UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Gas Technology Institute Docket No. RP04-378-000

ORDER ON APPLICATION FOR ADVANCE APPROVAL OF A RESEARCH AND DEVELOPMENT PROGRAM AND JURISDICTIONAL RATE PROVISIONS TO FUND THE PROGRAM

(Issued November 18, 2004)

1. On July 1, 2004, the Gas Technology Institute (GTI) filed an application for the advance approval of a 2005-2009 research, development and demonstration (RD&D) program and for approval of jurisdictional natural gas pipeline rate provisions to fund the 2005 RD&D program (Application). For the reasons appearing below, the Application is rejected. This order is in the public interest because it fulfills the 1998 settlement entered into by the Gas Research Institute (GRI), the predecessor to GTI, natural gas pipelines, local distribution companies (LDCs) and customer and public interest groups, as approved by the Commission.[1]

Background

2. In order to properly set the Application of GTI in perspective, it is first necessary to discuss GTI's predecessor organization, GRI, and the settlement GRI reached with its customers in 1998. The history of GRI's activities and the basis for funding of GRI's activities through a mandatory surcharge on volumes of gas transported by pipeline began with the recognition by the Commission and the gas industry that more efforts were needed in RD&D geared to the natural gas industry for the benefit of industry participants

[1] *Gas Research Institute*, 83 FERC ¶ 61,093 (1998), *order on reh'g*, 83 FERC ¶ 61,331 (1998), collectively referred to herein as the "April 29 Order." The settlement approved by that order is referred to as the "1998 settlement."

at all levels and ultimately for the benefit of consumers.[2] RD&D activities, the mechanisms for funding RD&D through GRI, and the process for approving that funding all evolved over a period of some 20 years, culminating in the 1998 settlement.

3. The approved mechanism for GRI funding prior to the 1998 settlement arose from an earlier contested settlement that in 1993 prescribed funding for GRI's 1994 and 1995 RD&D programs. This funding mechanism was extended through 1997, and GRI was required to file by March 1, 1997 a proposal for a long-term funding mechanism. GRI made such a filing in December 1996 in Docket No. RP97-149-000. The Commission convened a public conference in March 1997 to discuss the future funding of RD&D in the natural gas industry, and as a result of statements made at the conference by a representative cross-section of the industry, on April 30, 1997, the Commission issued a Notice of Proposed Rulemaking in Docket No. RM97-3-000.[3] The Commission proposed to amend its regulations to guarantee long-term funding for GRI. The Commission proposed a two-part mechanism that would fund GRI "core" RD&D programs that provide widely dispersed benefits through a non-discountable, non-by-passable, volumetric surcharge on all jurisdictional pipeline throughput. All other, or non-core, programs would be funded on a voluntary basis. Also on April 30, 1997, the Commission issued an order extending the funding mechanism which had been approved for GRI for 1996 and 1997 through the year 1998,[4] in order that the Commission and the parties would have ample time to complete the rulemaking in Docket No. RM97-3-000.

4. On June 10, 1997, GRI filed its annual application in Docket No. RP97-391-000 for advance approval of its 1998 RD&D program and its 1998-2002 five-year plan. Subsequent to the issuance of Staff's report on GRI's plan, GRI filed a petition requesting Commission approval of a comprehensive settlement proposed by the Interstate Natural Gas Association of America (INGAA), designed to address the funding for GRI, and adopted by GRI's Board of Directors. At the heart of this plan was a proposal to convert to voluntary funding all core and non-core projects beginning in 2003. The proposed settlement was supported by many interstate pipelines and GRI.

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[2] The early efforts of this Commission and its predecessor, the Federal Power Commission, in encouraging RD&D activities are described in *Gas Research Institute*, Docket No. RM77-14, Opinion No. 11, 2 FERC ¶ 61,259 (1978), at 61,616-61,620.

[3] *Research, Development, and Demonstration Funding*, 62 Fed. Reg. 24,853 (May 7, 1997), FERC Stats. & Regs. ¶ 32,524 (1997).

[4] *Gas Research Institute*, 79 FERC ¶ 61,110 (1977), *order on clarification*, 79 FERC ¶ 61,396 (1977).

The Commission, in its order approving the five-year plan for GRI,[5] noted that the settlement had not been negotiated by all segments of the natural gas industry, and referred the matter to a settlement judge for further proceedings.[6]

5. In the spring of 1998, the parties in Docket Nos. RP97-149-000 and RM97-3-000 representing a broad cross-section of the natural gas industry, including industrial customers, consumer advocates, producers, pipelines, LDCs, municipal distribution companies, and other industry participants, reached a settlement regarding the funding of GRI's RD&D program through mandatory surcharges on pipeline throughput. The settlement essentially provided for a commodity-based surcharge to be applied to discountable volumes of gas transported by interstate pipelines, and the monies so collected to be transferred to GRI to fund its RD&D program. Of utmost concern to the parties was the settlement's creation of an orderly seven-year transition to a system of completely voluntary funding no later than December 31, 2004.[7] The surcharge would steadily decline over the seven-year period, and no later than December 31, 2004, it would be eliminated altogether. Thereafter, all funding of any RD&D sponsored by GRI would be at GRI's risk – ratepayers would not be required to fund the RD&D program should GRI desire to continue any of its program beyond the expiration of the setlement. On April 29, 1998, the Commission approved the 1998 settlement, including the provision for the transition to completely voluntary funding. In so doing, the Commission stated: "All funding of GRI will be on a voluntary basis after December 31, 2004. Therefore, the Commission's objective of ensuring a broad based, voluntary long-term funding mechanism for GRI is achieved by the Settlement." [8]

Description of GTI's Application

6. GTI states that it is a non-profit organization providing a full range of technology solutions to energy industry stakeholders: natural gas producers, natural gas pipelines, LDCs, end-use equipment manufacturers, industrials, consumers and government agencies. It asserts that its programs span the complete technology development

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[5] *Gas Research Institute*, Opinion No. 418, 81 FERC ¶ 61,182 (1997).

[6] 81 FERC ¶ 61,182 at 61,784-85.

[7] *See* 1998 settlement at 4, 9, 10, 14, 18, 20, 21. At 4, the 1998 settlement states, "[I]n no event will a Commission-approved discountable (or non-discountable) uniform funding mechanism extend beyond December 31, 2004."

[8] 83 FERC ¶ 61,093, at 61,456 (1998).

spectrum.[9] It contends that it is a registered assumed corporate name for the Institute of Gas Technology (IGT), and that it has remained separate and apart from GRI. GTI states that IGT was incorporated in 1941, and it exists today as an assumed corporate name for IGT. GTI acknowledges that it has assumed many of GRI's duties pursuant to the 1998 settlement, having combined with GRI on April 24, 2000, but that it is an "impermissible stretch" to conclude that GTI "stands in the shoes" for all purposes so far as the 1998 settlement is concerned. GTI contends that it cannot be considered a signatory to the 1998 settlement.[10] GTI states that "gas industry RD&D funding initiatives outside the Commission's advance approval context have been ongoing under GRI's auspices, *and more recently under GTI's auspices* [emphasis added], since 1998."[11] GTI contends that there are other RD&D efforts that will continue to depend on an industry collaborative program.[12]

7. GTI seeks, through the instant application, advance approval of its proposed Collaborative Research, Development and Demonstration Program. GTI proposes an annual budget of $48 million per year for five years (2005-2009) funded by a commodity surcharge of 0.56 cents per dth, effective January 1, 2005, applied to interstate transportation and storage services rendered by the jurisdictional pipelines that support this application.

8. GTI proposes to use the $48 million per year in five different program areas.[13] GTI allocates the $48 million as follows: Supply, 14.6 percent; Transmission, 22.9 percent; Distribution, 39.6 percent; Utilization, 14.6 percent; and 8.3 percent, Administrative costs.

9. First, GTI allocates $7 million to its Gas Supply Program Area that would allegedly provide U.S. gas producers with technology solutions that would reduce costs, increase U.S. natural gas resources, and explore options for alternative supplies.

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[9] Application at 10.

[10] *Id.* at 9-10.

[11] *Id.* at 12.

[12] *Id.*

[13] *Id.* at 21.

