Complaint" and are seldom the correct answer to short-term price anomalies, since price caps tend to be ineffective and counterproductive, as California's recent experience in the electric market illustrates.

Finally, the Commission is without authority to set retroactive rates, and thus the requested January 1, 2001 effective date is completely without merit. Moreover, as actions under Section 5 have prospective effect, no refunds could be due. In any event, since there are no Commission

orders in effect which establish specific maximum rates for natural gas wholesale prices, no “natural gas marketer” can be said to be acting in derogation of those orders, and thus there is no asserted violation of statute or order on which the NAGC can rely as a basis for filing a complaint. For these reasons, the Commission should reject NAGC’s request to establish the requested natural gas benchmark price.

As an alternative remedy, NAGC asks the Commission to set the complaint for investigation and hearing for the purpose of ordering refunds for natural gas charges thereafter deemed by the Commission to be in violation of Sections 4 and 5 of the Natural Gas Act. NEM opposes this alternative request for all the reasons listed above.

Conclusion

NAGC’s pleading does not satisfy the requirements for a complaint under Rule 206, it offers no evidentiary basis on which the Commission should proceed further in this matter, and it presents no legal or policy rationale why the relief requested should be granted. Therefore, NEM respectfully asks that the Commission dismiss or reject the NAGC pleading outright or rule summarily in favor of the Respondents.

V.

NEM, as a representative of a diverse group of providers of energy and energy-related services, has an interest in this proceeding. The ability of NEM’s members to compete fairly in these markets will be specifically affected by the outcome of this proceeding. As such, the interests of NEM and its members in this proceeding cannot be adequately represented or protected by any other party hereto. Under all these circumstances, then, NEM submits that good cause exists to grant it leave to intervene in this proceeding.

VI.

WHEREFORE, for the reasons explained above, NEM respectfully requests that the Commission permit it to intervene in the above-captioned proceeding and be made a party for all purposes. Further, NEM requests that the Commission reject the NAGC pleading or rule summarily for Respondents.

Respectfully submitted,

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I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: March 1, 2001