10. Second, GTI allocates $11 million to its Gas Transmission Program Area to develop and disseminate technologies, products and procedures that would purportedly allow transmission companies to improve system delivery performance, safety, environmental performance and reliability in a cost-effective manner, thereby reducing the cost of service to customers.

11. Third, GTI allocates $19 million to its Gas Distribution Program Area to develop and disseminate technologies, products and procedures that GTI contends would reduce the cost of safely and reliably operating gas distribution systems and, thereby, reduce the cost of service to gas customers.

12. Fourth, GTI allocates $7 million to its Gas Utilization Program Area to develop and disseminate gas end-use equipment and systems which, according to GTI, would provide consumers with increased efficiency and effectiveness, while reducing cost, maintaining operational safety and complying with environmental regulations.

13. Finally, GTI allocates $4 million to its Program Management and Administration to manage the program.

14. GTI seeks Commission approval of a mandatory, fixed, but discountable, surcharge of 0.56 cents/dth, effective January 1, 2005. For each participating pipeline's customers, the surcharge would be mandatory unless discounted by the pipeline. For discounted transactions, pipelines would discount the GTI surcharge first and collect and remit to GTI only the surcharge amount that exceeds the discounted rate.[14]

15. GTI predicts the surcharge would raise $48 million annually, based on an anticipated yearly pipeline throughput of 8.3 Tcf. GTI assumes that during the initial five-year period, its annual revenues would remain constant, and that any increases in throughput would be offset by increased discounting. GTI states that it would review these assumptions after the first two years of experience. Finally, GTI states that if actual cash inflows exceed cash outlays, the excess funds would be retained in an interest-bearing account and all earned interest would be reported and remain part of the available program funds. GTI reserves the right to modify the surcharge in the future.[15]

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[14] *Id.* at 32. These provisions regarding the mandatory surcharge and its discounting duplicate the provisions of the 1998 settlement.

[15] *Id.*

16. The following services would be subject to the GTI surcharge:[16] deliveries of gas transported to LDCs for sale or use by such utilities, whether or not such LDCs are themselves members of GTI; deliveries of gas to other interstate pipeline companies that are not members of GTI; deliveries of transported gas to consumers for ultimate use, including gas transported by interstate pipelines for LDCs for redelivery to such end users; and deliveries of gas to intrastate pipeline companies, whether or not they are members of GTI. LDCs shipping gas on "participant" pipelines with discounted service would have the option to include the GTI surcharge in their pipeline invoices. This provision is referred to as "check the box" in pipeline tariffs.[17] Producers whose gas is shipped only on non-participating pipelines would have the opportunity to qualify as producer participants by using the "check the box" provision on gas that they ship on such pipelines.[18]

17. For storage the following rules would apply: (1) where storage is provided pursuant to an overall, one-time charge for service that includes such functions as transportation to the storage site, injection, inventory control, withdrawal, and transportation out of storage to customer delivery points, the volumetric surcharge would be included in billing for such overall service, unless discounted, in which case the pipeline would collect and remit only the amount by which the surcharge exceeded the discount; and (2) where there are separate charges and no change of ownership of the gas for various storage-related functions (*i.e.*, where there are separate charges for transportation to and/or from the storage site, and a separate charge for storage-related services), the volumetric surcharge would be included in billing only for the transportation transaction; where there are separate transactions for both transportation to storage and transportation from storage, the volumetric surcharge would be included in

[16] *Id*. These services are identical to those specified in the 1998 settlement.

[17] *Id.* "Check the box" refers to a collection mechanism whereby LDC and producer shippers may elect to contribute funds to GTI by including the GTI surcharge in their pipeline invoices from pipelines that discount. Producers whose gas is shipped on non-participating pipelines may also qualify as producer participants in funding GTI by using the "check the box" provision on gas they ship on such pipelines.

[18] *Id*. GTI provided no explanation of the intent of these provisions or the disparate treatment between producers and LDCs.

billing only for the first leg (*i.e.*, transportation to the storage site) and would not be included in the billing for the storage service; if service is rendered on a discounted basis, the pipeline would collect and remit only the amount by which the pertinent surcharge exceeded the discount.[19]

18. For transportation transactions involving more than one pipeline, the surcharge would be collected on the last transaction in the pipeline chain. GTI states that this is intended to ensure that natural gas transported in interstate commerce is subject only to one surcharge from the wellhead to the market.[20]

Procedural Matters, Interventions and Protests

19. On July 8, 2004, the Commission issued a notice of GTI's application, specifying that motions to intervene or protests should be filed by August 9, 2004. Thereafter, in response to a request filed by Bruce B. Ellsworth, the Commission extended the time for filing comments on the filing to August 23, 2004. Numerous timely motions to intervene were filed by interested parties.[21] Pursuant to Rule 214 (18 C.F.R. § 385.214 (2004)), any timely filed motion to intervene is granted unless an answer in opposition is filed within 15 days of the date such motion is filed. No answers in opposition to motions to intervene were filed.

20. Motions to intervene out of time were filed by certain parties. Pursuant to 18 C.F.R. § 214(d) (2004), the Commission finds that granting intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Consequently the motions for late intervention are hereby granted.

Comments and Answers

21. Comments were filed by numerous parties, some in support of GTI's application and some opposed. In addition, many of those parties who oppose the application also filed motions to reject the application, essentially arguing that the application is barred by the terms of the 1998 settlement and the Commission's April 29 Order. These parties

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[19] *Id.* at 32-33. These provisions are the same as in the 1998 settlement.

[20] *Id.* at 33.

[21] The intervening parties are listed in the Appendices to this order. Appendix A lists all parties who filed motions to intervene; Appendix B is a list of supporting parties; and Appendix C is a list of opposing parties.

argue that the GTI, as predecessor to GRI, is bound by the terms of the 1998 settlement and its provision to eliminate mandatory surcharges on pipeline throughput on and after December 31, 2004.

22. On August 24, 2004, GTI filed an answer to the motions for summary disposition filed by Process Gas Consumers Group, filing on behalf of the American Chemistry Council, American Forest & Paper Association, American Iron and Steel Institute, Georgia Industrial Group, Industrial Gas Users of Florida, New Jersey Large Energy Users Coalition, and California Manufacturers & Technology Association (collectively referred to as PGC) and the Independent Petroleum Association of America (IPAA), and sought leave to answer the protests filed in this proceeding. GTI contends that it is a wholly separate entity from GRI, that it is free to make the instant proposal and that it is not bound by the terms of the 1998 settlement. In its Application, GTI claimed wide support for its proposal. However in light of the vigorous opposition to the proposal, as discussed more fully below, GTI has recognized in its answer that it does not enjoy the wide support it thought it had.[22] The Fertilizer Institute filed a motion to reject GTI's answers to protests.

Discussion

GTI and the 1998 GRI Settlement

23. GTI states that it is distinct from the GRI, and that it (GTI) is not a signatory party to the 1998 settlement.[23] Several supporting parties[24] argue that the 1998 settlement applies only to GRI, and thus, GTI is not precluded from filing, or the Commission from approving, GTI's collaborative RD&D funding mechanism subsequent to December 31, 2004.[25]

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[22] *See* GTI Answer at 3.

[23] GTI Application at 9.

[24] *See e.g.*, KeySpan Delivery Companies, NiSource Inc., and the American Public Gas Association.

[25] The supporting parties virtually adopt the arguments of GTI in making their support known. Thus, our responses to GTI's claims will serve as comment or response to the assertions of the supporting parties.

24. In general, all of the opposing parties listed in Appendix C, object to GTI's assertions that it is a separate entity from GRI, and that it is not bound to the GRI Settlement. The Fertilizer Institute, IPAA, Indicated Shippers, the Missouri Public Service Commission (Missouri Commission), the National Association of State Utility Consumer Advocates (State Consumer Advocates), the Natural Gas Supply Association (NGSA), and PGC filed legal arguments based on the fundamental principles of corporate and contract law and Commission policy and precedent, arguing that GTI is bound by the terms of the 1998 settlement. Essentially, those parties state that GTI is the result of a "*de facto* merger"[26] between GRI and IGT, and as such, GTI is a successor-in-interest to GRI and bound by the terms of the 1998 settlement.

25. Under corporate-successor law, PGC argues that in the case of a *de facto* merger "all contractual obligations transfer to the successor as if the parties engaged in a traditional merger."[27] According to PGC and Indicated Shippers, under this law, the courts consider "several factors to determine whether a transaction is a *de facto* merger, including whether there is continuity of ownership, management, and business operations and whether any other equitable reasons exist to treat the transaction as a merger."[28]

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[26] IPAA cites to Black's Law Dictionary defining a "*de facto* merger" as a "transaction that has the economic effect of a statutory merger but is cast in the form of an acquisition of assets or an acquisition of voting stock and is treated by a court as if it were a statutory merger…. Occurs where one corporation is absorbed by another, but without compliance with statutory requirements for a merger."

[27] PGC at 5, *citing Holland v. Williams Mountain Coal Co*., 256 F.3d 819, 824 (D.C. Cir. 2001).

[28] PGC at 5, *citing Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 46 (2d Cir. 2003); *Nettis v. Levitt*, 241 F.3d 186, 193-94 (2d Cir. 2001); *see* specifically, 241 F.3d at 194, quoting *Woodrick v. Jack J. Burke Real Estate, Inc*., 703 A.2d 306 (N.J. Super. Ct. App. Div. 1977) (internal quotations omitted) (the *de facto* merger test is flexible, and courts disregard questions of form to determine "whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor."); *Gray v. Loyola Univ. of Chicago*, 652 N.E.2d 1306, 1310 (Ill. App. Ct. 1995); *see also* IPAA at 10.

Noting that GRI and GTI share the same President and CEO and the same General Counsel, and that senior executives are paid by both GTI and GRI, PGC claims that "continuity of ownership [a critical element for a *de facto* merger] exists between GTI and GRI."[29]

26. The Natural Gas Supply Association (NGSA)[30] and Statoil Natural Gas LLC (Statoil)[31] also refute GTI's contention that GRI did not "technically" merge with GTI, based on the principles of contract law.[32] Whatever the "ultimate corporate form of the transaction between GRI and IGT," NGSA asserts that "the reality of their 'combining' is that GTI assumed the rights and duties of GRI, and most importantly, received the surcharge amounts."[33] Statoil also argues that the fundamental principles of contract law "make it quite clear that IGT and GRI merged and GTI 'stepped into the shoes' of the original two organizations." As such, Statoil states that GTI is obligated to the Settlement, including the benefit of using the funds collected by the interstate pipelines under the expiring mandatory surcharge to administer the RD&D programs. Moreoever, Statoil affirms that contract law refutes GTI's asserted right to "arbitrarily choose" which elements of the Settlement to effectuate. IPAA concurs stating that "just as Microsoft

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[29] PGC at 5, *citing* Application of Gas Research Institute for Advance Approval of Its 2002-2006 RD&D Plan and 2002 RD&D Program and Jurisdictional Rate Provisions to Fund the 2002 Program, Docket No. RP01-434-000, June 1, 2001, at 3 ("All current members of GRI and IGT are now members of the Gas Technology Institute."); Application of Gas Research Institute for Advance Approval of its 2001-2005 RD&D Plan and 2001 RD&D Program and Jurisdictional Rate Provisions to Fund the 2001 Program, Docket No. RP00-313-000, June 1, 2000, at 2 (hereinafter "GRI 2000 Application") ("The combined organizations will remain non-profit businesses with a membership made up of all existing members of the two organizations."); *see also Gen. Elec. Capital Corp. v. Lease Resolution Corp*., 128 F.3d 1074, 1084 (7th Cir. 1997).

[30] NGSA represents industry gas producers and marketers.

[31] Statoil imports liquefied natural gas at Dominion Cove Point and sells regasified natural gas.

[32] *Id*. The Fertilizer Institute concurs rhetorically -- "[t]he bottom-line question is whether each entity has run its own race, or whether there has been a relay-style passing of the baton from one to the other." *Citing, 300 Pine Island v. Cohen*, 547 So. 2d 255, 256 (Fla. Dist. Ct. App. 1989).

[33] NGSA at 2-7.

[Corporation] cannot 'combine' with another organization, streamline its operations, and then repudiate its settlement with the Department of Justice, GTI cannot validly claim that there is no reason that it should 'stand in GRI's shoes'."[34]

27. PGC asserts that, even when an agreement has not been expressly assigned, courts have held that a party's, "silence and acceptance of the revenue," may be implied to have assumed the agreement.[35] PGC concludes that, in the first instance, GTI is legally obligated to comply with all the terms of the Settlement because of its *de facto* merger. In the alternative, even if GTI should not be held to stand in GRI's shoes due to a *de facto* merger, GTI's behavior consistently indicated acceptance of the Settlement terms and the Settlement revenues.

28. PGC and Indicated Shippers state that GTI both "implicitly and explicitly stood in GRI's shoes" and accepted the terms of the Settlement. The GTI website repeatedly references, in annual reports to shareholders and in questions and answers, that GTI manages the RD&D program funded by mandatory surcharges on interstate natural gas pipeline throughput. GTI lists the mandatory surcharges as sources of its (not GRI's) funding. GTI even makes the statement that "FERC itself reviews the program…proposed by GTI each year."

29. Several parties contend that the GTI/GRI merger is substantiated by GTI in its 2003 Annual Report stating that GTI manages the "Commission-approved" R&D program,[36] and GRI's website (http://www.gri.org) which redirects the user to GTI's

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[34] IPAA at 9.

[35] PGC at 9 -12, *citing White v. Nat'l Football League*, 92 F. Supp. 2d 918, 924 (D. Minn. 2000) ("When third parties... silently reap the benefits of contractual agreements. . . , they cannot later disclaim the obligations these agreements impose on them."); *Hillard v. Guidant Corp*., 37 F. Supp. 2d 379, 381 (M.D. Pa. 1999) ("The doctrine of equitable assignment provides that when one accepts the benefits of a contract he is bound by equity to be held to the terms of the contract."); *Collins v. Int'l Dairy Queen, Inc*., 2 F. Supp. 2d 1465, 1471 (M.D. Ga. 1998) (holding that a third party "cannot accept the benefits of the contract while at the same time avoiding its limitations").

[36] *Citing* Gas Technology Institute, 2003 Annual Report at 3 (2004), available at http://www.gastechnology.org/webroot/downloads/en/4ReportsPubs/4_4 AnnualRpt IGTIo3AnnualReport.pdf**.** *See also* Statoil at 3.

website citing all of GTI's R&D endeavors.[37] The Fertilizer Institute points to a specific statement on GTI's website:

> A substantial part of the GTI program is supported by funds made available through a surcharge on interstate gas sales that is authorized by the [FERC].…An agreement reached in 1998 by the FERC and Gas Research Institute – one of GTI's predecessor organizations – defined the terms for planning and conducting this program. GRI carries out the FERC-authorized program through contracts with GTI and other parties.

30. The Fertilizer Institute also points to the Application[38] and its references to GRI and its expressed duties under the Settlement (*e.g.,* GTI is an "assumed business name"; GTI "represents the joining" of IGT and GRI"; GTI refers to itself as "combination of the two [GRI and GTI] organizations"; GTI "has assumed many of GRI's duties" under the Settlement). Further, The Fertilizer Institute notes that GRI no longer maintains its own offices, its own staff or its own telephone number. All of these were transferred to GTI.[39]

31. Other parties cite to specific documentation also substantiating the GTI/GRI merger. PGC cites to an *Oil and Gas Journal* interview with John Riordan, the president and chief executive of GTI, who describes "the challenges of bringing IGT and GRI together into a single entity," and that "all of our staff need to get comfortable describing GTI as one company."[40] SCANA notes that GRI's former counsel signed GTI's instant

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[37] The Fertilizer Institute at 7.

[38] *Id*. *citing* GTI at 10-12.

[39] *Id*. The Fertilizer Institute notes that, under the Settlement, $688 million was recovered for GRI-sponsored research funds. The Fertilizer Institute asserts that GRI acknowledged in its 2003 application to the Commission in Docket No. RP03-514-000 for approval of its 2004 research program that its funding would end in 2004, and that if GRI/GTI does not want to honor its commitment under the Settlement, it should return "[the] money so that we can litigate the case we thought we settled in 1998," noting that GRI has recovered its projected $688 million in total GRI-sponsored research since the 1998 settlement. The Fertilizer Institute at 2, 4 and 5.

[40] PGC at 7, *citing* Bob Williams, *Newly Combined GTI Coping with US Natural Gas Industry R&D Challenges of Gas Supply Pipeline Safety*, Oil & Gas J., May 21, 2001 ("the merger, which Riordan prefers to think of more as a 'combination").

proposal, wherein it states that GTI claims it is a "new entity beyond the scope of the 1998 Settlement", and that it "relies on GRI's experience in research to demonstrate GTI's capability and experience to perform the planned RD&D."

32. Missouri Commission cites to a footnote in the GTI/GRI combined Year 2000 financial statements in GRI's 2002 Application in Docket No. RP01-434-000, stating:[41]

> On April 24, 2000 the management and memberships of Gas Research Institute ("GRI") and Institute of Gas Technology ("IGT"), (collectively the "Companies"), formed Gas Technology Institute ("GTI") to migrate towards a combination of the two organizations in order to serve a wider range of customers in meeting their technology needs associated with finding, delivering and using natural gas. As part of this effort, the two organizations elected a set of common officers and designated separate, but identical memberships and Boards of Directors.

33. Citing to the Financial Statements attached to the Application at Exhibit 4, CenterPoint Energy Minnegasco (Minnegasco) contends that GTI is "essentially a new incarnation of GRI," as reflected in the Financial Statements showing that GTI and GRI are the same organization.

34. Calpine Corporation contends that releasing GTI from its obligations under the Settlement potentially results in "gamesmanship…, allowing parties to renege on past deals, merely by changing business forms and titles."[42]

35. Indicated Shippers contend that, even if GTI is somehow considered not bound by the 1998 settlement, it is established law that parties to a settlement are bound by it; thus, the other signatory parties are bound.[43] Indicated Shippers state that these parties include all of the major interstate pipelines listed in Appendix B to the Settlement, INGAA, the American Gas Association (AGA), the PGC, and numerous individual producers, pipelines, LDCs and industrial users.[44] Indicated Shippers aver that "[i]f the Commission

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[41] Missouri Commission at 9-10.

[42] Calpine at 3 note 6.

[43] Indicated Shippers at 14, *citing Texas Gas Transmission Corp. v. FPC*, 441 F.2d 1392 (6th Cir. 1971); *Tennessee Gas Pipeline Co. v. FPC*, 504 F.2d 199 (D.C. Cir. 1974); and *Texas Eastern Transmission Corp.*, 91 FERC ¶ 61,293 (2000).

[44] 83 FERC at 61,457 and notes 28-36.

were to permit parties to avoid the effects of a settlement simply by changing their names, as requested herein, it would completely undermine the Commission's regulatory regime and the ability to rely upon Commission-approved settlements."[45]

36. GTI, in both its application and in its answer to the pleadings of others, argues that, while it "assumed many of GRI's duties pursuant to the 1998 GRI S&A," it is "an impermissible stretch to conclude that GTI 'stands in GRI's shoes' for all purposes so far as the 1998 GRI S&A is concerned."[46] GTI argues that, in any event, its obligations in the Settlement expire concurrently with the surcharges on December 31, 2004.[47]

37. The opposing parties disagree. PGC states that, when GTI accepted the funds from the pipelines and allocated them to R&D programs, it exercised "dominion" over the mandated surcharge and acquiesced to the terms of the Settlement.[48] PGC avers that GTI's cherry picking of the stipulations under the Settlement is contrary to basic contract law.[49] Citing to *American Legacy Foundation v. Lorillard Tobacco Co*., PGC notes that courts uniformly reject non-signatories' efforts to circumvent contracts that the non-signatories previously endorsed even where the non-signatory did not enter into a legal/formal relationship with the signatory.[50] PGC refutes GTI's arguments on this issue

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[45] Indicated Shippers at 15.

[46] Application at 10, and arguments stated *infra*, P6.

[47] Application at 7.

[48] PGC at 11, *citing* Restatement (Second) of Contracts § 69 (1981) (" of dominion, even though not intended as acceptance. . . , is a sufficient manifestation of assent….).

[49] *Id.* at 8, *citing* Restatement (Second) of Contracts § 69 (1981). PGC points to the Restatement of Contracts stating "that when an entity silently reaps the benefits of a contract it implicitly agrees to be bound by its limitations. Accordingly, if a nonsignatory accepts the benefits of a contract, it binds itself to the limitations and restrictions in the contract. [Thus,] GTI is estopped from denying the binding effect of the Settlement Agreement because for four years it accepted the benefits of the contract."

[50] *Id.* at 12, *citing* 831 A.2d 335 (Del. Ch. 2003) (The Delaware Court of Chancery held that the American Legacy Foundation, a nonprofit organization that produced anti-tobacco advertising and accepted funding under the settlement, was bound to the settlement even though it was not a signatory party to the settlement.); *citing also Philip Morris, Inc. v. Pittsburgh Penguins, Inc*., 589 F. Supp. 912 (W.D. Pa. 1983).

stating that GTI assumed GRI's obligations under the 1998 Settlement when for the past four years it "reaped the benefits" of the surcharges under the settlement, managed the R&D programs,[51] determined which projects to fund, and "induced the natural gas industry into believing that it would comply with the Settlement" and that the mandatory surcharges would end no later than December 31, 2004.[52] NGSA concurs with PGC that because GTI accepted the benefits negotiated by its predecessor GRI, GTI is obligated to fulfill the remaining stipulations under the Settlement, including the complete transition to a voluntary funding mechanism.[53] PGC, IPAA, and Statoil argue that the Commission should not allow GTI to "renege" on the Settlement after admitting its assumed responsibility for implementing the primary purpose of the Settlement.[54]

38. The Fertilizer Institute also concurs with PGC stating that the GRI Settlement "provided a stream of guaranteed payments to GRI over seven years through mandatory surcharges in exchange for GRI's promise to ask for nothing more after seven years." The Fertilizer Institute notes that such agreements are not unusual, in that the Commission previously used this type of agreement to settle take-or-pay contracts or stranded costs (*i.e.*, the ratepayers agree to pay a specified surcharge for a period of years, and the utility agrees to no further surcharges after the end of the period). Several parties concur that "[GRI's] agreement in 'perpetuity' does not make it any less enforceable."

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[51] C*iting* GTI 2003 Annual Report 3 (2004).

[52] PGC at 10 c*iting Philip Morris, Inc. v. Pittsburgh Penguins, Inc*., 589 F. Supp. 912, 919 (W.D. Pa. 1983). PGC also cites to certain documents where GTI stated that it would abide by various terms of the Settlement; *citing, e.g.*, Reply Comments of Gas Research Institute, Docket No. RP01-434-000, Aug. 31, 2001, at 3; GRI 2000 Application, at 2-3 ("One-third of the new board will represent gas consumers and public interest segments as specified in the April 29, 1998 GRI settlement."); and GTI 2003 Final Application at 6, where GRI stated that GTI's board of directors set a goal to "become self-sustaining by 2005, as envisioned in the 1998 funding settlement."

[53] NGSA at 5.

[54] *Citing* Application at 8-9 ("GTI recognizes diligent effort to free collaborative gas industry RD&D funding from the advance approval process to be a responsibility and submits that it has satisfied this responsibility." To that end, it embarked on "a very intensive campaign" and was "quite diligent in pursuing alternative funding avenues.").

39. The Indicated Shippers state that "canons of contract construction require a contract (and settlement agreement) to be interpreted in a manner which gives meaning to the provisions of the contract."[55] In other words, Indicated Shippers states "[w]hen interpreting the language of a contract, a court must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless."[56] Southern Company Services, Inc. (Southern Company)[57] agrees with the Indicated Shippers and views GTI as the successor to GRI, bound with all parties by the Settlement and barred from proposing or supporting any continuation of a Commission-approved uniform R&D surcharge to fund GRI and its successor GTI beyond 2004. PGC and NGSA echo these sentiments.

40. Missouri Commission states Article VI of the 1998 settlement specifically prohibits GTI, which now stands in GRI's shoes, from filing to re-institute an RD&D surcharge after December 31, 2004.[58] Specifically, Article VI of the Settlement states:

> By agreeing to this Offer of Settlement, no party is required to continue membership in GRI beyond December 31, 2004. Subject to Article V, all parties agree that (i) the Commission- approved uniform research and development surcharges shall terminate. . . December 31, 2004; (ii) funding of GRI will be voluntary thereafter as described herein; and (iii) none of the parties will propose or support any modification of the Offer of Settlement or any continuation of Commission-approved uniform research and development surcharges to fund GRI beyond December 31, 2004.

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[55] Indicated Shippers at 17; *citing United States v. Insurance Co. of N. Am.*, 83 F.3d 1507, 1511 (D.C. Cir. 1996) (the "cardinal principle of contract construction [is] that a document should be read to give effect to all its provisions") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, (1995)). *See also YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 389 (1993) ("When interpreting the language of a contract, a court must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless.").

[56] *Id.* at 17 *citing, YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 389 (1993).

[57] Southern Company acts as an agent for seven power companies and produces, transmits, distributes and sells electricity at retail in the south, and sells natural gas at retail in Georgia. A substantial portion of its generation is gas-fired.

[58] Missouri Commission at 4.

Commission Decision

41. The issue the Commission must resolve at the outset is whether GTI, as successor to GRI, is bound by the terms of the Commission's April 29 Order and the1998 settlement, which provides that GRI would transition to voluntary funding over a seven-year period ending on December 31, 2004. Based on our review of the filing, the comments and arguments by the parties, we conclude that GTI is bound by the terms of the April 29 Order and the 1998 settlement.

42. GTI contends that it is not bound by the terms of the 1998 settlement, since it is technically not a signatory to the 1998 settlement. Our review of the applicable pleadings leads us to conclude that GTI is the product of a combination of IGT with GRI and is to be treated as a successor-in-interest to GRI.[59] As successor-in-interest to GRI, GTI must fulfill GRI's obligations under the 1998 settlement. Though GTI has filed the instant application, it is clear that GTI is nothing more than a reconstituted GRI. According to one part of the application, GTI states that it is really an assumed corporate name for IGT.[60] It states further that GTI represents the joining of IGT and GRI. It continues that it (GTI) has assumed many of the GRI's duties pursuant to the 1998 settlement. Moreover, on its own web site, GTI states that a substantial part of the GTI program is supported by funds collected through a surcharge on interstate gas sales authorized by the Commission, and that an agreement reached in 1998 by the Commission and GRI, one of GTI's predecessor organizations, defined the terms for planning and conducting this program. Thus, whether GTI was formed from the joining or combining of IGT and GRI, there can be no doubt that GTI is the successor organization to GRI. GRI agreed to stop

[59] *See* 15 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7124.20 (2003) ("A *de facto* merger occurs when one corporation is absorbed but without compliance with the statutory requirements for a merger.") *See also Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003).

[60] Application, pp. 10-11. On April 24, 2000, GRI entered into a relationship with IGT, which GTI characterizes as a "combination." IGT then registered with the Illinois Secretary of State to assume the name GTI.

collecting the surcharges no later than December 31, 2004.[61] GRI's successor in interest cannot escape GRI's obligation to cease mandatory surcharges under the 1998 settlement merely by changing its name.

43. Continuity of ownership exists between GTI and GRI. All former members of GRI became members of GTI, thus retaining an ownership interest in the combined entity.[62] GTI intended that its Board of Directors comply with the terms of the 1998 settlement, as evidenced by GRI's filing in Docket No. RP01-434-000, August 31, 2001, at 3: "A consolidated [GTI and GRI] board of directors and management structure, which fully complies with the provisions of the GRI funding settlement, is now in place." In addition, GTI has absorbed GRI in such a manner that it would appear to outsiders that the companies had merged. The RD&D Program is run under GTI's auspices, and as stated by GRI, GTI "carries on all the essential activities of the two original organizations."[63] In its 2003 Annual Report, GTI states that it manages the R&D program approved by this Commission, and no mention is made of GRI.[64] Moreover, the website for GRI (www.gri.org) automatically redirects the user to GTI's website, and there all of the press releases announce GTI's R&D accomplishments. The natural gas

[61] *See* GRI's "Report on Progress as Operations Under the 1998 Funding Settlement Approach an End," filed June 4, 2004 in Docket No. RP97-391-000. In such report, at p. 1, GRI states that funding pursuant to the 1998 settlement "will be complete on or about August 1, 2004."

[62] Application of GRI for Advanced Approval of its 2002-2006 RD&D Plan, Docket No. RP01-434-000, filed June 1, 2001, at 3 ("All current members of GRI and IGT are now members of the Gas Technology Institute."); *see also* Application of GRI for Advanced Approval of its 2001-2005 RD&D Plan, Docket No. RP00-313-000, filed June 1, 2000 at 2 ("The combined organizations [GTI and GRI] will remain non-profit businesses with a membership made up of all existing members of the two organizations.").

[63] Application at 12; Reply Comments of GRI, Docket No. RP01-434-000, August 31, 2001, at 3.

[64] GTI, 2003 Annual Report at 3 (2004), available on the internet through www.gastechnology.org.

industry appears to view GTI as having absorbed GRI,[65] and GTI itself considers itself and GRI to be "one company" as evidenced by the statement of its president. In fact, except for the fact that GRI's name has appeared only on the documents filed with the Commission for budget approval once a year, GRI does not appear to have any role. Based on the foregoing, it is clear that GTI is in fact GRI.

44. Moreover, GTI explicitly on numerous occasions announced that it would continue to abide by the terms of the 1998 settlement. GTI stated that its "consolidated board of directors and management structure fully complies with the provision of the GRI funding settlement."[66] In its 2003 application for Commission approval of its RD&D program and funding for 2004, GRI stated that GTI's board of directors set a goal that it "become self-sustaining by 2005, as envisioned in the 1998 funding settlement."[67] GTI and GRI have been irretrievably mixed, and even GRI in its earlier applications treated the combined entity as one and the same.

45. GTI is bound by the 1998 settlement because it assumed the contract upon its combination with GRI. GTI accepted the benefits of the 1998 settlement, since it collected the natural gas surcharges which enabled it to fund and manage the RD&D programs since its combination with GRI in 2000. It decided which projects to fund and it took the credit for the technological enhancements achieved by such projects. GTI cannot now, having garnered the benefits of the 1998 settlement, turn its back on the obligations contained within that settlement. The law is replete with examples of where courts have held this to be true. [68] The thrust of these cases is that when a third party

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[65] *See* statement of William J. Haener, Executive Vice President of CMS Energy Corporation, at the hearing on H.R. 3609 before the House Transportation and Infrastructure Subcommittee on Highways and Transit, 107th Cong. (2002); Retail Services Reporter for November 16, 2001, *AGA Plans New Research Program to be Funded by Customers to Compliment GTI* ("Gas Technology Institute, the successor to GRI"); *Study Looks at Tight-Gas Restimulation Candidate Wells*, Oil & Gas Journal, October 8, 2001 ("GTI, formerly Gas Research Institute").

[66] Reply Comments of GRI, Docket No. RP01-434-000, filed August 31, 2001, at 3.

[67] GRI 2003 Application, Docket No. RP03-514-000, filed June 2, 2003, at 6.

[68] *See White v. National Football League*, 92 F. Supp. 2d 918 (D. Minn. 2000); *Hillard v. Guidant Corp.*, 37 F. Supp. 2d 379 (M.D. Pa. 1999); *Philip Morris, Inc. v. Pittsburgh Penguins, Inc.*, 589 F. Supp. 912 (W.D. Pa. 1983).

reaps the benefits of a contract, it cannot later disclaim the obligations that the agreement imposes on it, especially where, as here, the third party ostensibly acts in replacement of one of the contracting parties.

46. Finally, the parties to the 1998 settlement detrimentally relied on the assurances provided by GRI/GTI that it would abide by the terms of the 1998 settlement by their forbearance in objecting to the continued funding of RD&D pursuant to the terms of the 1998 settlement, even though GTI would conduct the operations formerly conducted by GRI, reasonably believing that GTI would not seek a continuation of the mandatory surcharge mechanism when the settlement expired at the end of 2004. Since the combination of the two entities in April of 2000, GTI has collected some $200 million from the parties to the 1998 settlement.[69] GTI cannot at this point avoid its obligation imposed by the 1998 settlement to discontinue the surcharge mechanism.

47. GTI argues that, even if the Commission concludes that GTI is bound by the 1998 settlement, the Commission should still allow it to seek RD&D funding under the Commission's regulations for the period after 2004. GTI contends that "the parties in entering into the GRI S&A [the 1998 settlement], and the Commission in approving it, had at least two goals in mind: (1) to provide a means of securing a broad-based and stable funding for consumer-oriented GRI programs, and (2) to do so in a way that would ultimately make GRI funding voluntary and no longer subject to FERC oversight."[70] However, the achievement of voluntary GRI funding has never been considered by the Commission to be merely a "goal" of the settlement. Rather, GRI made a commitment to fund future RD&D projects on a voluntary basis. It is important to note that it was GRI, GTI's predecessor, that first broached the subject of a transition to an entirely voluntary funding mechanism for both core and non-core projects.[71] It did so in the settlement originally filed in Docket Nos. RP97-149-002 and RP97-291-000, on August 22, 1997, which led to the Commission's Opinion No. 418.[72] Thereafter, the parties agreed to transition to entirely voluntary funding within seven years, rather than the five originally

[69] *See* IPAA Protest and Comments at 8.

[70] GTI Answer to Motions for Summary Disposition and Related Protests, filed August 24, 2004, at 12. Footnotes omitted.

[71] April 29 Order, 83 FERC at 61,456.

[72] *Gas Research Institute*, Opinion No. 418, 81 FERC ¶ 61,181 (1997).

proposed by GRI,[73] and this is what the Commission approved in the April 29 Order. In response to the contention of a group of East Coast LDCs that the seven-year period was too long, the Commission stated:

> The seven-year period [for transition to voluntary funding] agreed to by the parties was a compromise which was necessary to achieve a settlement which enjoyed broad support across the natural gas industry. The proposed settlement reflects weeks of negotiations that preceded its filing. No party received all that it desired. Moreover, under the terms of the settlement, seven years appears to be reasonable. The settlement provides for a three-year transition to voluntary funding of Non-Core projects and seven years of funding for Core projects. *By the year 2004, there will be no more GRI surcharges for either Core or Non-Core projects. All GRI funding will be voluntary and no longer subject to FERC oversight*. (April 29 Order, 83 FERC at 61,457 [emphasis added].)

48. Thus, the Commission approved a settlement among the parties that did not merely state that its *goal* was to achieve voluntary funding, but that *committed* GRI to entirely voluntary funding after 2004.

49. As to GTI's contention that the 1998 settlement is ambiguous as to what is intended after 2004 in the event that voluntary funding fails, the Commission does not agree that there is any ambiguity in the 1998 settlement. The 1998 settlement clearly provides, in Article VI, that mandatory funding shall cease at the latest at the end of 2004. Such cessation is not contingent upon voluntary funding being successful, nor is cessation conditional on any other condition. In fact, the 1998 settlement precludes the Commission from considering an application from the settling parties for the continued mandatory funding of RD&D projects beyond 2004. Yet, this is precisely what GTI, successor to GRI, would have the Commission do. GTI states in its application: "In order to ensure an orderly *continuation of funding*, GTI hereby requests that the Commission order that all GTI pipeline members may include the proposed funding components in their jurisdictional tariffs effective on January 1, 2005."[74] The point here is that GTI

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[73] *See Id*. at 61,780 ("The settlement …would extend GRI's current funding mechanism through 2002, subject to certain limited modifications. *Voluntary funding of core R&D would begin in 2003.* During the year 2000, GRI would …develop a voluntary funding approach to support this core program after 2002." [emphasis added.]).

[74] Application at 39. GTI's proposal does not give its member pipelines the option of including the surcharge in their jurisdictional tariffs. GTI's proposal requires that each member pipeline must include mandatory surcharges that it may then discount.

seeks a "continuation of funding" – *i.e.*, the continuation of GRI-type funding. This is a clear admission by GTI that it is proposing an extension of the GRI funding mechanism for a similar RD&D program, and this is in direct contravention of the 1998 settlement.

50. GTI contends that, even if it is bound by the 1998 settlement, the Commission clearly intended that the funding of an RD&D program such as that envisioned in the GTI application is not barred. GTI contends that the 1998 settlement must be interpreted to accommodate the public interest in maintaining adequate collaborative RD&D efforts in the gas industry.[75] GTI proposes, as an alternate rationale for approval of its application, that the Commission find that neither the Commission nor the industry intended the decision to phase out advanced approval funding for the GRI program as putting an effective end to cooperative RD&D in the gas industry.

51. The Commission agrees with GTI that phasing out funding for GRI should not be viewed as a decision for all time to put an effective end to cooperative RD&D in the gas industry. However, it was the parties to the settlement – including GTI's predecessor – who determined to put a "sunset" date on the mandatory funding that GTI seeks to continue. In fact, it was the Commission's proposal in the concurrent rulemaking to establish a mandatory surcharge on all volumes transported by interstate pipelines, without the possibility of discounting. The parties evidently could not agree with that approach, and now GTI would have the Commission revert to a substantially similar mechanism for funding which the parties agreed to end. Whether this marks the end of cooperative RD&D is unclear at this time. Given the fact that substantial RD&D is conducted by companies in this industry as well as many other industries, the Commission is not convinced that some form of cooperative efforts cannot be accomplished without the necessity of the mandatory funding mechanism, especially as proposed by GTI.

52. GTI asserts that an adequate collaborative gas industry RD&D effort continues to depend on continued support from interstate pipelines through advance approval pursuant to section 154.401 of the Commission's Regulations. GTI argues that "core circumstances pertaining to the [1998 settlement] have changed fundamentally," arguing that "market conditions are now very different than they were six years ago,"[76] and that there are significant differences between the proposed GTI and GRI programs, in terms of project size, scope, governance, design, and management structure.

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[75] *See Id.* at 13-19.

[76] *Id.* at 16.

53. We do not agree that continued reliance on mandatory funding for RD&D is necessary. If the industry and consumers demand a form of cooperative effort in RD&D, they will be accommodated without the mandatory funding GTI seeks here. Market-based RD&D would better serve the consuming public than the acrimony that has accompanied each and every GRI application since the onset of the program for mandatory funding of cooperative RD&D projects.

54. As to differences between GTI and GRI, we see very little evidence that GTI differs materially from GRI. As discussed above, we find that GTI is in fact the successor to GRI and is bound by the terms of the 1998 settlement, including the proscription on mandatory funding beyond 2004.

55. GTI further states that since 1998, there have been major changes in market and regulatory conditions, and that such changed conditions have led to increased needs for technology innovations associated with transmission and distribution integrity and security, safety and cost containment. GTI states that technology aimed at more general improvements in efficiency or reductions in emissions have not attracted significant new private capital, because benefits are rarely captured by the developer, instead accruing to energy consumers, and that technologies offering broad consumer benefits are not economic if developed and introduced by a single LDC or pipeline; rather, these technologies will not succeed without participation of industry as a whole. GTI further argues that it has been quite diligent in pursuing alternative funding avenues, but these initiatives have not obviated the need for a stable funding base for a gas industry cooperative RD&D effort aimed at technology development and deployment.

56. That there have been major changes in market and regulatory conditions since 1998 is obvious to all. However, nowhere does GTI make the necessary nexus between the effect of those changes and its alleged need for mandatory funding for cooperative voluntary RD&D through GTI. GTI has not demonstrated that there has been inadequate private capital devoted to RD&D efforts in enhancing technological improvements in efficiency or reductions in emissions, or in enhanced safety and security. There have been assertions that efforts by private parties would be insufficient to obtain such funding. However, GTI's application itself shows that it has obtained some $42 million annually for RD&D.[77] GTI notes that it has raised some $17 million from LDCs, and has commitments of $2-3 million per year from pipeline-oriented sources. In this connection, we note that individual pipelines may seek recovery in their rates for any reasonable amounts expended for RD&D purposes whether those RD&D efforts are provided by the pipeline or by a third party, provided they meet the tests of section 4 of the Natural Gas

[77] *Id.* at 8-9.

Act (NGA). Understandably, while there is the prospect of mandatory discountable surcharge funding, we have received no NGA section 4 applications which request rate coverage for such expenditures. Pipelines with RD&D expenditures can either file an application for advance approval, pursuant to §154.401 of our regulations, or account for RD&D expenses in Account No.188 of the Commission's Uniform System of Accounts and seek recovery of such costs in a section 4 rate proceeding. Finally, if GTI is correct that RD&D will elicit only inadequate financial support, then forcing the industry and its customers to pay for GTI-managed RD&D has not been justified. The industry and its customers are the supposed beneficiaries of this RD&D, and their consensus in opposition to mandatory funding should not be overridden by our second-guessing.

Effect of the Commission's Order on Rehearing Approving the 1998 Settlement

57. GTI argues that "On rehearing of the Commission's order approving the 1998 GRI funding S&A, APGA set forth its view as to two situations in which the provisions of the S&A would *not* pertain: (1) *beyond* December 31, 2004; and (2) in the event of termination before December 31, 2004; in its June 26, 1998 rehearing order, the Commission agreed with APGA that the 1998 S&A would no longer be effective under these circumstances, and that the proscription against advocating means of funding GRI, other than as provided in the 1998 S&A, would end." GTI concludes that the Commission should find that this same proscription would not preclude GTI funding after December 31, 2004.[78]

58. In its June 26 Order on rehearing, the Commission stated:

> APGA raises an issue regarding Article VI of the settlement, seeking clarification that it will not be bound in perpetuity to not taking a particular position regarding Commission-approved funding for GRI. It claims that it did not agree to be bound not to propose or support any modification of the settlement beyond the end of the settlement term, or December 31, 2004. It points out that there may be events which transpire which would effectively end the settlement before the end of its stated term, and that it should not be foreclosed from arguing for or supporting something other than what is in the existing settlement if such an event should occur. The Commission agrees with APGA on this point. The settlement agreement, in such an

[78] *Id.* at 19.

event, would no longer be effective and the proscription against advocating or supporting modifications to the settlement would end. Thus, the April 29 order is clarified to this extent. [79]

59. GTI claims that, in the June 26 Order, the Commission agreed with APGA's request for clarification of Article VI under the GRI Settlement and declared Article VI without legal effect.[80] KeySpan concurs and states that, in response to APGA's claim when it agreed to the GRI stipulation its intent was not to be bound in perpetuity, the Commission determined that the GRI stipulation's proscription against the continuation of Commission-approved funding for the GRI beyond December 31, 2004 was effective only so long as the GRI settlement was in effect. KeySpan further contends that neither the Commission nor any other party disputed APGA's claim that the settlement did not bind parties beyond December 31, 2004. KeySpan therefore states that Article VI should not be interpreted as precluding parties from proposing collaborative funding mechanisms to support other organizations engaged in RD&D activities for periods beyond December 31, 2004. GTI argues that its obligations in the Settlement expire concurrently with the surcharges on December 31, 2004.[81]

60. Contrary to GTI's claim, several parties[82] concur that the Commission's June 26 Order does not remove the legal effect of the 1998 settlement's bar on pre-approved Commission funding after December 31, 2004. Conversely, as the Commission explains "the settlement is a means to decrease and ultimately remove Commission-approved GRI surcharges."[83] NGSA insists that the Commission's order supported APGA's position "under limited circumstances."[84] NGSA states that it is clear that the Commission's

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[79] *Gas Research Institute, supra,* 83 FERC at 62,338.

[80] GTI at 3-6.

[81] *Id.* at 6.

[82] *See e.g.,* The Fertilizer Institute at 2, IPAA at 8, and Missouri Commission at 6. Specifically, Missouri Commission interprets the Commission's order limited to clarifying that, in case "events transpire" that would "effectively end" the settlement prior to its "stated term" (presumably the seven-year phase-out period), parties would not be barred from supporting something other than the programs and funding covered in the Settlement.

[83] 83 FERC at 62,337.

[84] *Citing, GRI,* 83 FERC ¶ 61,331 at 62,338.

agreement was tied to the situation where events occur that "effectively end the settlement before the end of its stated term"; in other words, the Commission held that in limited circumstances the 1998 settlement would no longer be effective and parties could support measures that were not originally in the agreement.

61. PGC asserts that the Commission never indicated that any provision of the 1998 settlement did not have the force and effect of law. In fact, PGC notes, the Commission recognized that "there may be events which transpire which would effectively end the settlement before the end of its stated term." PGC avers that the 1998 settlement remains in full effect because "such an event" has not occurred; therefore, the 1998 settlement and Article VI continue to bind the parties and their successors.[85]

62. PGC also points to a previous Commission finding that to "accept any other position would quickly make settlements meaningless, since a party to a settlement, finding its terms disadvantageous, could transfer its interests to a third party that could then ignore the restrictions of the settlement."[86]

63. Missouri Commission argues that the seven-year phase out period is not the "term" of the Settlement in the sense that a utility might agree to a seven-year moratorium in a rate settlement.[87] Missouri Commission contends that the phase-out period constituted a compromise during the negotiation process between those who favored continuation of the GRI funding and those who wanted the GRI funding eliminated.

Commission Decision

64. GTI misconstrues the effect of the Commission's June 26 Order on rehearing. GTI interprets our June 26 Order to give parties freedom to ignore their obligations under the 1998 settlement, one of which is not to propose modification of the funding mechanism approved, and not to seek any extension of mandatory funding beyond December 31, 2004. However, the elimination of the proscription against modifying the settlement only applies if a party sought to modify the settlement during its term. No one has sought to modify the settlement. In other words, if events had transpired which

[85] *See also* IPAA at 15 *citing Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000).

[86] PGC at 19.

[87] Missouri Commission at 8.

would have ended the settlement prematurely, then APGA, or other signatories, would not have been precluded from proposing some other approach to a GRI-type funding mechanism as a substitute until December 31, 2004, the date after which the Commission would no longer allow a GRI funding mechanism. Nothing in the Commission's clarification should be taken as allowing GRI or its successor, or any other signatory, to propose a new Commission-approved mandatory funding mechanism after the settlement termination date.

65. The 1998 settlement provides for the phasing out of the surcharge so that it ends when GRI has collected the maximum it could, but in no event later than December 31, 2004, after which funding will be on a voluntary basis. The limitation on funding in the 1998 settlement to voluntary funding after December 31, 2004 remains in effect. This was a fundamental undertaking of GTI's predecessor and of all parties to the settlement. The interpretation that GTI would place on this provision would render the settlement meaningless and the parties who had relied on the undertakings of GTI's predecessor to end mandatory funding at the end of 2004 would be irretrievably damaged. Rather than construe away the rights of the parties to the 1998 settlement, the law is quite clear that a contract, or in this case a settlement, "should be read to give effect to all its provisions."[88] Parties who seek to modify the 1998 settlement in this regard must do so only through a NGA section 5 proceeding.

Conclusion

66. Because we find that GTI is a successor company to GRI and is bound to the terms of the 1998 settlement agreement, including the provision for voluntary funding after 2004, we will reject GTI's application.

[88] *United States v. Insurance Co. of N. Am.*, 83 F. 3d 1507, 1511 (D.C. Cir. 1996) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1955)); *see also YRT Servs. Corp. v United States*, 28 Fed. Cl. 366, 389 (1993) ("When interpreting the language of a contract, a court must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless.").

The Commission orders:

The application by GTI is rejected.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

Gas Technology Institute
Docket No. RP04-378-000

List of Intervenors

Aera Energy, LLC
Alabama Gas Corporation
Alliance Pipeline L.P.
Alliant Energy Corporate Services, Inc.
American Chemistry Council
American Forest & Paper Association
American Gas Association
American Iron and Steel Institute
American Public Gas Association
and the American Public Gas Association Research Foundation
Anadarko Petroleum Corporation
Aquila Networks
Atlanta Gas Light Company, Chattanooga Gas Company,
and Virginia Natural Gas, Inc.
Atmos Energy Corporation
Baltimore Gas and Electric Company
BP America Production Company
and BP Energy Company
Bruce B. Ellsworth
Burlington Resources Trading Inc.
California Manufacturers and Technology Association
Calpine Corporation
Canadian Association of Petroleum Producers
CenterPoint Energy – Mississippi River Transmission Corporation
CenterPoint Energy Gas Transmission Company
CenterPoint Energy -- Minnegasco
ConocoPhillips Company
Consolidated Edison Company of New York, Inc.
and Orange and Rockland Utilities, Inc.
Consumers Energy Company
Duke Energy Gas Transmission Corporation, Algonquin Gas Transmission, LLC,
East Tennessee Natural Gas, LLC and Texas Eastern Transmission, LP
East Ohio Gas Company, d/b/a Dominion East Ohio, The Peoples Natural Gas
Company, d/b/a Dominion Peoples, and Hope Gas, Inc., d/b/a Dominion Hope
El Paso Corporation's Pipeline Group
Electric Power Supply Association

ExxonMobil Gas & Power Marketing Company, a division of ExxonMobil Corp.
The Fertilizer Institute
Florida Power & Light Company
Georgia Industrial Group
Gulf South Pipeline Company, LP
Gulfstream Natural Gas System, L.L.C.
Independent Petroleum Association of America
Independent Petroleum Association of Mountain States
Industrial Gas Users of Florida
International LNG Alliance
Interstate Natural Gas Association of America
Interstate Oil and Gas Compact Commission
John B. Curtis
KeySpan Delivery Companies
Kinder Morgan Interstate Gas Transmission LLC
Laclede Gas Company
Louisville Gas and Electric Company
Marathon Oil Company
Maritimes & Northeast Pipeline, L.L.C.
Michigan Consolidated Gas Company
Midland Cogeneration Venture Limited Partnership
Missouri Public Service Commission
National Association of State Utility Consumer Advocates
National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation
Natural Gas Supply Association
New Jersey Large Energy Users Coalition
New Jersey Natural Gas Company
Nicor Gas
NiSource Inc.
Northeast Gas Association/NYSEARCH
Northern Natural Gas Company
Northwest Industrial Gas Users
Northwest Natural Gas Company
Occidental Energy Marketing, Inc.
Operations Technology Development, NFP
Pacific Gas and Electric Company
PECO Energy Company
Peoples Gas System, a Division of Tampa Electric Company and Tampa Electric Co.
Piedmont Natural Gas Company, Inc.
Pipeline Research Council International, Inc.

The Process Gas Consumers Group
Progress Energy Corporation
PSEG Companies
Public Utilities Commission of Ohio
Questar Pipeline Company and Questar Gas Company
SCANA Energy Marketing, Inc.
SEMCO Energy Gas Company
Southern Company Services, Inc.
Statoil Natural Gas LLC
The Peoples Gas Light and Coke Company and North Shore Gas Company
UGI Utilities, Inc.
Utilization Technology Development, NFP
Vectren Energy Delivery of Ohio, Inc., and Southern Indiana Gas and Electric Company
Washington Gas Light Company
Wisconsin Public Service Corporation
Xcel Energy Services, Inc., *et al*.

Gas Technology Institute
Docket No. RP04-378-000

List of Supporting Parties

Alabama Gas Corporation (Alabama Gas)
Alliant Energy Corporate Services, Inc. (Alliant)
American Gas Association (AGA)[89]
American Public Gas Association and the American Public Gas Association Research Foundation (APGA) and (APGA-RF)
Atlanta Gas Light Company, Chattanooga Gas Company, and Virginia Natural Gas, Inc. (Atlanta), (Chattanooga), and (VNG)
Atmos Energy Corporation (Atmos)
Baltimore Gas and Electric Company (BGE)
Bruce B. Ellsworth
California Energy Commission (CEC)
Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (Con Edison) (O&R) adopts AGA and Northeast Gas Association/NYSEARCH comments
Consumers Energy Company (CECo)
Dr. Henry R. Linden, founding president of GRI
Duke Energy Gas Transmission Corporation, Algonquin Gas Transmission, LLC, East Tennessee Natural Gas, LLC, and Texas Eastern Transmission, LP (Duke Energy Gas Transmission, Algonquin, East Tennessee, Texas Eastern) (Duke Energy Pipelines)
East Ohio Gas Company, d/b/a Dominion East Ohio, The Peoples Natural Gas Company, d/b/a Dominion Peoples, and Hope Gas, Inc., d/b/a Dominion Hope (The Dominion LDCs)
El Paso Pipeline Group (EPPG)

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[89] Companies supporting GTI's application based on AGA's comments are: PECO Energy Company, Atlanta Gas Light Company, Chattanooga Gas Company, and Virginia Natural Gas, Inc., Washington Gas Light Company, Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., New Jersey Natural Gas Company, Wisconsin Public Service Corporation, ATMOS Energy Corporation, Baltimore Gas and Electric Company, Northwest Natural Gas Company, The Peoples Gas Light and Coke Company and North Shore Gas Company, Alabama Gas Corporation, Questar Gas Company, and Consumers Energy Company.

Industrial Heating Equipment Association (IHEA)
Interstate Natural Gas Association of America (INGAA)
Interstate Oil and Gas Compact Commission
John B. Curtis
John H. Gibbons
KeySpan Delivery Companies (KeySpan)
Louisiana Independent Oil and Gas Association
Louisville Gas and Electric Company (Louisville)
Massachusetts Institute of Technology (MIT)
Miller Brewing Company (Miller)
National Association of Regulatory Utility Commissioners (NARUC)
National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation (Distribution and Supply) (National Fuel)
New Jersey Natural Gas Company (NJNG)
New York State Energy Research and Development Authority (NYSERDA)
NiSource Inc. (NiSource)
Northeast Gas Association/NYSEARCH
Northwest Natural Gas Company (NW Natural)
Operations Technology Development, NFP (OTD)
PECO Energy Company (PECO) adopts AGA comments
Piedmont Natural Gas Company, Inc. (Piedmont)
Pipeline Research Council International, Inc. (PRCI)
Public Utilities Commission of Ohio (PUCO)
Questar Pipeline Company and Questar Gas Company (QPC and QGC)
Research and Special Programs Administration (RSPA)
Rob Dunnette (Plant Manager of the Olmsted Waste to Energy Facility (OWEF))
The INGAA Foundation, Inc. Interstate Natural Gas Association of America (adopts INGAA's comments)
The Peoples Gas Light and Coke Company and North Shore Gas Company (Peoples Gas and North Shore)
UGI Utilities, Inc. (UGI)
Utilization Technology Development (UTD)
Washington Gas Light Company (Washington Gas)
Wisconsin Public Service Corporation (Public Service)

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List of Opposing Parties

Alliance Pipeline L.P.
Calpine Corporation
Canadian Association of Petroleum Producers (Canadian Association)
CenterPoint Energy Minnegasco, A Division of CenterPoint Energy Resources Corp. (Minnegasco)
Electric Power Supply Association (Electric Power) supports protests of The Process Gas Consumers Group, the Independent Petroleum Association of America, and the Natural Gas Supply Association
The Fertilizer Institute
Independent Petroleum Association of America (IPAA)
International LNG Alliance
Midland Cogeneration Venture Limited Partnership
Missouri Public Service Commission (Missouri COMMISSION)
National Association of Public Utility Consumer Advocates (State Consumer Advocates)
Natural Gas Supply Association (NGSA)
Northwest Industrial Gas Users (Northwest Industrial)
The Process Gas Consumers Group filing on behalf of the American Chemistry Council, American Forest & Paper Association, American Iron and Steel Institute, Georgia Industrial Group, Industrial Gas Users of Florida, New Jersey Large Energy Users Coalition, and California Manufacturers & Technology Association (PGC)
PSEG Companies (PSEG)
The South Carolina Pipeline Corporation, Public Service Company of North Carolina, Inc., and SCANA Energy Marketing, Inc. on behalf of its Georgia retail marketer division SCANA Energy (SCANA)
Southern Company Services, Inc. supports the Fertilizer Institute protest
Statoil Natural Gas LLC (Statoil)
The Indicated Shippers
Williston Basin Interstate Pipeline Company (Williston)
Xcel Energy Services, Inc., *et al*. (Excel)